

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 585
RECORD NO. 2020/415JR

BETWEEN

EN

APPLICANT

-AND-

THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms Justice Tara Burns delivered on 9th September 2021

General

1. The Applicant is a national of Zimbabwe who entered the State on 31 July 2014. He applied for asylum on 13 July 2015.
2. The Applicant's application was made to and processed by the Office of the Refugee Applications Commissioner (hereinafter referred to as "ORAC") which, having found that the Applicant's claim lacked credibility, made a recommendation on 25 November 2016 that he be refused refugee status.
3. The Applicant's subsidiary protection claim was assessed pursuant to the International Protection Act 2015 (hereinafter referred to as "the 2015 Act"). On 21 February 2018, an International Protection Officer (hereinafter referred to as an "IPO") also found that the Applicant's claim lacked credibility and made a recommendation that he be refused subsidiary protection.
4. On 21 February 2018, the First Respondent refused to grant the Applicant permission to remain pursuant to s. 49(4) of the 2015 Act.
5. An Appeal of the negative international protection recommendations was made to the International Protection Appeals Tribunal (hereinafter referred to as "IPAT"). On 21 February 2019, it affirmed the first instance decisions and also recommended that the Applicant should be granted neither a refugee nor subsidiary protection declaration.
6. On 5 March 2019, the Applicant sought a review of the s.49(4) decision but did not make any submissions with respect to the issue of refoulement. While the form stated "further submission to follow", nothing further was received from the Applicant.
7. On 20 February 2020, the First Respondent affirmed the earlier s. 49(4) decision and refused the Applicant permission to remain on foot of the s. 49(7) review. With respect to s. 50 of the 2015 Act, she found that "there had been no material change in your personal circumstances or country of origin circumstances concerning the prohibition of refoulement under section 50" of the 2015 Act.
8. On foot of that decision, the First Respondent issued a Deportation Order in respect of the Applicant pursuant to s. 51 of the 2015 Act on 9 March 2020.

9. Leave to apply by way Judicial Review seeking an order of Certiorari of the s. 49(7) review decision and the Deportation Order was granted by the High Court on 15 July 2021 on the following single ground contained in an Amended Statement of Grounds:

“The Minister erred in law in her consideration of section 50(1)(b) of the [2015 Act], insofar as the Minister, in her “Impugned Decision,” purports to rely on the prior determinations of the IPO and the [IPAT], which determinations are predicated on an applicable standard of proof – namely, the balance of probabilities, coupled with affording the applicant the benefit of the doubt, in appropriate circumstances – to the assessment of historical facts, as disclosed by the individual applicant, which is a fact-finding exercise. In this regard, it is respectfully submitted that this standard of proof does not, as a matter of law, equate to the “serious risk” threshold, which the Minister is obliged to consider by virtue of section 50(1)(b) of the [2015 Act], when considering the prohibition of refoulement. Accordingly, having regard to the underlying facts of this case, and the nature of the [IPAT’s] determination, it is not open to the Minister to adopt without qualification, the prior determination of the Tribunal, in order to arrive at a determination that comports with the aforementioned section 50, and this State’s obligations under the European Convention of Human Rights, and by extension section 3 of the European Court of Human Rights Act 2003.”

IPAT’s Determination of the Applicant’s Protection Claim

10. The Applicant asserted that he feared the Chipangano group (who are a faction of the Zanu PF), Uncle G (who is a member of that faction) and JK (who is the head of the youth group of Zanu PF) because of his asserted previous involvement with them. He claimed to have witnessed killings and that he himself had been abducted and tortured by them
11. Arising from this fear, he left Zimbabwe in 2010 and travelled to South Africa where he lived until July 2014. He had applied for international protection in South Africa but abandoned that application in 2011 because the Zanu PF were active there and responsible for xenophobic attacks.
12. The IPAT found that while the Applicant’s account in relation to his alleged involvement with Zanu PF, JK and the Chipangano terror group was consistent with country of origin information, this was insufficient to establish the credibility of the Applicant’s claim. By reason of inconsistencies in the Applicant’s account and a lack of detail in relation thereto, the Tribunal decided that it could not extend the benefit of the doubt to the Applicant and rejected his credibility on his core claim.
13. The delay in claiming international protection was also found to mitigate against the Applicant’s credibility. His explanation for not pursuing his claim for asylum in South Africa was found to be undermined by the fact that he had remained in South Africa for approximately three and a half years.
14. The material facts which the IPAT did accept were that the Applicant was a 29 year old man from Harare and that he was an ethnic Shona. On that basis, the IPAT proceeded to

consider the international protection claims noting that he had not claimed to fear persecution or serious harm on either ground. The IPAT determined that there was “no reasonable chance that if he were to be returned to [Zimbabwe] he would face a well founded fear of persecution” and further found that there were no substantial grounds of believing that the Applicant was at risk of serious harm in Zimbabwe pursuant to s. 2(1)(a), (b) and (c) of the 2015 Act.

Section 49 Decisions and the Prohibition Against Refoulement

15. In relation to the prohibition of refoulement, the s. 49(4) decision of the First Respondent, having set out the provisions of s. 50(1) and (3) of the 2015 Act, stated:-

“The applicant has made representations regarding the prohibition of refoulement. The applicant claims that he fears anyone in the Chipangango Group and is afraid to be imprisoned, to be grievously bodily harmed and to be killed.

The applicant’s application for international protection was considered at first instance and an [IPO] has recommended that the applicant should be given neither a refugee declaration nor a subsidiary protection declaration.

Material elements of the applicant’s claim in the section 39 international protection report were not found to be credible.

The section 39 report found that the applicant was not at risk of torture or other inhumane or degrading treatment or punishment in Zimbabwe.

The following Country of Origin Information from the United States Department of State, 2016 Country Reports on Human Rights Practices – Zimbabwe, (Ref 1) indicates that “*The constitution and the law provide for freedom of internal movement, foreign travel, emigration and repatriation, but the government restricted these rights. The government generally cooperated with the Office of the UN High Commissioner for Refugees and other humanitarian organisations in assisting refugees, asylum seekers, stateless persons and other persons of concern but it interfered with some humanitarian efforts directed at IDPs*”. The applicant was able to leave Zimbabwe in the past in 2010 and travel to South Africa so he does not appear to have been restricted and the applicant does not appear to be at risk returning to Zimbabwe as a failed asylum seeker.

It is noted that the applicant has presented as single with no family connections to the State. Also, the applicant stated both of his parents are deceased and he has one sister... in the UK.

I have considered all the facts of this case together with relevant current country of origin information in respect of Zimbabwe. The prohibition of refoulement was also considered in the context of the International Protection determination. The prohibition of refoulement has also been considered in the context of this report. The country of origin information does not indicate that the prohibition of refoulement applies if the applicant is returned to Zimbabwe.

Accordingly, having considered all of the facts in this case and relevant country of origin information, I am of the opinion that repatriating the applicant to Zimbabwe is not contrary to Section 50 of the International Protection Act 2015, in this instance, for the reasons set out above.”

16. In relation to the prohibition of refoulement, the s. 49(7) review decision of the First Respondent, having set out s. 50(1) and (3) of the 2015 Act, stated:-

“The applicant has made no representations regarding the prohibition of refoulement.

The applicant’s international protection claim was refused by the IPO and affirmed by the IPAT as he was determined to be a person not in need of international protection.

The following country of origin information from United States Department of State 2018 Country Reports on Human Rights Practices (Zimbabwe), 13 March 2019 states:

“The constitution and the law provide for freedom of internal movement, foreign travel, emigration and repatriation, but the government restricted these rights. The government generally cooperated with the Office of the UN High Commissioner for Refugees and other humanitarian organisations in providing assistance to refugees, asylum seekers, stateless persons and other persons of concern at Tongogara refugee camp, but it interfered with some humanitarian efforts directed at internally displaced persons. The Registrar General continues to delay implementing a joint statelessness study as part of UNHCR’s campaign to end statelessness by 2024”.

I have considered all the facts of this case together with relevant current country of origin information in respect of Zimbabwe. The prohibition of refoulement was also considered in the context of the International Protection determination. The prohibition of refoulement has also been considered in the context of this report. The country of origin information does not indicate that the prohibition of refoulement applies if the applicant is returned to Zimbabwe.

Accordingly, having considered all of the facts in this case and relevant country of origin information, I am of the opinion that repatriating the applicant to Zimbabwe is not contrary to Section 50 of the International Protection Act 2015, in this instance.”

Statutory Provisions Relating to the s. 49(7) Review Process

17. With respect to the review of a s. 49(4) decision, the following provisions apply pursuant to s. 49(7) and (9) of the 2015 Act:-

“(7) Where the Tribunal affirms a recommendation [of an IPO], the Minister shall, upon receiving information from an applicant in accordance with subsection (9), review a

decision made by him or her under subsection (4)(b) in respect of the applicant concerned.

(9) An applicant, for the purposes of a review under subsection (7), and within [5 days] following receipt by him or her... of the decision of the Tribunal...

(a) may submit information that would have been relevant to the making of a decision under paragraph (b) of subsection (4) had it been in the possession of the Minister when making such decision, and

(b) shall, where he or she becomes aware of a change of circumstances that would have been relevant to the making of a decision under subsection (4)(b) had it been in the possession of the Minister when making such decision, inform the Minister, forthwith, of that change.”

18. It is important to state the obvious: a s. 49(7) decision is a review decision of the earlier s. 49(4) decision based on the further information submitted by an applicant having sought a review. It is not an appeal *de novo*. If further information in respect of an issue has not been submitted by an applicant, an obligation to consider that issue does not arise. In the instant case, no further information or submissions were made regarding the prohibition of refoulement for the purpose of the s. 49(7) review. Nonetheless, as is apparent, the First Respondent reconsidered the issue of refoulement, in light of all of the facts of the case. However, in circumstances where no new material was submitted regarding refoulement for the purpose of the s. 49(7) review, the two s. 49 decisions should be considered in conjunction with each other.

19. Of note, the challenge launched in the instant case relates solely to the s. 49(7) decision and the consequent Deportation Order. The original s. 49(4) decision has not been challenged and will remain a valid decision regardless of the outcome of these proceedings. In addition, no submissions were made to the Minister pursuant to s. 49(9) regarding the earlier s. 49(4) decision and its consideration of the prohibition of refoulement despite the same approach, as is being challenged in these proceedings, being adopted by the Minister when determining the refoulement issue.

Prohibition on Refoulement

20. Section 50 of the 2015 Act provides:-

“(1) A person shall not be expelled or returned in any manner whatsoever to the frontier of a territory where, in the opinion of the Minister-

(a) The life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or

(b) There is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

(2) In forming his or her opinion of the matters referred to in subsection (1), the Minister shall have regard to-

- (a) the information (if any) submitted by the person under subsection (3), and
 - (b) any relevant information presented by the person in his or her application for international protection, including any statement made by him or her at his or her preliminary interview and personal interview.
- (3) A person shall, where he or she becomes aware of a change of circumstances that would be relevant to the formation of an opinion by the Minister under this section, inform the Minister forthwith of that change.”

Section 50(1)(b) reflects Article 3 of the European Convention on Human Rights (hereinafter referred to as “the ECHR).

The Oral Submissions Made before the Court

21. At the hearing of this matter, quite a different case was argued on behalf of the Applicant to the one as pleaded in the Amended Statement of Grounds and the written submissions filed. It should be added that a different senior counsel appeared on behalf of the Applicant at the hearing of the action. The focus of the oral submissions instead was to the effect that there had been a failure by the First Respondent to give reasons for her decision regarding refoulement; that the First Respondent had failed to address the matters actually at issue; and that the making of the s. 50 decision in the course of the s. 49 review process was an inappropriate procedure which should not be made until a later stage in the process.
22. Leave had not been sought nor granted to challenge the decisions at issue on the basis of these legal grounds. Having regard to *AP v. DPP* [2011] IESC 2 and the completely different case made by the Applicant at hearing to that in respect of which leave was granted, it would be quite improper for this Court to make determinations in relation to these asserted legal failings when the Court has no jurisdiction to do so as leave to apply by way of judicial review has not been granted in respect of these matters.
23. However, by way of comment and for the comfort of the Applicant so that he can know that he would not have been otherwise successful had leave been sought and granted in relation to these issues, the Court does not agree that the statutory scheme should be construed as requiring that a s. 50 refoulement decision should be made at a later stage to the s. 49 permission to remain decision. It is completely appropriate that the s. 50 determination be made in the context of a permission to remain decision pursuant to s. 49.
24. Neither does the Court agree that the First Respondent failed to provide reasons for her decision regarding the prohibition of refoulement. The First Respondent’s decision is patently clear when the s. 49(4) and (7) decisions are considered in conjunction with each other, namely that having regard to the determinations made by the IPO and the IPAT refusing the Applicant international protection in light of material elements of the Applicant’s claim having been found not to be credible, and having regard to the Country of Origin information when considered in light of the Applicant’s personal circumstances which were accepted by the IPO and the IPAT, the prohibition of refoulement did not arise

for him if returned to Zimbabwe. Furthermore, those reasons are not irrational and were open to the First Respondent to make in light of the findings of the IPO and the IPAT.

25. The real question which has arisen in light of the oral submissions made, although not pleaded and accordingly not a matter in respect of which leave has been granted, is whether the First Respondent is in default of s. 50(2) of the 2015 Act by adopting the determinations of the IPO and the IPAT in relation to the information presented by the Applicant in his application for international protection rather than considering it herself. The immediate difficulty for the Applicant with respect to this argument, aside from the fact that leave has not been granted in respect of same, is that the First Respondent indicated in her decision that she had considered all the facts of the case. It is not possible for the Applicant to mount a successful challenge to this assertion as no information has been pointed to which can establish this not to be the case: the similar decisions of the IPO and the IPAT were not challenged by the Applicant, nor indeed was the earlier s. 49(4) decision of the First Respondent. Accordingly, there is no evidential basis to establish that the First Respondent is incorrect in asserting that she had considered all the facts of the case and thereby complied with s. 50(2) of the 2015 Act.
26. It is well established that the First Respondent is entitled to rely on decisions previously made in relation to an applicant by an IPO or the IPAT in reaching her decisions.
27. In *WJF v. Minister for Justice* [2016] IEHC 737, O'Regan J., having conducted an analysis of several authorities in this area, concluded at paragraphs 30 and 31 of her judgment:-

“From the foregoing case law the following principles emerge:-

- (i) The rationale for the decision must be patent or capable of being inferred from its terms and context.
- (ii) The Minister is entitled to adopt the RAT findings, however, if so adopting, the Minister must ensure that the findings were reasonable as, if unreasonable, the Minister's decision will be infected with the unreasonable portion of the RAT finding.
- (iii) Subject to the foregoing, there is no obligation on the Minister to reconsider the same facts and events to decide whether they are plausible or credible in the absence of new evidence, information or other basis capable of demonstrating the original findings were vitiated by material error.

31. Applying the foregoing, in circumstances where no new facts or evidence was adduced to the Minister to demonstrate that the original findings of the RAT were vitiated by material error, the Minister was entitled to adopt the RAT findings...”
28. In *M.N. (Malawi) v. Minister for Justice* [2019] IEHC 489, Humphreys J. stated at paragraph 26 of the judgment:-

“More broadly, it is certainly not correct to say that the Minister, in making a Deportation Order or refusing permission to remain, cannot rely on protection decisions including IPAT decisions. A Deportation Order is the end-stage of a

lengthy process of carefully calibrated steps. It is clear that any decision-maker can consider appropriately what happened during previous steps.”

Specifically, regarding s. 50 of the 2015 Act, he stated at paragraph 29:-

“[Section] 50 does not require a *de novo* reconsideration of all matters at this stage of making the Deportation Order. The Minister can consider all of the relevant circumstances of the case. That is implicit, and by definition that must include the decisions or recommendations of the IPO and IPAT. It is open to the Minister to in effect adopt the reasoning and conclusions of a protection decision for the purposes of the Deportation Order, and indeed, this is normally implicit in the Minister's decision-making. Furthermore, in particular, the outcome of the refoulement consideration can normally be determined by reference to the outcome of the protection claim, unless exceptional circumstances arise such as the application of the exclusion clause or anything distinctly new or additional presented such as to persuade the Minister otherwise: see the point made in *Meadows v. Minister for Justice and Equality* [2010] IESC 3 [2010] 2 I.R. 701 at 731 per Murray C.J., citing *Baby O v. Minister, Equality and Law Reform* [2002] IESC 44 [2002] 2 I.R. 169 at 193, to the effect that if the applicant did not make submissions regarding *refoulement*, the decision ‘*would have been one of form only and not required any rationale*’. That clearly implies that it is not necessary to reconsider the matters *de novo* and that there is an entitlement to rely on previous rejections.”

29. Section 50(2) of the 2015 Act requires the First Respondent to have regard to any relevant information presented by an Applicant in the course of her international protection claim. The First Respondent has stated that she did consider all the facts of this case. As already stated by the Court, there is no evidential basis upon which the Applicant can establish otherwise. It is then open to the First Respondent to either adopt the factual findings of the IPO and the IPAT or not. It seems to the Court, for the First Respondent to carry out the s. 49 decision making process by reconsidering afresh an applicant’s claim, without having regard to the earlier decisions of specialised and trained entities such as the IPO and the IPAT, would be a wasteful and useless exercise, in the absence of new information.
30. In the instant case, having considered all the facts, the First Respondent did not demur from the credibility findings of the IPO and the IPAT (no reason having even been proffered as to why she should have). There is no obligation on the First Respondent to provide reasons as to why she accepts the earlier findings of the IPO and the IPAT as this would in effect amount to her re-determining the applicant’s claim which she is not required to do. Of note, s. 50(2)(b) requires the First Respondent to “have regard” to relevant information provided by the Applicant in the international protection process. It is clear that the First Respondent did have regard to the underlying claim of the Applicant but relied and adopted the findings of the IPO and the IPAT with respect to accepted facts, as she was entitled to do, no further submissions having been made relevant to the

issue of refoulement. Non-compliance with s. 50(2) of the 2015 Act would not have been established, even had leave been granted to challenge the decisions at issue on this basis.

The Ground in Respect of Which Leave was Granted

31. The essence of the Applicant's challenge to the decisions at issue is that by relying on the prior determinations of the IPO and the IPAT, an incorrect standard of proof was adopted into the First Respondent's decision making process such that the decision was made without reference to the correct standard of proof.
32. The standard of proof applicable in International Protection determinations in this jurisdiction is well settled. O'Regan J. considered this issue in the "test case" of *ON v. RAT* [2017] IEHC 13 and found that with respect to the determination of past and present facts, the appropriate standard of proof is that of the balance of probabilities coupled with, where appropriate, the benefit of the doubt. Having established the accepted facts on the basis of this standard of proof, the protection bodies are then required to determine, having regard to those accepted facts, whether there is a reasonable chance of future persecution or real risk of future serious harm. See also *SS v. IPAT* [2021] IEHC 43 and *NL v. IPAT* [2021] IEHC 430.
33. S. 50(1)(b) of the 2015 Act requires the First Respondent to determine whether there is a "serious risk" that an applicant would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. The facts giving rise to such an asserted risk, must of course be established for that determination to take place.
34. The international protection bodies, when considering whether an applicant should be granted subsidiary protection, are required to determine whether substantial grounds have been shown for believing that an applicant would face a "real risk" of suffering the death penalty or execution, torture or inhuman or degrading treatment or punishment (s. 2 of the 2015 Act).
35. Accordingly, each entity is determining the same issue on the basis of a similar test. In *YY v. Minister for Justice* [2017] IESC 61, the Supreme Court accepted that the test in each of these decisions is effectively the same. O'Donnell J. stated at paragraph 74 of the judgment when considering the qualitative difference between a s. 50 decision and a subsidiary protection decision:-

"While clearly a different decision is being made, (serious risk as opposed to a risk of conduct prohibited by Article 3) with different consequences (denial of subsidiary protection and therefore a right to remain in the state as opposed to deportation...), a core question for both the Tribunal and the Minister was the same: was there a real and substantial risk to the applicant of torture or inhuman and degrading treatment...?"
36. The case, as pleaded by the Applicant, is to the effect that a lower standard of proof to that adopted by the international protection bodies should be applied in the First Respondent's refoulement considerations so as to determine whether a "serious risk" of

refoulement arises. The Court does not agree. Facts must first be established for a decision to be made as to whether, based on those accepted facts, a serious risk of refoulement arises. In this jurisdiction, the standard of proof applied by our Courts with respect to the establishment of facts in civil matters is that of the "balance of probabilities". Nothing within s. 50(1)(b) of the 2015 Act leads me to the conclusion that an exception to that principle should be made when the First Respondent is considering the issue of refoulement. Accordingly, adopting or relying on facts which were determined on the basis of being established on the balance of probabilities coupled with, where appropriate, the benefit of the doubt, is a correct approach for the First Respondent to take.

37. Furthermore, the fact that the law establishes that the First Respondent is entitled to rely upon the negative findings of the protection bodies implies that the standard of proof applicable in those decisions also applies to s. 50 of the 2015 Act decisions. Indeed, the legislative provisions relating to each decision is instructive in that regard, with the international protection bodies determining whether a real risk of future serious harm exists and the First Respondent determining whether a serious risk of future harm exists. No difference is apparent between these two tests.
38. The Applicant has not established that a "serious risk" test was not applied by the First Respondent. Indeed, in light of the fact that the IPO and the IPAT decisions in relation to subsidiary protection were not challenged where a "real risk" test was employed, it is difficult to see where the evidential basis for such a challenge arises.
39. An incompatibility with Article 3 of the European Convention of Human Rights has not been established in terms of the manner in which the First Respondent has determined the refoulement issue, as Article 3 does not mandate a different standard of proof with respect to the establishment of facts and circumstances to that adopted by the First Respondent.
40. The Applicant has failed to establish an invalidity with respect to the s. 49(7) decision and the consequent Deportation Order. Accordingly, I will refuse the relief sought by the Applicant and make an order for the Respondents costs as against the Applicant.