THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 390

[2022/1041 JR]

BETWEEN

T.A.

APPLICANT

AND

THE INTERNATIONAL PROTECTION OFFICE,

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Mark Heslin delivered on the 7th day of July 2023

Introduction

1. By order made on 19 December 2022 (Meenan J.) the Applicant was granted leave to apply by way of judicial review for the reliefs set out at para. [d] on the grounds set out at para. [e] of his Statement of Grounds dated 28 November 2022.

2. The material reliefs sought at para. [d] of the aforesaid statement comprises:-

(i) An order of *certiorari* quashing the decision of the First-Named Respondent, dated 14 September 2022, made under s. 39 of the International Protection Act 2015 ("the 2015 Act") communicated to the Applicant by letter dated 21 October 2022;

(ii) An order of *certiorari* quashing the decision of the First-Named Respondent, dated 21 October 2022, made under s. 49 of the 2015 Act, as communicated to the Applicant by letter dated 21 October 2022;

(iii) A stay on the International Protection Appeals Tribunal ("IPAT") hearing the Applicant's appeal of the decision made under s. 39 of the 2015 Act ("the s. 39 decision") pending the determination of these proceedings.

Submissions

3. Before proceeding further, I want to express my thanks to Mr. Conlon S.C., for the Applicant, and to Ms. McMahon B.L. for the Respondent. Both made oral submissions with great clarity and skill.

Both furnished detailed written submissions which have been of great assistance. During the course of this judgment, I will refer to the principal submissions and to those authorities which seem to me to be of most assistance in determining the matters in issue.

First instance decision

4. As can be seen from the relief sought, the present proceedings involve an application for *certiorari* of a first instance decision (also referred to in this judgment as "the s. 39 decision"). The Applicant in the present case has issued what was described as a "protective appeal" to IPAT against the s.39 decision. When these proceedings were heard on 15 June 2023, that appeal (referred to in the third of the reliefs sought by the Applicant) had not been heard or determined by IPAT.

5. The Applicant accepts that seeking judicial review of a decision by the International Protection Office ("IPO") without having pursued an appeal to IPAT represents an exception. However, the Applicant argues that the errors identified are so fundamental that the unfairness to the Applicant renders the statutory procedure for appeal to IPAT unsuitable to meet the Applicant's complaints.

6. I have carefully considered a range of authorities on this topic to which the court's attention was drawn [See *State Abengelen Properties* [1984] IR 381; *Stefan v. Minister for Justice* [2001] IESC 92; *BNN v. Minister for Justice* [2009] 1 IR 719 (at para. 45); *Z v. The Minister for Justice, Equality and Law Reform* [2008] IEHC 36; (at para. 8)]. These, and a range of other authorities, were given careful consideration by Phelan J. from para. 46 onwards of her 24 April 2023 decision in *ESO v. IPO* [2023] IEHC 197. It is sufficient for the purposes of this judgment to quote as follows from the learned judge's decision in *ESO,* beginning at para. 55:-

> *"55. From these cases, it is clear that in the normal course only a flaw which is so fundamental as to deprive the decision maker of jurisdiction is sufficient to support an application by way of judicial review. An applicant must demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal to the RAT. If such a clear and compelling case is not demonstrated, the applicant must avail of the procedure that has been set up by the Oireachtas. By way of example of cases which might be amenable to judicial review, Hedigan J. identified situations where only a partial appeal is available with the result that the injustice complained of may be incapable of being remedied on appeal."*

7. The reference to Hedigan J. was to his judgment in *BNN* wherein (at para. 45) the learned judge held *inter alia* that:- ". . . *it is only in very rare and limited circumstances indeed that judicial review is available in respect of an Office of the Refugee Applications Commissioner decision"* and the court went on to hold that an Applicant had to demonstrate:- "*a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal to the RAT*". The RAT was the predecessor of IPAT.

8. In her decision in ESO, Phelan J went on to state the following at para. 56:-

"56. Subsequently, in O(F) v RAC [2009] IEHC 300, Cooke J. restated the test governing court intervention by way of judicial review where an appeal lies as follows (para. 8):-

> *'only in the rare and exceptional cases where it is necessary to do so in order to rectify a material illegality in the report which is incapable of or unsuitable for rectification by appeal; which will have continuing adverse consequences for the applicant independently of the appeal; or is such that if sought to be cured by the appeal, will have the effect that the issue or that some wrongly excluded evidence involved, will not be reheard but will be examined only for the first time on the appeal'.*

57. Again, in J.M. (Mhlanga) v R.A.C. [2009] IEHC 64, Cooke J. referred to the possibility of a flaw or illegality being such that a rehearing (para. 26):-'would result in a material issue not being reheard but being heard for the first time upon the appeal'".

9. Guided by the foregoing principles, I am not satisfied that the alleged errors are such that they deprived the decision maker of jurisdiction. It does not seem to me that the alleged errors are so fundamental as to give rise to an injustice incapable of being remedied by means of the statutory appeal to IPAT. I take the view that the Applicant has not demonstrated what Phelan J. described at para. 55 as "*a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal*" to IPAT. It seems to me that the Applicant is required to proceed by way of an appeal to the IPAT and has not established that this is one of those rare exceptions where there is an entitlement to seek judicial review of a first instance decision.

10. Lest I be entirely wrong in the foregoing views, I now proceed to consider the case made by the Applicant. Before looking at the range of legal grounds pleaded, it is appropriate to refer to certain relevant facts.

<u>Facts</u>

11. The Applicant is an Algerian national, born in 1988. He is recorded as having applied for international protection on 4 August 2020, after leaving Algeria on 16 July 2020 and arriving in this State on 3 August 2020.

12. The Applicant completed a questionnaire, which is dated 25 August 2020. A copy of the questionnaire was exhibited. Counsel for the Applicant opened, in full, question 62 in part 7 of the questionnaire (internal pp. 35–37 inclusive) wherein the Applicant set out the reasons for seeking refugee status or subsidiary protection. The Applicant's narrative refers *inter alia* to conflict between the Applicant's father and the latter's half-brothers (the Applicant's uncles) which continued following the death of the Applicant's father in 2006. Reference is made *inter alia* to pressure on the Applicant from his uncles to leave his late father's home; sell same; and share with them the proceeds.

13. The narrative in the questionnaire proceeds to refer *inter alia* to threats to kill the Applicant, made by his uncles and that one uncle in particular ("ZM") was active in a gang and, in 2014,

threatened to kidnap the Applicant. It is said that the Applicant went to the police station the next morning but that, after he left the police station to return home, his uncle and his gang blocked the Applicant's way; told him they knew why he had gone to the police station; and threatened to kill him if he did not drop the complaint. The Applicant proceeds to state:-

> "*At the time, I realised that he had powerful people in the security services, and I told him that I would not do anything, so I immediately returned and dropped the complaint. After a short period of time, a special security squad came from outside the city and searched the house of my uncle ZM where they found a quantity of illegal drugs and he was arrested and sentenced to five years in prison. I was accused by my other uncles, as well as by his friends, on the grounds that I was the one who reported in coordination with this security group, and I entered into conflicts with them again".* (See pp. 36-37 of the Applicant's questionnaire)

14. The Applicant's narrative proceeds to refer *inter alia* to the Applicant taking a bus to a different city and securing a job at a bakery. On the Applicant's account, after 15 days there, he was located by a gang which threatened him; he filed a complaint that night; the police summoned his uncle after two days and interrogated him; and his uncle was released due to a lack of proof of his uncle's involvement in the assault.

15. Internal p. 37 of the questionnaire makes reference to the "*hearing report*". Ms. Mary Trayers, solicitor for the Applicant, swore an affidavit on 15 June 2023 exhibiting documents described as follows:-

> (a) A police service report dated 10 August 2014;
>
> (b) A police hearing record held on the 16 June 2020;
>
> (c) A police service report concerning the Applicant's summons to attend the office of the investigating judge on the 6 July 2020.

16. The English translation of the first of these documents states *inter alia* the following with respect to the Applicant:-

> "*And we informed him as follows: after you submitted a complaint regarding the case of beating, intentional wounding, and threats at the risk of using a white weapon against the person named/ZM on 20/06/2014. It was* ***decided as follows****: dismissed the case due to waiver".* (emphasis in original)

17. During the course of the hearing counsel for the Applicant submitted that reference to a "*white weapon*" was reference to a sword, whereas reference to a "*waiver*" was to a withdrawal by the Applicant of the 2014 complaint following threats by his uncle.

18. The second of the documents, namely, the "*hearing record*" with respect to the 2020 incident at the bakery records that the attackers were "*masked people*" and that "*… I am accusing my uncle ZM, because he has the same voice and the same body as one of the people who tried to attack me..."*. That document goes on to state *inter alia* the following:-

> "*I also declare to you that my relationship with my uncles, especially my uncle ZM, who are my father's brothers on the mother's side only, is very bad and even their relationship with my father was bad before his death. I assure you that the reason for the bad relationship is their desire to deprive my brothers of the inheritance that my father left for us, which is a house that belongs to my father, which he obtained as an inheritance from his father, and I prevented them from doing so".*

Later, the same document goes on to state *inter alia*:-

> "*I declare to you that on many occasions I was harassed and insulted by my uncles, especially my uncle called ZM, who hates me a lot, and he has a criminal record in several cases. I declare to you that my uncle ZM accused me several times that I informed the Security Directorate that he possessed and sold drugs, for which he was imprisoned for five years and this I never did. He threatened me that he would take revenge on me after his release from prison. . . .He also says that he has acquaintances and friends in the security authorities and has influences in the courts".*

19. With respect to the third of the documents exhibited by Ms. Trayers, this states *inter alia* the following with respect to the Applicant:-

> "*We have informed him of the following: you have to go to the office of the investigative judge in Court no. One of Chelghoum Laid Court on 06/07/2020 at 09.00 a.m. in order to hear him against as a victim in the case of threats and attempted murder, and we sent him a copy of this".*

20. Counsel for the Applicant submitted that it appears charges were not pressed against the Applicant's uncle due to insufficient proof that the masked assailant was the Applicant's uncle.

21. On 14 June 2022, the Applicant was interviewed by the IPO pursuant to s. 35 of the 2015 Act. The Applicant's exhibits included a copy of the report pursuant to s. 35 (12) of the 2015 Act ("the s. 35 report").

22. Section 5 of the s. 35 report (beginning on internal p. 10) concerns core elements of the Applicant's claim for international protection. As to why the Applicant is seeking international protection in Ireland, he states:- "*I am afraid that my uncle . . . will kill me"* (see answer 13). Why the Applicant's uncle tried to kill him is said by the Applicant to be:- "*because he thinks I reported him to the police station for having drugs in his house"* (see answer 15). As to when his uncle was imprisoned, the Applicant states:- "*It could be around end of 2014"* (see answer 24). Regarding when his uncle was released, the Applicant states:- "*He spent five years in jail and he was out in 2020"* (see answer to question 25).

23. With respect to the 2020 incident in the bakery, this is dealt with at answer 32 of the s.45 report, which begins as follows:-

> "*One day I was sleeping in the bakery as we open at 5.00 a.m. A person knocked at the door at 2 a.m. and I told him we did not open until 5.00 a.m. He asked for some bread as his car had broken down and his family was with him. I opened a small window and when I put my hand outside the window to hand him the cake, I noticed a large person behind him and he had a sword. He tried to hit my hand, but he only hit the iron cover on the window. I saw another two persons running down and they tried to break the window with a big iron. One of them told me that wherever I went he will find me, and he will kill me. When I heard his voice, I knew it was my uncle's voice. I called the police the minute this happened, and they told me to stay in a safe place. One of the neighbours who was related to the owner of the bakery came out of his house and he started talking to them. In that minute, they were just gone. When the police came, they looked at the scene. After their investigation the police took the sword which the intruders left behind and asked me to go to the police station to tell them what happened in the assault. After they gave me the document I showed you earlier they questioned me for about an hour from 3 a.m. to 4 a.m. After that, the owner of the bakery came and since that time I went from address to address in the city, and I did not return. The owner told me to get work as a market gardener. The bakery owner found the work for me. When I was working as a market gardener the police called to the bakery and gave the owner of the bakery an invitation for me to come to the police station. The owner of the bakery rang and told me that. I got the summons from the bakery, and I went to the police station the next day. I got a letter to go to the judge. After my case, I felt the judge did not take my case seriously. He said that there is no proof that it was my uncle who tried to kill me. . .*".

24. It seems clear that the reference to documentation in the Applicant's answer 32 relates to the documents exhibited by Ms. Trayers in her 15 June 2023 affidavit, in particular, the second and third of those documents from which I quoted earlier. The balance of answer 32 in the s.35 report relates to the Applicant's departure from Algeria and his travel to Spain, France, Belgium and, ultimately, to this State.

25. Consistent with the information in the Applicant's questionnaire, he confirms that two of those involved in the 2020 attack were wearing masks (answer 37) and the Applicant says that he recognised his uncle "*by his voice*" (answer 38).

26. At question 39, the Applicant was asked whether he would accept that "*there appears to have been an insufficient amount of evidence to bring charges against your uncle for the assault on you?*". This Court is not engaging in a merits–based appeal. Judicial review is not concerned with the merits of a decision made, as opposed to whether the decision was lawfully reached and nothing in this judgment should be interpreted as departing from that fundamentally important principle. Having made the foregoing clear, it is fair to say that, in objective terms, the Applicant did not answer the question asked at 39 (about insufficient evidence against his uncle) given that his response was as follows: "*First thing I have a problem with my uncle before that. The problem was about inheritance and he never forgave me because he blames me for him going to prison. My uncle is only half brother*

to my father from his mother's side. He thought it was me who called the police when he got arrested".

27. Later in the s. 35 report, it is recorded that question 43 was as follows: "*It is difficult to reconcile your uncle having connections with the police as you describe and him being jailed for five years after they raided his house and charged him with a drugs offence or offences".* The following answer is then recorded: "*As I say to you before the police who arrested him are from a different county and arrested him for drugs. The police in our county did nothing about that".*

28. Question 45 was in the following terms:- "*Do you have evidence of collusion between your uncle who is a criminal and a drugs dealer and the police?"*. The answer given by the Applicant was as follows: "*The evidence I have is that when I went to report the first time he knew straight away. The police station in our area would not know that the drugs police were coming to arrest him. He would not have the large amount of drugs in his house if he knew that the police were coming".*

29. The s. 39 report is dated 14 September 2022. This is the decision under review and I now proceed to look at the various legal issues raised by the Applicant.

Failure to take into account relevant considerations/irrationality

30. From internal pages 13 to 15, inclusive, of the s. 39 decision, there is a careful analysis of the 2020 incident at the bakery under the heading "*(ii) The incident with the sword"*. Whilst the IPO accepted as a material fact that the Applicant's uncle targeted him because he wrongfully believed that the Applicant reported him to the police for drug offences, and also accepted on the balance of probabilities that the Applicant was attacked while sleeping in the bakery, the IPO found that:- "*There is no substantive reason to believe that his uncle was behind the attack".* The Applicant contends that the foregoing finding was irrational and involved a failure to take relevant considerations into account.

31. In the oft–cited decision of Henchy J. in *State (Keegan) v. Stardust Compensation Tribunal* [1986] IR 642 the learned judge stated:-

> "*I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision <u>plainly and unambiguously flies in the face of fundamental reason and common sense</u>. If it does, then the decision maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision making which affects rights or duties requires, inter alia, that the decision–maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision".* (emphasis added)

32. In the equally well-known judgment of Finlay C.J. in *O'Keefe v. An Bord Pleanala* [1993] 1 IR 39, the then Chief Justice followed the decision of Henchy J. in *Keegan*, also stating that:-

> ". . . *the circumstances under which the Court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare".*

The learned Chief Justice further stated:-

> ". . . *[i]n order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally . . . so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision"*. (emphasis added)

33. This Court cannot interfere with the decision merely on the grounds that the Court is satisfied, on the facts as found, that it would have reached *different* findings. Nor is this Court entitled to interfere with a decision because it takes the view that the case *against* the decision made was stronger than the case *for* the decision in question. The Applicant - who at all times bears the burden of proof in judicial review – must prove that the decision plainly and unambiguously flies in the face of fundamental reason and common sense and that there was nothing before the IPO which would support the decision reached.

34. The applicant has not established that the decision maker had no relevant material before it which would support the decision made. In arriving at the finding impugned, it is clear that the IPO took into consideration *inter alia* the following:-

- The Applicant moved 277 km away from his hometown to work in the bakery (see internal p. 13 of the 29–page s. 39 report);
- The Applicant stated that the relevant assailants were wearing masks (see p. 15);
- The Applicant only knew that one of the attackers was his uncle "*by his voice"* (see p. 15);
- The police examined the crime scene and following their investigation they took the sword which the intruders left behind and asked the Applicant to go to the police station to tell them what had happened in the assault. (see p. 5);
- The Applicant was requested to appear before the Investigative Judge on 6 July 2020, who informed him there was no proof that the person who tried to kill him was his uncle. (see p. 5);
- The Applicant was asked whether his uncle and his gang were arrested and replied, "*I heard that he got some summons but I had no contact after that so I have no idea".* (Q. 35 – s. 35 interview) and also stated "*The owner of the bakery told me that my uncle got a call from the police because everyone knew him and he has had contact with the police"* (Q. 36 – s. 35 interview) (see p. 15);
- The IPO considered that the Applicant's replies concerning the arrest of his uncle and his gang were vague and lacking in the kind of detail and specificity one would expect of a person whom they attempted to kill (p. 15).

35. In my view, the Applicant has failed to discharge the burden facing him. He has failed to establish irrationality; he has failed to establish a failure on the part of the IPO to take relevant considerations into account. It seems to me that it was open to the IPO to make the findings which are challenged. I cannot accept that there was nothing before the IPO which would support the findings challenged.

36. It also seems to me that the applicant's central complaint under this heading is about the outcome (with which he is obviously unhappy) rather than a contention that there was nothing upon which the outcome was based. Judicial review cannot assist the applicant, or any applicant, in this regard.

37. Given that there undoubtedly was evidence before the IPO, it also seems appropriate to note, at this juncture, the well–established principle that the weight to be given to evidence is quintessentially a matter for a decision maker (see Birmingham J., as he then was, in *ME v. Refugee Appeals Tribunal* [2008] IEHC 192 at para. 27).

38. Furthermore, the essence of the Applicant's complaint under this ground relates to how the IPO assessed evidence and came to findings. It is not a complaint that relates to jurisdiction. This highlights the reality that the Applicant has a more suitable alternative remedy by way of an appeal to IPAT.

39. Whilst it appeared to me to be convenient to deal, first, with the above issue, it is fair to say that at the heart of the case, insofar as the Applicant is concerned, is the contention that the IPO erred in finding that the Applicant would face a reasonable chance of persecution and a real risk of serious harm and then proceeding to find that State protection was available to the Applicant in Algeria.

The significance of the finding of real risk of serious harm

40. To better understand this central element of the Applicant's case, it is useful to look again at the s. 39 report in order to understand the approach taken by the decision maker. On internal p. 11 (of 29) of the s. 39 report, the IPO looked at the first of the material facts of the Applicant's claim, namely, his nationality and his personal circumstances and, in the manner explained by the IPO, came to the following finding: "*The applicant's nationality and his personal circumstances are accepted as material facts".*

41. Between internal pages 11 and 12 of the s. 39 report, a credibility assessment is carried out by the IPO in respect of the second of the material facts in the Applicant's claim, namely, that his uncle (ZM) abducted him in 2014. The finding reached by the IPO was as follows: "*It is accepted on the balance of probabilities that the applicant's uncle. ZM, abducted him in 2014. This is accepted as a material fact".*

42. There follows an assessment of the third of the material facts in the Applicant's claim, namely, that his uncle targeted him because he wrongfully believed that the Applicant reported him to the police for drugs offences in 2014. The credibility assessment of this material fact in the claim can be seen from internal pages 12 to 15, inclusive. In the manner seen earlier, whilst the IPO did not find that the Applicant's uncle was behind the 2020 bakery attack, it was accepted as a material fact that his uncle: "*targeted him because he wrongfully believed that the applicant reported him to the police for drugs offences*".

43. A careful credibility assessment was then carried out with respect to the fourth of the material facts in the Applicant's claim, namely, that the Applicant's uncle has powerful friends in the security services and is in collusion with the police. The following comprise verbatim extracts from the careful assessment carried out by the IPO, which began by an acceptance that the Applicant was abducted by his uncle, ZM, in 2014 and proceeded to deal with reporting by the Applicant to the police:-

> "*He stated that when he was returning home from the police station he was met by his uncle, MK, and his gang and they told him that they knew why he had been to the police station (Q. 62 – questionnaire). He claimed that they threatened him that if he did not withdraw the complaint against them that they would burn his home and kill him (Q. 62 – questionnaire). He said that he realised that his uncle had powerful friends in the security services, so he returned to the police station and withdrew his complaint (Q. 62 – questionnaire). It was put to the applicant that it is difficult to understand why he withdrew a complaint of kidnapping against a criminal who had caused his father, himself and his family such grief over a long period of time as he described in his questionnaires. He replied 'When I reported him, I did not have much proof. The second thing is that he found out that I went to the police, and he threatened that he would burn me and my family and home. One of the policemen rang my uncle and told him that I reported him because the minute I came back from the police station he knew I was there. He told me that if I did not go to the police station and withdraw the complaint he would burn us. That is why I was sure it was one of the police who rang him. That is why I withdrew the complaint because I knew he had connections in there' (Q. 42 – s. 35 interview). <u>It is considered that ZM and his gang could have discovered in any number of ways that the applicant had made a complaint to the police and that his evidence in this regard is speculative</u>.*
>
> *It was put to the applicant that it is difficult to reconcile his uncle having connections with the police and him being jailed for five years after they raided his house and charged him with a drugs offence. He replied 'As I say to you before the police who arrested him are from a different county and arrested him for drugs. The police in our county did nothing about that'. (Q. 43 – s. 35 interview). <u>It is considered that if ZM was in collusion with the police and had powerful friends in the security service that he would not have had his house raided and been jailed for five years for drugs offences.</u>*
>
> *The applicant was asked whether he had any evidence of collusion between his uncle who is a criminal and a drug dealer and the police. He replied 'The evidence I have is that when I went to report the first time he knew straight away. The police station in our area would not know that the drugs police were coming to arrest him. He would not have the large amount of drugs in his own house if he knew that the police were coming' (Q. 45 – s. 35). He was asked how knew (sic) that the police who raided the house did not tell the local police beforehand. He replied, 'I was a student in the university for four years and I know the law in Algeria and the right is there in the judge to send the police straight away to the house'*

(Q. 47 – s. 35 interview). The applicant failed to substantiate that the police were in collusion with the applicant's uncle, ZM.

Given this credibility analysis, it is not accepted on the balance of probabilities that the applicant's uncle, ZM, had powerful friends in the security forces and was in collusion with the police. This is rejected as a material fact". (emphasis added)

44. It is not suggested that the IPO erred in respect of the foregoing analysis and findings. As the IPO make clear in the third paragraph on internal p. 17 of the s. 39 report, the following facts were accepted as credible and would be considered for the purposes of assessing whether there is a well-founded fear of persecution/real risk of serious harm, namely:-

- "*His nationality and his present circumstances;*
- *That the applicant's uncle ZM abducted him in 2014;*
- *That the applicant's uncle, ZM targeted him because he wrongfully believed that he reported him to the police for drugs offences in 2014*".

45. It is appropriate to quote verbatim the legal ground as pleaded by the Applicant at [e] of his statement of grounds:-

"*The International Protection Office (hereafter the "IPO") erred in law as to the significance of finding that there is a well–founded fear / real risk of persecution / serious harm. Those concepts of "well–founded fear of persecution" and "real risk of serious harm" are autonomous EU law concepts. It was accepted by the IPO as a material fact, that the applicant's uncle 'targeted him because he wrongfully believed that he reported him to the police for drugs offences in 2014' (per p. 17 of the s. 39 report). On p. 18 it is stated '[W]ith respect to the feared persecution and the accepted facts in this case, I do find that the applicant would face a reasonable chance of persecution if returned to his country of origin for the following reasons'.*

The IPO also accepted that there was a nexus to the Refugee Convention. Insofar as the IPO made the aforesaid finding that the applicant would face a reasonable chance of persecution if returned to his country of origin, that, in this case, is equivalent to finding that the applicant is a refugee. The fact that he later found that there was State Protection (p. 20, para. 6.3) and that there was no 'well–founded fear of persecution' (p.21 para. 6.6) is not enough to save the decision. The position in relation to Subsidiary Protection is even clearer. At p. 23 of the decision, he finds that 'I do find that the applicant would face a real risk of torture/inhuman or degrading punishment if returned to his country of origin'. It was not lawful or appropriate to make (as the Tribunal Member made) separate subsequent findings in relation to State Protection. If State Protection is available, then it suggests that there is no well–founded fear / reasonable chance / real risk of persecution / harm. It appears to be accepted that the applicant is unwilling, owing to his fear, to avail himself of the protection of Algeria. Alternatively, the IPO erred in law in failing to make a specific determination on this".

Refugee

46. At this juncture, it is appropriate to quote the following definitions which appear in s. 2 (1) of the 2015 Act:-

> "*'refugee' means a person, other than a person to whom section 10 applies, who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside his or her country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it*";

Person eligible for subsidiary protection

47.

> "*'person eligible for subsidiary protection' means a person—*
>
> *(a) who is not a national of a Member State of the European Union,*
>
> *(b) who does not qualify as a refugee,*
>
> *(c) in respect of whom substantial grounds have been shown for believing that he or she, if returned to his or her country of origin, would face a real risk of suffering serious harm and who is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country, and*
>
> *(d) who is not excluded under section 12 from being eligible for subsidiary protection*;"

Qualification Directive

48. The foregoing definitions reflect the contents of Article 2 of the "Qualification Directive" 2004/83/EC of 29 April 2004.

49. It is also appropriate to quote verbatim Article 4.4 of the Qualification Directive which, with regard to assessment of facts and circumstances, provides:-

> "*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 or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated*".

50. The foregoing wording is mirrored in s. 28 (6) of the 2015 Act.

51. At the core of the Applicant's case is that the decision maker misunderstood and misapplied the concepts of "*well–founded fear of being persecuted*" and "*real risk of suffering serious harm*". The Applicant contends that there are fundamental errors in the use of those terms by the decision maker, which errors "feed into" the s. 28 (6) analysis which, contends the Applicant, was not done properly or at all.

52. Whilst accepting that it is mandatory for the decision maker to consider State protection, the Applicant submits that the decision maker is required to consider State protection when considering whether there is a well–founded fear.

53. The Applicant contends that a finding of a well–founded fear of persecution necessarily involves a finding that the Applicant does *not* have adequate State protection. In other words, central to the Applicant's case is that the time to consider State protection is when the decision maker is considering whether there is a well–founded fear of persecution/a real risk of suffering serious harm.

54. With a particular focus on the concept of "*real risk*", the Applicant argues that "*real risk*" means risk after taking into account any State protection which may be available. The Applicant contends that on a proper interpretation of the provisions of the 2015 Act, risk incorporates any (inadequate) State protection which may be available, i.e., that State protection has been taken into account in concluding that there is a "*real risk*" (see para. 13 of the Applicant's written submission).

55. It is also useful to quote verbatim paras. 16 to 18 inclusive from the Applicant's written submissions:-

> *"16. We argue that if there is effective State protection, there is no real risk. It is a fundamental misunderstanding of the Qualification Directive / 2015 Act (especially the definitions provisions of each and 4 (4) QD and 28 (6) 2015 Act) for the decision maker and/or the respondents to suggest that, having found there to be a real risk of serious harm for the purpose of 4.4 / 28 (6), it is then appropriate to examine, entirely separately, the question of whether there is State protection. Such an approach is to misunderstand the definition of subsidiary protection and to place an applicant in an unacceptable kind of double jeopardy where he has to show that there is a real risk and, separately, (and as we understand the respondent's argument) without the benefit of the presumption in 4 (4) and 28(6)), that there is no effective State protection. Further, or alternatively, by dealing with the question of State protection after that of real risk, the decision maker has separated two intrinsically linked concepts.*
>
> *17. We argue that, once it is found that the applicant would face a reasonable chance of persecution if returned to his country of origin, that, in this case, is equivalent to finding that the applicant is a refugee.*
>
> *18. In the light of that finding of well–founded fear of persecution, it is submitted that the only appropriate and lawful outcome was for the IPO to recommend that the applicant should be given a refugee declaration in accordance with s. 39 (3) (a) of the 2015 Act. It was not, it is submitted, necessary, appropriate or lawful, for example, to proceed to consider separately the question of State protection. Well–founded fear of persecution / real risk of serious harm is not, for the purpose of the Qualification Directive / the 2015 Act, separate from the concept of State protection*".

56. With respect to the foregoing, the principal authority relied on by the Applicant is the 20 January 2021 opinion of Advocate General Hogan in Case–2/19 *SSHD v. OA* [2021] INLR 222. Given the emphasis which was laid on paras. 54 to 61, inclusive, of the Advocate General's opinion, I now set these paragraphs out verbatim:-

"54. One can, I think, rather overcomplicate an analysis of what, in the end, is a single concept which accordingly applies identical criteria in the context of the application of both Article 2(c) and Article 7 of the Qualification Directive and, indeed, in turn Article 11(1)(e) of that directive. (28)

55. In examining any application for refugee status, the question must always be whether an applicant has established a well-founded fear of persecution pursuant to Article 2(c) of the Qualification Directive. The use of the term 'well-founded' fear in the definition of 'refugee' in Article 2(c) of the Qualification Directive requires, inter alia, an analysis of whether the conditions in the applicant's country of nationality or origin are such as to objectively justify the applicant's fear of persecution.

56. This test will necessarily require, in my view, an objective examination of whether or not there is protection in the applicant's country of nationality by actors of protection as defined in Article 7 of the Qualification Directive against persecution (29) and whether the applicant has access to that protection. (30)

57. I therefore agree, in essence, with the Commission's observation (31) that refugee status falls to be determined by reference to a single protection test which meets the requirements laid down in Article 7 of the Qualification Directive. I would stress, however, that protection in the country of nationality must be available against all actors of persecution as defined by Article 6 of the Qualification Directive. (32)

58. While there is, strictly speaking, no formal definition of 'protection' in Article 2 of the Qualification Directive, protection is in fact described in Article 7(2) of the Qualification Directive. This occurs when the actors of protection mentioned in Article 7(1) of the Qualification Directive take 'reasonable steps to prevent the persecution …, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution …' (33) and where the applicant 'has access to such protection.' (34)

59. Thus, the continued necessity for international protection (refugee status) in a case such as that in the main proceedings is determined, inter alia, by the ability or otherwise of an actor of protection to take reasonable steps to prevent the persecution of the applicant at the hand of non-State actors by, inter alia, operating an effective legal system for the detection, prosecution and punishment of such acts by, inter alia, non-State actors. (35)

60. If, for whatever reason, actors of protection fail to or cannot otherwise take such reasonable steps to prevent the persecution of the applicant, then the applicant is in principle entitled to refugee status. (36)

61. I therefore consider that in order to ascertain whether a person has a well-founded fear of persecution, in accordance with Article 2(c) of the Qualification Directive, from non-State actors, the availability of 'protection' as described by Article 7(2) of the Qualification Directive by actors of protection must be taken into consideration. The same analysis must be conducted in respect of the cessation of refugee status in accordance with Article 11(1)(e) of the Qualification Directive".

57. Relying on the foregoing, the Applicant submits that, in order to consider whether there is a well–founded fear, the decision maker must simultaneously consider the availability of State protection (i.e., otherwise it is not a well–founded fear). Thus, contends the Applicant, well–founded fear / real risk is not separate from the concept of State protection, for the purposes of the 2015 Act / Qualification Directive.

58. Notwithstanding the sophistication with which this submission is made, I am not satisfied that the Applicant's reliance on *OA* supports a finding that the decision maker erred in law in the present case. I take this view for several reasons, as follows.

59. Unlike the present situation, OA was someone who was granted refugee status. OA was a Somali national and a member of a particular clan. He and his then–wife suffered serious harm on various occasions in the 1990s at the hands of militia. His wife came to the UK in 2001 and was granted refugee status. OA entered the UK in 2003 and was granted refugee status as her dependent spouse. Several years later, in 2016, the Secretary of State revoked OA's refugee status, due to a change in the circumstances in Somalia. The Secretary of State claimed that effective protection was now available to OA, who argued that the UK authorities erred in basing this determination in part on the availability of protection from family or other clan members, who were private, not State, actors.

60. In short, *OA* concerned the cessation of refugee status and the appropriate approach to be taken in that context. It seems to me that the essential point articulated in para. 61 of the Advocate General's opinion concerns whether the same State protection analysis must be carried out at the *cessation* stage, as was carried out when refugee status was *granted*. However, nothing in the Advocate General's opinion seems to me to support the submission that the IPO erred in law in respect of the analysis conducted in the present case. On the contrary, it is clear that the IPO analysed and took into consideration the concepts of well–founded fear *and* State protection.

61. Turning to the decision of the Court of Justice in *OA*, paras. 55 to 59 featured heavily at the hearing before me and, therefore, I also set them out verbatim:-

"*55 Under Article 2(c) of Directive 2004/83, the term 'refugee' refers, in particular, to a third country national who is outside the country of his or her nationality 'owing to a well-founded*

fear of being persecuted' for reasons of race, religion, nationality, political opinion or membership of a particular social group and is unable or, 'owing to such fear', unwilling to avail himself or herself of the 'protection' of that country. Where the circumstances justifying such fear have ceased to exist, refugee status may come to an end, under Article 11(1)(e) of that directive.

56 In that regard, it should be observed that the conditions specified in Article 2(c) of Directive 2004/83, in relation to the fear of persecution and to protection, are intrinsically linked. Indeed, the protection to which that provision refers is, as is stated in paragraph 47 of the present judgment, protection from acts of persecution.

57 Accordingly, the Court has previously held that if the national concerned has, because of the circumstances existing in his or her country of origin, a well-founded fear of being personally the subject of persecution for at least one of the five reasons listed in Article 2(c) of Directive 2004/83, those circumstances establish that the third country in question does not protect its national against acts of persecution (see, to that effect, judgment of 2 March 2010, Salahadin Abdulla and Others, C 175/08, C 176/08, C 178/08 and C 179/08, EU:C:2010:105, paragraphs 57 and 58). A third country national who is in fact protected against acts of persecution within the meaning of that provision cannot, for that reason, be regarded as having a well-founded fear of persecution.

58 Further, the same circumstances that establish that the third country concerned does not protect its national against acts of persecution explain why it is impossible for that national, or why he or she justifiably refuses, to avail himself or herself of the protection of his or her country of origin in terms of that provision, that is to say, in terms of that country's ability to prevent or punish acts of persecution (judgment of 2 March 2010, Salahadin Abdulla and Others, C 175/08, C 176/08, C 178/08 and C 179/08, EU:C:2010:105, paragraph 59).

59 Consequently, for the purposes of determining whether the third country national concerned has a well-founded fear of persecution in his or her country of origin, within the meaning of Article 2(c) of Directive 2004/83, account must be taken of whether there is or is not protection from acts of persecution in that third country".

62. Considerable emphasis was laid by the Applicant on the use of the words "*intrinsically linked*", as they appear in para. 56 of the decision of the Court of Justice in *OA*. However, to say that concepts are intrinsically linked is not equivalent to saying that they are the *same* concept. Central to the Applicant's case is that (i) fear of persecution / real risk of serious harm; and (ii) State protection are the same, not different concepts, for the purposes of the 2015 Act and the Directive. Respectfully, I cannot agree.

63. Well–founded fear is certainly an element of the definition of refugee status. However, it seems to me that there is a clear distinction between the concept of well–founded fear and the entitlement

to refugee status (whereas the applicant contends that a finding of the former automatically gives rise to the latter). Based on a literal interpretation of the words used (in s.2 of the 2015 Act/Article 2 of the Qualification Directive), it seems to me that State protection is an element of, but distinct from, the definition of refugee.

64. It is appropriate to recall the words used in the definitions of "*refugee*" and a "*person eligible for subsidiary protection*" respectively (*per* s. 2 (1) of the 2015 Act, reflecting Article 2 of the Qualification Directive). Focusing on the definition of "*refugee*", it is clear from the plain meaning of the words used that there are several elements, namely:-

- *"a person . . . who, owing to a well-founded fear of being persecuted . . .*
- *is outside his or her country of nationality* <u>*and*</u>
- *is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country* <u>*or*</u>
- *a stateless person who, being outside of the country of former habitual residence for the same reasons as mentioned above,*
- *is unable or, owing to such fear, unwilling to return to it;".*

65. It seems to me that the elements of the refugee definition which are linked by the conjunction "*and"* remain distinct concepts, albeit in the context of a single definition.

66. In other words, the concepts of (i) fear of persecution and (ii) protection are certainly *"intrinsically linked"* (to cite *OA*), but this is a close linking of distinct elements making up a unitary definition. In the impugned decision, both these elements *were* considered by the IPO and I cannot accept that it is permissible for this Court to take issue with the clear and logical approach taken by the IPO when carrying out this consideration. In other words, I can identify nothing in the definition of refugee which entitles this court to hold that the IPO fell into error insofar as its careful consideration was concerned.

67. Similar comments apply in respect of the definition of a "*person eligible for subsidiary protection"*. Again, distinct elements of a unitary definition are linked by use of the word "*and*". It seems to me that the concepts of "*risk*" and "*protection*", whilst elements of a single definition, amount to distinct concepts.

68. I do not accept that the 'proper' interpretation of the words used in the 2015 Act/Qualification Directive mean that (i) fear of persecution / real risk of serious harm; and (ii) State - protection are the same, not different, concepts (as opposed to being closely linked but distinct elements of a definition, which elements the decision maker considered in a careful and logical fashion).

<u>**UNHCR Handbook**</u>

69. I am fortified in the foregoing views by the contents of the February 2019 UNHCR "*Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection".* It is appropriate to quote the following extract from Chapter II, s. B which concerns the interpretation of terms:-

"(2) "well-founded fear of being persecuted"

(a) General analysis

37. The phrase "well-founded fear of being persecuted" is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories (i.e., persons of a certain origin not enjoying the protection of their country) by the general concept of "fear" for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.

38. To the element of fear – a state of mind and a subjective condition – is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration".

70. Recognising, as the foregoing guidance does, that well–founded fear involves both a *subjective* and an *objective* element, it seems entirely uncontroversial to suggest that whether a person is in fear, subjectively, is wholly distinct from an analysis of such State protection as may or may not exist. In my view, this alone fatally undermines the submissions by the applicant as to the proper interpretation of s. 2(1)/Article 2.

71. In submissions on behalf of the Respondents, counsel drew the court's attention to "Asylum Law and Practice" (2nd Ed.; Symes/Jorro /Berry; Bloomsbury Professional; 2010). From p. 82 (para. 2.40) onwards, the learned authors look at "Subjective Fear", before proceeding to look at "Objective Risk" (p. 83; para. 242 onwards).

72. Later, from p. 265 (para. 5.1) onwards, the learned authors look separately at the question of State protection, insofar as non–state actors are concerned.

73. The authors' analysis of distinct elements within a unitary definition fortifies me in the view that the Applicant is incorrect when submitting that well–founded fear of persecution / real risk of serious harm is not separate from the concept of State protection, for the purpose of the Qualification Directive / 2015 Act.

74. I am also satisfied that reliance on Case C–175 /08 *Abdulla* [2011] QB 46 cannot avail the Applicant. In that case, the claimants, who were Iraqi nationals, applied for asylum in Germany on the basis that they feared being persecuted by the Ba'ath Party regime then in power. The Applicants were granted refugee status in 2001 and 2002. In 2005, their refugee status was revoked, in light of the changed circumstances in Iraq following the fall from power of the Ba'ath Party. The referring court asked whether cessation of refugee status only concerned the elements of refugee status or

whether dangers of a general nature could be examined in the context of the revocation of refugee status.

75. In the first question referred, the CJEU considered the elements of refugee status as set out in Article 2 (c) of the Qualification Directive. At para. 68 the court held that:-

> *". . . the circumstances which demonstrate the country of origin's inability or, conversely, its ability to ensure protection against acts of persecution constitute a crucial element in the assessment which leads to the granting of, or, as the case may be, by means of the opposite conclusion, to the cessation of refugee status*". (emphasis added)

76. It should also be noted that in *Abdulla*, and wholly unlike the present situation, the Applicant was found to fear persecution by a State actor. Furthermore, *Abdulla* concerned Article 11 of Directive 2004 / 83 / EC, with respect to refugee status *ceasing* to exist. Furthermore, the judgment in *Abdulla* did not consider the definition of well–founded fear. Nor did it alter in any way the guidance which can be seen in the UNCHR Handbook.

77. Nothing in *Abdulla* seems to me to require this Court to find that, on a proper interpretation of the Qualification Directive / 2015 Act, the decision maker erred in law, be that with respect to interpretation or as regards the assessment carried out. I am satisfied that, in the present case, the IPO considered each of the elements of the definition of "*refugee*" and this is clear from sections 6.1 to 6.3, inclusive, of the s. 39 report.

78. It will be recalled that a core submission made on behalf of the Applicant is that, having made a finding of well–founded fear of persecution, the *only* appropriate and lawful course was for the IPO to recommend that the Applicant be given a refugee declaration. Indeed, the Applicant argues that it was not necessary, appropriate or lawful "*. . . to proceed to consider separately the question of State protection*". I respectfully disagree, particularly in light of the guidance provided in the 20 November 2020 decision by Ms. Justice Burns in *BA v. IPAT* [2020] IEHC 589.

79. The following extract from the learned judge's decision in *BA* seems to me to be particularly relevant to the present case:-

> "*Well Founded Fear Finding*
> *12. At paragraph 5.8 of the First Respondent's decision it found 'that there is a reasonable chance that if she were to be returned to her country of origin she would face a well-founded fear of persecution from her ex-partner.' The First Respondent then proceeded to consider whether state protection was available to her.*
>
> *13. Counsel for the Applicant submits that this was a finding of the First Respondent which necessitated a declaration of refugee status being granted to the Applicant. A convoluted argument was made that this finding, by the First Respondent, encapsulated an objective finding that the Applicant feared her ex-partner because state protection was not available to her and that accordingly, the sole determination to be made by the First Respondent was whether she was unwilling, because of this objectively justified fear, to return to Nigeria.*

14. I cannot accept that interpretation of this finding of the First Respondent and do not follow the logic of the argument. Considering the decision as a whole, it is clear that what the First Respondent meant to convey is that in the absence of a finding by the First Respondent that state protection was available to her, the Applicant had a well-founded fear of persecution from her ex-partner. <u>The First Respondent ordered its decision making process in a logical fashion: initially determining whether a well-founded fear of the Applicant being subjected to serious harm by her ex-partner existed, and then determining, on foot of the positive finding that it did exist, the question of whether state protection was available</u>.

15. The impugned sentence cannot be interpreted as a finding that refugee status should be declared to the Applicant". (emphasis added)

80. In the present case, the decision–making process was ordered in a similarly logical fashion and it seems to me that the decision in *BA* approves, in explicit terms, of the very approach taken by the decision-maker in the present case, namely, to look at whether well–founded fear had been established and then to consider the question of State protection, each being important elements of a unitary concept i.e. refugee.

81. It is common case that a consideration of state protection was mandatory. It is entirely clear from the decision that this issue was considered. Satisfied that the concept of state protection is conceptually distinct from well–founded fear, I feel bound to reject the argument that the logical approach taken by the decision–maker in the present case involved an error of law, being, it seems to me, the same argument rejected by this Court in *BA*.

82. I also accept entirely the submission made by Counsel for the Respondents that, had the decision-maker not considered State protection as a distinct element (albeit within a single definition) they could have left themselves open to the charge of failing to do so properly and/or failing to provide a sufficiently clear and reasoned decision.

<u>S.28(6) of the 2015 Act</u>

83. Commenting on Article 4.4 of the Qualification Directive, the learned authors of "EU Immigration and Asylum Law" (Daniel Thym & Kay Hailbronner; 3rd ed.; 2022) begin by stating the following, on p. 1257, with respect to what they describe as the "*Alleviating evidentiary rule"*:

"*Article 4(4) contains an alleviating evidentiary rule (Beweiser Leichterung) for persons who have already been subject to persecution or serious harm, or to direct threats of such persecution or such harm. Such past events give rise to a refutable presumption that the applicant qualifies for refugee or subsidiary protection – assuming that the initial situation remains the same. The provision however does not introduce a specific standard of proof…"*

84. Section 28 (6) of the 2015 Act was considered relatively recently by Phelan J. in *NU v. IPAT* [2022] IEHC 87. At para. 38, the learned judge stated the following:-

"*38. While it is certainly good practice to do so, it is accepted by me that it is not necessary to identify the applicable statutory provisions which guide the discharge of the statutory decision-making function in the text of the Decision itself in order for that Decision to be capable of being subjected to a "thorough review". It is possible for a court to be satisfied that the correct legal test has been applied by the Tribunal through the record of the assessment carried out and the Decision arrived at as demonstrated in the reasoning employed . . .*". (emphasis added)

85. In the decision of Mr. Justice Ferreter in *M.Y. v. IPAT & Anor* [2022] IEHC 345, the learned judge stated *inter alia* the following at para. 24:

"I accept that the general principle espoused by Phelan J. in this paragraph could equally apply to the question of whether the Tribunal had properly applied itself to the application of the rebuttable presumption in s.28(6); it is not necessarily fatal that there is no express reference to the terms of s.28(6) once it is clear that s.28(6) is being applied and properly engaged with. .." (emphasis added)

86. In the present case, on the basis of the first three material facts which the IPO accepted as credible (i.e., (i) the Applicant's nationality and personal circumstances; (ii) that his uncle, ZM, abducted him in 2014; and (iii) that his uncle targeted him because he wrongfully believed that the Applicant reported him to the police for drugs offences in 2014) the decision–maker went on to find that the Applicant faced a reasonable chance of future persecution / a real risk of serious harm if returned to Algeria. It is a statement of the obvious to say that the three accepted facts (which are set out, *inter alia*, on internal p. 17 of the s. 39 report) relate to *past* events.

87. At s. 6.1 (internal p. 18) of the decision, the IPO went on to state *inter alia* the following:-

"*In this section I have considered, on the basis of the accepted facts, whether the feared persecution claimed by the applicant as well as other accepted facts in this case along with relevant country of origin information establish that if the applicant is returned to his country of origin, he will face a reasonable chance of persecution.*

With respect to the feared persecution and the accepted facts in this case, I do find that the applicant would face a reasonable chance of persecution if returned to his country of origin for the following reasons. The accepted material facts are….". (emphasis added)

88. Thus, in the context of *past* events, the decision–maker accepted that there was a reasonable chance of *future* persecution and came to a positive finding insofar as the Applicant was concerned.

89. A similar analysis was undertaken by the decision–maker at s. 7.1 of the impugned decision where, again, on the basis of accepted facts which speak to *past* events, the decision–maker went on to find that the Applicant would face a real risk of *future* harm (see analysis from p. 22 onwards).

90. The Applicant has not established that there was a failure on the part of the decision maker to afford him what was described as the "*evidential advantage"* which flows from s. 28 (6) of the 2015 Act (reflecting Article 4.4 of the Qualification Directive 2004/83/EEC).

91. The Applicant has not demonstrated a failure on the part of the decision–maker to apply s. 28 (6) of the 2015 Act in favour of the Applicant.

92. Nor has the Applicant established that there was a failure on the part of the decision-maker to make a finding as to whether it was accepted that there had been past persecution and/or serious harm.

93. In the present case, the Applicant has not established that there was any failure to apply and properly engage with s.28(6).

94. In my view, the Applicant has not established that the decision–maker failed to apply s. 28 (6) of the 2015 Act, correctly or at all.

State protection

95. I am not satisfied that the Applicant has established any failure on the part of the decision maker to engage adequately or at all with the relevant test to determine whether State protection would be available.

96. Section 31 of the 2015 Act is entitled "Actors of protection" and provides:-

> "*31 (1) For the purposes of this Act, protection against persecution or serious harm can only be provided by—*
>
> > *(a) a state, or*
> >
> > *(b) parties or organisations, including international organisations, controlling a state or a substantial part of the territory of a state,*
> >
> > *provided that they are willing and able to offer protection in accordance with subsection (2).*
>
> *(2) Protection against persecution or serious harm—*
>
> > *(a) must be effective and of a non-temporary nature, and*
> >
> > *(b) shall be regarded as being generally provided where—*
> >
> > > *(i) the actors referred to in paragraphs (a) and (b) of subsection (1) take reasonable steps to prevent the persecution or suffering of serious harm, and*
> > >
> > > *(ii) the applicant has access to such protection.*
>
> *. . . .*
>
> *(4) The steps referred to in subsection (2)(b)(i) shall include the operating of an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm*".

97. The decision–maker, in the present case considered State protection, in the manner detailed in ss. 6.3 and 7.2 of the s. 39 report (the Applicant's uncle being a non-State actor). As is clear from the explicit terms of the decision, the IPO took into consideration available COI; that the Applicant had withdrawn his first complaint against his uncle when he abducted him; and that he made no complaint when his uncle went to his house looking for him after he was released from prison.

98. Among the findings (see p. 16 of the s. 39 report) is that the decision–maker considered that if the Applicant's uncle: "*…was in collusion with the police and had powerful friends in the security services that he would not have had his house raided and been jailed for five years for drugs offences*".

99. A not dissimilar finding was held by this Court, in *LAA (Bolivia) v. RAT* [2016] IEHC 12, to be reasonable. In that case, the Applicant sought protection on the basis of a risk of domestic violence. She claimed that her husband would enjoy impunity in Bolivia due to his connections to the police and public servants. As can be seen from para. 7 of the judgment of Stewart J in *LAA,* the impugned decision found *inter alia* that:-

> "*The case brought to the Tribunal is the [husband] is a man who is to be feared because of his connections with the police and public servants. The documents on file do not support this claim. What the documents show is that [husband] has criminal convictions because of his drunken violence. While this supports that claim brought by [first named applicant] (i.e., that her husband is drunken and violent) it indicates that [husband] is not a man of great influence. He was convicted of separate offences in 2010 and 2011. It does not make sense to suggest that [husband] would be prepared to tell police to look the other way in the event of his wife's complaint of violence while at the same time not using his influence with the police when he himself was facing criminal charges*".

100. Later in the same decision, Stewart J. (from para. 19 onwards) held as follows:-

> "*19. In Idiakheua v. The Minister for Justice, Equality and Law Reform [2005] IEHC 150, Clarke J. held 'the true test is whether the country concerned provides reasonable protection in practical terms'. This is in line with Article 7(2) of the 2004 Qualification Directive, which provides the following guidance as to the standard of protection that states are expected to provide:-*
>
> > *'Protection is generally provided when the actors [of protection] take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.'*
>
> *State protection can never be perfect protection. The existence of legislation proscribing certain practices is not enough to show the existence of state protection. These laws must also be enforced by the state. An applicant for a grant of refugee status must show that the state authorities are failing in some way to protect persons, and this will be with particular regard to their claim, region and other such circumstances.*

20. According to the country of origin information before the decision-maker, domestic violence appeared to be endemic in Bolivia. The tribunal member then went on to assess whether the first named applicant's husband's connections were such that he could reasonably prevent her securing state protection. The tribunal found that his connections were not so influential so that state protection would not be forthcoming to the applicant. This amounts to an assessment of the adequacy of the state protection given the applicant's particular circumstances and therefore, I reject the applicants' contention that such an assessment was not performed. This assessment is within the jurisdiction of the tribunal and it is not open to this court on judicial review to supplant its own assessment for that of the decision-maker".

101. In my view, the foregoing can also be said of the present case. I am obliged, in light of the evidence, to reject the Applicant's submission that the IPO failed to engage adequately or at all with the question of State protection. An assessment was performed. This assessment engaged with the Applicant's particular circumstances. It was an assessment carried out by the decision–maker within jurisdiction.

102. Furthermore, it is accepted on behalf of the Applicant that the alleged error with respect to the question of State protection is something capable of being dealt with by means of an appeal to IPAT. For the reasons set out in this judgment, I am not satisfied that any error has been established, fortifying me in the views expressed earlier to the effect that judicial review is not available of the first instance decision in this case.

103. The findings made by the decision–maker on the issue of State protection were open to the IPO to reach, having regard to the material before the decision maker. Arising out of information furnished by the Applicant:-

- His uncle spent five years in jail, until 2020 (see Q. 25 on internal p. 12 of the report pursuant to s. 35 (12) of the 2015 Act);
- With respect to the incident in the bakery at 2 a.m. and the attempted attack by masked assailants, one of whom the Applicant says that he recognised as his uncle by his voice, the Applicant stated:- "*I called the police the minute this happened and they told me to stay in a safe place*" (see Q. 32 on internal p. 13 of the report pursuant to s. 35 (12));
- In relation to the same incident, the Applicant goes on to state *inter alia*:- "*When the police came they looked at the scene. After their investigation the police took the sword which the intruders left behind and asked me to go to the police station to tell them what happened in the assault*" (again see Q. 32 on internal p. 13);
- The Applicant goes on to make clear that the matter went before a judge who "*. . . said that there was no proof that it was my uncle who tried to kill me"* (again see Q. 32 on internal p. 13);
- The Applicant confirmed that his uncle was wearing a mask, but that he "*…knew him by his voice"* (see Q. 38 on internal p. 15 of the report pursuant to s. 35 (12) of the 2015 Act).

Error of fact

104. A further ground of challenge is that the decision–maker made a material error of fact in assessing the nature of the Applicant's connection to the State.

105. It is accepted by the Respondents that the s. 49 report contains an error in relation to *when* the Applicant arrived in this State. That error appears twice on internal page 7 (of 16) of the s. 49 report, where it is erroneously stated that the Applicant arrived in the State on 03/08/2021 (as opposed to 2020). The same error can also be seen on internal page 13 (of 16) of the s. 49 report.

106. Despite the foregoing, it does not seem to me that the Applicant has established that this was a *material* error. I take this view for several reasons. It is common case that the Applicant, in fact, arrived in this State on 03/08/2020. Moreover, the *correct* date is used in the s. 49 report on a number of occasions, as follows:-

- On internal p. 10 (of 16) of the s. 49 report, it is recorded, correctly, that "*the applicant arrived in the State on 03/08/2020"*;
- On the same page (p. 10 of 16) it is recorded, correctly, that the Applicant "*applied for international protection on 04/08/2020"*;
- On internal p. 7 (of 16) it is recorded, correctly, that "*The applicant was granted permission to access the labour market by the LMAU, valid from 04/02/2021…"* (which is very obviously *prior* to 22/06/2021);
- As is recorded on internal p. 6 (of 16) in the s. 49 report, documentation submitted in support of the application included *inter alia* a "*letter regarding applicant's attendance at English course from CDETB adult education service dated 18/11/2020…."* (which is obviously prior to 03/08/2021);
- Similarly, page (6 of 16) also records that the Applicant's documentation included: "*Four Contracts of Employment with…."* a certain employer "*…dated 22/06/2021…."* (again, obviously prior to 03/08/2021).

107. In addition to the foregoing, the decision–maker plainly took into account the Applicant's personal circumstances, as correctly recorded on internal p. 7 (of 16) in the s. 49 report, namely, that the Applicant presented as single with no family connections to the State; that he resided in IPAS provided accommodation within the State; and that he had been granted labour access permission.

108. In these circumstances, it does not seem to me that the Applicant has established that the error was a material one, or that it played any role in the decision impugned.

Humanitarian considerations

109. As is clear from the 2015 Act, s. 39 requires the IPO to cause a written report to be prepared, which shall set out the IPO's recommendation, whereas a different exercise is required pursuant to s. 49. In other words, the s. 49 decision-maker is required to come to their independent conclusion, in the manner mandated by that section.

110. Among the grounds of challenge is that the s. 49 decision is vitiated by the failure of the IPO to consider the favourable findings reached in the s. 39 determination with respect to the Applicant's credibility, in particular under the heading of "humanitarian considerations". It does not seem to me that there is anything in the s. 49 report to suggest that the author of same did not consider the findings in the s. 39 report.

111. Internal page 8 (of 16) of the s.49 report is entitled "*5. Section 49(3)(b) – Humanitarian Considerations"* and is followed by a setting-out of what the Applicant stated in his questionnaire and/or submitted at interview. The conclusion expressed on internal page 11 (of 16) of the s. 14 report is put in the following terms:

> "*The applicant's application for international protection was considered at first instance and an International Protection Officer has recommended that the applicant should be given neither a refugee declaration nor a subsidiary protection declaration.*
>
> <u>*Having considered the information submitted in support of humanitarian considerations in this case*</u>*, it is concluded that the common good in maintaining the integrity of the international protection and immigration system outweighs the features of this case which may tend to support a decision to grant permission to remain the applicant*." (emphasis added)

112. It seems to me that it was open to the Third-Named Respondent to come to this view, in light of the material before the Minister and the applicant has not established this ground of challenge.

<u>In summary</u>

113. For the reasons set out in this judgment, I take the view that, at all material times, the Applicant has had more appropriate remedy in the form of a statutory appeal to IPAT. In my view, the Applicant has not established that this is one of those rare exceptions where judicial review is available in respect of the IPO's first instance decision.

114. Even if I am wrong in that view, the Applicant has not established any entitlement to judicial review and this is an application which must be dismissed.

115. On 24 March 2020, the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*

116. The parties should correspond with each other, forthwith, regarding the appropriate form of order, including as to costs which should be made, and to submit a draft order to the Registrar. My preliminary view is that, as the "entirely successful" party, the Respondents are entitled to their costs (see s.169 of the Legal Services Regulation Act, 2015). In default of agreement between the parties, short written submissions should be filed in the Central Office within 14 days.