

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 586  
**RECORD NO. 2019/657JR**

**BETWEEN**

**IN**

**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 Georgia who entered the State on 13 December 2015. She applied for asylum on 21 December 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 in respect of two core aspects, and noting that the Applicant had lied with respect to her entry into the State, made a recommendation on 8 June 2016 that she 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 2 May 2018, an International Protection Officer (hereinafter referred to as an "IPO") found that some material aspects of the Applicant's claim lacked credibility. On the basis of the aspects of the Applicant's claim which were accepted, the IPO determined that the Applicant did not face a real risk of serious harm if returned to Georgia and made a recommendation that she be refused subsidiary protection.
4. On 2 May 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 19 December 2018, the IPAT affirmed the first instance decisions and recommended that the Applicant should be granted neither a refugee nor subsidiary protection declaration.
6. On 15 January 2019, the Applicant sought a review of the s. 49(4) decision. Further information was submitted on 24 January 2019. The information submitted for the purpose of the review did not include any further submissions on behalf of the Applicant regarding the issue of refoulement.
7. On 1 August 2019, 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. The First Respondent 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 26 August 2019.
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 14 October 2019. The grounds of challenge to the decisions, after several amendments were made to the Statement of Grounds, can be summarised as follows:-
  - “1. The s. 49(7) Review Decision (and the s. 49(4) decision) was vitiated by the absence of a valid and lawful Section 35 Report and the failure to provide a report of the Applicant’s interview under s. 35(12) of the Act which was in compliance with s. 35(13)(b) of the Act, prior to making the PTR decision. The Respondents have not given proper regard or effect to the decision of Barrett J., in IX v. IPAT [2019] IEHC 21.
  2. The First Named Respondent erred in law and failed to comply with natural and constitutional justice by failing to furnish the Applicant with the completed Section 35 Report in advance of the s. 49(4) decision. The First Named Respondent remains in breach of s. 35(13) of the 2015 Act.
  3. The Minister erred in law in its consideration of section 50(1)(b) of the [2015 Act], insofar as he purports to rely on the prior determination of the IPO and the [IPAT], which are decisions predicated on a standard of proof as determined by O’Regan J. in ON v. Refugee Appeals Tribunal & Ors [2017] IEHC 13 with that Court determining that the standard of proof applicable to the assessment of the history of events as disclosed by an individual applicant, which is a fact-finding exercise, is that of the balance of probabilities, coupled with affording the applicant the benefit of the doubt in appropriate circumstances.

In so doing, the Minister’s determination pursuant to section 50(1)(b) of the [2015 Act], cannot in so far as it is based on the prior determination of the IPO and the IPAT, without any further comment or qualification, be deemed to be a determination that comports with 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 (and the Schedule thereto). In so far as the Minister did make such a determination, the Applicant contends the decision is irrational, and/or illegal and/or tainted by procedural impropriety.”

**IPAT’s Determination of the Applicant’s Protection Claim**

10. The Applicant claimed that she feared persecution or serious harm from a particular named family with whom, she asserted, her husband and extended family had a long running significant dispute. The IPAT accepted that the Applicant was, as claimed, an internally displaced person (hereinafter referred to as an “IDP”) within Georgia, however it found that the Applicant was not credible with respect to other material aspects of her claim regarding this asserted dispute.

11. On the basis of the facts which were accepted by it, the IPAT proceeded to consider the international protection claims. It noted that the Applicant had not expressed a subjective fear of persecution on grounds connected with her status as an IDP at the oral hearing and that there was a lack of objective support for such a subjective fear. It therefore rejected her refugee claim. With respect to her subsidiary protection claim, the IPAT rejected any argument that the Applicant had suffered past serious harm on account of her status as an IDP in Georgia. Having considered country of origin information, the IPAT determined substantial grounds had not been demonstrated to establish that the Applicant was at serious risk, because of her status as an IDP, of being subjected to the death penalty or execution, or experiencing torture or inhuman or degrading treatment or punishment in Georgia.

#### **Section 49 Decisions and the Prohibition of Refoulement**

12. 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 she fears "the [V] brothers" (Section 35 Interview, Page 7, Answer 17) and he is afraid "the [V] brothers will kill me and it has been 23 years they persecute us" (Section 35 Interview, Page 7, Answer 18).

The Applicant stated in the protection application that "there is no protection in Georgia (Section 35 Interview, Page 9, Answer 30).

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

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

The applicant's application for international protection was considered at first instance and an International Protection Officer has recommended that the applicant should be given neither a refugee declaration nor a subsidiary protection declaration.

The following country of origin information from United States Department of State's Country Report on Human Rights Practices for 2016 – Georgia (Ref 1) indicates the law provides for freedom of movement within the country, foreign travel, emigration and repatriation of citizens, but de facto authorities and Russian occupying forces limited this freedom in Abkhazia and South Ossetia. The government cooperated with the UN Office of the High Commissioner for Refugees (UNHCR) and other humanitarian organizations in providing protection and assistance to internally displaced persons, refugees, returning refugees, asylum seekers, stateless persons, and other persons of concern, therefore, the applicant is not at risk returning to Georgia as a failed asylum seeker or as an IDP.

It is noted that the applicant's husband, two sons, daughter and mother live in Georgia.

I have considered all the facts of this case together with relevant current country of origin information in respect of Georgia. 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 Georgia.

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 Georgia is not contrary to Section 50 of the [2015 Act], in this instance, for the reasons set out above."

13. 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 US State Department Country Report on Human Rights Practices, Georgia, 2018, states:

*"The law provides for freedom of internal movement, foreign travel, emigration, and repatriation of citizens, but de facto authorities and Russian occupying forces limited this freedom in Abkhazia and South Ossetia.*

*The government co-operated with the UN High Commission for Refugees (UNHCR) and other humanitarian organizations in providing protection and assistance to IDPs, refugees, returning refugees, asylum seekers, stateless persons, and most other persons of concern. The Public Defender's Office and NGOs, however, alleged that authorities made politically motivated decisions on asylum and other requests affecting selected Turkish and Azerbaijani citizens." (Ref1)"*

I have considered all the facts of this case together with relevant current country of origin information in respect of Georgia. 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 Georgia.

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 Georgia is not contrary to Section 50 of the [2015 Act], in this instance, for the reasons set out above.”

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

14. 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.”
15. 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.
16. 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**

17. 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**

18. 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.
19. 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.
20. However, by way of comment and for the comfort of the Applicant so that she can know that she 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.

21. 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 her if returned to Georgia. 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.
22. 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 her 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.
23. 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.
24. 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...”
25. 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.”

26. The First Respondent accepts that the practise of s. 49 decision makers is to generally rely upon the earlier findings of the IPO and the IPAT as averred to in an affidavit sworn by Ruth Byrne on behalf of the Respondents (paragraph 4). She further avers that an applicant’s claim for international protection is not reassessed as part of the refoulement consideration in a s. 49 decision making process (paragraph 9). Indeed, it seems to the Court that 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.

27. 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, although it is fairly indicated by the First Respondent that generally the findings of the international protection bodies are adopted. 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**

28. The s. 35 of the 2015 Act report which issued as a result of the consideration of the Applicant's subsidiary protection claim, did not comply with s. 35(13)(b) of the 2015 Act. The s. 49(4) decision was made on foot of this report. An amendment to the Statement of Grounds sought and granted to the Applicant, permitted this issue to be argued as a ground of challenge to the decisions at issue in these proceedings. This Court found in *HK v. Minister for Justice* [2021] IEHC 40, that this invalidity in a s. 35 report did not invalidate the s. 49 decisions made on foot of same. An appeal of the HK decision is currently before the Court of Appeal. The parties agree that grounds e(1) and (2) are dependent on the outcome of that appeal.

**Incorrect Standard of Proof**

29. The essence of ground (e)(3) is to the effect 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.

30. 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.

31. 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.
32. 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).
33. 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...?"
34. 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.
35. 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.

36. 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.
37. 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.
38. The Applicant has failed to establish an invalidity with respect to the s. 49(7) decision and the consequent Deportation Order.
39. In light of the appeal before the Court of Appeal in *HK v. Minister for Justice* [2021] IEHC 40, and the agreement between the parties in this case that the determination of that Court will determine the outcome of the grounds of challenge at e(1) and (2), the Court will refuse the relief sought with respect to grounds e(3) and will adjourn these proceedings into the *HK* holding list in relation to grounds e(1) and (2). Costs will be reserved in the matter until the outcome of the Court of Appeal decision. The parties are granted liberty to mention this matter to this Court after the conclusion of the Court of Appeal decision in *HK* with respect to the issue of costs if this is necessitated.