

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 87
RECORD NO.: 2020/553 JR

BETWEEN

N.U.

APPLICANT

AND

**THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR
JUSTICE AND EQUALITY**

RESPONDENTS

**JUDGMENT OF MS. JUSTICE SIOBHÁN PHELAN, DELIVERED ON 17TH DAY OF
FEBRUARY, 2022**

INTRODUCTION

1. The applicant is a Georgian national who claims protection. Her claim relates to her experience of rape; intimate partner violence and threat of violence; and the future risks to her and her twin children in Georgia associated with those experiences.
2. In these proceedings the applicant seeks an order of certiorari quashing the Decision of the first named respondent (hereinafter "the Tribunal") notified by letter dated the 10th July 2020 to uphold the negative Decision of the International Protection Office in respect of the applicant's application for refugee status and subsidiary protection status.
3. In its impugned Decision, the Tribunal accepted that there are grounds for a successful claim in that the applicant has a well-founded fear of persecution and there is a convention nexus. The case therefore principally turns on the Tribunal's treatment of state protection.
4. The applicant contends that the Tribunal failed to apply the correct legal test in its assessment of whether state protection (within the meaning of s. 31 of the International Protection Act 2015 (hereinafter "the 2015 Act") was available to her. It is further complained that the Tribunal did not provide adequate reasons as to why in the context of the state protection assessment, the applicant's claims regarding the absence of state protection were rejected in favour of the general observation that Georgia has been designated as a safe country of origin. The conclusion as to the availability of state protection is challenged as unreasonable.

THE CLAIM FOR PROTECTION

5. The applicant claimed to have been victimized in a number of ways in Georgia.
6. The applicant claimed that she had worked unofficially as coordinator for the National Movement Party (hereafter the "NM") in Georgia and that in 2003, the NM went into government until 2012. The applicant claimed that she felt like she was working for "dark people". She claimed that when she refused to continue to work for them in 2007 she was kidnapped by some supporters of the NM, was abused and attacked where she suffered spinal injuries. She described how six men took her in a vehicle to a forest and asked her why she had stopped working for the NM. They put a gun to her head. She pretended that she would return to the NM but instead left for the UK.

7. The applicant lived in the UK from 2006 to 2016. She did not make an application for international protection in the UK as she said that she always hoped to return to Georgia when the political situation changed. She met her former partner in 2014 while working and living in London. He is also a Georgian national. He told her that he was a police officer and worked with the government in Georgia. He indicated that he was divorced and had children from his previous marriage.
8. In 2016 the applicant and her former partner got engaged to marry and returned to Georgia to live. When they returned to Georgia, the applicant reported that she had no problems from the NM however her relationship with her former partner deteriorated when she told him that she was pregnant. He wanted her to have an abortion and did not want a family with his mistress. He made numerous threats and physical attacks on her. She also suffered a rape attack from a drunk friend of his when she was about three months pregnant. She was attacked by knife by her former partner on several occasions. She was assaulted and thrown down the stairs resulting in vaginal bleeding. He followed her to her sister's home where he was stopped from suffocating her when her sister intervened. On another occasion he drove his car towards her. She ran behind a pole to shield herself. She described how he got out of the car and banged her head off the pole, rendering her unconscious. She spent 10 days in hospital. She said that he threatened to kill her and her unborn children.
9. She said that although she reported the abuse to the police, she believed the only action taken was a verbal warning.
10. After she was discharged from hospital, she went to a remote area of Georgia and remained in hiding in her friend's home for a month until arrangements were made for her to leave Georgia and come to Ireland. Her two children (twins) were born in Ireland and are included in her protection claim.
11. The applicant advanced her claim to be at risk of persecution and without state protection on the following grounds:
 - a. one of the 'actors of persecution or serious harm' was a member of police;
 - b. when she previously made a complaint, there was an ineffective response by the police;
 - c. country of origin confirmed the risks and absence of protection in Georgia in the context of her particular case and/or;
 - d. she was at particular risk of persecution / serious harm by reason of her having two children with her former partner, and the risks posed thereby of having to interact with him in Georgia – including through the civil court system – in particular in circumstances in which he had threatened their lives in the past.

THE TRIBUNAL DECISION

12. The Decision summarises the applicant's claim recording her claims that:

- I. in 2007, for political reasons, she was subject to kidnap, an attack (in which she suffered spinal injuries) and threatened with death causing her to leave Georgia at that time;
 - II. she met her former partner while living illegally in the UK and then commenced a relationship during his work visits to the UK before they became engaged and she returned to Georgia to live with him;
 - III. her former partner held a position of influence through his work with the police;
 - IV. her relationship with her former partner became violent during 2016 when he learned that she was pregnant as he already had a wife and children;
 - V. she was raped by a friend of her former partner while she was pregnant in approximately October 2016;
 - VI. her former partner held a knife to her throat, cut her hand, beat and punched her, and threw her down the stairs (which resulted in vaginal bleeding) in approximately October 2016;
 - VII. she was also attacked with a knife by her former partner in 2016 and suffered scarring to her leg;
 - VIII. in November 2016, her former partner drove his car at her and hit her head on a pole in the street, which rendered her unconscious;
 - IX. that she reported her former partner's abuse to the police, but the only action taken was to give him a verbal warning;
 - X. that the response to domestic violence is poor in Georgia and;
 - XI. that the applicant's former partner had threatened to kill her and her children.
13. The applicant's ongoing physical and psychological problems are also recorded, and reference is made to medical reports which evidence her extreme worry and anxiety about the safety of her children and her being hyper-vigilant and stressed about their safety and welfare. The medical evidence confirming that she suffers from PTSD which impairs concentration and inhibits recall and that she is prescribed with the antidepressant, sertraline was accepted by the Tribunal.
14. The following findings of fact material to the impugned Decision were made:
1. The applicant is a national of Georgia (para. 31);
 2. The claim that she risked persecution owing to her political or party involvement was rejected (para. 40) and the general credibility of this claim was not established (para. 56(e));

3. The applicant continues to suffer with some medical and psychological problems (para. 50);
4. The applicant's ongoing psychological presentations and symptoms could be attributable to a former relationship (para. 55);
5. The applicant is the mother of twin children born in Dublin in March 2017 (para. 57(i));
6. The applicant was the victim of violence, possibly intimate partner violence and she suffers with depression, psychological problems, lower back pain and raised blood pressure (para. 57(ii));
7. As the victim of violence, possibly intimate partner violence who suffers with depression and psychological problems, lower back pain and raised blood pressure, the applicant has a well-founded fear of persecution upon her return to Georgia (para. 60);
8. The applicant is a member of a social group as a victim of domestic violence/intimate partner abuse and therefore her fear of persecution is linked to a Convention ground (para. 61);
9. While noting that the applicant claimed she had made a report to the police and that their response was inadequate and that she relied on country of origin information (hereinafter "the COI") to support her claim that domestic violence/intimate partner violence is not dealt with by the Georgian authorities in an appropriate manner, the Tribunal rejected the applicant's claim that there is no state protection available to her if she were to be returned to Georgia. In rejecting her claim, the Tribunal relied on the designation of Georgia as a safe country of origin by the Irish State and "other COI" said to support the position that the authorities in Georgia have an appropriate response and system to deal with domestic/intimate partner violence (para. 62).
15. The Tribunal returned to the question of state protection in dealing with the application for subsidiary protection. In this part of the decision, the Tribunal repeats its findings at para. 72 and adds:

"whilst the Tribunal acknowledges that there is COI which supports the claim that there are criticisms of the legal and police systems in Georgia the Tribunal finds that there is nothing in the Appellant's accepted facts and/or personal circumstances that supports the Appellants' claims that they, or any of them are entitled to a grant of subsidiary protection."
16. No finding is made anywhere in the decision as regards the claim of rape. Nor is any finding made in respect of the threat to the children's lives, save insofar as it may be inferred from the finding that they are not at risk of persecution upon their return to

Georgia (para. 59) that the claim on their behalf is either not accepted or is not considered to constitute persecution.

STATUTORY FRAMEWORK

17. The court's attention has been drawn to the provisions of ss. 28(6), 31 and 33 of the 2015 Act as being the provisions which determine the proper approach to decision making in this case.
18. Section 28 guides the International Protection Officer and the Tribunal in the proper assessment of facts and circumstances. Under s. 28(4) the Tribunal is mandated to carry out the assessment on an individual, case by case basis which must include all relevant facts as they relate to the country of origin, the individual position and personal circumstances of the applicant and the general credibility of the applicant.
19. In the light of the finding made at paras. 60 and 61 of the Decision that the applicant had a well-founded fear of persecution on a Convention ground, s. 28(6) applies to the further assessment of her claim by the Tribunal. Section 28(6) provides:

"The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such serious 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."

20. By reason of s. 28(6) of the 2015 Act, in assessing the extent of a future risk ("real") and in that context the availability of state protection, the Tribunal is directed to treat as a serious indicator of risk that an applicant has already been subjected to persecution or harm. This provision has been described as creating "a rebuttable presumption" that where events constituting persecution have been established (see *IL v. IPAT & Anor.* [2021] IEHC 106), this in turn establishes a serious indication that the applicant's subjective fear of suffering serious harm, if returned, is well founded unless there were good reasons to consider that such serious harm would not be repeated.
21. Section 31 of the 2015 Act ("s. 31") provides for the concept of "state protection" as follows:

"(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.
- (3) When assessing whether an international organisation controls a state or a substantial part of its territory and provides protection as described in subsection (2), the Minister, the international protection officer or, as the case may be, the Tribunal, shall take into account any guidance which may be provided in relevant European Union acts.
- (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.”

22. Section 33 of the 2015 Act provides as regards a safe country of origin that:

“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.”

23. As it is the applicant’s case that the Tribunal applied the wrong test as to the existence or not of state protection by failing to properly focus on the essential preconditions for a finding of effective state protection as set out in s. 31, the challenge in this case is to determine how these three provisions interact with each other and whether the statutory test applicable to the assessment of “state protection” has been properly identified and applied in the impugned decision.

SUBMISSIONS OF THE PARTIES

24. The applicant complains that in its impugned Decision the Tribunal carries out an analysis which “garbles” the separate concepts referred to in ss. 31 and 33. It is submitted that no analysis under s. 31 is required unless the applicant first surmounts the hurdle of s. 33 and shows that she has presented serious grounds for the country not to be safe in her particular circumstances. Only then, should the Tribunal consider s. 31 and whether there is an effective system for the prevention, detection, prosecution and punishment, of the particular type of risk which arises in the particular circumstances and at this stage of the consideration, it is no longer relevant that the country has been designated safe by the state.

25. It is contended that what the Tribunal has done in its analysis at para. 62 of the Decision is to consider the fact of Georgia being a safe country of origin generally to be adverse to the applicant (which they say it would not be if she surmounts the s. 33 hurdle in her personal circumstances); and then the Tribunal fails to refer to, or apply, the actual test applicable in s. 31 to an assessment of whether effective state protection is available. It is submitted that the Tribunal is entirely unaware that the designation of Georgia as a safe country of origin is only relevant to the state protection analysis if the criteria in s. 33 are not met, and that s. 31 must be utilised if they are. Rather, the Tribunal uses the designation against the applicant to presume the availability of state protection to the applicant (s. 31) without ascertaining whether or not it applies, but then also engages in an additional analysis of the COI by reference to the risks specific to her case but without performing the individual assessment required under s. 31. It is submitted that these are separate tests and they cannot be combined. Particular emphasis was placed on the fact that the key test in s. 33 referring to "serious grounds" and "particular circumstances" is not referred to at all.
26. It is further submitted that the Tribunal fails to consider the entirety of the actual evidence of the applicant when determining facts by noting that she "claims she made only one complaint to the police." Throughout the Decision, the Tribunal repeatedly notes the applicant's claim that her former partner was a police officer, and that her complaint was corruptly dealt with for reasons including his profession as a police member and the corruption in the police generally, and that this was the reason why he was only given a verbal warning regarding acts of serious violence. It is submitted that this evidence was not explicitly rejected but was not included in any relevant application of ss. 33 or 31 by reference to the applicant's particular circumstances.
27. Complaint is made in submissions on behalf of the applicant that the COI relied upon by the applicant is consistent with her account of ineffective state protection and that in preferring some COI over other information, the Tribunal is selective. Even as within documents, the Tribunal relies on extracts from documents only while ignoring other elements and does not advance reasoning for so doing so in a manner which explains the Decision taken.
28. Particular reliance was placed on behalf of the applicant on the recent related-decisions of Barrett J. in *C -v- The International Protection Appeals Tribunal & anor* [2019] IEHC 762, and *B -v- The International Protection Appeals Tribunal & anor* [2019] IEHC 763 and Ferriter J. in *FM & RM v. The International Protection Appeals Tribunal & anor* [2021] IEHC 817. These cases support the contention that there is a requirement for the Tribunal to demonstrate real engagement with the component parts of the s. 31 test on the material before the Tribunal in a reasoned manner and in a way which allows the court to understand how and why the Decision was taken.
29. The applicant submits that the entire premise of the analysis on state protection is undermined by the fact that the issue of rape by a person outside of the context of a romantic relationship was not dealt with at all in the analysis conducted; and so no

analysis is done on whether this is a relevant factor to either the s. 33 or the s. 31 analysis. Nor was the question of specific risks posed by reason of the paternal relationship of the applicant's former partner to the dependents who were included in the appeal, and what practical implications this would have.

30. The respondents' position in relation to the application of the statutory test by the Tribunal might be summarized as being that the applicant had not submitted sufficiently serious grounds for considering the country not to be safe in her particular circumstances. It appears to be the respondent's position that the additional analysis thereafter conducted by the Tribunal with regard to the availability of state protection was not required but did not prejudice the applicant.
31. In submissions on behalf of the respondents, it was also contended that it was permissible for the Tribunal to have regard to the fact that a country had been designated as safe to support the finding of the Tribunal that the authorities in Georgia have an appropriate response system to deal with intimate/partner violence.
32. Counsel for the respondent brought me carefully through the materials before the Tribunal to demonstrate to me that there was material before the Tribunal which could lead to a conclusion that state protection within the meaning of s. 31 was available in Georgia. She placed particular emphasis on the fact that some legislative changes had occurred in Georgia, indicative of an acknowledgment of a need for improvement and a move in "the right direction". She stressed that the applicant had only complained once to the authorities in Georgia and whilst she might have considered their response inadequate, there was a response in the form of a verbal warning. She submitted that the fact that there had been a response from the authorities in the form of a verbal warning also supported a conclusion that the applicant's partner was not so influential or important that he would not be subjected to legal sanction. She referred to COI which suggested that a progressive system of penalty and sanction operates in Georgia such that it might be presumed that a tougher response might result where complaints recur.
33. She urged me to have regard to the fact that state protection can never be perfect and that domestic violence, of its nature, is difficult to police such that the documented high rates of domestic violence relied upon by the applicant in supporting her claim does not equate with an absence of state protection.
34. She attached importance to the fact that the applicant had extricated herself from the relationship such that on a return to Georgia she would be in a different position.
35. As regards the failure to assess the claim of rape, it is contended that the Tribunal accepted the evidence of domestic violence and that it could be said that the rape (by a third party) was composite in that narrative and did not require specific determination. It was further contended that if the Tribunal's Decision were read "as a whole" it was clear that the Tribunal member fully understood and assessed the claim and the two children were considered in the Decision that state protection was available. It was submitted that the children's claim was considered as predicated on the mother's claim of domestic

violence and that no separate and distinctive fears had been identified on behalf of the children (citing *INM v. Minister for Justice, Equality and Law Reform & Anor.* [2009] IEHC 233).

DISCUSSION AND DECISION

General Observations and Nature of Review

36. This case concerns the proper approach to an assessment of state protection when the applicant has established a fear of persecution on a Convention ground but where she is from a country which has been designated by the State as a safe country. The impugned decision addresses s. 28(7) of the 2015 Act in finding that the applicant is not entitled to the benefit of the doubt with regard to her claim of political persecution but no reference is made in the decision to ss. 28(6), 31 or 33 of the 2015 Act although these provisions set out the test which the Tribunal must apply in considering whether “state protection” within the meaning of the 2015 Act would be available to the applicant.
37. In *R.A. v Refugee Appeals Tribunal* [2017] IECA 297 (a case which turned on credibility) Hogan J., for the Court of Appeal, addressed the role of the Court in judicial review proceedings following the coming into force of the Qualification Directive and said at para. 63:

“It is, in any event, clear since the coming into force of the Qualification Directive (Directive 2004/83/EC) that the grant of asylum is fundamentally governed by EU law: see Case C-57/09 and C-101/09 *B and D* EU:C: 2010: 661. As this Court has already made clear in *NM (DRC)*, the requirement of Article 39 of the Procedures Directive means that the supervisory jurisdiction of the High Court in judicial review proceedings must nonetheless ensure that ‘the reasons which led the competent authority to reject the application for asylum as unfounded... may be the subject of a thorough review by the national court.’ ...”

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. Where the Tribunal fails to clearly identify the relevant statutory provisions in the decision, however, a court in judicial review proceedings must be vigilant to ensure that the Tribunal had identified and applied the correct test.

Article 28(6) Presumption

39. In the case of *IL v. IPAT & Anor* [2021] IEHC 106 the Court (Burns J.) considered the proper approach to assessing state protection in circumstances where, as here, the applicant has the benefit of a s. 28(6) presumption. The Tribunal had made a finding of fact that the applicant had been subject to a threat of serious harm but then proceeded to find at paras. 12 to 14:

"The First Respondent does not engage in any analysis of the rebuttable presumption which the Applicant was entitled to in light of its earlier finding that the Applicant had been subject to threats of serious harm. The Applicant's claim was that he had been subject to death threats from the politician's associates. The First Respondent accepted that he had been threatened by the politician's associates and does not take issue with the nature of the threat. The implication must therefore be that the First Respondent accepted that the nature of the threats were death threats which are threats of serious harm within the meaning of the 2015 Act. Once that earlier finding had been made by the First Respondent, this established a serious indication that the Applicant's subjective fear of suffering serious harm if returned to Georgia was well founded unless there were good reasons to consider that such serious harm would not be repeated.

There was an obligation on the First Respondent to engage in an analysis of this rebuttable presumption which it failed to do. Indeed, there is no reference whatsoever by the First Respondent to s. 28(6). This is an error on the part of the First Respondent. Section 28(6) provides a significant evidential presumption to an applicant which can be rebutted by good reason. However, it should be unambiguous from the First Respondent's decision that such a significant evidential presumption was considered by the First Respondent and the good reasons which rebutted the presumption should be stated. In *NS (South Africa) v. Refugee Appeals Tribunal* [2018] IEHC 243, Humphries J stated: -

"If it is accepted that there was past persecution, the decision-maker needs to consider positively whether there is good reason to consider that there would be no future risk."

The Respondent argues that good reasons did exist to rebut the presumption and that they are set out and apparent in the decision, although s. 28(6) is not specifically analysed. This is not sufficient to deal with this issue. As already stated, s. 28(6) is a significant evidential benefit which an applicant, who has been found to have been subjected to threats of serious harm, has. It is not appropriate that assumptions and inferences be made as to whether this issue had been considered by the First Respondent, and if so, what the good reasons were for determining that the presumption, which the Applicant is entitled to, has been rebutted."

40. Section 28(6) applies in this case to give a significant evidential benefit to the applicant but there is no evidence in the terms of the impugned decision that the Tribunal identified and considered good reasons for determining that the presumption of a future indicator of a risk of persecution had been rebutted (see *IL v. IPAT & Anor* [2021] IEHC 106, Burns J. at para. 14). I accept the applicant's submission that having found a fear of persecution to be established, there was an obligation on the first respondent to engage in an analysis of this rebuttable presumption under s. 28(6) and to explain the reasons why the Tribunal was satisfied that there was good reason that there would be no future risk, if this is indeed the Tribunal's Decision. No such analysis is carried out by the Tribunal in deciding that state protection would be available.

Disapplying Safe Country of Origin

41. Some guidance to the correct approach to s. 33 designation of safe country of origin is gleaned from the decision in *B v. IPAT* [2019] IEHC 763 (Barrett J.) where he states:

“Such a designation is not lightly made and before it is made the various elements of s.72 of the Act of 2015 must be satisfied. However, it is clear from s.33 of that Act that while designation is a matter of practical and legal significance (and it is), a safe country of origin shall be considered to be a safe country of origin “*only where ... (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*”. It is apparent from the evidence before the court that Ms B has submitted such “*serious grounds*”; and that it seems to the court, with respect, is a more “*imposing feature of this case*” than the fact of designation *simpliciter*.”

42. The UNHCR notes that an application of the “safe country of origin” concept raises against an applicant for international protection “a presumption of non-refugee status which they must rebut’ (Background Note on the Safe Country Concept and Refugee Status EC/SC/68, 26 July, 1991). Additionally, the UNHCR paper entitled “UNHCR Urges Caution as EU Negotiate Safe Country Concepts” dated 1st of October, 2003 notes that in respect of the application of the safe country concept to an application for international protection “an applicant needs to be given an opportunity to explain why he or she might be at risk in a country that is generally considered to be safe” (quoted in Hughes and Hughes, *International Protection Act 2015: Annotated* (Clarus Press, 2020) at p. 312).
43. Recital 21 of the Asylum Procedures Directive is also relevant in terms of the safe country of origin concept. It states:

“the designation of a third country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country. By its very nature the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned. For this reason, it is important that where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her.”

44. As observed in Hughes and Hughes (above citation), in an extracted relied upon by the applicant (p.313), it would appear from the terms of Recital 21 that:

“an application by an applicant from a designated safe country of origin must nevertheless be subject to an individual and complete examination in which the presumption of safety can be rebutted. Therefore, designation of the country as a safe country of origin cannot be a ground for inadmissibility.

45. Accordingly, s. 33 precludes treatment of a state as a safe country of origin in an individual case where the applicant has submitted serious grounds for considering the country not safe in his or her circumstances. This requires a consideration by the Tribunal of whether grounds have been submitted and a conclusion as to whether they constitute serious grounds within the meaning of section 33(b). No such analysis is carried out by the Tribunal in this case in deciding, if it did so decide, that the applicant had not established to the satisfaction of the Tribunal that the safe country of origin designation could not be applied in her case. Given that the conclusion on the application of s. 33 determines what further assessment is required by the Tribunal of the claim for state protection, it is important in my view that the application of s. 33 is considered and a conclusion reached in clear terms.
46. As set out above the test under s. 33 is that a country may be treated as a safe third country “only where” the applicant has not submitted any serious grounds for considering the country not to be safe. Accordingly, the Tribunal can only rely on the safe country of origin designation to ground a decision that state protection is available where it has considered the applicant’s personal circumstances and concluded that no serious grounds have been submitted. If this is the conclusion, the Tribunal is then not required to proceed to consider the s. 31 test because the tribunal is satisfied that the country of origin is a safe country and, by definition, state protection is available. Where it proceeds, even if on a “what if I am wrong basis”, it should do so having first clearly recorded a conclusion in respect of its s. 33 assessment.
47. If the Tribunal has concluded, however, that the country is not to be considered a safe country of origin because the applicant has submitted serious grounds for considering the country not to be safe in his or her particular circumstances, then the Tribunal is required to proceed to apply the s. 31 test. The question which arises is whether the Tribunal must do this without further reliance on the fact that the country has been designated a safe country of origin.

Section 31 State Protection

48. The Recast Qualification Directive (which has not yet been opted into by Ireland) contains a similar provision to s. 31 at Article 7 of the Directive. In Hailbronner and Thym, EU Immigration and Asylum Law: A Commentary (2nd edn, CH Beck/Hart/Nomos, 2016 cited in Hughes and Hughes, *International Protection Act 2015: Annotated* (Clarus Press, 2020)), it is noted with reference to Article 7 that whether the necessary protection is provided has to be established on the basis of three conditions as follows:

“Firstly, the protection has to be effective. Secondly, it must be of a non-temporary nature. Thirdly, the applicant must have access to such protection”.

49. Accordingly, deciding whether state protection is available in accordance with s. 31 requires the Tribunal to ask and answer these three questions.
50. In their commentary on s. 31 of the 2015 Act, Hughes & Hughes offer the view that:

"A decision maker must consider whether an applicant for international protection can genuinely avail of meaningful protection, In this respect, the decision maker must have regard to relevant COI, coupled with the individual circumstances of an applicant....If the applicant's feared persecution emanates from non-state actors, an assessment will need to be made on whether the authorities in question are able and willing to protect an applicant; any evidence tendered by the applicant in relation to the issue of state protection should also be considered."

51. It is clear from the decision of the ECJ in Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Abdulla* (paras. 70-74) that assessing whether "reasonable steps" have been taken (in the context of Article 7(2) of the Qualification Directive) through *inter alia*, an effective legal system of the detection, prosecution and punishment of acts constituting persecution requires the decision maker to verify whether the national concerned will have access to such protection and where laws have been provided for, how these laws are applied in practice in a country to provide effective or real protection.
52. In addressing the question of "access" to state protection, Hughes and Hughes (at p. 297) identify factors which might be considered as including, *inter alia*, whether there is evidence that the actors of persecution/serious harm are linked to the actors of protection; whether the actors of protection have taken steps to address similar problems/issues; or whether an applicant has previously sought such protection and the response to same by the state/actor of protection. They continue:

"Furthermore, where it is considered that there is general sufficiency of state protection, one must consider an applicant's individual circumstances, and determine whether, in light of same, there are reasons to believe that the applicant would not be able to avail of such effective protection".

53. The principles applicable to the evaluation by the Tribunal of a claim that a country of origin cannot provide state protection have been considered in a number of cases including *LAA (Bolivia) & Ors. V RAT & Ors* [2016] IEHC 12 (Stewart J.), *BC v. IPAT* [2019] IEHC 763 (Barrett J.), *BA v. IPAT* [2020] IEHC 589 (Burns J.) and most recently *FM & RM v. IPAT & Anor* [2021] IEHC 817 (Ferriter J.).
54. Barrett J. in *BC v. IPAT* [2019] IEHC 763 ("BCI"), having quoted the terms of s. 31, stated (at para. 10) that s. 31:

"...yields the following questions for determination by IPAT when deciding whether or not state protection would be available:

- (1) Does the State in question take reasonable steps to prevent the persecution or suffering of the serious harm feared by a particular applicant?
- (2) Do such steps include the operating of an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm?
- (3) Is such protection effective and of a non-temporary nature?

(4) Does the particular applicant have access to such protection?"

55. It is clear from all of the foregoing that s. 31 requires an individual, personal consideration of the factors relevant to access to state protection of the applicant and not nationals of the state generally. I am satisfied that reliance cannot be lawfully placed on the safe country of origin designation where the Tribunal has determined on an application of s. 33 that serious grounds have been advanced but must apply the component parts of the statutory test set down in s. 31 because this designation has been found not to apply therefore necessitating the s. 31 assessment. The prescribed statutory pathway requires the Tribunal to proceed to instead consider whether actual state protection within the meaning of s. 31 is available in the individual circumstances of the applicant. Whilst the COI relied upon by the State in designating the country as a safe country under s. 72 of the 2015 Act is likely also to be relevant to a determination by the Tribunal in applying the constituent parts of s. 31, the Tribunal must assess for itself that information and cannot proceed on the basis that because the state has been designated as a safe country the separate requirements for state protection under s. 31 are also met.
56. From the structure and reasoning advanced by the Tribunal in the impugned decision, I do not have any clear idea of the "path" of the Tribunal's reasoning (to borrow the language of O'Donnell J in *Y.Y. v Minister for Justice and Equality* [2017] IESC 61 at para. 80). I cannot be satisfied that the Tribunal has determined the question of whether the applicant has submitted any serious grounds for considering the country not to be a safe country of origin in her particular circumstances and in terms of her eligibility for international protection. Given that the applicant also has the benefit of a rebuttable presumption under s. 28(6) as regards real risk of persecution, it is necessary that this assessment be carried out in clear terms.
57. In this case it might seem open for me to find that the decision maker has concluded that serious grounds for considering Georgia not to be safe in the applicant's case have been advanced, even though this is not expressly stated. The justification for this might be said to lie in the fact that the decision proceeds to determine the question of state protection, given that it is only when a determination is made that there are serious grounds for considering the country of origin not to be safe that this question arises for the Tribunal at all. I am unhappy to take this approach in this case because it is not apparent from the Decision that if the Tribunal reached this Decision under s. 33, it then properly applied s. 31. In my view, having concluded that the country is not a safe country in view of the serious grounds advanced by the applicant in her own particular case, it is not then open to the decision maker to rely on the general safe country of origin designation in concluding that state protection under s. 33 is available because in a s. 31 analysis the Tribunal is considering the evidence in relation to the country of origin by reference to the statutory elements of the test prescribed under section 31. This assessment cannot be short circuited or circumvented by falling back on the fact that a designation of safe country has been made.

58. I consider that the reliance by the Tribunal on the fact that the country has been designated a safe country even though when applying s. 31 the Tribunal Member must first have decided that the country is not a safe country of origin insofar as the applicant is concerned, is indicative of an error of law and a failure by the Tribunal to understand the test and apply it properly.
59. A concern that the Tribunal did not identify or refer to the correct test in its application of the "state protection" concept is heightened for me by the fact that the Tribunal does not refer substantively to the kinds of issues and facts which would have been relevant to that test, including factors which would have allowed the Tribunal to assess the component parts of the test when broken down (as per Barrett J. in *B.C. v. IPAT* cited above), namely:
- (1) Does the State in question take reasonable steps to prevent the persecution or suffering of the serious harm feared by a particular applicant?
 - (2) Do such steps include the operating of an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm?
 - (3) Is such protection effective and of a non-temporary nature?
 - (4) Does the particular applicant have access to such protection?
60. It is accepted by the respondents through counsel that the Decision does not address each of these four questions in their terms but it is submitted that reading the Decision "in the round", I can be satisfied that the Tribunal properly determined that state protection was available to the applicant.
61. In addressing the Decision "in the round" however, counsel for the applicant was required to parse the country of origin documentation before the Tribunal to extract elements which could be relied upon to address the component elements of the test and support a conclusion that state protection was available. The Tribunal did not in the terms of the Decision itself provide any reasons as to why the applicant's submissions as to why she was particularly vulnerable to future persecution or serious harm were rejected or outweighed in the determination made that state protection was available in reliance upon the fact that Georgia has been designated as a safe country of origin. Nor is it clear why in the face of conflicting COI, having regard to the component parts of the test under s. 31, it was concluded that reasonable steps were taken by Georgia, that the steps include the operation of an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, that such protection is effective and that the applicant has access to such protection in the light of the individual factors raised by the applicant in her evidence and in the country of origin information she relies upon.
62. In *LAA*, Stewart J. quoted at length from the decision of Clarke J. (as he then was) when addressing the question of state protection as follows (at para. 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.'"

Stewart J. continued:

"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." (para. 19.)

63. Addressing the facts in the case before her Stewart J. stated at para. 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."

64. In the present case, there is no analysis of the applicant's partner's status, connections, or capacity to prevent the applicant from obtaining protections that another similarly placed person might otherwise expect to mitigate my concerns that the correct test has not been identified and applied. In the absence of this analysis my concern that the Tribunal was not adhering to the relevant tests; or if it was, not providing reasons for the conclusions reached is not alleviated. No analysis or sufficient analysis of the type described by Stewart J. in *LAA* is present in this case.

65. Given the expert job performed by counsel for the respondent in identifying features in the materials before the decision maker which could support the conclusions arrived at, I am not prepared to say that the Decision made was irrational in the sense of never being open to the decision maker. Where it is the Tribunal's function to apply the correct legal

test to the facts it is not acceptable, that the task of drawing out the strands of a sustainable decision falls to be performed by counsel by reference to the large volume of material before the decision maker. Asking me to accept that the correct legal test has been applied because counsel demonstrates that there is material on the file which could support the Decision on a correct application of the test would involve me stepping into the shoes of the Tribunal. It requires me to divine how the Tribunal might have reasoned the Decision made by reference to the legal test on the basis of the materials before the Tribunal in a manner which is impermissible.

66. In my view, the situation here is unlike that in *BA v. IPAT* where Burns J. found that a decision of the Tribunal to the effect that state protection would be available to the applicant in that case if returned to her country of origin (Nigeria) was erroneous as a matter of law and irrational in coming to the positive conclusion that state protection would be available to the applicant. She reached this decision in circumstances where the COI before the Tribunal in that case "and the finding it makes regarding state protection is not reflective of the summary of the country of origin information it had itself compiled". In other words, the material was incapable of providing a rational basis for the decision taken.
67. It is recalled that in this case there are some statements of fact set out in COI that support the claim of the applicant, and some which do not. In that circumstance, the Tribunal is required to weigh the different and conflicting information and explain why it is considered that notwithstanding that the information goes in contrary directions, a particular conclusion or finding is being reached or one part of the information preferred over another. The necessity to state the reasons for the preference is well-established and the *locus classicus* in that regard is *D.V.T.S. v. Minister for Justice, Equality and Law Reform & anor.* [2007] IEHC 305, [2008] 3 I.R. 476 wherein it was held that the Tribunal must conduct a rational analysis of conflicting country of origin information and justify any preferment of one piece of information over another.
68. While counsel for the respondent capably demonstrated how the test might have been applied on the material available to reach a sustainable conclusion, this is not a satisfactory response to the applicant's complaint. In this case, the Tribunal identifies the materials before it in footnotes and while this shows that the Tribunal read the material, it fails to engage in an analysis of the COI material in a manner which presents a reasoned conclusion which might be reviewed as to its rationality. The fact that material was before the Tribunal which, if assessed in a particular way might have been relied upon to reach a conclusion on a correct application of the test cannot demonstrate that the Tribunal addressed itself properly to the question it was required to determine. It is for the Tribunal to explain in the reasoning provided in the decision why the test is satisfied where, as in this case, there is material before the Tribunal which could also support different conclusions.

CONCLUSION

69. For the reasons set out above I cannot be satisfied from the terms of the Decision that the Tribunal reached a lawful conclusion on the availability of "state protection" as it is not

clear that the Tribunal identified and applied the correct legal test to either the safe country of origin or the "state protection" concepts.

70. The fact that I am not so satisfied derives in part from the failure to advert clearly to the relevant statutory provisions or component parts of the test in the Decision but also in part from the reasoning in the Decision which is not expressed in a manner which demonstrates that the Tribunal properly addressed its mind to the correct test in deciding that state protection within the meaning of the Act was available. There is a requirement for the Tribunal to record a decision under s. 33 as to whether serious grounds have been submitted for disapplying the designation in a given case and, if so, to demonstrate real engagement with the component parts of the s. 31 test on the material before the Tribunal in a reasoned manner and in a way which allows the court to understand how and why the Decision was taken.
71. Counsel for the respondent demonstrated through oral argument that there was material before the Tribunal which could support the decision made depending on the approach of the Tribunal as expert body to the questions the Tribunal was obliged to determine under section 31. Accordingly, I make no finding on the rationality or reasonableness or lack thereof of a decision that "state protection" is available in all of the circumstances of this case as I am satisfied that this can only be considered in a case like this one upon a review of a properly reasoned application of the test to the facts as found in this case by the Tribunal in the first instance.
72. For the reasons set out above, I will make an order of certiorari in terms of para. 1 of the notice of motion and I will direct that the application for protection be remitted for determination by a differently constituted Tribunal to that which has previously dealt with the applicant's case. I also propose to make an order for the applicant's costs as against the respondents to be adjudicated upon in default of agreement in circumstances where the applicant has been successful in these proceedings. Should the parties contend for a different form of order or any other consequential order, I will allow a period of seven days from the date of delivery of the within judgment for the applicant to exchange and deliver such written submission addressed to the form of the order as they consider appropriate and a further seven days for the respondent to respond before the terms of my order are finalized.