HIGH COURT
JUDICIAL REVIEW

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

[2024] IEHC 184

RECORD NO.2023/19/JR

BETWEEN:

W.P.L.

AND

B.P.

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT Of Ms. Justice Siobhán Phelan, delivered on the 22nd day of March, 2024.

INTRODUCTION

1. These proceedings arise from the designation by the State of South Africa as a safe country of origin for the purpose of international protection applications and impact of this designation on applications made by the Applicants who are both nationals of South Africa. Although the notion of a safe country of origin is not regulated in the Geneva Convention

(Convention and Protocol Relating to the Status of Refugees), it is not a new concept on the international scene. It is widely used in migration management to define countries which, based on their stable democratic system and compliance with international human-rights treaties, are presumed safe to live in.

2. Many, but not all, Member States of the EU rely on the safe country of origin concept in their migration processes. Ireland has made provision for the application of the concept through the designation of a country of origin as safe by ministerial order for more than twenty years.

3. The concept of safe country of origin should be differentiated from the notion of safe third country. The concept of safe country of origin applies to a country whose own citizens are not persecuted, whereas the safe third country concept refers to a transit country considered safe for provision of international protection. The application of both concepts by the State in its immigration process are subject to regulation by EU law.

4. In these proceedings the Applicants challenge, *inter alia*, the lawfulness of:

(i) the decision of the First Named Respondent made under s.72 of the International Protection Act, 2015 (as amended) (hereinafter "the 2015 Act") to maintain the designation of South Africa as a safe country of origin pursuant to the International Protection Act 2015 (Safe Countries of Origin) Order 2018 (S.I. No. 121/2018) (hereinafter "the 2018 Designation Order");

and

(ii) the decision of the Second Named Respondent (hereinafter "the Tribunal") dated the 29th November, 2022 (the "Impugned Tribunal Decision") made under s.46(3)(a) of the 2015 Act affirming the recommendation of the International Protection Office ("IPO"") under s.39(3)(c) of the 2015 Act that the Applicants be given neither refugee nor subsidiary protection declarations.

FACTUAL BACKGROUND

5. The Applicants are a couple from South Africa who made a claim for international protection in the State on the 21st of January 2021 on the basis that they are not safe in South Africa due to "*farm attacks, crime, corruption, and because they are unable to find work due*

to the [system of] Black Economic Empowerment". The Applicants assert fears that they would be targeted by criminals and that the risk is enhanced due to their race or ethnicity, or perceived wealth and/or membership of a particular social group of white farmers in South Africa, who are reasonably likely to be subject to violent acts on that basis.

6. The Applicants were interviewed under s.35 of the 2015 Act on the 14th of June 2022. On the 23rd of August, 2022, the International Protection Office ("IPO") issued each Applicant with a report pursuant to s.39 of the 2015 Act which determined that they should be given neither a refugee nor subsidiary protection declaration. The IPO records in its recommendations that under the 2018 Designation Order the Applicants' country of origin, South Africa, is designated as a safe country. In consequence of this designation, the Applicants' appeals from the decisions of the IPO fell under the prescribed modifications of s.43 of the 2015 Act, and fall to be determined without an oral hearing unless the Tribunal determines that one is required in the interests of justice.

7. The Applicants duly appealed to the Tribunal on the 29th of August 2022. Although not automatically entitled to an oral hearing, the Tribunal determined that the interests of justice required that a full appeal with oral hearing be afforded to the Applicants.

8. The appeal hearing took place on the 16th of November 2022.

9. The Impugned Tribunal Decision is dated 29th November 2022, and was issued on the 1st December 2022.

IMPUGNED TRIBUNAL DECISION

10. As recorded in the Impugned Tribunal Decision the Tribunal assessed the material factual elements of the Applicants' claims and accepted as follows (at paragraph 4.16):

> • The First and Second named Applicants are white, South African nationals from South Africa;
>
> • South Africa has a very high crime rate and the Applicants, and their family members, have been the victims of crime, including the following incidents;
>
> i) In 2008, the Second Named Applicant was robbed at gunpoint while in her car;

ii) The Second Named Applicant also experienced incidents where people tried to grab items from her car, however she was able to drive away in time;

iii) In November 2019, the First Named Applicant was attacked on his parents' farm and received a cut to his stomach;

iv) In 2018, the First Named Applicant's brother was attacked on a farm owned by his parents in Magaliesburg;

v) In October 2020, the First Named Applicant's father was attacked and robbed at an ATM;

11. It was not accepted by the Tribunal following an assessment of the evidence and the Country-of-Origin information (hereinafter "the COI") that white people in South Africa are more at risk of crime from black people because of their race. While it was accepted that the Applicants may find it difficult to find work due to the high rate of unemployment in South Africa, the contention that they would be unable to find work in South Africa or run a viable company due to "*Black Economic Empowerment*" was not accepted.

12. The Tribunal found that there was no reasonable chance the Applicants would face a well-founded fear of persecution based on nationality or religion (at paragraph 5.2) or for reasons of lack of employment (at paragraphs 5.3-5.5) or based on Hate Crime (at paragraph 5.8). While accepting that the First Named Applicant was attacked on his parents' farm, as was his brother (paragraph 5.11), the Tribunal found (at paragraph 5.12) that there are "*very high crime rates in South Africa*" and that the Applicants were "*victims of common criminals ... due to the effects of the poor economic situation and the high crime rate*" but that this does not amount to persecution for a Convention reason and no causal connection has been established as the incidents of crime do not "*appear to be motivated by reasons of race*."

13. It is recorded in the decision (at paragraph 5.12) that the Applicants accepted at hearing that they and their family members were victims of random incidents of crime and they had not claimed, nor was there evidence before the Tribunal, that any of the individual crimes were connected to or carried out by the same individuals or group.

14. The Tribunal accepted that the incidents were "*traumatic experiences*" for the Applicants but that they did not reach "*the level of severity required to characterise the past mistreatment they experienced, as past persecution*." (at paragraph 5.14).

15. The Tribunal found that COI shows that white South Africans are not generally at any greater risk of crime than other races or ethnicities. The Tribunal found (at paragraph 5.15) that "*even for farmers who might be at a somewhat elevated risk of experiencing crime in South Africa, there is insufficient evidence to support a finding that this is at a level that gives rise to a well-founded fear of persecution*". The Tribunal further noted that, by their own evidence, the Applicants "*are not farmers and last resided on the first named Appellant's parents' farm when Covid-19 restrictions were in effect and they were unable to continue with their employment in Cape Town*." The Tribunal also noted that "*they would not be returning to work on a farm in South Africa*" as the plot rented had been relinquished and there was an "*extremely remote possibility that they may work on a farm*."

16. Having referred to the COI relied upon and the individual circumstances of the Applicants, the Tribunal concluded that it had not been demonstrated that they have a well-founded fear of future persecution should they be returned (at paragraph 5.16). The Tribunal found there to be a "*reasonable chance that if the Appellants were to be returned to their country of origin they would experience incidents of crime, such as theft or robbery*" but that such crimes would be "*opportunistic and do not constitute persecution or serious harm*".

17. As for the Second Named Applicant's assertion that she is at risk of rape because she is a woman, it was accepted that COI indicates that rape and other gender-based violence against women is a pervasive issue in South Africa, such that in theory a convention nexus could be established on this basis. Accordingly, the Tribunal determined that for completeness and notwithstanding a finding that past persecution had not occurred that it would proceed to assess whether State Protection would be available to the Applicants if they returned to their country of origin against crime generally, including that which is gender-based.

18. In assessing State Protection, the Tribunal noted (at paragraph 5.18) that South Africa has been designated to be a safe country of origin and it was observed that this creates a rebuttable presumption that there is generally no persecution, torture or inhuman or degrading treatment. Immediately afterwards, however, the Tribunal added:

> "*…each case must be determined on its own set of facts. In written legal submissions it is argued that there are serious reasons to consider South Africa not to be safe in the Appellants particular circumstances, which renders the designation of South Africa as a safe country to be no longer relevant to them*."

19. The Tribunal then proceeded to consider the application of s. 31 of the 2015 Act. Following a review of the case-law with reference to cases such as *Idiakheua v. Minister for Justice* [2005] IEHC 150, *OAA v. Refugee Appeals Tribunal* [2007] IEHC 169, *DK v. Refugee Appeals Tribunal* [2006] 3 I.R. 368, *BC v. IPAT* [2019] IEHC 763 and *A.N. v. Refugee Appeals Tribunal* [2016] IEHC 276, the Tribunal observed (at paragraph 5.26):

> *"…it can be said that protection is generally provided when the state takes reasonable steps to prevent 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 first named Appellant has access to such protection. Thus, the focus here is whether reasonable protection, in practical terms, can be provided."*

20. The police force in South Africa is referred to in COI as the South African Police Service ("SAPS"). The Tribunal found objective evidence (at paragraph 5.30) that "*crime rates are extremely high in South Africa; that many members of the police are mistrusted and that oversight of the SAPS is an issue*" but that, in light of monitoring and reduction in response time "*it cannot be said that there is clear evidence of a lack of effective State Protection in South Africa in relation to crime in general*".

21. The Tribunal proceeded to consider whether there were reasons individual to the Applicants as to why State Protection would not be available to them, including reasons particular to the fact that the Second Named Applicant is a woman. Whereas rape occurs at a "*very high rate*" and "*the level of prosecution is low*" the Tribunal found that "*steps are being taken to train the SAPS in human rights issues such as gender violence*" (at paragraph 5.31). Accepting (at paragraph 5.32) that "*shortcomings are more acute in terms of gender-based violence such as rape*" the Tribunal noted that the Second Named Applicant did not claim to have experienced gender-based violence in the past or fear "*any specific actors of harm in this respect*." The Tribunal found (at paragraph 5.32) that the Applicant's evidence in this regard was "*general in nature, and not indicative of anything specific to their own situation*".

22. Whereas the Applicants claimed that the police had not meaningfully assisted them in the past, the Tribunal found (at paragraph 5.33) that "*no evidence was given of any effort to access the structures set up to address complaints against police inaction*" and that "*isolated incidents where state protection was deficient is insufficient to establish its inadequacy*." While

some of the reported farm attacks were "*brutal in nature*" the Tribunal found (at paragraph 5.34) that the farming community worked with organizations and the police to "*devise safety plans to protect farmers*".

23. The Tribunal concluded that it was satisfied that the Applicants would have access to State Protection, finding (at paragraph 5.35) that the SAPS "*generally provides protection to South African citizens from criminal behaviour by non-State actors*" and in the event of failure, there was a complaint mechanism available to the Independent Police Investigative Directorate ("IPID") although this was "*not always successful*." Whereas the police and justice system was "*not without its shortcomings*," the Tribunal found, in light of the accepted material facts and evidence (at paragraphs 5.36-5.39) that the Applicants had not rebutted the presumption of State Protection which is "*effective, non-temporary and accessible*" and that South Africa "*does not lack a reasonably functioning police and criminal justice protection such that the Appellants require international protection*."

24. Having found that State Protection was available, the Tribunal confirmed that it was affirming the recommendation of the IPO that the Applicants were not entitled refugee status (at paragraph 6.1) before next proceeding to assess the subsidiary protection claim on the basis of the facts as found and whether they provided a basis for a finding that the Applicants would face, if returned to their country of origin, a real risk of serious harm.

25. The Tribunal found (at paragraph 7.4) that the Applicants do not face "*a real risk of torture or inhuman or degrading treatment or punishment*" in South Africa "*on account of being White South Africans*" or that any discrimination or difficulties they may face "*by reason of affirmative action in South Africa*" is not reasonably likely to give rise to a real risk that they will suffer serious harm.

26. The Tribunal determined (at paragraph 7.5) that s.28(6) of the 2015 Act was inapplicable on the basis that "*the kind of serious harm envisaged under Article 15(b) Qualification Directive is generally an individualised risk of harm*" and that COI "*does not establish such a high generalised, randomised risk of violence as would necessitate the grant of international protection*". Whereas there was a "*real chance*" that the Applicant would experience incidents of crime depending on their location, the Tribunal determined that State Protection "*while less than perfect, is effective, non-temporary and accessible*" to the Applicants in respect of their asserted fear from crime (at paragraph 7.6).

27. The Applicants had relied on several previous Tribunal decisions in which the Tribunal found that State Protection was not "*sufficiently effective to protect*" protection applicants in those cases. The Second Named Respondent found (at paragraph 7.7) that it was "*not bound by any previous Tribunal decision*" and that "*no decision was submitted which sufficiently mirrored the factual elements of the Appellants' claim*."

28. The Tribunal affirmed the recommendation of the IPO that the Applicants were not entitled to either a refugee or subsidiary protection declaration.

LEGAL FRAMEWORK AND THE DESIGNATION OF SOUTH AFRICA AS A SAFE COUNTRY OF ORIGIN

29. The Refugee Act 1996 (the "1996 Act") did not provide for a safe country of origin designation upon enactment. It made provision at s.12(4) for "*manifestly unfounded*" applications, providing that an applicant might not be declared to be a refugee for several reasons, none of which expressly addressed the safety of his/her country of origin. The first reference to the "*safe country of origin*" in Irish legislation was introduced by s.7(g) of the Immigration Act, 2003 (hereinafter "the 2003 Act") which substituted s.12(4) of the 1996 Act. The newly substituted s.12(4)(a) of the 1996 Act (as amended) provided:

> *"(4) (a) The Minister may, after consultation with the Minister for Foreign Affairs, by order designate a country as a safe country of origin.*
>
> *(b) In deciding whether to make an order under paragraph (a), the Minister shall have regard to the following matters:*
>
> > *(i) whether the country is a party to and generally complies with obligations under the Convention Against Torture, the International Covenant on Civil and Political Rights, and, where appropriate, the European Convention on Human Rights,*
> >
> > *(ii) whether the country has a democratic political system and an independent judiciary,*
> >
> > *(iii) whether the country is governed by the rule of law.*
>
> *(c) The Minister may by order amend or revoke an order under this subsection including an order under this paragraph.*

(5) In this section—

'the Convention against Torture' means the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by resolution 39/46 of the General Assembly of the United Nations on 10 December 1984;

'the European Convention on Human Rights' means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950;

'the International Covenant on Civil and Political Rights' means the International Covenant on Civil and Political Rights adopted by Resolution 2200A (XXI) of the General Assembly of the United Nations on 16 December 1966."

30. As clear from the foregoing, s.12(4)(a) of the 1996 Act, as substituted by s.7 of the 2003 Act, permitted the First Named Respondent "*after consultation with the Minister for Foreign Affairs*" to designate a safe country of origin for asylum applicants post-September 2003 when it was commenced.

31. By the Refugee Act 1996 (Safe Countries of Origin) Order 2004 (S.I. 714 of 2004) made in December 2004 (hereinafter "the 2004 Designation Order"), the First Named Respondent designated South Africa a safe country of origin in exercise of the powers conferred on him by s.12(4)(a) (inserted by s.7(g) of the 2003 Act) of the 1996 Act after consultation with the Minister for Foreign Affairs and having had regard to the matters referred to in s.12(4)(b) of the 1996 Act.

32. While these provisions are historic and do not impact on the statutory power to designate at issue in these proceedings, this timeline is of some relevance because it demonstrates that provision was made in Irish law for a "*safe country of origin*" designation as a matter of domestic law even before the adoption of Council Directive 2005/85/EC (hereinafter "the Procedures Directive") in December 2005.

33. The Procedures Directive recognises the lawfulness of a safe country of origin doctrine for EU law purposes. Recital 17 of the Procedures Directive recorded that a key consideration for the well-foundedness of an asylum application is the safety of the applicant in his/her country of origin stating:

"Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he/she presents serious counter indications."

34. In this vein, Recital 21 further records:

"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."

35. The Procedures Directive recognises at Article 23(4)(c)(i) that in establishing examination procedures for asylum applications it was permissible to prioritise or accelerate a procedure, *inter alia*, if the application for asylum was considered unfounded because the applicant is from a safe country of origin within the meaning of Articles 29, 30 and 31 of the Procedures Directive.

36. Article 29 of the Procedures Directive also provided for a "*minimum common list of third countries regarded as safe countries of origin,"* This was subsequently annulled by the Court of Justice of the European Union ("CJEU") in C-133/06 *Parliament v Council (Justice & Home Affairs)* [2008] O.J. C 158/04.

37. Article 30(1) of the Procedures Directive provides that Member States may "*retain or introduce legislation*" allowing for the national designation of safe countries of origin where the conditions in Annex II of the Directive are fulfilled. Annex II lays down the rules for designation of a country as a safe country of origin requiring that it be shown, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal

armed conflict. Annex II specifies that in making this assessment, account shall be taken, *inter alia*, of the extent to which protection is provided against persecution or mistreatment by:

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

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

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

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

38. Article 30(2) specifically provides "*by derogation*" that Member States may "*retain legislation in force on 1 December 2005*" allowing for national designation for the purposes of examining "*applications for asylum*" where Member States are satisfied that persons will not be subject to persecution (as defined in Article 9 of Directive 2004/83/EC) or torture or inhuman or degrading treatment of punishment.

39. Furthermore, when assessing whether a country is a safe country of origin, Article 30(4) requires ("*shall*") that Member States have regard to the legal situation, the application of the law and the general political circumstances in the country concerned. Article 30(5) mandates that the assessment of whether a country is safe is based on a range information including information from other Member States, the UNHCR, the Council of Europe and other relevant international organizations. Article 30(6) requires Member States to notify to the Commission the countries that are designated as safe countries in accordance with that Article.

40. Article 31 of the Procedures Directive further provides for an individual examination in each case in which the safe country of origin concept is relied upon and precludes reliance on the concept if serious grounds have been submitted for considering the country not to be a safe country of origin in the circumstances of the case.

41. Ireland was required under Article 43 dealing with transposition to bring into force "*laws, regulations and administrative provisions*" necessary to comply with the Procedures Directive by no later than 1st December, 2007. Article 43 also requires Member States to communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

42. No further specific steps were taken in Ireland in relation to adopting legislation to provide for designation of a safe country of origin following the adoption of the Procedures Directive until 2011, after the time-frame allowed for transposition had passed. Whether the existing designation of South Africa at that time met the requirements for derogation specified under Article 30(2) may indeed be questionable but is not an issue that arises for determination in these proceedings.

43. Further effect was sought to be given to the Procedures Directive insofar as safe country of origin designation was concerned by the European Communities (Asylum Procedures) Regulations 2011, S.I. 51/2011 ("the 2011 Regulations"). The 2011 Regulations commenced on 1st March, 2011, over three years after the transposition deadline fixed under Article 43 of the Procedures Directive and further amended s.12(4)(a) of the 1996 Act. Section 12(4)(a) of the 1996 Act (as amended) in 2011 provided:

> *"(4)(a) The Minister may, by order made after consultation with the Minister for Foreign Affairs, designate a country as a safe country of origin.*
>
> *(b) The Minister may make an order under paragraph (a) only if he or she is satisfied that, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that, in the country concerned, there is generally and consistently no persecution, construed in accordance with section 2 and Regulation 9 of the Regulations of 2006, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.*
>
> *(c) In making the assessment referred to in paragraph (b), the Minister shall take account of, among other things, the extent to which protection against persecution or mistreatment is provided in the country concerned by—*

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

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

(iii) respect of the non-refoulement principle according to the Geneva Convention, and

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

(d) The determination as to whether an order under paragraph (a) should be made in relation to a particular country shall be based on, among other things, available information from other Member States, the High Commissioner, the Council of Europe and other relevant international organisations.

(e) Where the Minister considers it appropriate, he or she shall, in consultation with the Minister for Foreign Affairs, review a designation under paragraph (a) having regard to the matters specified in paragraphs (b) to (d).

(f) The Minister shall notify the European Commission of the making, amendment or revocation of an order under paragraph (a).

(5) In this section—

'the Convention against Torture' means the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by resolution 39/46 of the General Assembly of the United Nations on 10 December 1984;

'country' includes part of a country;

'the European Convention on Human Rights' means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950;

'the International Covenant on Civil and Political Rights' means the International Covenant on Civil and Political Rights adopted by Resolution 2200A (XXI) of the General Assembly of the United Nations on 16 December 1966."

44. Clearly the language of the 2011 Regulations mirrors closely the requirements of Article 30(4) & (5) and Annex II of the Procedures Directive.

45. The Procedures Directive was repealed on 20th July 2015 by the provisions of Directive 2013/32/EU (hereinafter "the Recast Procedures Directive") for Member States who were bound by the new Recast Procedures Directive (Article 53 of the Recast Procedures Directive). Ireland did not adhere to the Recast Procedures Directive. Ireland is expressed in Recital 58 to the Recast Procedures Directive not to be bound by it or subject to its application. Recital 61 of the Recast Procedures Directive provides that the obligations to transpose arising under the Procedures Directive are unchanged and arise under that Directive. For completeness, however, it is important to reflect that some changes were introduced as a matter of EU law for those Member States bound by the Recast Procedures Directive and applying the safe country of origin concept (specifically under Articles 36 and 37). Under the terms of the Recast Procedures Directive, Member States adhering to that Directive should conduct regular reviews of the situation in safe countries based on a range of sources of information as prescribed under the terms of the Directive (Article 37(3)).

46. Meanwhile, in Ireland, the 1996 Act and the 2011 Regulations, as well as the 2004 Designation Order, which had designated the Republic of South Africa as a safe country of origin, were repealed by way of s.6 of the 2015 Act. The 2015 Act made new statutory provision for designation of a safe country of origin under ss. 33 and 72. As a matter of EU law, the Oireachtas in enacting the 2015 Act was obliged to give effect to the conditions governing the application of the concept laid down in the Procedures Directive which continue to bind the State.

47. Reflecting the requirements of Article 31 of the Procedures Directive, s.33 of the 2015 Act provides:

"A country that has been designated under section 72 as a safe country of origin shall, for the purposes of the assessment of an application for international protection, be considered to be a safe country of origin in relation to a particular applicant only where—

(a) the country is the country of origin of the applicant, and

(b) the applicant has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her eligibility for international protection."

48. Further to s.72(1) of the 2015 Act, the Minister may make an order designating a "*safe country of origin*" for international protection applicants. As it is the power at the heart of these proceedings, it is set out in full. Section 72 provides:

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

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

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

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

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

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

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

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

(a) other Member States,

(b) the European Asylum Support Office,

(c) the High Commissioner,

(d) the Council of Europe, and

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

(5) The Minister shall, in accordance with subsections (2) to (4) and on a regular basis, review the situation in a country designated under subsection (1).

(6) The Minister shall notify the European Commission of the making, amendment or revocation of an order under subsection (1).

(7) In this section—

"Convention against Torture" means the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by Resolution 39/46 of the General Assembly of the United Nations on 10 December 1984;

"country" means a country other than an EU Member State;

"European Convention on Human Rights" means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950;

"International Covenant on Civil and Political Rights" means the International Covenant on Civil and Political Rights adopted by Resolution 2200A (XXI) of the General Assembly of the United Nations on 16 December 1966.

49. As provided for under s. 72, the Minister must be satisfied under s.72(2) that it can be shown there is "*generally and consistently no persecution, no torture or inhuman or degrading*

treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict" having regard to mandatory considerations as further prescribed at s. 72(3) and (4). Section 72(5) mandates that the Minister shall "*on a regular basis*" review the situation in a designated safe country of origin. It is noteworthy that the requirement for regular review is directly in line with the requirement of Article 37(2) of the Recast Procedures Directive even though Ireland did not adhere to that Directive. Similarly, the requirement to have regard to information from the European Asylum Support Office ("EASO") reflects a change introduced in the Recast Procedures Directive (Article 37(3)).

50. Section 72 of the 2015 Act was commenced in December 2016. South Africa was again designated as a safe country of origin by the provisions of the International Protection Act 2015 (Safe Countries of Origin) Order 2018 (S.I. No. 121/2018) (referred to in these proceedings as "the 2018 Designation Order") which came into operation on the 16th of April, 2018. It is this statutory instrument which is challenged as unlawful in these proceedings.

51. Finally, it bears note that, as envisaged by Article 23 of the Procedures Directive, an accelerated procedure applies under the 2015 Act to cases where a safe country of origin designation applies. In providing for an accelerated procedure in respect of cases where applicants come from a safe country of origin, s.43 provides:

> *"Where the report under section 39 includes any of the findings referred to in section 39 (4), the following modifications shall apply in relation to an appeal under section 41 by the applicant concerned—*
>
> *(a) the appeal shall be brought by notice in writing within such period, which may be a shorter period than that prescribed for the purposes of section 41 (2)(a), from the date of the sending to the applicant of the notification under section 40 , as may be prescribed under section 77 ,*
>
> *(b) notwithstanding the provisions of section 42 , the Tribunal, unless it considers it is not in the interests of justice to do so, shall make its decision in relation to the appeal without holding an oral hearing, and*
>
> *(c) the notification referred to in section 40 (1) shall include a statement informing the applicant concerned of the effect of the modifications referred to in paragraph (a) and (b)."*

52. Although the First Named Respondent's notification under s.40 has not been exhibited in these proceedings, recommendations were made by the IPO in its s.39 report in terms of s.39(4)(e) as exhibited, namely, that the applicants' country of origin is a safe country of origin. It is not in dispute therefore that the Applicants were notified of modifications whereby they were not automatically entitled to an oral hearing. Under s.43(b) of the 2015 Act, however, the Tribunal retains a discretion to hold an oral hearing where it decides that it is in the interests of justice to do so, a discretion which it exercised in this case as recorded in the terms of the Impugned Tribunal Decision.

PROCEEDINGS

51. The affidavits grounding the within application for judicial review were all sworn on the 7th of January 2023 but papers were only filed in the Central Office of the High Court on the 11th of January 2023 and the application was not opened before the High Court until the 17th of January, 2023 It was then adjourned to the 13th of February 2023, when leave was granted (Meenan J.) *ex parte* and a direction was given that a Notice of Motion be made returnable to the 13th of March 2023.

52. Opposition papers verified by Affidavit sworn on the 24th of July 2023 were filed some five months after the grant of leave. The Respondents' Affidavit confirmed correspondence with the European Commission on the 3rd of May 2018 notifying the designation of South Africa as a safe country of origin and exhibited the documentation relied upon in a decision on the part of the First Named Respondent to approve the retention of the decision in December 2021 following a review of its earlier designation. The submission to the First Named Respondent in respect of the retention decision on review was partially redacted.

53. Thereafter, an application was made by Notice of Motion dated the 20th of November 2023 for an order directing the First Named Respondent to produce for inspection an unredacted copy of the submission in respect of the review of designation. This application came on for hearing on the 19th of January 2024 and the orders sought were refused (Hyland J.). It is clear from the papers before me that redactions were effected to the review/retention of designation submission for reasons of legal professional privilege.

ISSUES

54. Preliminary issues are raised on the pleadings in relation to time and standing. The substantive issues arising on the pleadings include:

A. Whether the designation of South Africa as a "*safe country of origin*" for the purposes of s.33 and s.72 of the 2015 Act is *intra vires* and compatible with the Procedures Directive – the *Vires* Ground;

B. Whether the "*safe country of origin*" designation is otherwise in breach of s.72(5) of the 2015 Act for failure of the First Named Respondent to review the current situation in South Africa – the *Review* Ground;

C. Whether the Tribunal erred in law, contrary to ss. 28, 31, 33 and 46 of 2015 Act (as amended) in the assessment of the Applicants' claims for international protection.

55. A claim that there was no evidence that the State has complied with its obligations to notify the Commission of countries designated as safe countries of origin for the purposes of Article 30(6) of the Procedures Directive was not pursued in the face of evidence that the designation of South Africa had, in fact, been notified to the Commission in writing in May, 2018.

DISCUSSION AND DECISION

56. I propose to address each of the identified issues in turn.

Time

57. The Respondents object that the Applicants are out of time to seek the reliefs sought, namely, to quash the Minister's continuing decision to designate South Africa as a safe country of origin under s.72 of the 2015 Act and the Tribunal decision of 29th November 2022 refusing the Applicants international protection.

58. Pursuant to s.5(2) of the Illegal Immigrants (Trafficking) Act, 2000 (as amended) (hereinafter "the 2000 Act"), an application to challenge a decision under s.46 of the 2015 Act must be brought within 28 days unless the Court considers that there is "*good and sufficient reason for extending the period…*". In this case the Impugned Decision was received on 1st December 2022 and the 28-day deadline fell during the Christmas court vacation.

59. In their Grounding Affidavits, both Applicants set out that their affidavits were being sworn on 7th January 2023 having been drafted and emailed to their solicitors (presumably by counsel but not so stated on affidavit) on the 3rd of January 2023 (already outside the 28-day time limit), but that the Applicants were unable to attend with their solicitors until the 7th of January 2023. Reliance is placed on their behalf on the fact that the Court Offices remained closed until 11th January 2023, although this is not averred to on affidavit, it being asserted only "*the High Court remains closed until the 11th of January, 2023*". The Affidavits are silent as to when instructions to draft proceedings were given and why the application, having been drafted, was not opened earlier either before a vacation judge or on the commencement of the new legal term on the 11th of January 2023, the papers being filed in the Central Office that day. In fact, the application for leave to proceed was only opened before the High Court on the 17th of January 2023.

60. As it has been established that under the Rules as they applied in January 2023, time stops only when the application is opened before the Court. It follows that the extension of time sought for the purposes of a challenge to the Tribunal decision is in the order of some 19 days.

61. In *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418, 423 the Court considered the test to apply under s.5 of the 2000 Act. *GK* establishes that good reason is not limited to the reasons for delay and factors to be considered include: (i) the period of delay; (ii) the reasons for the delay; (iii) the *prima facie* strength of the case; (iv) the complexity of the legal issues; (v) language difficulties; and (vi) any other personal circumstances. In this case the Applicant relies on factors (i)-(iv).

62. While the extension required is a relatively short one, a 19-day extension is long in the scheme of a 28-day statutory time limit. It is clear, however, that the 28-day period permitted under s.5(2) of the 2000 Act expired during the Christmas vacation period and while the Courts were closed for routine business. While time does not stop running during Court vacation periods and it is possible for applications to be brought during vacation before a duty judge, I accept that in practice such applications are not brought as a matter of course. They require special organisation and the demonstration of conditions of urgency. Although conditions of urgency are met where a statutory time limit is about to expire and I have no doubt that it would have been possible to make this application in time during the Christmas vacation had the papers been ready for presentation, nonetheless the additional barrier in accessing court during

the Christmas vacation is a compelling factor in this case given that the majority of the delay in question fell during the vacation period.

63. While the majority of the delay might be attributable to the vacation period and covered by the bare terms of the averments made by and on behalf of the Applicants in respect of an extension of time, the failure to address the period between the 11th and 17th of January 2023 expressly is unsatisfactory. It suggests an unduly casual attitude to time limits which is concerning given the potential significance for international protection seekers of a failure to comply with time limits. A failure to explain this additional period could result in proceedings being time barred and cannot be readily glossed over. As the additional period for which no explanation whatsoever has been proffered relates to an a six-day period at the beginning of the new legal term and the end of the Christmas vacation, it seems to me having regard to the nature of the delay and the timing of same, that a refusal of an extension of time because of this additional period of unexplained delay could disproportionately impact on the Applicants. By that time the Applicants had, at least ostensibly, taken all steps necessary from their perspective by the 7th of January 2023 (drafted papers only having been emailed, it seems, after the time period had already expired) and were dependent on their legal advisors to take the steps necessary to protect their position by issuing the proceedings and making court application.

64. It is further noted that the Respondents do not assert prejudice arising from delay. It seems to me to be relevant from an equality of arms perspective that the Respondents delayed for several months after the service of proceedings on them in delivering Opposition papers. This reflects both the complexity of the issues, the fact that the time was required to address them and a lack of any urgency on the Respondents' part.

65. As for the merits of the application, substantive and important issues are raised in these proceedings requiring careful deliberation such that the claim advanced ought properly to be treated as meritorious for the purpose of considerations of an extension of time.

66. In view of the explanation for not issuing proceedings within the time limits specified under s.5(2)(a) of the 2000 Act and the further factors identified above and notwithstanding the failure to explain the further delay between the 11th and 17th of January 2023, I am satisfied that "*good and sufficient reason*" exists for extending time in this case to the challenge the decision of the Tribunal.

67. For completeness, I note that the challenge to the designation of South Africa as a safe country of origin is not captured by s.5(2) of the 2000 Act but is subject to judicial review time limits under the Rules of the Superior Courts. I do not understand the case to have been pressed that the challenge to the designation itself was out of time. While the designation was given effect to by the 2018 Designation Order which came into operation on the 16th of April 2018, this occurred several years before the Applicants sought international protection in the State. It cannot therefore be realistically contended that the Applicants ought to have challenged the designation, which did not then affect them, within the three-month period fixed under Order 84 rule 21 of the Rules of the Superior Courts.

68. It might, however, be contended (although no such argument was ventilated before me) that the designation first impacted on the Applicants when the IPO pointed out in the Report prepared under s.39 of the 2015 Act that South Africa had been designated a safe country of origin by the 2018 Designation Order as notified to the Applicants by letter dated the 23rd of August 2022. Having assessed the claim for refugee status the IPO officials concluded in each case that they were not satisfied that the applicants had submitted any serious grounds for considering their country of origin not to be a safe country of origin in their circumstances and in terms of eligibility for refugee status. The claim for subsidiary protection was similarly rejected.

69. The Applicants elected not to challenge the designation immediately upon being advised of the recommendation under s.39(3) of the 2015 Act in which it was recorded that s.39(4)(e) of the 2015 Act, namely that that the Applicants' country of origin is a safe country of origin, applied on receipt of the first instance decision letters dated the 23rd of August 2022. Instead, they pursued an appeal to the Tribunal in which it was contended that the safe country of origin designation should be disapplied because there were serious reasons to consider South Africa not to be safe for the Applicants. Notices of Appeal dated the 29th of August 2022 were submitted in which an oral hearing was sought in connection with the appeals.

70. The Tribunal duly exercised a discretion to accord the Applicants an oral hearing notwithstanding the safe country of origin designation. In the submissions made for the purpose of the appeal to the Tribunal dating to November 2022, it was further argued that in the Applicants' cases "*there are serious reasons to consider South Africa not to be safe*" in their particular circumstances, "*which renders the designation of South Africa as a safe country to be no longer relevant*".

71. The decision not to press an argument that the challenge to the 2018 Designation Order was out of time was a proper one in my view. Had a challenge been brought at an earlier point in time and within three months of first notice to the Applicants that a safe country of origin designation impacted on their applications, it would risk being met with a claim that it was premature in circumstances where it was open to the Applicants to contend, as they did, that they should be afforded an oral hearing and that the safe country of origin designation should be disapplied in their cases. It was always possible that their claim that there were serious reasons to consider South Africa not to be safe in their circumstances and that State Protection was not available to them might have been accepted with the consequence that their applications could have been successful obviating the necessity for proceedings.

72. Proceedings were, in any event, commenced just over four months after the first notification to the Applicants that a safe country of origin designation had application to their cases such that it is difficult to see that any prejudice to the Respondents could arise from delay in challenging the 2018 Designation Order and none was identified.

73. As the designation of South Africa as a safe country of origin is ongoing and the Applicants remain subject to procedures within the Irish asylum and immigration process which may be affected by the fact of designation, I am satisfied that no time issue arises such as would properly preclude their challenge to the designation in these proceedings. The Applicants engaged appropriately with the appeal process before the Tribunal to make the case that the designation was irrelevant, securing an oral hearing in the process despite the fact of designation, such that any challenge pre-empting the Tribunal decision might have been considered premature and might also have been unnecessary as the Tribunal process had the potential to afford them an adequate, alternative remedy. These proceedings commenced well within three months of the determination of those appeals against them.

Standing

74. It is separately contended that the Applicants lack standing to challenge the 2018 Designation Order where the Impugned Tribunal Decision did not actually rely on the fact that South Africa was a designated safe country of origin. In this regard weight is placed on the fact that the Applicants were not denied an oral hearing because of the designation as the Tribunal had found that an oral hearing was necessary in the interests of justice. It is further pointed out that the only other reference to the designation is in the section addressing "*State Protection*",

where the designation is correctly described as a rebuttable presumption and from which it is clear that the Tribunal proceeded on the basis that the cases required to be considered on their own facts to determine whether State Protection was available to the Applicants, regardless of the designation of South Africa as a safe country.

75. It is contended that as no weight was accorded by the Tribunal to the designation of safe country of origin in proceeding to consider State Protection and where the Tribunal applied the State Protection analysis which would be required of any country of origin, the Applicants lack standing to challenge the designation.

76. It is asserted that the Applicants cannot challenge the designation on the basis of either an alleged absence of *vires* in EU law, or an alleged failure to review under s.72(5) of the 2015 Act as to do so would amount to impermissibly seeking to invoke a *jus tertii* without their applications for international protection actually being affected by reliance upon the designation either (i) to deny an oral hearing or (ii) to invoke s.33 of the 2015 to require them to submit "*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.*" In support of this argument, I am referred on behalf of the Respondents to the decision of the Supreme Court (Hardiman J.) in *A v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 (at para. 196) where it was found that a person who seeks to invalidate a statutory provision must do so by reference to the effect of the provision on his own rights.

77. While the Applicants have not yet been prejudiced by the application of the safe country of origin designation because they have been afforded an oral hearing and their cases for refugee status have been rejected based on a finding on the facts of their cases that State Protection is available, I am mindful that the process is not at an end for the Applicants. If they were to succeed in these proceedings on the basis that the Tribunal decision is unsustainable, then their application could be remitted for fresh consideration in accordance with law. There is no guarantee that on a rehearing they would be afforded an oral hearing or be treated as having demonstrated serious grounds under s.33 of the 2015 Act. While the risk of a different decision-making process on remittal may be excluded by a negative outcome of the challenge to the Tribunal decision in these proceedings, whether the Applicants have standing to bring these proceedings in the first place is a separate and different question and falls to be determined independently of the outcome to these proceedings.

78. It also remains for the First Named Respondent to consider an application under s.49 for leave to remain (should one be made on behalf of the Applicants in due course) and/or to consider the prohibition on refoulement under s.50. The safe country of origin designation may still carry weight in the assessment of these applications on the assumption that it is lawful. It seems to me, therefore, that it cannot properly be concluded that the Applicants are not affected by the designation in a manner which deprives them of standing.

79. Consistent with their right of access to the Court and an effective remedy protected both as a matter of constitutional law and under EU law, I am satisfied that the Applicants have standing to pursue the relief sought in these proceedings on the grounds for which leave has been granted.

Vires to Designate

80. The *vires* to designate is challenged both as to the lack of a proper legal basis for designation and on grounds of rationality. I will consider firstly whether a proper legal basis exists for the making of a designation order and, thereafter, whether the power has been properly exercised.

81. The Applicants contend that the designation of South Africa by the First Named Respondent as a "*safe country of origin*" for the purposes of s.33 and s.72 of the 2015 Act is *ultra vires* the Procedures Directive and/or was improperly made contrary to Ireland's obligations under the Common European Asylum System ("CEAS"). This argument is advanced on the basis that the safe country of origin concept is derived from Article 30(1) of Procedures Directive by which Member States may "*retain or introduce legislation*" allowing for the national designation of safe countries of origin.

82. It is argued that pursuant to Article 43 of the Procedures Directive, Ireland was required to introduce transposing legislation, including legislation for the designation of countries as safe countries of origin, by no later than 1st December, 2007. It is asserted that insofar as there was a failure to fully transpose the Procedures Directive as regards safe country of origin designation prior to the transposition deadline in December, 2007, the legal power to designate came to an end and designation subsequently was in breach of EU law.

83. It is further contended, as I understand the argument, that as the Procedures Directive is no longer in force, having been repealed on the 20th July 2015, Ireland is not entitled to introduce legislation to provide for a "*safe country of origin*" designation after its repeal. In

circumstances where s.72 of the 2015 Act was not commenced until 31st of December 2016 and the 2018 Designation Order designating South Africa did not come into operation until the 16th of April 2018, it is asserted that s.72 of the 2015 Act is incompatible with EU law. This submitted incompatibility is said to render the 2018 Designation Order made pursuant to s.72(2) of the 2015 Act unlawful. Reliance is placed in submissions (but not in the case as pleaded) on the "*principle of non-regression*" and on the provisions of the Dublin III Regulations (Regulation EU 604/2013).

84. The case made on behalf of the Applicants as to a lack of legal basis is misconceived. The contention that the safe country of origin concept derives from the Procedures Directive ignores the fact that Ireland already applied a safe country of origin concept prior to the adoption of the Procedures Directive (under s.7(g) of the 2003 Act which substituted s.12(4) 1996 Act to permit the Minister "*after consultation with the Minister for Foreign Affairs, by order [to] designate a country as a safe country of origin*"). In consequence, South Africa was designated a safe country of origin as long ago as 2004 and ever before the Procedures Directive.

85. The power to designate South Africa as a safe country of origin exercised in 2004 derived exclusively from domestic legislation. The concept of safe country of origin did not depend for its existence on any provision of EU law. Indeed, not every Member State of the EU relies on a safe country of origin designation in its immigration processes and while there have been proposals in this regard, there is as yet no common EU list of safe countries of origin.

86. Although the Procedures Directive recognised and regulated the application of a safe country of origin concept, it did not mandate safe country of origin designation but merely permitted it. It was and is a matter for domestic law and each individual Member States whether they exercise the option left open by the Procedures Directive to rely on a safe country of origin concept in the international protection process adopted in each Member State. I am satisfied therefore that the authority to introduce legislation providing in Irish law for a safe country of origin concept, although not unfettered, vests in the Oireachtas as the legislative arm of the State and does not derive from EU law and is not yet required by EU law. Having legislated for the power, however, the State must comply with safeguards or conditions precedent to reliance on a safe country of origin concept which apply as a matter of EU law.

87. The clear effect of the Procedures Directive was to require that in designating a country

of origin as safe, if a Member State elected to do so, the criteria specified by EU law would be applied. In this way the EU ensures that the right to apply for asylum is not improperly curtailed or delimited in a manner which undermines EU common standards of protection. The fact that Member States apply different lists, containing different safe countries, hampers uniform application as between Member States of the EU and risks incentivising secondary movements. Requiring compliance with conditions which determine when the concept may be applied through the Procedures Directive limits these risks.

88. It is recalled that in *Seredych v. Minister for Justice* [2020] IESC 62 the Supreme Court found that the Directives [Procedures and Qualification] are part of the establishment of a common system for the determination of applications for international protection based on the Refugee Convention and apply to all applications for asylum made in the Member States.

89. While the Procedures Directive has been repealed for those countries who adhered to the Recast Procedures Directive, it is established that its provisions continue to bind Ireland. Accordingly, the criteria specified under Articles 30(4), (5) & (6), Article 31 (1) and (3) and Annex II are mandatory and binding on the State for so long as a safe country of origin concept is applied in Irish law. Relying on the decision in *Seredych*, Burns J. found in *EV v. IPAT & Ors.* [2020] IEHC 617, another case in which the *vires* of ss. 33 and 72 of the 2015 Act were challenged, that the fact that Ireland did not adopt the Recast Directives does not absolve Ireland from applying the earlier Directives in a situation where it has been agreed that it will not adopt the Recast Directives but remains bound by the earlier Directives.

90. If, as appears to be the case, the State failed to introduce the mandatory conditions for designation deriving from the Procedures Directive prior to the deadline for transposition in 2007 or the repeal of the Procedures Directive for those Member States adhering to the Recast Procedures Directive, this fact (if it be fact) does not detract from a power to introduce provisions bringing the Irish designation system into line with EU law requirements subsequently. The effect of previous failure to make provision for conditions compliant with the requirements of Article 30(2), applicable by way of derogation in respect of retained legislation, or Articles 30(4),(5),(6) & Annex II in respect of any new provision, may mean the processing of applications based on a safe country of origin concept were not then in accordance with EU law. It does not mean that the State is precluded from bringing the domestic legislative framework into line with EU requirements (be that through the amendment effected by Regulation 5 of the European Communities (Asylum Procedures) Regulations

2011, S.I. 51/2011 substituting a further revised s.12(4) of the 1996 Act or the repeal of the existing system and the introduction of the 2015 Act).

91. Any prior unlawfulness which may have existed is not a matter in respect of which the Applicants can now make complaint. This is because if the designation of South Africa under the 2004 Order did not meet the requirements of EU law, the Applicants have not been affected by any such previous unlawful designation occurring under the 1996 Act (as amended) ever before they arrived in the State.

92. Crucially, I do not understand the Applicants to contend that the 2015 Act fails to provide for pre-conditions for designation mandated under the Procedures Directive (repealed by the Recast Procedures Directive but continuing to bind Ireland). It is not part of the Applicants' case that such pre-conditions as were mandated under the Procedures Directive are not met in the terms of the 2015 Act (specifically through the terms of ss. 33 and 72). Instead, their case rests on the contention that there is no power recognised under EU law to legislate belatedly for a safe country concept which is compliant with conditions fixed by EU law for reliance on such concept. They acknowledge that while the application of the safe country of origin concept is also permitted under the Recast Procedures Directive, it is contended that not having adhered to this Directive, Ireland cannot rely on its provisions in providing for the safe country of origin concept in domestic law.

93. The argument that "*the transposition date has long passed*" such that "*Ireland is no longer entitled to introduce new legislation*" permitting a safe country of origin designation under the 2015 Act is untenable in my view, recalling again that the Procedures Directive does not oblige Ireland to enact any national laws providing for designation but merely provides that Member States "*may retain or introduce*" legislation allowing for such designation in accordance with the Annex II. The Procedures Directive is clearly permissive rather than mandatory insofar as the power to legislate domestically for safe country of origin designation is concerned.

94. The Applicants offer no authority for the proposition that there can be any time-limit imposed on a Member State's exercise of a discretion conferred by a Directive, so long as that Directive remains in force in respect of that Member State. The transposition deadline of the 1st of December, 2007 fixed under Article 43 of the Procedures Directive applied only in respect of the laws, regulations and administrative provisions "*necessary to comply with this*

Directive". While there may indeed have been an issue of compliance with the Procedures Directive prior to the amendment of s.12(4) effected by Regulation 5 of the European Communities (Asylum Procedures) Regulations 2011, S.I. 51/2011, the question of Ireland's historical compliance is not an issue for me for the simple reason that it has had no effect on the Applicant's international protection application and long pre-dates their arrival in the State.

95. I note that in C-616/19 *M.S. v. Minister for Justice and Equality* [2020] EU: C: 2020: 1010 it was established that the failure to adhere to a subsequent Directive which makes particular provision in a manner not available under the previous Directive (since repealed for the parties adhering to the later Directive) to which the Member State was a party, was found to not preclude that Member State from adopting a domestic law which is compatible with EU law as it is applied to parties adhering to the later Directive. Indeed, adopting measures compatible with the later requirements of EU law, although not mandated because the State had not adhered to the later Directive, was considered the correct interpretation of the legal regime as it was consistent with the context and the objectives pursued by the CEAS.

96. Contrary to the case made on behalf of the Applicants, I am satisfied there was no impediment under EU law to the State introducing new legislation in 2015 in conjunction with the repeal of the pre-existing or retained legislation. The State remained free to elect to introduce legislation providing for safe country of origin designation, so long as any such legislation complied with the requirements of EU law by providing for the pre-conditions for designation mandated under the Procedures Directive. Those mandatory pre-conditions to designation remain binding on the State if the State relies on a safe country of origin designations in its system for examining international protection applications.

97. The argument on behalf of the Applicants to the contrary in these proceedings does not withstand scrutiny. Not only is it not supported by authority (and flies in the face of decisions in cases such as *Seredych v. Minister for Justice* [2020] IESC 62 and *EV v. IPAT & Ors.* [2020] IEHC 617) but if the logic of the Applicants' argument were correct, it would follow that a Member State found to be in breach of the requirements of EU law in infringement proceedings at the suit of the Commission or another Member State should not be permitted to regularize the position in their domestic legal order for the purpose of bringing it into compliance.

98. Indeed, the Applicants' position is irreconcilable with the provision for infringement proceedings in the Treaty on the Functioning of the European Union ("TFEU") (Articles 258, 259 and 260) which are predicated on a Member State who fails to adopt measures within the

time allowed being persuaded to bring the domestic legal order into line with EU law requirements. Illustrating the fallacy of the Applicants' argument in this regard, the decision of the CJEU in C-658/19 *Commission v. Spain* [2021] EU: C: 2021: 138 to impose fines as a dissuasive measure for the failure to adopt measures as required by EU law within the time prescribed in a reasoned opinion of the Commission should the failures persist as at the date of delivery of the Court's ruling, was referred to in argument on behalf of the Respondents. In that case Spain was made subject to a daily penalty payment for each additional day of continuing non-compliance post-delivery of the decision.

99. The power to provide for a safe country of origin designation does not depend on EU law for its existence but the obligation under EU law to only rely on the concept when prescribed conditions are met is an obligation which clearly endures beyond the expiry of the transposition deadline. That this must be the correct position in law is reinforced by the terms of Article 53 of the Recast Procedures Directive which makes clear that transposition obligations under the Procedures Directive remain unaffected by the repeal of the Procedures Directive for those Member States bound by the Recast Procedures Directive.

100. In terms of the principle of non-regression urged on behalf of the Applicants, as I understand it the case made is that the right to seek asylum safeguarded under Article 18 of the Charter of Fundamental Rights ("CFR") and protected under Article 2 TEU is weakened by the adoption under the 2015 Act of a safe country of origin concept. It is maintained on behalf of the Applicants that the safe country of origin designation renders their position less favourable than other applicants for international protection because they are deprived of an automatic right to an oral hearing on appeal (albeit in their case they were afforded an oral hearing at the discretion of the Tribunal).

101. The Respondents object to this argument, *inter alia*, on the basis that the issue is simply not pleaded in the Statement of Grounds and leave has not been granted leave to argue this issue. I am satisfied that it is, however, appropriate to consider this argument as it has been clearly pleaded that the designation is in breach of EU law for reasons associated with the time allowed for transposition. The principle of non-regression, sometimes referred to as "*the non-backsliding principle*," "*the standstill doctrine*", or the obligation not to "*backtrack*" from commitments, is a principle which is related to the timing of a measure which may be or may be perceived to be a retrograde step. It seems to me that an argument based on the principle of non-regression is open to the Applicants on the case as pleaded because the timing of provision for designation of a country as a safe country of origin has been made a central issue on the

pleadings in this case, albeit without express reference to the principle of non-regression. I consider it to be permissible for them to expand in legal submission on why they contend a provision to be in breach of EU law once the gist of the grounds for challenge are clear on the Statement of Grounds, as I am satisfied that they were in this case.

102. The principle of non-regression as expanded upon in legal argument is a relatively new concept in EU law area. The CJEU has recently discussed it in the rule of law context in C-896/19 *Repubblika v. Il-Prim Ministru* (Maltese Judges) and C-791/19 *Commission v Poland* (disciplinary regime applicable to judges). It seems fair to say, therefore, that thus far, the principle of non-regression in relation to the rule of law has been closely linked to that of judicial independence. The possible wider application of the principle has not been developed.

103. The decision of the CJEU in *Repubblika* concerning Maltese judges is relied upon on behalf of the Applicants in arguing that by reason of the principle of non-regression expounded upon in that decision any designation of a safe country of origin which operates to reintroduce the concept in Irish law post the transposition deadline for the Procedures Directive and/or its repeal is *ultra vires* as incompatible with EU law. It is therefore necessary to consider the decision in *Repubblika* in greater detail.

104. In its decision in *Repubblika* the CJEU scrutinised the system for judicial appointment in Malta. It found that constitutional provisions granting the Maltese Prime Minister the power to appoint judges had been in force ever since Malta became an independent state in 1964. The same constitution was the basis of Malta's accession to the EU under Article 49 Treaty on the European Union ("TEU") in 2004. The CJEU noted that the EU consists of states, which freely and voluntarily committed themselves to Article 2 TEU values. The Court also expanded on the notion of mutual trust which is based on shared common values, such as the rule of law. It was against this background that the Court established a prohibition on regression from the observance of the common and foundational Article 2 TEU values stating (paras. 63-64):

> *"A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU ….*

The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organization of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary".

105. The statement of principle enunciated in the decision in *Repubblika* falls to be understood in the context in which it was made. A fundamental constitutional principle of EU law is the rule of law, a value common to the Member States, enshrined in Article 2 TEU. It is long established that the EU and the EC before it is a community based on the rule of law. The rule of law constitutes part of the very foundations of the EU and its legal order. Mutual trust, which is integral to the operation of the EU legal order, is anchored on common values contained in Article 2 TEU upon which the EU is founded and which all Member States are bound by. It is therefore a condition of membership that the rule of law will be respected within the domestic legal order of each Member State. The rule of law is of the essence to the very existence of effective judicial review designed to ensure compliance with EU law. Respect for this fundamental value constitutes a condition for accession to the EU and remains essential thereafter (Articles 7 and 49 TEU). The principle of non-regression developed in *Repubblika* is therefore entirely consistent with a requirement on Member States to ensure observance of core values upon which the whole Union is constructed and depends.

106. At its core *Repubblika* was about judicial independence, the interpretation and the material scope of Articles 2 and 19(1) TEU and Article 47 of the CFR. While the decision in *Repubblika* is authority for the proposition that there is now a recognised prohibition in EU law against Member States falling below the minimum standard of compliance with Article 2 values upon which accession to Union membership is conditioned, it is far from clear what application this principle might have for issues arising in this case in respect of safe country of origin designation.

107. The judgment in *Repubblika* may well signify a new and important approach by the CJEU in reading Articles 2, 19 and 49 TEU together as obliging the Member States to ensure national non-regression in the protection of the founding values but it is nonetheless a principle which only finds application in respect of core values which are fundamental to the rule of law upon which mutual trust between Member States of the EU is built. It is therefore difficult to understand the contention that the principle of non-regression is offended by the adoption of a measure by the State which is expressly contemplated by EU law.

108. It seems to me that Article 18 cannot be read as preventing the designation of a safe country of origin when designation is expressly contemplated by Articles 30, 31 and Annex II of the Procedures Directive itself (and for that matter by the subsequent Recast Procedures Directive applicable to other Member States). It is important to recall that Article 18 articulates a right to have an application for international protection examined in line with applicable law. Article 18 was described in C-821/19 *Commission v Hungary Commission v Hungary* (at para. 132) as guaranteeing "*the fundamental right to apply for asylum in a Member State*", and in C-673/19 *M* (para. 40*)* as encompassing "*the principle of non-refoulement.*"

109. The argument advanced on behalf of the Applicants, if correct, would mean that a Member State is prohibited by Article 2 of TEU from enacting legislation which may have the effect in the Member State concerned of adversely affecting certain applicants' prospects of obtaining international protection on inadmissibility grounds, even where the basis for such regulation of protection claims is expressly permitted by positive EU law as the right to asylum is protected, inter alia, under Article 18 CFR.

110. Given that EU law expressly permits and continues to permit the operation of a safe country of origin designation in the organisation of the domestic international protection systems of each Member State, and where a system of safe country of origin designation is in fact operated in many Member States, I am satisfied that the emerging principle of non-regression does not assist the Applicants. There is no common, fundamental value of EU law which would preclude a Member State from continuing or reintroducing the safe country of origin concept, provided the mandatory requirements of EU law in relation to its operation are adhered to. The principle of non-regression which finds expression in cases such as *Repubblika* has not been advanced to a point where it might be relied upon in judicial review proceedings to ground a finding of incompatibility with EU law by reason of the reintroduction of a safe country of origin designation regime which is not, *per se*, itself incompatible with the EU legal order.

111. The argument advanced in reliance on the Dublin III regulations (Regulation EU 604/2013) is similarly misconceived in my view. The Applicants argue that "*Dublin III confirms that Ireland cannot employ the safe third country system*" but this case does not concern the safe third country system. While Article 3(3) of the Dublin III Regulations makes reliance on the safe third country concept (as opposed to the safe country of origin designation at issue in these proceedings) subject to compliance with the requirements pertaining to the designation

of safe third countries in the Recast Procedures Directive, no similar extension of the Recast Procedures Directive is provided for in respect of safe country of origin designations.

112. The retention in Article 3(3) of the Dublin III Regulations of a right for Member States to send an applicant to a safe third country subject to the safeguards of the Recast Procedures Directive cannot in my view affect the separate entitlement of Member States to designate safe countries of origin when Dublin III is silent in this regard. Article 30 of the Procedures Directive renders it lawful for Ireland to designate South Africa as a safe country of origin and nothing in Article 3(3) of the Dublin III Regulations operates to countermand the *vires* thus conferred. While Article 3(3) of the Dublin III Regulations has implications for the procedures which apply to the designation of safe third countries, it has no similar implication for the safe country of origin designation (see *A v. Minister for Justice and Equality* [2024] IEHC 183).

Rationality

113. The Applicants contend that the designation by the First Named Respondent of South Africa as a "*safe country of origin*" for the purposes of s.33 and s.72 of the 2015 Act is unlawful as irrational. Accordingly, in these proceedings I am also asked to review the validity of the 2018 Designation Order, an instrument of delegated legislation, on rationality grounds. This is not the first time this question or a related question has arisen. The lawfulness of the 2004 Designation Order was litigated in *S.U.N. v. Refugees Commissioner* (Unreported, High Court, Cooke J., 30th March 2012), however, considering other reliefs sought and the determination by Cooke J. of a preliminary issue, the question of the lawfulness of the designation of South Africa as a safe country of origin was not determined. Leave to argue that the 2018 Designation Order was unlawful as irrational was also granted in *E.V.*, but it seems that the issue was not determined in those proceedings either.

114. As a starting point for consideration of the question in these proceedings it is important to recall that in designating a country as a safe country of origin in accordance with EU law, there is no requirement to be satisfied that that safety is guaranteed. This is reflected in Recital 21 of the Procedures Directive which provides that designation of a third country as a safe country of origin for the purposes of the Directive cannot establish an absolute guarantee of safety for nationals of that country. It is further acknowledged by the terms of the Procedures Directive that by its very nature, the assessment underlying the designation can only consider 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.

115. It is because the safe country of origin designation has regard to the general circumstances in a country only that the Procedures Directive requires that where an applicant shows that there are serious reasons to consider the country not to be safe in his/her circumstances, the designation of the country as safe can no longer be considered relevant for him/her (Article 31(1) Procedures Directive). Section 33 of the 2015 Act transposes this requirement imposed by the Procedures Directive making it a requirement of Irish law that when a safe country of origin designation is in place that an individual assessment nonetheless take place in each case if there are serious reasons to consider the country not to be safe in an individual applicant's circumstances. Accordingly, the designation operates as a default starting position or rebuttable presumption only. As soon as serious reasons for concern in relation to an individual's safety are demonstrated, the designation is no longer relevant to the consideration of the protection application.

116. In making the 2018 Designation Order under s. 72 of the 2015 Act, it is contended on behalf of the Applicant that the First Named Respondent could not reasonably have been satisfied, on a proper assessment under s.72(3) and/or (4), that there was "*generally and consistently no persecution, no torture or inhuman or degrading treatment or punishment*" in South Africa for the purposes of s.72(2). It is argued that the First Named Respondent has failed to give proper regard to or afford appropriate weight in her assessment under ss.72(3) and (4) of the 2015 Act to COI which discloses risks of persecution and/or torture or inhuman and degrading treatment or punishment in South Africa.

117. A decision to designate (or maintain designation) is a balancing exercise in which available evidence is rationally assessed with reference to statutory criteria. In Ireland the Oireachtas has charged the First Named Respondent, not the Courts, with conducting that balancing exercise in deciding whether to designate. As a rule, generally where the Oireachtas has by statute delegated a power to introduce subordinate legislation, the power must be exercised within the limitations of that power as expressed or necessarily implied in the statutory delegation. Otherwise, the exercise of a power otherwise than as prescribed by the Oireachtas, will be held to have been invalidly exercised for being *ultra vires*. It is a necessary implication in such a statutory delegation that the power to issue subordinate legislation should be exercised reasonably.

118. To invalidate subordinate legislation, it is necessary to demonstrate arbitrariness, injustice or partiality such that a court concludes that the Oireachtas never intended to give authority to make such rules; they are unreasonable and *ultra vires* (see test laid down by the Supreme Court in *Cassidy v. Minister for Industry and Commerce* [1978] I.R. 297, 310 – 311). The position in law may be summarised (see *Donnellan v. Minister for Justice & Equality & Ors.* [2008] IEHC 467, McKechnie J. at paras. 19-24 for distillation of the principles) as follows:

> (a) Delegated legislation must be made within and for the purposes authorised by the parent Act.
>
> (b) This means (i) that the legislation must strictly comply with the express and implied limitations of the conferring provision; and (ii) that the exerciser of the power must act reasonably.
>
> (c) This requirement can be tested by asking whether the instrument made suffers from arbitrariness, injustice, unfairness or whether it is manifestly illogical.

Where the subordinate legislation fails any of these tests, then it is unlawful, as the Oireachtas could never have intended such results. The test is therefore one of manifest arbitrariness or demonstrable illogicality or gross unfairness or injustice.

119. I have approached the issue in these proceedings on the basis that in making a designation order under s.72(1), the First Respondent was required to be satisfied as to matters in s.72(2) having regard to factors set out in s.72(3) and information in accordance with s.72(4) of the Act of 2015. It is noted, however, that the Ministerial Order designating South Africa as a safe country of origin states that the First Named Respondent was satisfied with respect to the matters specified in s.72(2) of the Act of 2015 in relation to South Africa only. It does not expressly recite that regard was had to the factors set out s.72(3) based on information from the sources identified at s.72(4) of the 2015 Act. Although one might read the terms "*in accordance with s. 72*" as embracing compliance with s. 72(3) & (4), it seems to me that it is not manifestly clear from the face of the 2018 Designation Order alone that there was compliance with s.72(3) and (4) in conducting an assessment for the purpose of exercising the s.72(1) designation power in April, 2018.

120. Given that Order on its face does not expressly confirm that regard was had to s. 72(3) based on information identified at s. 72(4) and proceeding on the basis that the power to designate must strictly comply with the express and implied limitations of the conferring provision, I have carefully considered the evidence adduced on behalf of the Respondents to establish whether designation in accordance with s. 72(3) and (4) of the 2015 Act is satisfactorily established. Notably, the First Named Respondent's considerations at the time of the making of the 2018 Designation Order are not exhibited to establish due consideration in accordance with s.72(3) and (4).

121. In the absence of evidence as to the material relied upon in making the designation in the first instance to demonstrate consideration of s.72(2) in accordance with the factors in s.72(3) on the basis of available information in accordance with s.72(4) and the reasonableness of that decision, the fact that the designation was formally reviewed during the course of 2021 in accordance with s.72(5) of the 2015 Act culminating in a decision in December, 2021 to retain the designation is of some added importance, particularly given the failure to recite compliance with s.72(3) and (4) on the face of the 2018 Designation Order.

122. As the maintenance of the designation of South Africa at material times rests on this review, it seems to me that a demonstrably proper application of s. 72(3) and (4) of the 2015 Act at review stage is a full answer to any concern created by the failure to be more specific on the face of the 2018 Designation Order. This is because the statutory review under s. 72(5) entails a fresh assessment of the country of origin in accordance with s.72(2), (3) & (4) of the 2015 Act.

123. Crucially, given the importance attaching to proper consideration at review stage in the absence of satisfactory evidence in relation to the making of the 2018 Designation Order, the submissions prepared for the First Named Respondent in the context of this review are available in evidence. The submission which dates to December 2021 contains a detailed analysis of material considered. It not only evidences the material put before the First Named Respondent for the purpose of the decision to retain designation to demonstrate compliance with s. 72(3) and (4) but also permits consideration of the rationality, logicality or fairness of the designation, as separate features of a rationality challenge.

124. It is clear from the material which was before the First Named Respondent for the purpose of the formal review of the s.72(1) designation under s. 72(5), as exhibited in these proceedings, that consideration was expressly given to the requirements of s.72(2) of the 2015

Act in the light of the factors identified in s.72(3) and on the basis of information garnered in accordance with s.72(4) of the 2015 Act when deciding to maintain the designation of South Africa as a safe country of origin. It is averred on behalf of the First Named Respondent that following consideration of the up-to-date country information, the First Named Respondent approved the retention of the Republic of South Africa as a designated safe country in December 2021. I am therefore satisfied that the designation made under s. 72(1) was made with due regard to the statutory limitations imposed by the Oireachtas in the exercise of the power and within the four corners of the parameters of the delegated power.

125. In terms of the rationality, logicality or fairness of the ongoing designation of South Africa, it further emerges from the information which was before the First Named Respondent that South Africa is not widely designated as a safe country of origin by those EU countries who operate a designation process. The only members of the EU designating South Africa as such being Slovakia, Norway and Ireland, albeit that some 13 Member States (excluding the UK) had national designated lists of safe countries of origin (as of 2021 at the time of review of designation).

126. While the fact that South Africa has not been widely designated as a safe country of origin within the EU may have caused the First Named Respondent to reflect when deciding whether to retain the designation of South Africa and is a factor in assessing the rationality of that decision, it is clearly not determinative of the lawfulness of Ireland's designation. A fact highlighted in the submission to the First Named Respondent for the purposes of review is that until recently South African nationals were not generally visa required for Ireland, in contrast with most other Members States of the EU. As alluded to in the review submission, other member states of the EU may not consider it expedient to designate South Africa in view of relatively small number of applications received from nationals of that country and the organisation of their immigration systems.

127. It was noted in the submission to the First Named Respondent for the purposes of the review that the State receives a disproportionately greater number of protection applicants from South Africa than other Member States of the EU. The evidence before the First Named Respondent was that while Ireland received on average 26 applications per month in 2019, the UK received an average of only 5 applications a month in the same period. It seems to me, therefore, that it cannot be concluded that because many other countries have not designated South Africa a safe country of origin, this means that it cannot lawfully be treated as one by Ireland.

128. The Applicants do not identify relevant material which they say ought to have been considered in the weighing exercise which was not considered. Accordingly, I am invited to interfere with the First Named Respondent's decision to approve the retention of designation based on my assessment of the same material considered by the First Named Respondent.

129. Having carefully considered the material which was before the First Named Respondent and mindful of my role in a challenge by way of judicial review to the exercise of a delegated regulatory power, it seems to me that the analysis of COI prepared for the First Named Respondent is detailed, balanced and quite properly records and considers COI showing problems in South Africa (for example, the high rate of gender-based violence). The analysis also takes account of positive evidence, demonstrating the steps taken by South Africa to address these problems.

130. I am satisfied that the material before the First Named Respondent for the purpose of the decision to retain designation on the s. 72(5) review demonstrates due regard to the prescribed statutory considerations. The material before the First Named Respondent was considered in a rational manner. The Applicants have failed to persuade me that the decision reached by the First Named Respondent to maintain designation was one which was not properly open on a proper application of the statutory criteria and flowing from the available evidence. In my view the decision was not manifestly arbitrary or demonstrably illogical. I have not been persuaded that it results in gross unfairness or injustice. In the circumstances it is not open to me to find that the designation of South Africa as a safe country of origin is other than in accordance with law.

Failure to Review

131. The Applicants challenge the lawfulness of the continuing designation of South Africa on the basis that there has not been a sufficiently "*regular*" review of the designation. Although the Applicants were not aware at the time of institution of proceedings (having made no pre-litigation enquiry in this regard), it has been established in evidence that a formal review took place in December, 2021, after an interval of some 3 ½ years from the first designation of South Africa under the 2015 Act by the terms of the 2018 Designation Order in April 2018. The Applicants can point to no provision in the 2015 Act or the Procedures Directive, addressed to the frequency with which a review should occur in discharge of the duty to regularly review under s. 72(5) of the 2015 Act. The requirement for "*regular*" review is a feature of our

transposing legislation, rather than any express EU law obligation currently binding on the State.

132. Unlike the position regarding the designation of a safe third country under Article 27 of the Procedures Directive (noting that the word "*designation*" does not appear at all in Article 27 with regard to the application of the safe third country concept) where the State is required to be satisfied as to treatment of an applicant at the time of reliance on (or application of) the safe third country concept, there is no equivalent provision in respect of safe country of origin designation. National designation is expressly contemplated under Article 30(1) of the Procedures Directive in the case of safe countries of origin. The criteria specified under Article 30(4), (5) & (6) and Annex II apply at the time of assessment for the purpose of designation.

133. Accordingly, in contrast with Article 27 requirements pertaining to the application of the safe third country concept, there is no ongoing requirement under the Procedures Directive to be satisfied before applying the safe country of origin concept in any one case that the designation itself remains properly made or open on the up-to-date information concerning the designated country. The difference between the provisions relating to the third safe country and the safe country of origin concepts may, at least in part, be explained by the fact that as a matter of EU law (as transposed by s.33 of the 2015 Act) a Member State cannot rely on the designation of safe country of origin in respect of a protection application if an applicant has 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 qualification as a refugee in accordance with Directive 2004/83 EC (Article 31(1) of the Procedures Directive).

134. A requirement for individual consideration under s.33 of the 2015 Act (transposing Article 31(1) of the Procedures Directive), does not mean that once a country has been designated that it would be lawful for that designation to be maintained where it no longer complies with the condition for designation as mandated under EU law and transposed into domestic law. It remains the case, however, that there is nothing in the terms of the Procedures Directive which mandates a periodic review at regular intervals as a mandatory condition of availing of a safe country of origin designation under the Procedures Directive. Nor has any other provision of EU law currently binding on the State been identified on behalf of the Applicants as requiring periodic review. As noted above, regular review is, however, mandated under Article 37(2) of the Recast Procedures Directive.

135. The similarity in the language of Article 37(2) of the Recast Procedures Directive and s.72(5) of the 2015 Act as regards the requirement for regular review is striking. Even though Ireland has not adhered itself to the Recast Procedures Directive, provision has been made for regular review in a manner which mirrors the requirement in the Recast Procedures Directive. While s. 72(5) of the 2015 Act (as amended) clearly draws inspiration from Article 37(2) of the Recast Procedures Directive, a requirement for regular review is nonetheless not binding on the State as a matter of EU law pursuant to the provisions of the Recast Procedures Directive which has no application to the State. Accordingly, although obviously inspired by the language of Article 37(2) of the Recast Procedures Directive and perhaps with the intention of providing equivalent protection to that mandated by the Recast Procedures Directive, the express requirement for a regular review in respect of designation as a safe country of origin relied upon by the Applicants derives from s.72(5) of the 2015 Act rather than any provision of EU law.

136. No particular time-frame for review is mandated in s.72(5) of the 2015 Act and I have not been directed to any authority which might assist in determining how frequently a formal review should occur in order to comply with the requirements of s.72(5) of the 2015 Act, or Article 37(2) of the Recast Procedures Directive for that matter.

137. A similar requirement for regular review also arises under s. 72A(5) of the 2015 Act (as amended) insofar as third safe country designation is concerned. It seems to me that the requirement for regular review of the application of the safe third country concept provided for in s.72A of the 2015 Act (as amended), considered in *A v Minister for Justice and Equality* [2024] IEHC 183 differs, however, from the review obligation under s.72 of the 2015 Act because the provisions of the Procedures Directive sought to be transposed are different. Indeed, while the Recast Procedures Directive at Article 37(2) provides for a regular review of designation as a safe country of origin, no similar provision is introduced in these terms with regard to the application of the safe third country concept as provided for under Article 38, even though the recitals to the Recast Procedures Directive refer to reviews of all safe country concepts (Recitals 47 and 48).

138. It seems to me that although the Recast Procedures Directive is not binding on Ireland, it is nonetheless the inspiration behind provision for review in s. 72(5). It is therefore useful to consider the intention behind the provision for regular reviews under the terms of the Recast

Procedures Directive. This intention is expanded upon in Recitals 47 and 48. The reasons for review, as discernible from Recital 47, are threefold, namely:

(i) To facilitate exchange of information about the national application of the concepts of safe country of origin, safe third country and European safe third country,

(ii) To facilitate review by the Commission of the use of those concepts by Member States, and

(iii) To prepare for a potential further harmonisation in the future.

139. Recital 48 refers to a requirement to conduct regular reviews to "*ensure the correct application of the safe country concepts based on up-to-date information.*" Recital 48 further provides that where a Member State becomes aware of:

> *"a significant change in the human rights situation in a country designated by them as safe, they should ensure that a review of that situation is conducted as soon as possible and, where necessary, review the designation of that country as safe."*

140. As the requirement for regular review is not a precise or certain requirement measurable by reference to a specific period or length of time, it must be interpreted in its context and must be exercised in a rational manner and in a way which complies with the prescribed review duty in line with the legislative intention. While this is clearly stated with regard to the review requirement contained in the Recast Procedures Directive which is not binding on the State, the intention behind the domestic review power, modelled as it is so directly on the provisions of the Recast Procedures Directive, is self-evidently to recognise the fact that the general civil, legal and political circumstances in a country are liable to change in a manner which warrants a change in designation. 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 may differ, for example as between regime changes and conditions in country of origin may not remain static.

141. I am satisfied that the fact that a review is mandated under s.72(5) of the 2015 Act places an onus on the State to have systems in place whereby conditions in designated countries of origin are reviewed on a periodic basis. The purpose of the requirement is to ensure that circumstances have not changed such that it is no longer appropriate, in view of the conditions

precedent to designation, to maintain that designation. When a significant change related to the human rights situation occurs in a country which has been designated as safe, the First Named Respondent is required to review the situation as soon as possible and, where necessary, assess the designation of that country as safe. Reported changes in circumstances in a country of origin may give rise to an imperative for urgent review even in circumstances where only a short time had passed since a previous review. The review power serves to ensure that where circumstances change, a designation is not maintained unless the State is satisfied, following a fresh assessment of conditions in the country of origin in view of the prescribed conditions for designation, that it remains appropriate and lawful to do so.

142. There is no direct evidence before me as to the State's approach to systematic, periodic review save that it is noted that one occurred within four years of the first designation under the 2015 Act. The review conducted in December 2021 noted that South Africa was due to undergo its next Universal Periodic Review ("UPR") in 2022 and stated that the position should be monitored with reference to this review.

143. The implication of the reference to the next UPR in the analysis conducted as part of the last review in December 2021 was that a requirement for further review might be triggered by the findings recorded in the 2022 UPR and that the position would be monitored. As stated in the Analysis prepared for the First Named Respondent's consideration on review:

> *"[I]t is recommended that South Africa would remain as one of the countries designated as safe countries of origin for the purposes of the International Protection Act, 2015, but that this position be further reviewed at a later date after the UPR has been competed, and that the situation be monitored ongoing as appropriate."*

144. It bears note that the within proceedings commenced slightly over two years after the previous review of designation under s.72 of the 2015 Act, in circumstances where UPR occurred in the previous year. It seems to me that where the requirement for regular review is not of a precise or certain nature, a failure to review since December 2021 would only be amenable to court direction where a significant change related to the human rights situation had occurred in South Africa without the designation being reviewed. Whereas I am satisfied that significant change related to the human rights situation in South Africa would trigger a need for a further review under s. 72(5) of the 2015 Act, no change of circumstance in South Africa since December 2021 has been identified on behalf of the Applicants as giving rise to a

requirement for review under s.72(5) of the 2015 Act in this case. No reliance has been placed on the UPR which was conducted in 2022 and concluded before the commencement of these proceedings or on any subsequent reports which are such as to signal a change in circumstance warranting a review.

145. The burden rests with the Applicants as moving parties in these proceedings to demonstrate a requirement for a review necessitated by some development after December 2021 which they contend triggers a need for review with reference to the requirements of s.72(2) and (3) of the 2015 Act, in circumstances where the legislation itself does not mandate a particular time-frame for review. It is telling therefore that the Applicants have not referred to the UPR or submissions made to the Human Rights Council of the United Nations as part of the UPR process or any other report as identifying a factual basis which might give rise to an imperative for review of the Irish designation since December 2021.

146. Furthermore, it is my view, that where the case is made that designation of a country of origin should be reviewed in the light of a change of circumstances in that country which means that the preconditions for designation are no longer met, it would be proper for an application to be made to the First Named Respondent in this regard before recourse is had to proceedings challenging the maintenance of designation on the basis of an asserted failure to review. No complaint was addressed to the First Named Respondent in respect of the safe country of origin designation in advance of the challenge brought in these proceedings. It is expected that such a complaint might refer to developments in the country of origin relied upon to contend that the conditions for designation were no longer met. Had such a complaint been made in advance, the Applicant would likely have been appraised of the fact that a full review was conducted in 2021 and the fact that the position was being monitored. Any specific factual matters advanced on behalf of the Applicants as material to a review of designation could have been addressed by the First Named Respondent. A failure to do so in a rational, coherent manner could in turn ground proceedings by way of judicial review.

147. In all the circumstances the Applicants have failed to establish a breach of a duty to regularly review on the evidence before me. Nothing on the evidence or on the law justifies relief in judicial review proceedings instituted slightly over two years after a previous review absent a significant change in circumstances of a nature which triggers the need for review and an improper failure and/or refusal by the First Named Respondent to conduct such a review.

Sustainability of Decision of the Tribunal

148. The Applicants contend variously that the Impugned Tribunal Decision was unlawful or unfair as contrary to ss.7, 28(6), s.31 and s.33 and that the decision was irrational. I propose for completeness to treat of the case made on behalf of the Applicants sequentially using the numbering employed in the Statement of Grounds and a summary of the ground as pleaded. As there is overlap between these grounds which are themselves prolix, despite some endeavour on my part, repetition is unavoidable.

(i) *The Tribunal accepted the core facts of the Applicants' claim that South Africa has a "very high crime rate" and that the Applicants and their family members had been victims of crime (including violent crime) on a number of occasions and they would have difficulty finding work due to the high rate of unemployment but erred in concluding that that while the incidents of crime were "traumatic experiences" they did not "reach the level of severity required to characterise the past mistreatment they experienced, as past persecution".*

149. Although the Applicants clearly take issue with the outcome of the Impugned Decision on its merits insofar its conclusions as to the occurrence of persecution, it is long established from cases such as *E.D. (a minor) v. Refugee Appeals Tribunal* [2017] 1 I.R. 325 that it is not for the courts to make their own assessment of whether the cumulative effect of violations meets the threshold of persecution. Some latitude is afforded to decision makers in this regard as the case-law recognises that persecution can be an uncertain concept. In *G.V.* v. RAT & Ors. [2011] IEHC 262 (Ryan J.) (at paras.15-16) the case made was not "*so strong as to leave open only one possible conclusion, namely, that the discrimination at issue was such as to constitute persecution.*" In *EG (Albania)* v. *IPAT & Ors.* [2019] IEHC 474 (Humphreys J.) it was reiterated that the threshold of severity is, in principle, a matter for the decision-maker, not the Court. In that case the Tribunal considered that "*one incident of violence*" (combined with incidents of harassment and bullying) did "*not rise to the level of persecution.*" The Court upheld this as reasonable, noting the UNHCR's confirmation that "*[t]here is no universally accepted definition of 'persecution.*'" Ultimately, the question for the court was whether the decision made was open to the decision-maker.

150. Applying established principles and a test of whether the decision actually made was reasonably open to the decision-maker, I am satisfied that no error on the part of the Tribunal

is demonstrated having regard to terms of the Impugned Decision and the terms of s.7 of the 2015 Act which defines acts of persecution. In my view it was open to the Tribunal to conclude that the random criminal acts to which the Applicants had been subjected due to high crime rates in South Africa, as described in their claim, did not constitute persecution as defined in s. 7.

151. Furthermore, it is recalled that for the purposes of a refugee claim, persecution within the meaning of s.7 of the 2015 Act requires not only serious violations of basic human rights but also requires a Convention nexus. No Convention nexus was demonstrated on behalf of the First Named Applicant as it was found that he was not a farmer (or member of a social group) but merely happened to have lived on a farm for a period and had been the victim of random acts of violence due to high crime levels.

152. As for the Second Named Applicant, the decision acknowledged that gender related violence if demonstrated might establish a Convention nexus but recalled that the Second Named Applicant made no complaint that she had been subjected in the past to gender related crime. The conclusion that treatment did not reach the level of severity required to characterise the past mistreatment experienced as past persecution, viewed in this context, is not in error.

(ii) The Tribunal erred in failing properly to assess and/or minimizing the enhanced risk to the Applicants due to their race or ethnicity, perceived wealth and/or a membership of a particular social group of white farmers.

153. The Applicants argue that the Tribunal Member [at paragraph 5.15] made an irrational finding, contrary to the evidence, that "*even for farmers who might be at a somewhat elevated risk of experiencing crime in south Africa, there is insufficient evidence to support a finding that this is at a level that gives risk to a well-founded fear of persecution.*" It is further argued that the Tribunal also engaged in irrationality in finding they were not farmers but had last resided on their parents' farm when they were unable to continue employment in Cape Town.

154. The Applicants further maintain that the Tribunal failed properly to assess the risk of persecution based on past persecution under s.28(6), and having regard to the Applicants' work history, by finding that there was only an "*extremely remote possibility that they may work on a farm*."

155. The Applicants argue that the Tribunal engaged in irrationality in finding (at paragraph 5.16) that was there a "*reasonable chance that if the Appellants were to be returned to their country of origin they would experience incidents of crime, such as theft or robbery*" but that such crimes would be "*opportunistic and do not constitute persecution or serious harm*". The Applicants maintain that they and their family members were victims of violent crime which at the very least rises to a risk of serious harm.

156. In my view none of these complaints withstand scrutiny. The Applicants did not claim to be farmers. Their claim was that they lived for a time on the First Named Applicant's parents' farm. In any event, COI demonstrates that the farming community in South Africa has worked alongside organisations, such as Agri Securitas Trust Fund and the police, to devise safety plans to protect farmers.

157. As for the application of s. 28(6) of the 2015 Act, it must be recalled that s.28(6) only applies for the Applicants' benefit where they have established that they have already been subjected to persecution or serious harm (as defined in the 2015 Act) or direct threats of same. There was no finding to this effect by the Tribunal such as might warrant the application of s.28(6) for the Applicants' benefit at all. The claim for subsidiary protection – where a real "*risk of serious harm*" would be required – was dealt with in section 7 of the Tribunal decision. Serious harm is defined in Article 15 of the Qualification Directive (and the concept is provided for under s. 2 of the 2015 Act) as meaning:

> (a) death penalty or execution;
>
> (b) torture or inhuman or degrading treatment or punishment of a person in his or her country of origin, or
>
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of international or internal armed conflict.

158. In its decision the Tribunal found correctly that the kind of "*serious harm*" envisaged under Article 15(b) of the Qualification Directive "*is generally an individualised risk of harm.*" This is reflected in Recital 26 of the Qualification Directive which provides that "*[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.*" Furthermore, the decision in C-465/07 *Elgafaji* [2009] ECR I-921 (at para. 38) emphasises that

the harm identified in Articles 15(a) and (b) of the Qualification Directive "*requires a clear degree of individualisation.*"

159. It is recalled in this context that even presuming that Article 15(b) of the Qualification Directive may be invoked in some cases of entirely indiscriminate exposure to harm otherwise than by reference to one's individual circumstances, the threshold risk of harm under Article 3 the European Convention on Human Rights, which the CJEU has stated corresponds to Article 15(b) of the Qualification Directive, is very high. In *N.A. v United Kingdom* (Appl. No. 25904/07) the ECtHR stated that (at para. 114) "*a general situation of violence will not normally in itself entail a violation of Article 3 in the event of an expulsion*" and that (at para. 115) "*the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.*"

160. The finding that a risk of serious harm was not established was made by the Tribunal on a proper application of the law to the facts as found by the Tribunal following due consideration of the Applicants' claims, rationally assessed. No error in the application of s. 2 of the 2015 Act (or Article 15 of the Qualification Directive) to the facts has been demonstrated. The conclusion arrived at as challenged in these proceedings is a reasoned and rational one which it was open to the Tribunal to make.

161. Where, as here, the Tribunal found the risk of serious harm feared by the Applicants was a risk to which the South African population was "*generally exposed*", then s.28(6) of the 2015 Act simply does not apply. There had not been any "*serious harm*" within the meaning of Article 15(b) of the Qualification Directive previously meted out to the Applicants. The Tribunal thus cannot have "*erred in failing to conduct a proper assessment under s.28(6)*" and no error of law is demonstrated.

(iii) The Applicants maintain that the Tribunal erred [7.4] in its findings that the Applicants do not face "a real risk of torture or inhuman or degrading treatment or punishment" in South Africa "on account of being White South Africans" or that any discrimination or difficulties they may face "by reason of anti-white rhetoric, hate speech, or affirmative action in South Africa" is not reasonably likely to give rise to a real risk that they will suffer serious harm as the Applicants are not

required to establish any Convention nexus to demonstrate that they are at risk of serious harm.

162. It is correct as a matter of law that the Applicants are not required to establish a Convention nexus to demonstrate that they are at risk of serious harm. I do not consider, however, that the claim for protection from serious harm was rejected because of an incorrect imposition of a requirement to demonstrate a Convention nexus in a claim for subsidiary protection.

163. From the terms of the Tribunal's decision, I am satisfied that the Tribunal clearly considered that treatment constituting serious harm as defined in s.2 of the 2015 Act (transposing Article 15 of the Qualification Directive) had not been demonstrated on the claim as advanced. On an objective reading of the Impugned Decision, the Tribunal in the words used merely rejected the Applicants' claim that their white ethnicity established an "*enhanced risk of serious harm.*" This should not be construed as the Tribunal thereby erroneously signalling that a Convention nexus was required to establish serious harm for the purpose of a subsidiary protection claim. I do not read the decision as imposing an incorrect requirement to establish a Convention nexus in this regard.

(iv) The Tribunal accepted (at paragraph 7.5) that the Applicants were victims of crime in the past (which included incidents of violent criminal attacks). The Applicants maintain that the Tribunal erred in failing to conduct a proper assessment under s.28(6) of the Act as to whether these incidents establish a "serious indication" of a real risk of suffering serious harm in the future.

164. In advancing these grounds it is contended on behalf of the Applicants that the Tribunal acted irrationally in finding that s.28(6) of the 2015 Act was inapplicable on the basis that "*the kind of serious harm envisaged under Article 15(b) Qualification Directive is generally an individualised risk of harm*". It is argued that the Applicants had established that they were at an individualised risk considering their past experience. I have already rejected these arguments in addressing ground (ii) above and will not repeat myself under this separate heading.

165. It is contended that the Tribunal further engaged in irrationality and inconsistency, contrary to the evidence, in stating that the COI "*does not establish such a high generalised, randomised risk of violence as would necessitate the grant of international protection*". I am satisfied, however, that the conclusion arrived at by the Tribunal was one which was open to it

on the material before it. The Applicants have not satisfied me that there is any error of law or irrationality undermining these findings.

(v) The Tribunal engaged in unfairness and inconsistency [7.7] in finding that it was "not bound by any previous Tribunal decision" and that "no decision was submitted which sufficiently mirrored the factual elements of the Appellants ' claim" while at the same time stating that the Tribunal had considered "the analysis and findings in the submitted decisions, particularly in respect of material facts which were similar to the Appellants ' circumstances.

166. This argument was not pursued with vigour during the hearing before me and does not withstand scrutiny. It is established that the Tribunal is not bound by previous decisions (see *I.T.N. v. RAT* [2009] IEHC 434 (Clark J.) and *G.V. v. RAT & Anor.* [2011] IEHC 262 (Ryan J.). It is not irrational for the Tribunal to consider the "*material facts*" of other decisions "*which were similar to the Appellants' circumstances*", while simultaneously concluding that those other decisions did not sufficiently mirror the factual elements of the Appellants' claim such that they must be followed.

167. Decision 2158763-IPAP-22 referred to on behalf of the Applicants found that the applicant in that case could suffer significant physiological harm as a result of the real risk of harm from indiscriminate crime and in respect of which State Protection was not "*sufficiently effective*" for the applicant in that case (who was in very poor health, had suffered from depressive episodes, and had been hospitalized following a nervous breakdown), and where the SAPS were having difficulty combatting levels of crime in Durban.

168. The facts of this previous case are by no means on all fours with the Applicants' particular circumstances. There are significant distinguishing features. Accordingly, there was no error established on the part of the Applicants regarding the treatment of previous decisions of the Tribunal. It was quite correct for the Tribunal to conclude, as it did, that each case turned on its own facts and circumstances. A system of precedent does not operate to bind the Tribunal.

169. Nor can I accept the contention that the Tribunal has not provided sufficient reasons for departing from its findings of lack of State Protection in other cases. There is no obligation on the Tribunal Member to engage in a detailed assessment of each decision or to explain why his

conclusions differed from those reached in each of the previous decisions furnished (*I.T.N. v. RAT* [2009] IEHC 434 (Clark J.) at para. 37).

170. While the Supreme Court said in *P.P.A. v. Refugee Appeals Tribunal* [2007] 4 I.R. 94 that "*consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary*." I have not been referred to any previous decision on the part of the Tribunal in which the facts were so similar to the facts in this case as to demonstrate arbitrariness or inconsistency of a nature which would render the decision unsustainable as unreasonable. The extent to which a Tribunal member should engage with a previous decision depends on the relevance of that decision. The circumstances of the earlier case specifically referred to on behalf of the Applicants are clearly different. The decision was not so relevant or made on facts so similar as to it make it necessary for the Tribunal to explicitly explain with references to distinguishing features why it was reaching a different decision.

(vi) Finally, it is contended that the Impugned Tribunal Decision is vitiated by the Tribunal's errors and/or irrationality in the assessment of the effectiveness of State Protection under s.31(2) of the Act and in the failure to properly evaluate the Applicants' past experience and in the COI assessment under s.28(4)(a) of the 2015 Act.

171. Under this head of challenge, it is contended that the Tribunal erred, contrary to s.31 of the 2015 Act and the test set out in *B.C. v. IPAT* [2019] IEHC 763, in concluding in essence that State Protection was "*effective*". The Applicants maintain that it was unreasonable for the Tribunal to conclude that the Republic of South Africa could offer effective protection to the Applicants, having regard to objective COI and to the Applicants' personal experience. Having accepted (at paragraph 5.30) that crime rates were "*extremely high*" in South Africa, that the SAPS are mistrusted, and police oversight is "*an issue*", it is contended on behalf of the Applicants that the Tribunal engaged in irrationality in finding that "*it cannot be said that there is clear evidence of a lack of effective State Protection in South Africa in relation to crime in general*." It is further contended that the Tribunal engaged in irrationality (at paragraph 5.31) in finding that COI suggests that "*rape against women in South Africa occurs at a very high rate and that the level of prosecution is low*" but that "*steps were being taken*" to train the SAPS in gender violence when the steps taken to train the police is inadequate to meet the criteria for State Protection under s.31 of the 2015 Act.

172. It is claimed that the Decision is undermined by the error (at paragraphs 5.31-5.36) in the individualised assessment of State Protection which minimized the risk of future harm to the Applicants, in light of their past experience, and engaged in alleged irrationality in the treatment of COI. Reliance is placed on behalf of the Applicants in this regard on the fact that the Tribunal found (at paragraph 5.31) "*inadequacies in how crime generally is dealt with by the authorities in South Africa*" and accepted (at paragraph 5.32) that "*shortcomings are more acute in terms of gender based violence such as rape*" but then stated that the Second Named Applicant did not claim to have experienced gender-based violence in the past before finding that she "*does not fear any specific actors of harm in this respect*." This is a finding which the Applicants claim is irrational.

173. In a similar vein it is contended that the Tribunal erred in fact (at paragraph 5.32) and was inconsistent in stating that the Applicants' evidence of police failure was "*general in nature, and not indicative of anything specific to their own situation*". The Applicants contend that the Tribunal further engaged in irrationality in the purported individualised assessment by finding (at paragraph 5.33) that "*isolated incidents where state protection was deficient*" was "*insufficient to establish its inadequacy*."

174. The Applicants maintain that the Tribunal erred (at paragraph 5.33) in reversing the burden of proof by noting that the First Named Applicant claimed that he and his family had no meaningful police assistance when they reported crimes in the past, but that there was no evidence they had accessed the complaints structures against police inaction. The Applicants further maintain that the Tribunal engaged in irrationality (at paragraph 5.34) regarding police protection in respect of farm attacks. In this regard I am referred to the fact that the Tribunal noted that some reported attacks were "*brutal in nature*" but that "*the farming community has worked alongside organisations, such as the Agri Securitas Trust Fund and the police, to devise safety plans to protect farmers*."

175. In addition, it is contended that the Tribunal erred in fact (at paragraph 5.35), contrary to the COI submitted, in finding that the SAPS "*generally provides protection to South African citizens from criminal behaviour by non-State actors*." The Applicants maintain that the finding that the availability of complaints to the Independent Police Investigative Directorate ("IPID") was adequate to meet the criteria for effective State Protection is irrational where the Tribunal also noted that the IPID was "*not always successful*." The Applicants argue that the Tribunal erred, in light of the accepted material facts and the evidence, in finding in effect (paragraphs

5.36-5.39) that the Applicants had failed to demonstrate by clear and convincing proof that the South African authorities were incapable of protecting them, and that South Africa "*does not lack a reasonably functioning police and criminal justice protection such that the Appellants require international protection.*"

176. Firstly, given that fundamentally these proceedings involve a challenge to the application of a safe country of origin designation to the Applicants, it seems to me from any objective reading of the decision, that the Tribunal decided not to rely on the safe country of origin designation by proceeding to assess the availability of State Protection. There is an implicit finding either that serious reasons for contending that the safe country of origin designation should not be applied in the circumstances of their case in accordance with s.33 of the 2015 Act or, if not, that the Tribunal decided to adopt a precautionary approach by proceeding on this basis. This is the only conclusion consistent with the fact that the Tribunal clearly proceeded to apply s.31 of the 2015 Act in considering whether State Protection was available without further referring to designation of South Africa as a safe country of origin but instead considered at length the COI with regard to the terms of the Applicants' protection claims. Had the Tribunal relied on safe country of origin designation on the basis that the Applicants had 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*" (*per* s.33 of the 2015 Act), this exercise would have been unnecessary.

177. It is further noted that in carrying out the s.31 assessment in this case the Tribunal did not further rely on the safe country of origin designation at all stating at the outset (paragraph 5.18) as set out above that "*…each case must be determined on its own set of facts. In written legal submissions it is argued that there are serious reasons to consider South Africa not to be safe in the Appellants particular circumstances, which renders the designation of South Africa as a safe country to be no longer relevant to them*," thereby avoiding the error found in *N.U. v. IPAT* [2022] IEHC 87 where it was not clear that the reasoning in respect of State Protection was not affected by reliance on the safe country of origin designation.

178. In considering the argument that the Tribunal erred with regard to the assessment of State Protection under s.31 of the 2015 Act it cannot be denied that in the Impugned Decision the Tribunal weighs a significant amount of COI (including the IBRC report (2018); the UK Home Office report (2020) (citing the US Department of State Overseas Security Advisory

Council *South Africa 2020 Crime & Safety Report* (2020) and the US Department of State report (2018)) in assessing State Protection.

179. The Tribunal did not, as contended, minimize the risk of future harm in simply acknowledging that the Applicants' evidence did not establish any intention to work on a farm in future. Nor did the Tribunal reverse the burden of proof by requiring the Applicants to explain why they had not made complaint against police inaction. The decision in *A.N. v. R.A.T.* [2016] IEHC 276 (Faherty J.) (at para. 52), confirms that failure to make such complaint may legitimately be considered in assessing State Protection. As set out in the decision in *A.N.*, the key consideration when assessing whether State Protection is available is whether the applicants through their testimony and considering all the documentary evidence established that they have a prospective well-founded fear of persecution on a Convention ground if they were to return to South Africa.

180. The Applicants argue that the Tribunal erred, in light of the accepted material facts and the evidence, in finding in effect [5.36-5.39] that the Applicants had failed to demonstrate "*by clear and convincing proof*" that the South African authorities were incapable of protecting them and that South Africa "*does not lack a reasonably functioning police and criminal justice protection such that the Appellants require international protection*." I am, however, satisfied that the decision that State Protection is available is rationally made following due consideration of the Applicants' claim and available COI for reasons properly set out.

181. Contrary to the Applicants' starting premise, a high level of crime generally, committed by non-state actors, does not necessarily mean State Protection is unavailable where the Tribunal is satisfied that "*reasonable steps are being taken to deal with same*". The Tribunal referred to the steps being taken to train the SAPS in the area of gender violence (at paragraph 5.31), acknowledged that the "*shortcomings are more acute in terms of gender-based violence such as rape*" (albeit the Second Applicant did not claim to have experienced such violence herself and feared no specific actors), and referred to the Applicants' failure to "*access the structures set up to address complaints against police inaction*" (at paragraph 5.33) and to the IPID's mandate to investigate complaints of inaction by the SAPS (at paragraph 5.35).

182. I am mindful as I must be that the obligation to provide State Protection is to provide "*effective protection*" not "*perfect protection.*" While COI certainly suggests a high level of police corruption in South Africa, there are bodies in place to monitor and investigate corrupt

police officers. There is further evidence to suggest that members of the SAP are prosecuted in this respect. There is nothing in the text of either of the Qualification Directive which might prompt a different interpretation of s.31 such as to equate effective protection with effective prevention. The test turns not on success rates in preventing crime or corruption but on the nature of the measures put in place and whether they can be characterized as "*reasonable steps*." By contrast, the Applicants posit a test based on success rates, pleading irrationality based on the IPID being "*not always successful*", which in my view is not the correct approach.

183. As regards "*isolated incidents*" of deficient protection being insufficient to establish inadequacy, it was never suggested by the Applicants that State Protection was withheld from the Applicants for any reason specific to them. Any past deficiency in protection was not claimed to be deliberate or a result of some aspect of the Applicants' particular circumstances. Accordingly, the fact that there may have been instances of failure of State Protection need not result in a conclusion against State Protection being available. As found in *Idiakheua* v. *Minister for Justice & Anor* [2005] IEHC 150 (Clarke J.) an isolated example of State Protection may not be sufficient to justify a finding of adequate state action in just the same way that the establishment of an isolated incident where State Protection failed may not be sufficient to establish its inadequacy. Clarke J. found that the true test is as to "*whether the country concerned provides reasonable protection in practical terms*" (*infra* at p.6). Neither, for the same reason, is there an error evident in finding SAPS "*generally provides protection to South African citizens*" or that the IPID, while "*not always successful*", was adequate. As the Respondents submit, this is simply an instance of the Applicants drawing a different conclusion from the COI to that drawn by the Tribunal, as opposed to identifying any error of legal principle which would warrant relief in judicial review proceedings.

184. The key consideration for the Tribunal when assessing whether State Protection is available is whether the applicants through their testimony and considering all the documentary evidence established that they have a prospective well-founded fear of persecution on a Convention ground if they were to return to South Africa. On this key consideration I am satisfied that it was open to the Tribunal to conclude on the case made and the material available that they had not. I am satisfied that in this case COI has been considered in terms of whether that material constituted clear and convincing proof that State Protection was not available to the Applicants. The reasons given adequately explain the Decision that it was not established

that State Protection was available, even though a contrary decision might also have been supported by some of the material before the Tribunal.

185. It has been repeatedly held in cases such as *H.O. v. Refugee Appeals Tribunal & Anor* [2007] IEHC 299 (Hedigan J.), *E.G. (Albania) v. IPAT & Anor* [2019] IEHC 474 (Humphreys J.), *E.D. (a minor) v. Refugee Appeals Tribunal* [2017] 1 IR 325 (Clarke J.) and *B.A. v. IPAT* [2020] IEHC 589 (Burns J.), that courts should not interfere with findings which were within the range of conclusions which would be open to a Tribunal properly directed as to the law, on the basis of the materials available. Whether one agrees or not with the conclusion that State Protection is available is not the test in judicial review proceedings.

186. I am satisfied that on an objective reading of the Impugned Decision, it passes the test of legality. The decision was arrived at in a lawful and appropriate manner, taking into account correct considerations and coming to a rational and reasonable decision on the material before the Tribunal, in the sense that it was a decision which was open to the Tribunal on the case made.

CONCLUSION

187. Having been satisfied to grant an extension of time up to and including the 17th of January 2023 and determined that the Applicants have standing to maintain the within proceedings, I have concluded that the challenge to the maintenance of a safe country of origin designation in respect of South Africa on *vires* grounds fails. I have also concluded that the Applicants have not demonstrated a breach of a duty to review designation in accordance with s.72(5) of the 2015 Act on the facts and circumstances of this case.

188. As for the challenge to the Tribunal Decision, the conferral of refugee or subsidiary protection status requires a level of severity to be reached and demonstration that State Protection is not available. The Applicants have not overcome the burden of demonstrating that the decision reached was not open to the Tribunal or was otherwise unlawful. The correct legal principles were considered. The decision made was one that was open to the Tribunal on the material before it.

189. For the reasons given above, therefore, these proceedings are dismissed. I will hear the parties in respect of matters arising and the final form of order, if these matters cannot be agreed.