**THE HIGH COURT**

**JUDICIAL REVIEW**

**IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED)**

[2020] 556 JR

**Record No: 2020/556JR**

**BETWEEN:**

**EV, JV AND MV (A MINOR SUING BY HER FATHER AND NEXT FRIEND, EV**

**APPLICANTS**

**AND**

**THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Ms Justice Tara Burns delivered on the 25th day of November, 2020**

**General**

1. The Applicants seek leave to apply by way of Judicial Review for the following principal reliefs:-

   a) An Order of *Certiorari* of the decision of the First Respondent dated 29 June 2020, made under Section 46(3)(a) of the International Protection Act 2015 (hereinafter referred to as the "Act of 2015") refusing to grant the Applicants either refugee or subsidiary protection declarations;

   b) A Declaration that ss.33 and 72 of the Act of 2015 combined are void as *ultra vires* and/or incompatible with Ireland's obligations under Council Directive 2005/85/EU of 1 December 2005 (hereinafter referred to as "the Procedures Directive") and/or the Common European Asylum System;

   c) A Declaration that the Second Respondent erred, contrary to s.72 of the Act of 2015, in the designation of South Africa as a safe country of origin.

**Test for Leave regarding the decision of the First Respondent**

2. Section 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended, applies to these proceedings. Accordingly, the Applicants must satisfy the Court that there are substantial grounds for contending that the decision in their cases ought to be quashed.

3. A "substantial" ground must, in the words of Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125*, be 'arguable, weighty and must not be trivial or tenuous'. She added 'a ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial'.*

**The Facts**

4. The Applicants are South African: the First and Second Applicants are married and the Third Applicant is their daughter. They arrived in Ireland on 9 September 2018 and made a claim for international protection on 10 September 2018 on the basis that they feared persecution and/or serious harm because of their race and history of having been persecuted and having been victims of crime.

5. The IPO received the Applicants completed Questionnaire on 5 October 2018. They were interviewed under s.35 of the Act of 2015 on 3 April 2019. The IPO issued its s.39 report on 4 June 2019 recommending that they not be given a refugee declaration or subsidiary protection. This included a finding that South Africa is a safe country of origin. They were informed by letters dated 9 September 2019 of this decision.

6. The Applicants appealed to the First Respondent by notices of appeal on 16 September 2019. As South Africa has been designated a safe country of origin, s. 43(b) of the Act of 2015 requires that the First Respondent consider the appeal without holding an oral hearing unless it is satisfied that it would not be in the interests of justice so to do. In this case, the appeal before the First Respondent proceeded on a papers only basis.

7. The First Respondent accepted the Applicants' general credibility and the material elements of the Applicants' claims: that they were victims of a number of different crimes including robbery of their home, and that they reported these issues to the police whose response was ineffective.

8. The First Respondent also accepted that their fears of robbery, murder and the potential abduction of the Third Applicant (who was 13) may constitute persecution. The First Respondent further accepted that the Applicants' claim had a nexus to the Convention on account of their race: they were perceived as wealthy and with social status.

9. However, the Applicants' claim for international protection failed as the First Respondent, having considered relevant Country of Origin Information, was satisfied that state protection is available in South Africa. In making that determination, the First Respondent had regard to the fact that the Second Respondent has designated South Africa as a safe country of origin pursuant to the International Protection Act 2015 (Safe Countries of Origin Order) 2018 (S.I. 121 of 2018).

**Safe Country of Origin Designation**

10. The Applicants submit that the designation by the Second Respondent of South Africa as "a safe country of origin" for the purposes of ss.33 and 72 of the Act of 2015 is *ultra vires* the Procedures Directive and/or is otherwise unlawful.

11. Section 33 of the Act of 2015 provides:-

> *"A country that has been designated under section 72 as a safe country of origin shall, for the purposes of the assessment of an application for international protection, be considered to be a safe country of origin in relation to a particular applicant only where—*
>
> *(a) the country is the country of origin of the applicant, and*
>
> *(b) the applicant has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her eligibility for international protection."*

12. Section 72 of the Act of 2015 provides:-

*"(1) The Minister may by order designate a country as a safe country of origin.*

*(2) The Minister may make an order under subsection (1) only if he or she is satisfied that, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.*

*(3) In making the assessment referred to in subsection (2), the Minister shall take account of, among other things, the extent to which protection is provided against persecution or mistreatment by—*

*(a) the relevant laws and regulations of the country and the manner in which they are applied,*

*(b) observance of the rights and freedoms laid down in the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the United Nations Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention on Human Rights,*

*(c) respect for the non-refoulement principle in accordance with the Geneva Convention, and*

*(d) provision for a system of effective remedies against violations of those rights and freedoms.*

*(4) The Minister shall base his or her assessment referred to in subsection (2) on a range of sources of information including in particular information from -*

*(a) other Member States,*

*(b) the European Asylum Support Office,*

*(c) the High Commissioner,*

*(d) the Council of Europe, and*

*(e) such other international organisations as the Minister considers appropriate".*

13. Counsel for the Applicants submits that the power vested in the Second Respondent to designate a country as a safe country of origin for international protection applicants, derives from Article 37(1) and Annex 1 of EU Directive 2013/32 (hereinafter referred to as "the Procedures Directive Recast"). He submits that as Ireland has not adopted the Procedures Directive Recast, the State is not entitled to avail of the provisions of that

Directive in order to apply the safe country of origin concept, as defined at Annex 1, to international protection applicants, which includes by definition at s.2 of the Act of 2015, a person declared to be a refugee or a person eligible for subsidiary protection.

14. Counsel for the Respondents submits that this argument is untenable. She submits that the safe country of origin concept was established by the Procedures Directive. This was then provided for in domestic law by s.7(g) of the Immigration Act 2003 which substituted s.12(4) of the Refugee Act 1996. This was further amended by the European Communities (Asylum Procedures) Regulations 2011 (S.I. 51 of 2011) which gave effect to Annex II of the Procedures Directive. Both the 1996 Act and the European Communities (Asylum Procedures) Regulation 2011 were repealed by s.6 of the Act of 2015. However, the Act of 2015, re-enacted the safe country of origin concept prescribed by the Procedures Directive: s.33 of the Act of 2015 gives effect to Article 31 of the Procedures Directive; s.72(2) and (3) are directly derived from Annex II of the Procedures Directive; and s.72(4), (5), and (6) give effect to Article 30(4), (5) and (6) of the Procedures Directive. Thus, it is submitted, the concept of a safe country of origin and the designation of a safe country of origin is undoubtedly derived from the original 2005 Procedures Directive.

**The History of "Safe Country of Origin" in EU Directives**

**Qualification Directive**

15. EU Directive 2004/83 (hereinafter referred as "the Qualification Directive") is the original Qualification Directive, which sets down*, inter alia*, the concept of subsidiary protection. Ireland is bound by this Directive and gave effect to it by way of the European Communities (Eligibility for Subsidiary Protection) Regulations 2006 and the European Union (Subsidiary Protection) Regulations 2013. Both Regulations were repealed by s.6 of the Act of 2015.

16. Article 3 of the Qualification Directive provides that Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with the Directive.

17. Article 15 of the Qualification Directive provides that serious harm consists of:-

*"(a) death penalty or execution; or*

*(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or*

*(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."*

18. The Qualification Directive was recast by EU Directive 2011/95, (hereinafter referred to as "the Qualification Directive Recast" which is stated to be '*on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for*

*the content of the protection granted'.* The United Kingdom and Ireland have not taken part in this more recent Directive, as is recorded in Recital 50 of the Directive.

**The Procedures Directive**

19. The Procedures Directive sets out minimum standards for the granting and withdrawing of refugee status. An 'applicant' under the Procedures Directive is defined as a third country national or stateless person who has applied for asylum and is awaiting a decision.

20. Recital (22) states that:-

> *"Member States should examine all applications on the substance, i.e. assess whether the applicant in question qualifies as a refugee in accordance with Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted except where the present Directive provides otherwise…"*

21. Article 3(3) extends the scope of the Directive to situations:-

> *"Where Member States employ or introduce a procedure in which asylum applications are examined both as applications on the basis of the Geneva Convention and as applications for other kinds of international protection given under the circumstances defined by Article 15 of Directive 2004/83/EC, they shall apply this Directive throughout their procedure."*

22. Article 3(4) provides:-

> *"Moreover, Member State may decide to apply this Directive in procedures for deciding on applications for any kind of international protection."*

23. Article 5 provides that Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, insofar as those standards are compatible with this Directive.

24. Article 29 establishes the safe country of origin concept which is subject to Annex II. Article 30 provides that Member States may retain or introduce legislation that allows, in accordance with Annex II, for the designation of third countries, other than those appearing on the minimum common list, for the purpose of examining an application for asylum.

25. Article 31 provides:-

> *"1. A third country designated as a safe country of origin in accordance with either Article 29 or 30 may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant for asylum only if:*
>
> *(a) he/she has the nationality of that country; or*

(b) *he/she is a stateless person and was formerly habitually resident in that country;*

*and he/she has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances and in terms of his/her qualification as a refugee in accordance with Directive 2004/83/EC.*

2. *Member States shall, in accordance with paragraph 1, consider the application for asylum as unfounded where the third country is designated as safe pursuant to Article 29.*

3. *Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept."*

25. Annex II provides:-

*"Designation of safe countries of origin for the purposes of Articles 29 and 30(1)*

*A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.*

*In making this assessment, account shall be taken*, inter alia*, of the extent to which protection is provided against persecution or mistreatment by:*

(a) *the relevant laws and regulations of the country and the manner in which they are applied*

(b) *observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;*

(c) *respect of the non-refoulement principle according to the Geneva Convention;*

(d) *provision for a system of effective remedies against violations of these rights and freedoms."*

**Procedures Directive Recast**

26. The Procedures Directive Recast is binding on those EU Member States who adopted the Directive and the Procedures Directive is repealed. However, Recital 58 cites that neither the UK nor Ireland are taking part in the Recast Procedures Directive.

27. The main objective of this Directive is to further develop the standards for procedures in Member States for granting and withdrawing international protection. The definition of an applicant is streamlined in the Recast Directive to include an applicant for asylum or subsidiary protection.

28. Annex I of the Procedures Directive Recast is in identical terms to Annex II of the original Procedures Directive cited above.

**Are ss.33 and 72 of the Act of 2015 void as *ultra vires* or incompatible with Ireland's obligations under Council Directive 2005/85?**

29. Counsel for the Applicants submits that s.72(2) of the Act of 2015, by which the Second Respondent may make an order designating a country as a "*safe country of origin*" for applicants for "*international protection*", is derived from Article 37(1) and Annex 1 of the Procedures Directive Recast, which requires Member States to engage*, inter alia*, in an assessment of the risk of "*serious harm*" as set out at Article 38(1)(b). It is submitted that as Ireland has not adopted the Recast Procedures Directive, neither Ireland nor the Second Named Respondent are entitled to avail of the provisions of that Directive to apply the "*safe country of origin*" concept as defined at Annex 1 of the Procedures Directive Recast to applicants for international protection.

30. As is clear from the history of the EU protection Directives, set out above, the safe country of origin concept was established by the Procedures Directive and is provided for in Articles 29-31 thereof.

31. The long title to the Act of 2015 states*, inter alia*, that it is to give further effect to the Qualification Directive *"on minimum standards for the qualification and status of third country nationals or stateless persons or refugees or as persons who otherwise need international protection and the content of protection granted*"; and to give further effect to the Procedures Directive "*on minimum standards on procedures in Member States for granting and withdrawing refugee status*".

32. As is clear from the analysis of domestic law above, Ireland continues to operate its protection system under the older regime provided for in the Procedures Directive and the Qualification Directive, while the other Member States (bar Denmark) have adopted the later Procedures Directive Recast and the Qualification Directive Recast. Ireland remains bound by the earlier original Directives and accordingly must operate an asylum system which reflects those Directives. The fact that Ireland did not adopt the recast Directives does not absolve Ireland from applying the earlier Directives in a situation where it has been agreed that it will not adopt these recast Directives but remains bound by the earlier Directives.

33. The fact that Ireland also applies this system to subsidiary protection applicants is not unlawful. Article 3(3) of the Procedures Directive states that where a Member State introduces a single procedure on the basis of the Geneva Convention and under Article 15 (subsidiary protection ground) of the Qualification Directive (which Ireland has done by the introduction of the Act of 2015), the Member State "*shall apply this Directive throughout their procedure".* Accordingly, the concept of a safe country of origin applies

equally to applications for refugee status as it does to subsidiary protection applications, in accordance with the Directives which Ireland is bound by. Further, recital 22 of the Procedures Directive expressly provides that Member States should examine the substance of all applications, including a claim for refugee status under the Qualification Direction "*or as persons who otherwise need international protection and the content of the protection granted*". This is a direct acknowledgement of the entitlement of a Member State to include subsidiary protection applicants.

34. In Seredych v Minister for Justice [2020] IESC 62, Baker J, delivering the judgment of the Supreme Court stated at paragraph 46:-

> *"The Directives [Procedures and Qualification] are part of the establishment of a common system for the determination of applications for international protection based on the Refugee Convention and apply to all applications for asylum made in the Member States.*
>
> *47. The process in Irish legislation is consistent with the Qualification Directive and the Procedures Directive both now recast, but which in their original form continue to apply in Ireland by reason of the State taking part in only some of the Schengen acquis."*

35. On the basis of this analysis of European and domestic law, it is clear that the Applicants have not established an arguable case with respect to their claim that ss.33 and 72 of the Act of 2015 are *ultra vires* the Procedures Directive and/or the Common European Asylum System. Accordingly, I am refusing the Applicants leave to apply by way of Judicial Review for the relief set out at paragraph (d)(2) of their Statement of Grounds

**The Second Respondent erred in designating South Africa as a "safe country of origin" pursuant to s.72(2) of the Act of 2105**

36. In the alternative, the Applicants claim that the Second Respondent erred contrary to s.72(2) of the Act of 2015 in designating South Africa as a "*safe country of origin*". It is claimed that the Second Respondent could not reasonably have been satisfied that there was "*generally and consistently no persecution, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict*" in South Africa in light of conditions in South Africa as disclosed by Country of Origin information.

37. The Second Respondent is empowered under s.72 of the Act of 2015 to designate a country as a safe country of origin and did so in respect of South Africa by ministerial order on 16th April 2018. In making this determination, the Second Respondent was required to have regard to s. 72(3) and (4) of the Act of 2015. The Ministerial Order designating South Africa as a safe country of origin states that the Second Respondent was satisfied with respect to the matters set out in s. 72 of the Act of 2015 in relation to South Africa.

38. South Africa was previously designated by the Second Respondent as a safe country of origin in December 2004 pursuant to the Refugee Act 1996 (Safe Country of Origin) Order

2004, SI 714/2004. However, it would appear that South Africa is not generally classified as a safe country of origin with only the United Kingdom and Slovakia designating it as such.

39. In light of the declaratory relief sought regarding whether the Second Respondent erred in law in designating South Africa as a safe country of origin, the test to be satisfied by the Applicants in an application for leave to apply by way of Judicial Review is one of argue-ability.

40. The lawfulness of the 2004 designation was litigated previously in *SUN v. Refugees Commissione*r (Unreported, High Court, Cooke J., 30th March 2012). On that occasion, leave was granted by Cooke J to apply for a series of reliefs by way of Judicial Review including declaratory relief regarding the designation of South Africa as a safe country of origin. However, in light of other reliefs sought and the determination of Cooke J of a preliminary issue, the question of the lawfulness of the designation of South Africa as a safe country of origin was not determined.

41. The significance to the Applicants of the designation of South Africa as a safe country of origin is that an oral hearing was not conducted on foot of s. 43(b) of the Act of 2015 and the designation was relied upon by the First Respondent in determining that state protection was available to the Applicants.

42. Having regard to the fact that another applicant previously got leave to apply for Judicial Review seeking similar declaratory relief; the significance to the applicants of the designation of South Africa as a safe country of origin; that South Africa appears not to be generally designated as a safe country of origin by other Member States; and the Country of Information available relating to South Africa, I am of the view that the Applicants have established an arguable case to permit them to apply for Judicial Review seeking the declaratory relief set out at paragraph (d)(3) of their Statement of Grounds.

**The First Respondent's determination**

43. The decision of the First Respondent to refuse the Applicants protection status is challenged, on what could be characterised as more traditional grounds, namely: illegality, irrationality, failure to take in account material considerations, and failure to properly evaluate the evidence. These challenges relate to what is asserted to be an incorrect determination that State Protection was available to the Applicants and that the First Respondent incorrectly analysed the Country of Origin information before it. The Applicants have established substantial grounds with respect to this aspect of their claim and accordingly, I will grant them leave to apply by way of Judicial Review seeking the relief as set out at paragraph (d)(1) of their Statement of Grounds.

44. In summary, I am granting the Applicants leave to apply by way of Judicial Review seeking the reliefs as set out at paragraph (d)(1) and (3) of the Statement of Grounds on the grounds set out at paragraph (e)(1)(iv) and (v) and at paragraph (e)(2)(3) and (4).

45. I will reserve the question of costs and adjourn the proceedings to 11 January 2021 for delivery of the opposition papers of the Respondents.