THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 553
[Record No: 2021/284 JR]

BETWEEN

E.S

APPLICANT

AND

INTERNATIONAL PROTECTION APPEALS TRIBUNAL
AND
THE MINISTER FOR JUSTICE

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 7th day of October, 2022

INTRODUCTION

1. In these proceedings the Applicant seeks to quash the portion of the decision of the First Respondent dated the 3rd of March, 2021 falling under the heading "*Internal Protection Alternative*".

2. In essence, the Applicant contends that the First Respondent erred in law in finding that he could avoid persecution by altering his occupation and consequently that an internal protection alternative exists.

3. These are the second set of judicial review proceedings brought by the Applicant in respect of the portion of the decision which falls under the heading "*Internal Protection Alternative*".

4. The Applicant did not pursue at hearing a pleaded argument that the First Respondent had erred in finding that there was no discretion to grant a declaration of

refugee status absent a consideration of the internal protection alternative under s. 32 of the International Protection Act, 2015 [hereinafter "the 2015 Act"] and so this claim will not be considered in this judgment.

5. The Applicant is a Muslim and a citizen of India. The First Respondent has accepted his claim that until 2017, he was a businessman working in the beef industry. In June 2017, he was attacked by cow vigilantes who insisted that he cease his trade and that he convert to Hinduism.

6. The Applicant arrived in Ireland in August, 2017 with two of his sons and applied for international protection claiming a risk persecution in India within the nexus of religious belief, and a risk of serious harm. The core of his claim was that he had suffered religious persecution at the hands of Hindu nationalists because of his involvement in the beef industry.

PROCEDURAL HISTORY

7. In the interview conducted by the International Protection Office [hereinafter "the IPO"] under s.35 of the 2015 Act on the 14th of September, 2018, the Applicant responded candidly that he would not be involved in the buffalo or cattle slaughter business again if he returned to India. Nevertheless, he was seeking protection in Ireland.

8. On the 8th of July, 2019, in a report pursuant to s.39 of the 2015 Act, the IPO recommended that the Applicant should be given neither a refugee declaration nor a subsidiary protection declaration. It appears from the report that the basis for this decision was the conclusion by the IPO that state protection is available. The Applicant appealed this recommendation to the International Protection Appeals Tribunal [hereinafter "the IPAT"]. While the Applicant originally sought an oral hearing, following a change in solicitors, his new solicitors sought a paper only appeal on his behalf. It was indicated that given the narrow parameters of the appeal, which was said to be directed to the question of availability of state protection in view of the grounds

advanced for the finding made by the International Protection Office [hereinafter "the IPO"] refusing protection, a paper only appeal would be adequate. The Applicant's solicitor confirmed that it was considered that the appeal point was very net and could be dealt with fairly on the papers. In a response dated the 24th of September, 2019 from the IPAT, the Applicant was reminded that all matters were open for consideration on appeal. In a reply dated the 1st of October, 2019, the Applicant's solicitor accepted that the appeal gave rise to a *de novo* consideration of the papers but it was confirmed that the Applicant wished to proceed with a paper only appeal. It was, however, indicated that should issues requiring clarification arise, the Applicant could be requested to address same in writing or participate in an oral hearing directed to such issues as might arise.

9. On the 4th of December, 2019, IPAT affirmed the recommendation [hereinafter "the first decision"]. The appeal report was not exhibited, however, it is understood to be common case that in its first decision, the IPAT accepted that there was a reasonable chance **t**he Applicant and his dependents would face a well-founded fear of persecution from the group that had previously attacked him, but that there was not a reasonable chance he and his dependents would face a well-founded fear of persecution from "*cow vigilantes*" other than the group that attached him. The IPAT further found that State protection was not available, thereby not upholding the IPO decision in this regard. However, under the heading of "*Internal protection alternative*", the IPAT found that it was not unreasonable for the Applicant or his dependents to settle in Delhi, Bangalore or Hyderabad. Accordingly, in its first decision, the First Respondent accepted that the Applicant had been subject to incidences of persecution which had occurred because his occupation had led him to be the target of religious persecution. It also accepted that there had been a lack of state protection. However, the First Respondent declined to recommend the grant of refugee status on the basis that there was an internal protection alternative.

10. On the 13th of January, 2020, the High Court (Humphreys J.) granted the Applicant (together with his two sons who were joined in the proceedings) leave to seek judicial review of the first decision (record no. 2020/12 JR). By consent order dated the 16th of October, 2020, the High Court (Burns J.) ordered that that portion of the first

decision as fell under the heading "*Internal Protection Alternative*" be quashed and that the matter be remitted to the First Respondent for reconsideration by the same member of that portion of the decision as fell under the heading "*Internal Protection Alternative*" only.

11. Renewed grounds of appeal and additional country of origin information were submitted on behalf of the Applicant to the First Respondent on dates up to the 19th of February, 2021 including responses to queries from the First Respondent on specified proposed locations for internal relocation which were communicated by letter from the IPAT dated the 8th of February, 2021. It was specifically submitted to IPAT that (para. 23 Submissions on behalf of the Applicant exhibited at "ES5"):

> *"the view that the risk of persecution has diminished because the appellant would no longer participate in the beef industry ignores the fact that being required to sell his property and change his career is a manifestation of persecution, rather than merely incidental to it."*

12. On the 3rd of March, 2021, in a decision received by the Applicant on 12th of March, 2021 [hereinafter "the second decision"], the IPAT again affirmed the recommendation of the International Protection Office. Under the heading, "*Internal protection alternative*", this question was given fresh consideration.

13. On the 26th of April, 2021, the High Court (Burns J.) granted the applicant leave for judicial review to seek an order of *certiorari* quashing that portion of the second decision as fell under the heading "*Internal Protection Alternative*" and that the matter be remitted to the Tribunal for reconsideration. On 12th of July, 2021, the Respondents submitted a statement of opposition. On 23rd of November, 2021, this was supported by an affidavit of John Moore, Higher Executive Officer in the Irish Naturalisation and Immigration Service, Department of Justice. The proceedings came on for hearing before me on the 28th day of June, 2022.

IMPUGNED IPAT DECISION

14. As already noted, in the second decision dating to March 2021, the First Respondent affirmed the decision of the IPO and again found that there was an internal protection alternative. It appears to be common case that the only part of the Decision to change was that part under the heading "*internal protection alternative*" in accordance with the consent order made in the earlier judicial review proceedings.

15. The IPAT found that there was a reasonable chance that the Applicant would face persecution were he to return to India (para. 63 of the decision). This persecution fell under the nexus of religious persecution (para. 57 of the decision). The incidence of persecution was linked to the Applicant's occupation within the beef industry. It was concluded, having regard to the Applicant's previous experiences with the police where they did not more than take his name after the incident on the 23rd of June, 2017 and failed to register a complaint after the attack on his shop on the 28th of June, 2017, it was concluded that state protection was not available to him (para. 69 of the decision).

16. In assessing the prevalence of persecution on grounds of religion, the First Respondent considered that the Applicant and his family were not personally affected. In analysing the reasonableness of the alternative locations, the First Respondent considered that given the resources of the Applicant, he would not need to work, or that if he wished to work, he could change occupation to work otherwise than the occupation which led to his persecution for reasons of religion. The IPAT found, at para. 93 (when considering internal relocation):

> "*The Appellant owns investment property worth €4 million when he completed his Application for International Protection Questionnaire in 2017, which he proposes to sell when the price increases further. Having regard to the amount of his assets he may not need to work. However, if he needs to work, he is an experienced businessman who has already transferred his business skills from a garment business to a beef business. ...*"

DISCUSSION AND DECISION

17. The Applicant accepted during interview and does not resile in these proceedings from the fact that were he compelled to return to India, he would not return to the beef industry. He contends, however, that the First Respondent erred in law in determining that he need not work in the beef industry and therefore is not at risk of persecution. The Applicant submits that being restricted in the form of his employment in this manner would be a continuation of the persecution suffered. It is submitted that the view that the risk of persecution has diminished because the Applicant would no longer participate in the beef industry ignores the fact that being required to change his career to avoid persecution would be a manifestation of the persecution, rather than merely being incidental to it. He relies on the decision of O'Donnell J. in *N.H.V. v Minister for Justice* [2017] IESC 35 [2018] 1 I.R. 246, where he found (at p. 316) that a right to work at least in the sense of a freedom to work or seek employment is a part of the human personality protected under Articles 40.1 and 40.3 of the Constitution together with paragraph 1 of General Comment No. 18 on the Right to Work, adopted by the United Nations Committee on Economic, Social and Cultural Rights on the 24th of November 2005 (considered by O'Donnell J. in *N.H.V. v Minister for Justice* [2017] IESC 35, [2018] 1 I.R. 246) wherein the fundamental nature of the right to work is recognised.

18. It is further submitted in reliance on a decision of the Australian courts in *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 that the decision to require relocation and a change of profession was unreasonable in law where the practice of profession was linked to a Convention ground (in that case, political opinion). It is submitted that in the present case, the fact that the Applicant suffered persecution on grounds of religion due to his choice of occupation within the beef industry indicates that his choice of profession is in this instance tied to questions of religious freedom. It is further maintained that the IPAT erred and acted unreasonably in considering the various occurrences of persecution by reason of religion against Muslims in India as discrete matters to be assessed separately placing reliance in this regard on *Re X*, 2018 CanLII 142968 (CA IRB).

19. In opposing the application for relief, it is contended that the finding made by the First Respondent was that the Applicant confirmed that he did not intend to return to his previous occupation in the beef industry, not that he could avoid persecution by

changing his job. It is further contended that as the finding actually made by the First Respondent was contained in the first decision made by the First Respondent in December 2019 but had not been challenged at that time, it was not open to the Applicant to challenge the finding at this late juncture. The Respondents argued that the Applicant's contention that internal protection is not reasonable where the form of persecution that led to flight is present in other parts of India disregards the Applicant's own evidence that he would not continue to work in the beef industry such that the manifestation of his religious beliefs would no longer be apparent. The Respondents further maintained that the IPAT did, in any event, consider the actual risks alleged in the various proposed areas of relocation and found, based on the COI and the Applicant's own evidence, that there was no such risk. It was submitted that this was a reasonable finding in all of the circumstances where the IPAT accepted the Applicant's word that he would work in another industry in circumstances where if he was not working in the industry, he would not therefore generally be at risk.

20. Based on the arguments presented and noting that the case that the IPAT erred in finding that it had no discretion not to consider the question of internal protection alternatives under s. 32 of the 2015 Act is not being pursued, I propose to now address the questions upon which issue has been joined in turn as follows:

a. Is the Applicant precluded from seeking to challenge the Tribunal's assessment that he could work other than in the beef industry in circumstances where that finding does not fall within the section of the Decision which is challenged in these proceedings?
b. If the Applicant is not so precluded, did the Tribunal err in finding that the Applicant could avoid persecution on grounds of religion by changing occupation and was there any error of law in the assessment of the internal protection alternative?

Whether the Applicant is precluded from seeking to challenge the finding that he could work other than in the beef industry?

21. In their Statement of Opposition the Respondents plead that the Applicant is not entitled to seek relief on the basis that he could work other than in the beef industry, as the finding was one made was in the first decision, and in a section not subject to the order of Burns J. on the 16th of October, 2021. The Respondents further contended that there was in fact no finding that the Applicant could avoid persecution by altering his occupation as the conclusions in this regard flowed from the evidence given by the Applicant during the interview as to his intentions if returned to India.

22. I cannot accept the Respondents' submissions. The IPAT made a finding, firstly under the heading 'Case Facts and Documents' at para. 12 to the effect that: "*The Appellant closed his beef business. He would not engage in the buffalo or cattle slaughter business again if he returned to India* (Questions 36 and 38 of the Section 35 Interview)". These findings arose from the answers given by the Applicant himself to the International Protection Office in his section 35 interview. The relevant exchange was as follows:

> *"Q 36: What happened to the buffalo business?*
> *A: That was closed down.*
> *Q38*: *If you returned to India would you be involved in the Buffalo or cattle slaughter business again?*
> *A: No."*
> (Note: There is no Q37)

23. The IPAT went on to find that if the Applicant needed to work, he is an experienced businessman (para. 93) who had already transferred his business skills from a garment business to a beef business. The Applicant construes this as a finding that by changing his occupation he could relocate and avoid persecution whereas the Respondents contend that the IPAT really found that the Applicant had previously changed his occupation and there were therefore possibilities for him. The finding on Internal Protection Alternative was therefore not contingent on him changing his occupation as it is found on the basis that this is what he had already decided.

24. The Respondents points to the fact that the IPAT does not state in its findings in respect of the Internal Protection Alternative that if he wished to work he could change occupation to work otherwise than the occupation which led to his persecution for reasons of his religion. It is true that this is not expressly stated but I consider that this finding must be implicit in the reference to the Applicant "*having already transferred his business skills*".

25. In my view the Respondents' submission conflates the finding of fact based on the Applicant's answer to the IPO with its application and consideration. In the first decision, it was accepted that the Applicant faced a well-founded fear of persecution and that the Applicant would not have state protection in India. Therefore, any recommendation by the IPAT not to recommend a declaration for refugee status could only have been considered under the heading of internal relocation alternative. This internal relocation section of the first decision was quashed, and given fresh consideration in the second impugned decision. At para. 93 of the second decision, under the heading of reasonableness analysis, the IPAT considered the questions of whether the Applicant would need to work at all, or whether he could work in another industry. This part of the decision is fully within and under the heading "*internal protection alternatives*" in the second decision of the IPAT which is the subject of these proceedings and is amenable to challenge in these proceedings. The link between changing profession, albeit without expressly acknowledging that this is due to persecution, and relocation is made in this part of the second decision. It is the finding based on this link which is under challenge as unsustainable in these proceedings.

26. I am satisfied that the Applicant is not precluded from maintaining these proceedings on that basis that he had not previously challenged a finding that he would not engage in the beef industry if returned or on the basis that the within proceedings represent a collateral challenge on that previous decision. I am satisfied that it is not the finding that the Applicant would not engage in the beef industry (recorded in the first decision and carried over into the second) but rather the finding in the second decision that by relocating and not engaging in the beef industry the Applicant could avoid risk of persecution on religious grounds which is challenged in these proceedings. This finding is challenged as being a finding which is unsustainable in law either because the

IPAT fails to identify that a change in profession in order to avoid persecution may itself be a manifestation of persecution or because the decision is unreasonable. This is a challenge which it is open to the Applicant to maintain and does not constitute an attack on the first decision which ought properly to have been pursued earlier and which is now immune from challenge.

Whether the IPAT erred in law or acted unreasonably in its assessment of a well-founded fear of the applicant of being persecuted for reasons of religion in the proposed areas of relocation by finding that the Applicant could avoid persecution on grounds of religion by changing occupation?

27. The IPAT was satisfied that the Applicant had suffered persecution on religious grounds because of his involvement in the beef industry. The IPAT found, at paras. 68 and 69, that state protection was not available to the Applicant where the police were reluctant to prosecute members of the group that had attacked him. In this case international protection has been refused solely on the basis that there were internal protection alternatives available to the Applicant were he to relocate within India. From reading the Decision it can only be interpreted as being that on relocation to Delhi, Bangalore or Hyderabad, the Applicant would have the option to remain unemployed and live off his investments, or engage in work other than in the beef industry. The Decision is therefore predicated on "*internal protection alternatives*" being available provided that the Applicant change profession and not disclose his previous connection with the beef industry. Further, IPAT considered that he could reasonably be expected to relocate internally as the Applicant had sufficient means of income, such that he did not need to work or possesses business abilities that could be used in industries other than the beef industry. A careful consideration of the Decision shows that it nowhere contemplates or addresses a situation where the Applicant either continued his former business upon relocation or his involvement with his former business became known following internal relocation.

28. It is accepted by the Applicant that, were he compelled to return to India, he would be discreet to the extent that he would work otherwise than in the beef industry. It is the Applicant's position, however, that it is unreasonable to expect and require such

discretion, both to the extent of altering occupation or not working at all, and in maintaining silence about his past occupation and the reasons for flight from Mumbai. In contending that internal relocation is not reasonable he has placed reliance on the fact that the form of persecution that led to the Applicant's flight is present elsewhere in the country, including in the areas of proposed relocation. In this instance, both the specific form of persecution through attacks by cow vigilantes and the generalised form of persecution by reason of religion against Muslims are present throughout India and are not disputed. Highlighted elements of COI relied upon on behalf of the Applicant include the discriminatory treatment of Muslims evident in the enactment of Citizenship Amendment Act, the restructuring of Jammu and Kashmir, the use of the citizen registry, and the documented violence suffered by those in interfaith marriages. He points to the fact that it was in these circumstances that the United States Commission on International Religious Freedom 2020 Report on India recommended that India be designated as a "*country of particular concern*" for "*engaging in and tolerating systematic, ongoing, and egregious religious freedom violations, as defined by the International Religious Freedom Act*".

29. While significant COI was produced before IPAT in respect of cow vigilantism, the Applicant also relied more generally on COI relating to discriminatory or persecutory actions documented as taking place in respect of Muslims not because he is a member of sub-set of Muslims affected by these measures but rather to demonstrate a pattern of increased violence and persecution motivated by Hindu nationalism throughout India and a failure of state protection. It is part of his case that Hindu nationalism has manifested in either persecution for reasons of religion by the state, or a lack of state protection where there have been incidences of persecution for reasons of religion by private actors. He contends that these should be considered cumulatively whereas the IPAT dismissed this COI on the basis that the actions, whilst directed against Muslims, were not directed against the Applicant. He maintains that the IPAT erred and acted unreasonably in considering the various occurrences of persecution by reason of religion against Muslims in India as discrete matters to be assessed separately.

30. The Applicant's core case in these proceedings is that internal protection alternatives are not reasonably available where the form of persecution that led to the

Applicant's flight is present elsewhere in India, including in the areas of proposed relocation and where he is required to change occupation and not disclose his former occupation because of its link with religious beliefs in order to avoid persecution. He identifies a failure by the IPAT to properly assess the risks present in the areas of proposed relocation and to consider whether a requirement to change profession or cease work constitutes persecution as errors of law rendering the refusal of protection unsustainable in this case.

31. The case-law establishes that where a claimant has been found to have been persecuted on protected grounds, then considerable care is required before a decision to refuse international protection is made. In *K.D. (Nigeria) v Refugee Appeals Tribunal* [2013] IEHC 481, [2013] 1 I.R. 448, at p. 465 (considered by Burns. J. in *N.N.M. v. International Protection Appeals Tribunal* [2020] IEHC 590, at para. 22), Clark J. assessed the high bar required in considerations of internal relocation:

> *"(13) The threshold to be reached before internal relocation is considered is high. The applicant would be recognised as a refugee but for the fact that he can safely relocate. The inquiry is commensurately careful."*

32. The *United Nations Rights Commissioner for Refugees' Guidelines on International Protection: Internal Flight or Relocation Alternative* (2003) ("the UNHCR Guidelines") (considered by Clark J. in *K.D. (Nigera) v Refugee Appeals Tribunal* [2013] IEHC 481, [2013] 1 I.R. 448) consider the circumstances where there has been a lack of state protection as follows:

> *"15. Where the claimant fears persecution by a non-State agent of persecution, the main inquiries should include an assessment of the motivation of the persecutor, the ability of the persecutor to pursue the claimant in the proposed area, and the protection available to the claimant in that area from State authorities. As with questions involving State protection generally, the latter involves an evaluation of the ability and willingness of the State to protect the claimant from the harm feared. A State may, for instance, have lost effective*

control over its territory and thus not be able to protect. Laws and mechanisms for the claimant to obtain protection from the State may reflect the State's willingness, but, unless they are given effect in practice, they are not of themselves indicative of the availability of protection. Evidence of the State's inability or unwillingness to protect the claimant in the original persecution area will be relevant. It can be presumed that if the State is unable or unwilling to protect the individual in one part of the country, it may also not be able or willing to extend protection in other areas. This may apply in particular to cases of gender-related persecution."

33. It is maintained on behalf of the Applicant that, were he to relocate to another state in India and settle there with his family, he would have to refrain from disclosing a part of his employment history. He claims that his personal and occupational history is a part of his identity and it is unreasonable for him to be expected to be discreet about this. In this respect, the judgment of Lord Hope in *H.J. (Iran) v. Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 A.C. 596, at p. 626, is relied upon as instructive. It is important to recall, however, that the judgment in *H.J. (Iran)* is concerned with persecution on grounds of sexual orientation. In that case the UK Supreme Court found that where a claimant could avoid persecution only by modifying his behaviour on a return to his home country, but chose not to do so, he had a well founded fear of persecution and, since the persecution did not cease to be so because those fearing it could take avoiding action, a claimant who would live discreetly on return for the material, but not necessarily the sole, reason that he feared persecution, would not lose the protection of the Convention. It was for the Tribunal, conducting its factual inquiry in the particular circumstances of each case, to consider why the claimant had exercised discretion and to accept his claim where his discretion arose materially from his well-founded fear of persecution but to reject it where it was due to social or family pressures. In his judgment Lord Hope summarised the argument made by the Secretary of State in that case as follows:

"[24] For the Secretary of State, Mr. Bourne submitted that there were two major questions that had to be addressed: (I) what will the situation be on return and

(II) in these circumstances is there a real risk of persecution. The inquiry in regard to the first question was directed to how the applicant will conduct himself and how others will react to this. He accepted that a finding that the applicant will in fact be discreet on return to the country of his nationality is not the end of the inquiry. The question that then had to be asked, he said, was whether opting for discretion itself amounted to persecution. The threshold between what was and was not persecution was marked by what he could reasonably be expected to tolerate. As in the case of internal flight, it was what he could not reasonably be expected to tolerate that amounted to persecution."

34. The test to be applied by the Tribunal who has found that a claimant has been persecuted for reasons of sexual orientation in his country of nationality was expressed by Lord Roger as follows (para. 82):

"...the tribunal must go on to consider what the individual applicant would do if returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution – even if he could avoid the risk by living "discreetly". If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures e.g. not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them....If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution."

35. This approach of Lord Rogers appears to represent the ratio of the decision as his analysis as set out above is expressly agreed with by Lord Walker (at para. 28), Lord Collins (at para. 100) and Lord Dyson (at paras. 108 and 132). The decision in *H.J. (Iran) v. Secretary of State for the Home Department* was approved by McDermott J. in the High Court in *C.C. v. Refugee Appeals Tribunal* [2014] IEHC 491 and more recently, albeit obiter, by Ferriter J. In *M.Y. v. International Protection Appeals Tribunal & Anor.* [2022] IEHC 345. The significance of the obiter dicta of Ferriter J. is the principled acceptance in that case that the *H.J. (Iran)* reasoning applied beyond a situation of discrimination on grounds of sexual orientation (innate and inherent to one's personality) to other protected areas of human activity, in that case political opinion.

36. In addressing whether persecution on grounds of religion in respect of business activity might be captured by the ratio in *H.J. (Iran),* I was referred to Joined Cases *C-71/11 and C-99/11 Bundesrepublik Deutschland v. Y and Z.*. In those cases, the CJEU considered religion as a ground of persecution under Directive 2004/83/EC with particular reference to Article 10(1)(b) which provides:

> *"1. ...*
> *(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms* ***of personal or communal****"*

37. In question in the referral to the CJEU in Cases *C-71/11 and C-99/11 Y & Z* was a law which criminalised the practice for Islam. In that context, the Court found (paras 62-63):

> *"for the purpose of determining, specifically, which acts may be regarded as constituting persecution within the meaning of Article 9(1)(a) of the Directive, it is unnecessary to distinguish acts that interfere with "core areas" ('forum*

internum") of the basic right to freedom of religion, which do not include religious activities in public ('forum externum'), from acts which do not affect those purported core areas. Such a distinction is incompatible with the broad definition of 'religion' given by Article10(1)(b) of the Directive, which encompasses all constituent components, be they public or private, collective or individual. Acts which may constitute a "severe violation" within the meaning of Article 9(1)(a) of the Directive include serious acts which interfere with the applicant's freedom not only to practice his faith in private circles but also to live that faith publicly."

38. In this case, it bears emphasis that the IPAT has already accepted that there was a nexus between the persecution suffered and religion on the facts, albeit that the persecution was directed to business activities, which might be seen as an aspect of living faith openly, rather than the actual practice of the religion (such as worship in a church). It is therefore not in question but that the Applicant has suffered persecution on grounds connected with his religious freedoms and logic suggests that the same or similar future treatment related to his business activities which is connected to his religious freedoms would likely also constitute persecution.

39. In *C-71/11 and C-99/11 Y & Z* the CJEU was also asked to consider, however, whether Article 2(c) of the Directive (which contains the definition of "*refugee*" found in the Geneva Convention and in the 2015 Act) must be interpreted as meaning that a fear of persecution was well founded where such person can avoid exposure to persecution in his country of origin by abstaining from certain religious practices. The CJEU approached its' response to this question on the basis that the person in question, unlike the situation in this case where it has been found by the IPAT that the Applicant was persecuted in connection with his religion, had not already been persecuted on religious grounds. The question determined was therefore whether the person could properly be required to continue to avoid a risk of persecution through changed practices. The Court ruled (para. 78-79):

"None of these rules states that, in assessing the extent of the risk of actual acts of persecution in a particular situation, it is necessary to take account of the

possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and, consequently, renouncing the protection which the Directive is intended to afford the applicant by conferring refugee status. It follows that, where it is established that, upon his return to his country of original, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status, in accordance with Article 13 of the Directive. The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant."

40. It seems to me that this *dicta* is directed to abstaining from religious rather than business practices which are connected with religious belief and practice and must be read in this light. It is telling, however, that the Court proceeded on the basis that the question of abstaining from a practice arose in the context of a requirement to assess a level of risk of persecution where the applicant had not already been subject to persecution or direct threat of persecution on account of his religion. This appears to be because Article 4(4) of the Directive provides that where an applicant has already been subject to persecution or to direct threats of persecution this is considered a "*serious indication of the applicant's well-founded fear of persecution*", unless there are good reasons to consider that the persecution will not be repeated. In this context reliance on the fact that the activity which led to acts which have been found to be persecutory will not be repeated requires careful consideration of whether abstaining from the activity is itself a serious breach of rights such as might itself constitute persecution.

41. I agree with the obiter dicta of Ferriter J. in *M.Y. v. International Protection Appeals Tribunal & Anor.* [2022] IEHC 345 made following a careful consideration of both the *H.J. (Iran)* and *C-71/11 and C-99/11 Y & Z* to the effect that the principles espoused by the UK Supreme Court in the *H.J. (Iran)* could equally apply to other Convention grounds. As noted by Ferriter J. (at para. 51), the judgments in the *H.J. (Iran)* make reference, with approval, to dicta in Australian case-law to the effect that the principle that concealment to avoid persecution may amount to well-founded fear of persecution would also apply to political opinion. It seems to me that the same can be said of religious opinions. This is clear from the reliance of both Lord Hope (at para. 25) and Lord Rogers on the joint judgment of McHugh and Kirby JJ in the Australian

High Court in *S395/2002 v. Minister for Immigration and Cultural Affairs* 216 CLR 473 where it was stated:

> *"But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a 'particular social group' if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution."*

42. Referring to this judgment *S395/2002 v. Minister for Immigration and Cultural Affairs* and the separate Australian case of *SZATV v. Minister for Immigration and Citizenship* (2007) 233 CLR 18 (also cited in argument before me), Lord Rogers records that the Australian Court had found that the Tribunal had gone wrong by approaching the issue persecution against a Ukrainian journalist on the basis that he could obtain work which would not involve the express to the public of his political opinions. It seems to me that an approach which includes within the ratio of *H.J. (Iran)* the concealment of beliefs or practices on religious grounds is also an approach most consistent with the reasoning of the CJEU in *C-71/11 and C-99/11 Y & Z.*

43. Accordingly, the IPAT when considering whether internal protection is available if certain practices are avoided should consider whether what is required of the protection applicant to avoid risk is such a significant interference with his human rights as to itself come within the ambit of a risk of "*being persecuted*". A decision of the Refugee Appeals Authority of New Zealand (*Refugee Appeal No. 74665/03*, July, 2004, Decision of the Authority delivered by RPG Haines QC) relied upon during oral submissions (and referred to with approval in *H.J. (Iran))* encapsulates what is required as follows (at para. 90):

"the gaze of the refugee decision maker is fixed firmly on the question whether the anticipated denial of human rights in the country of origin meets the "being persecuted" standard". Under this approach, where the risk is only that activity at the margin of a protected interest is prohibited, it is not logically encompassed by the notion of "being persecuted". Similarly, in the context of the downstream issue of causation, where the risk of a broader range of persecutory harm ensues only from taking such marginal actions, the risk is unlikely to be "for reasons of" religion, political opinion, sexual identity or whatever other Convention ground is relied upon."

44. The essence of what the Authority went on to decide in that case is that where the action imposed on or required of the claimant by way of restriction (here restraining from business activity in the beef industry) is at the core of the right, as opposed to at the margins, and the restriction is unlawful, then the individual has no duty to avoid harm by being discreet or by complying with the wishes of the persecutor. If, however, the proposed activity is at the margin of the protected interest, then persistence in the activity in the face of the threatened harm is not a situation of "*being persecuted*". In such a situation the individual can choose to carry out the intended conduct or to act reasonably or discreetly in order to avoid the threatened harm but this does not engage a right to international protection. The underlying principle being that refugee status cannot be denied by requiring of the claimant that he or she avoid being persecuted by forfeiting a fundamental human right.

45. While referring to the decision of the New Zealand Authority with approval, Lord Hope was careful to stress in *H.J. (Iran)* the fact-sensitive nature of the application of the principles in the context of fear of persecution said to arise from the holding of a political opinion. The same could be said of a fear of persecution by reason of religious beliefs or practices. Following his review of comparative jurisprudence, Lord Hope concluded (para. 31) that:

"the single most important message to emerge from these cases is a need for a careful and fact-sensitive analysis."

46. Lord Dyson similarly observed (having cited the approach of the New Zealand Authority as set out above) (at para. 115) that:

> *"It is open to question how far the distinction between harmful action at the core of the right and harmful action at its margin is of relevance in cases of persecution on grounds of immutable characteristics such as race and sexual orientation. But it is a valuable distinction and there may be more scope for its application in relation to cases concerning persecution for reasons of religion or political opinion."*

47. In this case, the IPAT Decision does not address whether the Applicant would be at risk in the proposed relocation areas were he to continue in the beef business or were his prior involvement to become known. No analysis has been carried out by the IPAT in its Decision of why the Applicant had decided he would no longer engage in the beef trade (and indeed it does not appear to me that the Applicant was ever asked to address this question either in written submission or through an oral hearing directed to this issue) and whether, where the change is necessitated by a fear of persecution, it is reasonable to expect him to make this change on the basis that the threshold between what was and was not persecution is not reached. No attempt is made to identify where on the spectrum the harmful action of refraining from involvement in a business activity and concealing previous involvement falls in determining whether such restriction or concealment could in itself constitute persecution.

48. By failing to engage with the submission, which had been made in writing, that a view that the risk of persecution has diminished because the Applicant would no longer participate in the beef industry, the First Respondent ignored the argument that being required to sell his property and change his career was a manifestation of persecution, rather than merely incidental to it. In my view, the failure to address this contention is very damaging to the integrity of the Decision. Not alone is this submission not referenced, but the question of whether a requirement to change profession constituted a manifestation of persecution is not addressed by the IPAT except perhaps in the passing reference to "*having already transferred his business skills*". While this statement might hint at a finding that the Applicant's connection to the beef industry

was not considered so embedded that a change could constitute persecution, it seems to me that in the absence of an identification of the reason for the change of profession and an acknowledgement of and assessment of its impact (if any) on the Applicant's rights, this cannot properly be presumed. Nor would it be correct for me to step into the shoes of the IPAT by conducting my own assessment of whether what would be required of the Applicant to avoid persecution is sufficiently integral to his fundamental freedoms as to constitute persecution in and of itself as this is properly the function of the IPAT.

49. Noting the requirement for "*careful*" consideration, the IPAT Decision does not demonstrate that the IPAT approached the question of whether alternative protection was reasonably available by considering whether the Applicant, a man in his 40s, had decided to cease work or change profession solely in order to avoid further incidents of persecution and thereafter assessing whether the need to change work could in itself and on the facts of this case potentially constitute persecution before refusing protection on the basis of a reasoned conclusion that the change of profession in the event of a return to a different part of India did not constitute persecution. Through its failure to conduct this analysis, I am satisfied that the IPAT has erred in law in its identification of the legal test to be applied in deciding that a reasonable internal protection alternative is available to the Applicant.

50. For the sake of completeness and in circumstances where the application falls to be remitted for fresh consideration, I propose to briefly also consider the case made that the IPAT erred in its' approach to the assessment of the evidence regarding the proposed areas for relocation. In the Decision, IPAT considered submissions made on behalf of the Applicant in respect of each of the identified possible relocation areas and accepted that it would not be reasonable to expect the Applicant to relocate to one such area (Srinagar). It did so first by examining each area of identified persecution risks against Muslims separately and by reference to the particular area providing reasoning as to why a well-founded fear of persecution had not been established under each specific head. The Applicant's complaint is that the Tribunal did not consider the position cumulatively.

51. The decision of the UK Court of Appeal in *Karanakaran v. Secretary of State for the Home Department* [2000] 3 All ER 449 is a helpful authority to guide the proper approach to determining whether internal relocation is a reasonable alternative to asylum. It identifies the importance when dealing with questions of internal protection of not considering matters put forward in isolation but considering the potential cumulative effect of same. In other words and by way of example, the fact that the Applicant does not personally identify a basis for fearing persecution because of being party to an interfaith marriage where a spouse converts is clearly a consideration when weighing the risk of persecution under laws already introduced or in contemplation to criminalise same. Not being personally affected, little weight should be attached to these potentially persecutory laws in the Applicant's case but they should not be completely excluded from consideration. They remain relevant to a proper determination of whether it would be unduly harsh to expect the Applicant to relocate within India. As stated by Brooke LJ in *Karanakaran* (at p. 470):

> *"..After determining the level at which state protection is in fact provided, it should consider all the relevant circumstances (after discarding those it considers safe to eliminate altogether) when considering whether there is nevertheless a serious possibility of persecution occurring, and whether the level of state protection is sufficient by international standards."*

52. He further confirmed that his concern was not with the merits of the decision in that case but with the methodology adopted stating (at p. 471):

> *"Unless something is so trivial that even on a cumulative assessment it would be bound to carry no weight, or the decision maker has no real doubt that it is entitled to discard some point from its consideration altogether, it would be wrong to eliminate that point completely."*

53. The importance of weighing relevant information was also emphasised in In *Re X*, 2018 CanLII 142968 (CA IRB), an authority relied on by the Applicant having particular regard to the similarity of facts between that case and this one. In *Re X*, the Refugee Appeal Division of the Immigration and Refugee Board of Canada considered

internal relocation for an appellant who had been subject to persecution on grounds of religion at the hands of cow vigilante groups stating:

> *"[61] […] As described above, cow vigilante groups are active across India, even in states where the BJP is not in power, and they are becoming more and more emboldened as time passes. These groups use intimidation and harassment in their pursuit of protecting cows in India as well as resorting to mob attacks and lynching for which Muslims are disproportionately targeted – and often the accusations of involvement in the beef industry, of consumption or transport of beef tabled against those attacked by the cow vigilante groups are unfounded.*
>
> *[62] Indeed, the documentation before the RAD indicates that even a suspicion that someone is involved in beef slaughter or consumption of beef products can lead to incidents of violence and even death at the hands of these radical Hindu groups, and this suspicion is often arising based on the person's religion. Worse still, even being found in the possession of what might be construed as beef can lead to violence and possibly even death for the person caught with it. Added to this, the documentation shows that anti-Muslim sentiment and discrimination against Muslims is growing in India due to the discourse of the current BJP government in India. If the appellant were to relocate anywhere in India, he would have to reinstall himself in a new community and look for work in order to live. If he were to mention his previous work experience or if his previous work experience were to be discovered, he would be exposed to significant risks ranging from intimidation and harassment to retribution and violent vigilante justice. Indeed, this risk exists even if he chooses to stop working in the beef industry since Muslims are disproportionately targeted by vigilante groups based solely on unfounded suspicions of their involvement in the industry, of transportation of beef or even mere beef consumption. When these risks are considered cumulatively with the numerous forms of discrimination faced by Muslims on a daily basis that are highlighted above, the RAD finds that the appellant has established that there is no viable IFA [internal flight alternative] for him within India."*

54. As apparent from the foregoing, the Refugee Appeal Division considered the persecution against Muslims cumulatively. It also considered the risk to the appellant that his previous work within the beef industry might be discovered, as the form of persecution is not limited to any one state in India. This seems to me to be a correct approach in law.

55. In assessing the COI in this case, the IPAT considered that the Applicant had not demonstrated a risk of persecution on grounds of a forced interfaith marriage or of discriminatory treatment in an application for citizenship but without further considering the fact that this COI information evidenced discriminatory treatment of Muslims and a failure of state protection in the proposed areas for relocation instead relying on the fact that (para. 96):

> *"the personal characteristics of the Appellant and his family do not put them in a category which would make it unreasonable for them to relocate to Delhi, Bagalore or Hyderbad."*

56. The IPAT further referred to the fact that the Muslim community was a sizeable minority in each of these cities. While this is so, it does not mean that the evidence of discriminatory treatment of Muslims in the areas is therefore of no weight.

57. It is certainly arguable that a cumulative approach may be seen insofar as the IPAT has considered the existence of community and religious tensions in the identified areas in arriving at its decision that it is not unreasonable for the Applicant and his family to relocate to those areas. What gives me real cause for concern, however, is that the information pertaining to the widespread existence of cow vigilantism is not addressed as its significance to the Applicant's claim as part of a cumulative approach to the assessment of the evidence. This may be on the basis that the Applicant would abstain from the beef business and his prior involvement in the business would not be disclosed. Proceeding on the stated basis that the personal characteristics of the Applicant and his family did not put them in a category which would make it unreasonable for them to relocate without also including consideration of the documented widespread existence

of cow vigilantism throughout India suggests that the evidence was not assessed cumulatively by IPAT. It cannot be said that their personal characteristics did not put them in a risk category insofar as cow vigilantism is concerned.

58. It is my view that the existence of cow vigilantism throughout India needed to be considered cumulatively with the other evidence of discriminatory or persecutory treatment of Muslims in assessing whether it was reasonable to expect the Applicant and his family to relocate to the identified areas.

59. In consequence of a failure to adopt this cumulative approach to all of the evidence including evidence to which little weight might be attached because the Applicant was not within the sub-category of Muslim experiencing issues together with the evidence as to the existence of cow vigilantism occurring on a widespread basis in India, it is my view that the availability of an internal protection option was not properly assessed in the light of relevant COI as to the occurrence of religious persecution and lack of state protection in the identified areas.

CONCLUSION

60. In view of the high threshold and careful consideration mandated in cases where an applicant would be recognised as a refugee but for the fact that he can safely relocate, the failure to assess the COI in this case as to the risk for Muslims who have a known or perceived connection with the beef trade in the proposed alternative locations is concerning. When coupled with the failure to consider whether a requirement to refrain from lawfully pursuing a particular profession because of the associated risks constitutes persecution on the facts of this case, I am confirmed in my conclusion, that the decision is unsustainable in law.

61. A proper application of the test in this case requires the IPAT to consider why the Applicant would cease his involvement in the beef industry and conceal his prior involvement if returned to India and whether, if it is concluded that he does so to avoid risk of persecution on religious grounds, then, on the facts of this case, such a restriction itself infringes his fundamental rights in a manner which reaches a level or threshold

which the law would regard as constituting "*persecution*". In this case that involves considering the impact on the Applicant's right to religious freedom as protected in law but also the significance from a human rights perspective of the Applicant's broader rights which include the right to work and the significance of the interference with such rights.

62. Interference with broader rights may constitute persecution depending on the severity and extent of the interference and its impact. Having found past persecution on religious grounds, the IPAT must also weigh the future risk upon relocation with proper regard to all COI which demonstrates the availability or otherwise of state protection against religious persecution in those areas.

63. The decision on whether alternative protection was reasonably available to the Applicant on the facts in this case is a matter entirely for the IPAT having followed a correct methodology.

64. I will hear the parties in relation to the appropriate form of orders to be made in view of the findings in this judgment.