THE HIGH COURT
JUDICIAL REVIEW

[2024] IEHC 699

RECORD NO. 2024 23 JR

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

BETWEEN

A. A. H.

APPLICANT

AND

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

RESPONDENTS

AND

RECORD NO. 2024 63 JR

BETWEEN

M. H. A.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 6th day of December, 2024

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INTRODUCTION

1. Both these cases concern decisions by the International Protection Appeals Tribunal (hereinafter "the Tribunal") pursuant to s. 21(9) of International Protection Act, 2015 (as amended) (hereinafter "the 2015 Act") in which it was found that applications for international protection made by two unrelated Somali nationals were inadmissible under s. 21(2)(a) of the 2015 Act, because they had each been granted protection in Greece before seeking protection in Ireland. A Return Order under s. 51A of the 2015 Act has yet to be made in either case.

2. Each Applicant seeks to have their application admitted to the international protection process in Ireland because of conditions in Greece which they say result in destitution, homelessness and/or extreme material poverty and are such as to give rise to a real or serious risk of a breach of their fundamental rights as protected under the Constitution and/or s. 3 of the European Convention on Human Rights Act, 2003 (specifically, Article 3 of the European Convention on Human Rights – hereinafter "the Convention") and/or Article 4 of the EU Charter of Fundamental Rights and Freedoms (hereinafter "the Charter"). It is maintained by the Applicants in these proceedings that the decision to find the applications inadmissible in each case is flawed on grounds which might broadly be described as a failure to properly assess this risk in accordance with law.

3. Although each matter was pleaded individually and with differences to be found between them, grounds of challenge pursued by separate counsel acting on behalf of the Applicants in each case may be summarized as: inadequacy of the procedural safeguards applied in the decision-making process (most specifically, the lack of an oral hearing in circumstances where s. 21(7)(a) requires that the Tribunal decision be made without an oral hearing and the failure to put matters arising from documentation considered to the Applicants), the standard of proof and the evidential burden applied by the Tribunal in reviewing the risk of harm to the Applicants. In one of the two cases (the case on behalf of the Applicant hereinafter referred to as "Mr. H"), the grounds of challenge include a plea that s. 21(7) of the 2015 Act is unconstitutional insofar as it excludes any possibility of an oral hearing in respect of an appeal under s. 21(6).

4. It is of some significance that these issues arise in the context of the mutual trust underpinning the Common European Asylum System (hereinafter "the CEAS") and the requirement to ensure compliance with the Charter within the field of operation of EU law.

5. Core to the aims and objectives of the CEAS is the avoidance of secondary movement by international protection seekers which impact on the proper functioning of a system based on the principle that one Member State is responsible for an asylum application. However, in an unusual application of the principle of mutual trust in these cases, it is contended on behalf of one of the Applicants that the principle of mutual trust extends to preclude the making of an inadmissibility decision in circumstances where decisions have been made in other Member States to refuse to return international protection beneficiaries on the basis that their basic needs ("*bed, bread, soap*") could not be met in Greece.

6. The cases come before me for telescoped hearing as lead or "*pathfinder*" cases for a much larger group of cases collectively referred to as the "*Greek Transfer Cases*". Notwithstanding the quasi-pathfinder status of these proceedings, a delay issue has been raised on behalf of the Respondents in respect of one of the cases (the case of the Applicant hereinafter referred to as "Mr. A"). It further bears note that these cases were not first in time chronologically. Earlier cases falling within a broader category of Greek Transfer Cases have settled without court determination. In giving judgment in these cases I make some findings of a general nature which are likely to have broader application, but some findings are fact specific and are made having regard to the particular facts of the cases before me and in the light of the arguments canvassed.

FACTUAL BACKGROUND

Mr. A – the First Applicant

7. Mr. A is a national of Somalia, born in May, 1999. He is a member of the Madhibaan clan, a minority clan in Somalia which is persecuted by the majority clans. His wife is a member of the Taulafo clan, which is a sub-clan of the majority Daarod clan.

They married in secret. It is claimed that when the marriage was discovered, he was threatened with death because of his clan status. He evaded an attempt to kidnap him, subsequently fleeing Somalia to ensure his and his wife's safety.

8. Having fled Somalia in August, 2019, Mr. A claims he then went to Turkey where he remained for 4 months. Next, he went to Greece where he applied for international protection on the 24th December, 2019, thereafter residing in the Moria camp. He was granted refugee status on the 2nd June, 2020. He claims that he remained in the Moria camp in the absence of any alternative form of accommodation, notwithstanding that his permission to stay there ceased upon the grant of refugee status. Following the burning of the Moria camp in September, 2020, he moved to another camp where conditions were even worse than Moria. There, he shared a tent with 11 others. He was subjected to attacks and robbery and failed to receive assistance from either the police or camp authorities. He reports that a close friend was stabbed to death without consequence.

9. Mr. A stayed in Greece for a total of 17 months, before travelling to France where he remained for 2 months, and then to the UK where he remained for 10 months. He arrived in Ireland on the 29th May, 2022 and applied for international protection on the 30th May, 2022. He was interviewed on the same day (he claims under both ss. 13 and 15 of the 2015 Act) and disclosed his movements since having fled Somalia.

10. A Eurodac report was received by the IPO on the 8th June, 2022 which confirmed that Mr. A's prints had been taken in Moria in December, 2019. Mr. A was assigned a legal representative from the Legal Aid Board panel of private practitioners in June, 2022. Mr. A completed his questionnaire in support of his international protection application on the 25th August, 2022 and submitted it to the IPO.

11. Following a further request from the Irish authorities on the 24th January, 2023, the Greek authorities replied on the 27th January, 2023, stating that Mr. A had been granted refugee status on the 2nd June, 2020.

12. An admissibility consideration interview was held on the 29th June, 2023. During this interview, Mr. A was asked a series of questions in relation to the length of time he spent in Greece, how he supported himself in Greece, why he left Greece and what he would fear if returned and whether he reported these fears to authorities in Greece. He was

invited to provide any additional information or submissions. The terms of his responses to these questions were recorded. It appears that Mr. A was not asked more specific or probing questions about matters such as his efforts to obtain social assistance, employment or accommodation.

13. By way of report dated the 5th July, 2023, Mr. A's international protection application was deemed inadmissible by the IPO. In this report, extensive reliance was placed on extracts from COI including the AIDA Report) and the US State 2022 Country Report.

14. The Applicant appealed the decision of the IPO to the Tribunal and advanced detailed submissions through his solicitors regarding, *inter alia,* his exposure and potential exposure to inhuman or degrading treatment in Greece.

15. In the detailed submissions advanced on his behalf, reference was made to the fact that Mr. A lived in the Moria camp, unlawfully and unofficially, even after he got refugee status on the 2nd June, 2020, as his allowance was stopped, and he had no resources to survive. While there, he depended on access to a food distribution line for food. Sleeping conditions were described as not safe because there were people fighting over a tent. There were also people who tried to steal tents so one had to stay on guard at all times. He referred again to the killing of his friend with a knife. Mr. A claimed that he could not report his death to the police as he was not supposed to be in the camp. The limitations on hygiene facilities at the camp were described in detail. His fears of homelessness or forced return to the Moria camp if transferred to Greece were also set out.

16. In support of Mr. A's application to be admitted to the international protection process in Ireland, reliance was placed on decisions of the European Court of Human Rights in relation to the Moria camp, specifically *H.A. and others v Greece*, (*Application no. 4892/18 and 4920/18*), *MSS v. Belgium and Greece (Application no. 30696/09)* and on a decision of the European Court of Justice in C-297/17, C-218-17 and C438-17 *Ibrahim et al v. Germany.* Reliance was also placed on COI, specifically the then most recent AIDA report**,** the *RS Aegean Report* and *Beneficiaries of international protection in Greece: Access to Documents and Socio-Economic Rights* (from March 2023).

17. Reference was made to facts documented in these reports including most notably

that courts in countries such as Germany, the Netherlands and Belgium were said to have halted returns of beneficiaries of international protection to Greece and to documented serious issues in relation to conditions in Greece were documented. It was further submitted that the Tribunal was required to apply Article 1 CFEU, Article 4 CFEU/Article 3 ECHR (including the procedural aspects thereof) and/or Article 18 CFEU and/or 19(2) CFEU and/or Article 41 CFEU (or the general principle reflected in it) and/or 47 CFEU and/or 52(3) CFEU as well as the relevant tests in the case law, notably C-297/17, C-218-17 and C438-17 *Ibrahim et al v. Germany*; C-163-17 *Jawo v. Germany;* as well as *Hirsi Jamaa v. Italy (Application no. 27765/09)*, *Tarakhel v Switzerland (Application no. 29217/12)* and *Paposhvili v Belgium (Application no. 41738/10).*

18. It was submitted that the question for the Tribunal was whether there were substantial grounds for believing that there was a real risk of treatment contrary to Article 4 of the Charter/Article 3 of the Convention and to subject the Applicant's complaint of breach of Article 4 of the Charter/Article 3 of the Convention to "*close scrutiny*" and/or independent and/or rigorous and/or thorough scrutiny and to provide procedural protection similar or analogous to that set out in *Paposhvili v Belgium (Application no. 41738/10)* at paragraphs 185 to 192 and the authorities therein cited and, if necessary, to seek assurances from Greece.

19. The Tribunal was referred to the AIDA Report in relation to the practice in other countries and a copy of a decision of the Higher Administrative Court of the Free Hanseatic City of Bremen OVG (judgment of November, 2021) was appended to the submissions. COI in relation to accommodation, employment prospects and access to social assistance benefits were reviewed at some length in this case before the Court in Bremen concluded that the inadmissibility decision could not stand by reason of a conclusion that there was a serious risk that the returned refugee would be subjected to treatment in breach of Article 4 of the Charter.

20. It was further submitted that should the Tribunal disbelieve Mr. A in any of his evidence, he should be given an opportunity to deal with any such disbelief in reliance on an asserted constitutional or EU law right to an oral hearing. The Applicant's rights pursuant to the Preamble to the Constitution (the protection of human dignity); Articles 40.1 and 40.3 of the Constitution (protection of right to life; the person and bodily integrity as well as the right to Constitutional Justice and fair procedures) were highlighted.

21. Finally, reliance was placed on a decision of Ms. Hilkka Becker, Chair of the Tribunal dating from July, 2020 (Decision No: 1946562-IAAP-19), in which assurances were sought from Greece. It was submitted that assurances ought to be sought from Greece in Mr. A's case if it was proposed to refuse to allow Mr. A to apply for international protection in the State and/or to return the Applicant to Greece.

22. By letter dated the 15th November, 2023, received on or about Monday 20th November, 2023, Mr. A was notified that the Tribunal had decided to refuse the appeal and affirm the first instance decision to deem his international protection application in the State as inadmissible. A copy of the decision dated the 12th November, 2023, was attached.

23. Mr. A seeks to challenge the decisions of the Tribunal deeming his international protection application in the State to be inadmissible and the subsequence decision of the Minister terminating his international protection application on foot of same.

Mr H – the Second Applicant

24. Mr. H is also a 21-year-old Somalian male who arrived at Dublin Airport on the 15th April, 2022, and made an application for international protection. He was interviewed by the International Protection Office (hereinafter "the IPO") under s.13(2) of the 2015 Act on that date and confirmed that he came to the State to seek asylum having first been in Greece and then Germany. He returned to the IPO on the 19th April, 2022, and made a formal application for international protection by filling out an application form on the 19th of April, 2022. He was again interviewed on that date under s. 15 of the 2015 Act. He completed an IPO questionnaire on the 24th April, 2022. He was assigned a solicitor from the Private Practitioner International Protection Panel in June, 2022.

25. During interview, Mr. H confirmed that he had left Somalia on the 22nd December, 2020, and travelled to Greece. He confirmed that he had sought protection in Greece because of discrimination and because an Al- Shabaab militia organization had tried to kill him in Somalia. He was subsequently granted international protection status in Greece, and he remained there for one year. He travelled to Ireland using a Greek travel document which he subsequently said he had lost, spending one month in Germany *en route*.

26. The IPO issued a request for information to Greece under Art. 34 of Regulation

(EU) No. 604/2003 (the "Dublin III Regulation") on the 21st July, 2022. The Greek authorities replied on the 9th August, 2022, confirming that Mr. H had applied for international protection in Greece on the 23rd March, 2021, was granted refugee status on the 23rd April, 2021, and was issued with a residence permit valid from 5th May, 2021, to 4th May, 2024, and a travel document valid from the 7th October, 2021, to the 6th October, 2026.

27. By letter dated the 14th June, 2022, the Applicant was invited to further interview in relation to his application. This further interview conducted by the IPO is referred to as an "*Inadmissibility Consideration Interview*" and occurred nearly a year after the Greek authorities had informed the IPO that Mr. H had been granted refugee status in Greece. The record of this interview is recorded as a series of questions and answers. The Applicant was asked how long he had lived in Greece, how long he had stayed after he obtained refugee status, how he supported himself in Greece, why he left Greece, whether he had a fear of being returned to Greece and, if so, what fear, and whether he had reported these fears to authorities in Greece and, if not, why not. He was also afforded an opportunity to add any additional information or submission.

28. In his responses given at interview, the Applicant again accepted that he entered Greece in February, 2021. He added that he had been quarantined for one month before he applied for asylum. He confirmed that he obtained refugee status in May, 2021, and remained there until November, 2021, when he travelled by foot to Macedonia, then on to Serbia, Hungary, and Austria. In Austria, he says he was arrested and told to leave. He travelled to Italy where he remained for one or two months before travelling to Germany and finally on to Ireland arriving in April, 2022.

29. Mr. H described that while in he was in Greece, he lived in a camp, identified as Moria camp, where he was given water and one meal per day. He claimed that after he received his documents, he did not know what status he had. His tent was burnt one night, and he fled for his life without any documents. He further claimed that he attempted to explain these events to the Greek authorities, whom he said told him it was hard to restart the process. He moved to Selonik for work, but he said he had no documentation or understanding of the language and lacked support. He reported that he was homeless whilst there for two weeks and this was why he moved out of the country, adding that there was no help or safety. He was not asked specific questions

about why he had not accessed social assistance or what efforts he had made to obtain employment or accommodation after he had been granted refugee status.

30. Mr. H claimed that Greece was less safe than Somalia. He reported that there were gangs inside and outside the camp who cause a lot of problems. When he moved to the city, there was no help or support from the authorities. He outlined that he fears being returned to Greece for safety reasons because he cannot speak the language and will get no help from the authorities. Asked if he reported his fears to the authorities he stated:

> "*I did report my safety concerns to the authorities in the camp and they said they know the problems that go on in the camp but there is not much they can do about it because there is so much people. One of the mains things1 experienced was they tried to burn me when I was in the camp and when I tried to report this the authorities didn't do anything about it.*"

31. Mr. H submitted pictures of himself at the Moria camp. He pointed out that his life has changed in the short time he has been in Ireland, as he has accommodation, work and is able to integrate within the State.

32. The IPO's Report and Recommendation to Minister Prepared Pursuant to s. 21(4) of the 2015 Act dated the 26th June, 2023, recommended that his application be deemed inadmissible because he already has refugee status in Greece.

33. The IPO consideration document identified Country of Origin Information (hereinafter "COI") in relation to conditions in Greece which confirmed that according to law, beneficiaries of international protection have access to accommodation under the conditions and limitations applicable to third country nationals residing legally in the State. It was also confirmed that recognized refugees have a right to work but face difficulties in terms of entry into the employment market in the form of competition from Greek speaking employees. It was further found that beneficiaries of international protection enjoy the same rights as nationals and receive social assistance without discrimination as well as free access to health care, albeit hindered by significant shortages affecting both foreigners and

locals. Securing access to basic services was assessed as difficult or challenging, but not impossible.

34. The IPO considered the *Ibrahim* factors and found that Mr. H:

> *"falls short of establishing that the fundamental rights he enjoys in international law, particularly those protected by EU law and the ECHR would be infringed if he was to be returned to Greece.*"

35. An appeal was lodged to the Tribunal on the 5th July, 2023. In the detailed grounds of appeal advanced on behalf of the Applicant, it was confirmed that Mr. H's concern was that he would be rendered homeless and destitute in Greece and without access to adequate healthcare if returned there. Detailed reference was made to additional concerns to those expressly noted by the IPO as comprised in the *AIDA Country Report: Greece* (*AIDA Country Report: Greece* (2022 Update, published June 2023) (hereinafter "*the AIDA Report*") specifically regarding housing, access to the labour market, access to healthcare and current reception conditions in Greece. Mr. H further invoked his rights under Article 7 of the Charter and/or Article 8 of the Convention, albeit without providing any particulars.

36. The Impugned Decision of the Tribunal affirming the IPO's inadmissibility recommendation issued on 11th December, 2023. Subsequently, on 19th January, 2024, the Minister issued a determination under s.21(11) of the 2015 Act that Mr. H's application for international protection had been deemed inadmissible and would be terminated in consequence of which the report under s.39 of the 2015 Act would not be prepared. Mr. H was instructed that he had no permission to be in the State and his labour market permission was no longer valid. He was advised that the Minister would proceed to make a Return Order under s. 51A of the 2015 Act (subject to s. 50A).

37. In consequence, Mr. H seeks to challenge the inadmissibility findings made under s. 21 of the 2015 Act in these proceedings.

THE TRIBUNAL DECISIONS

38. While I am concerned in these proceedings with two separate Tribunal decisions which are the subject of separate and distinct legal challenges, there are evident common features to the two cases and similarities between the two Tribunal decisions in consequence.

39. Both cases involve Somali nationals who obtained international protection in Greece, lived in the Moria camp in Greece and complain of the conditions to which they were subjected in Greece before travelling to Ireland. Both cases involve a consideration of the same legal tests in the s. 21 decision-making process, differing only as to the application of the test on the facts of their individual cases. The cases were also considered on appeal by the same Tribunal member and a like approach was taken in both cases as to the identification of the applicable legal principles.

40. Thus, in both cases, the Tribunal member identified the parameters of the Tribunal's jurisdiction under s. 21 of the 2015 Act in identical terms as follows (including quoting extensively from *Ibrahim et al* at paras. 86-91 of the CJEU judgment):

> *"[4.2] In this type of appeal, the Tribunal is tasked with the application of the admissibility criteria contained in section 21(2) of the International Protection Act 2015, which contains an exhaustive list and creates, where the relevant criteria are fulfilled, a binding obligation on the Minister for Justice and Equality to deem an application inadmissible.*
>
> *[4.3] Nevertheless, the Tribunal notes that, as set out by the CJEU in the Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 Ibrahim et al, "(I)t is not (...) inconceivable that that [the Common European Asylum System] may, in practice, experience major operational problems in a given Member State, so that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights (...); and that:*

"Against that background, it must be stated that, having regard to the general and absolute nature of the prohibition laid down in Article 4 of the Charter, which is closely linked to respect for human dignity and which prohibits, without any possibility of derogation, inhuman or degrading treatment in whatever form, it is immaterial, for the purposes of the application of Article 4, that it is at the very time of transfer, in the course of the asylum procedure or on the conclusion of that procedure, that the person concerned would be exposed to a serious risk of suffering such treatment (...)".

[4.4] The Tribunal is particularly conscious that "(...), where a court or tribunal hearing an action brought against a decision rejecting a new application for international protection as being inadmissible has available to it evidence produced by the applicant in order to establish the existence of such a risk in the Member State that has previously granted subsidiary protection, that court or tribunal is obliged to assess, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, whether there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people (...)". However, it is clear from the judgment of the CJEU that "(...), if the deficiencies mentioned in the preceding paragraph (...) are to fall within the scope of Article 4 of the Charter, which corresponds to Article 3 of the ECHR, and the meaning and scope of which is therefore, under Article 52(3) of the Charter, the same as those laid down by the ECHR, those deficiencies must attain a particularly high level of severity, which depends on all the circumstances of the case (...)". Moreover, "(T)hat particularly high level of severity is attained where the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and his personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity (...)"; and "(T)hat threshold cannot therefore cover situations characterised even by a high degree of insecurity or a significant degradation of the living conditions of the person

concerned, where they do not entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment".

41. Having noted that s.21(2)(a) of the 2015 Act requires that an application for international protection be found inadmissible where another member state has granted protection in its decision in both cases, the Tribunal nonetheless set out the principles in *Ibrahim* as quoted above with express regard to the risk of systemic deficiencies which may result in a person "*wholly dependent on State support*" being placed in a "*situation of extreme material poverty*" which does not meet the basic needs of "*food, personal hygiene and a place to live*" and undermines a person's physical or mental health or puts the person "*in a state of degradation incompatible with human dignity*" [at paras. 4.3-4.4].

42. The Tribunal further noted that it was required to subject the Applicants' complaints of breach of Article 4 of the Charter /Article 3 of the Convention to "*close scrutiny*" and/or independent and/or rigorous and/or thorough scrutiny as required authorities such as *Hirsi Jamaa v. Italy (Application no. 27765/09)* [at para. 116] and *Tarakhel v. Switzerland (Application no. 29217/12)* [at para. 126].

43. In each case, the Tribunal determined that it must assess the objective situation in Greece in the context of each Applicant's personal circumstances and it proceeded to do so in somewhat different terms in each case. It is not disputed on behalf of the Applicants that in identifying the legal test and the parameters of the Tribunal's jurisdiction as aforesaid, the Tribunal identified the correct legal test. Issues are raised, however, on behalf of both Applicants as to the application of the test by the Tribunal.

Mr. A's Case

44. The Tribunal decision in Mr. A's case spans 23 pages (as compared with 19 pages in Mr. H's case). Mr. A's grounds of appeal were summarised [at para. 3.1] of the Tribunal Decision as follows:

(i) The conditions in the refugee camp constituted inhuman and degrading treatment;
(ii) Mr. A did not report the death of his friend;
(iii) Mr. A did not have access to healthcare;
(iv) Mr. A would be homeless on return;
(v) It would be a breach of mutual trust to return him;
(vi) It would be a breach of Article 4 of the Charter and Article 3 of the Convention if Mr. A were to be returned;
(vii) It would also be a breach of Mr. A's constitutional rights;
(viii) Previous decision of the Tribunal (July 2020)

45. Documents submitted in support of the appeal were noted to include the AIDA Report; the RSA/ ProAsyl Report 2023, the Decision of the Bremen Court, the earlier Tribunal Decision 1946562-IAAP-19 and photos. I do not propose to recite the detail of the decision which is lengthy. However, it is appropriate to record that the Tribunal proceeded to consider Mr. A's personal circumstances in some detail, addressing under separate headings the issues raised in the Notice of Appeal.

46. Mr. A's personal circumstances were set out [from para. 4.10] to include his work experience and further training in Ireland [at para. 4.11]. The Tribunal noted specifically [at para. 4.12] that the Appellant obtained a residence card (ADET) for Greece in 2020, which lapsed in June, 2023. It was further noted that according to COI, in order to obtain a residence permit in Greece one must undertake a series of difficult steps. These were set out. It was noted that to obtain a travel document, which Mr. A already had, one had to pay a fee. The Tribunal observed that as the Mr. A had already obtained an ADET and a travel document, he had demonstrated the capacity to navigate the somewhat complicated bureaucratic structures in Greece.

47. The Tribunal noted that Mr. A's residence card had expired, and he would have to renew it to continue to reside in Greece but stated that COI indicated that renewal applications are submitted via email to the Asylum Service and decisions are notified by email. It was noted that there is no evidence before the Tribunal to suggest that Mr. A had made an application for the reissuance *via* email from Ireland. COI which confirms that the renewal process for travel documents is also facilitated via email was cited by the

Tribunal before it was concluded that as it is an online system, Mr. A could arrange this, if necessary, from Ireland [at para. 4.12].

48. The Tribunal further noted that it was apparent from COI that a residence permit ('ADET') is necessary for obtaining a Social Security Number ('AMKA') and social benefits. The fact that the Appellant had already been granted a residence permit and required only to have it reissued was considered by the Tribunal to put him in a more favourable position than most, in that regard.

49. The Tribunal observed [at para. 4.14] that it is also apparent from COI that once a person is granted a residence permit, they are notified that they are the beneficiary of an AMKA, and they are notified of the steps that they must take to have that number issued. The Tribunal pointed out that it was not clear if Mr. A had taken the necessary steps to have the number issued before he left Greece. Even if he did not, the Tribunal considered that he is a literate, able-bodied person who was able to navigate the administrative hurdles to obtain a residence permit, and, therefore, he should also be in a position to obtain the documents necessary to apply for an AMKA.

50. It was pointed out by the Tribunal that Mr. A had not submitted any medical reports to suggest he is suffering from mental or physical incapacities which put him in a very different situation to Appellants who have mental health problems and post-traumatic stress, or Appellants who have never been issued with a residence permit [para. 4.15].

51. Each of the submissions made on behalf of Mr. A were considered in some detail under separate headings including his submission that:

(i) there are deficiencies in refugee camps in Greece;
(ii) he could not report the death of his friend;
(iii) he would be at risk of extreme material poverty/ inhuman & degrading treatment if returned to Greece;
(iv) there are housing issues.

52. The Tribunal addressed each of these submissions in turn, noting with regard to deficiencies in the camp that Mr. A had been able to access food and water when in the camps, albeit by queuing. While accepting that sleeping conditions may not have been safe

at the camp, the Tribunal noted as Mr. A already had international protection, he would not be returning to the camp if he had to go back to Greece [at para. 4.18]. In terms of hygiene, it was pointed out that the submissions on behalf of Mr. A suggested the presence of hygiene facilities in the camp, albeit queues were long and water cold [at para. 4.19].

53. The Tribunal readily accepted from the COI and reports submitted that it was clear that while there is a system for reception in Greece, it is "*far from perfect*" [at para. 4.20]. The Tribunal reiterated, however, that it was not directly concerned with the deficiencies in the Greek reception conditions and/or asylum procedures for asylum applicants but must assess the conditions that are likely to be experienced by a recognised refugee. The Tribunal identified that the real question for consideration before the Tribunal is what the current situation in Greece for beneficiaries of international protection appears to be, in relation to matters such as healthcare, jobs, hygiene and accommodation.

54. In terms of Mr. A's purported inability to report the murder of his friend in a knife attack, the Tribunal observed that Mr. A had reported matters to the police previously and there was no evidence that had a murder been reported, that the authorities would have failed to investigate a murder crime in a refugee camp. The Tribunal noted that Greece is a functioning democracy with a police force.

55. As for the claim to be at risk of extreme material poverty and/or inhuman & degrading treatment if returned to Greece, it was noted that he had lived in Greece for one year and five months and received international protection in 2020. During this time, he had been able to navigate the complex system relating to the issuance of residence cards and he managed to get one as well as a travel document. The Tribunal referred to COI which confirmed difficulties with housing, healthcare or employment and noted the existence of infringement proceedings against Greece for poor implementation of the Qualification Directive as regards the content of international protection. It was pointed out, however, that while COI highlighted the various difficulties which beneficiaries encounter, the Tribunal also noted that "*no minimum residence is required for eligibility for guaranteed minimum income, formerly known as Social Solidarity Income, a €200 monthly allowance per household, plus €100 per additional adult and €50 per additional child*". The Tribunal observed that while the minimum income is low in comparison to what a person might receive in this jurisdiction, it was not the case that there is no financial

assistance in terms of a guaranteed minimum income.

56. Having considered the objective COI evidence, which reported high risks of homelessness and destitution among people granted international protection in Greece given that access to the necessary documents and resources to secure accommodation is not possible within the 30-day deadline left to persons to vacate their reception places upon obtaining international protection, the Tribunal noted that there is no evidence to suggest Mr. A made any efforts to secure alternative accommodation during that 30-day time-frame window. It was noted that his evidence was simply that he remained at the refugee camp. The Tribunal further recorded that there was no evidence of any attempts whatsoever on the part of Mr. A to apply for jobs or seek accommodation.

57. The Tribunal noted that the Pro-Asyl report had suggested that beneficiaries are differentiated from Greek nationals in relation to housing, as there is a five-year minimum residence requirement for those seeking housing allowance (Pro-Asyl – 2023, p. 19) but then observed that the CJEU has emphasised that infringements of Ch. VII of the Recast Qualification Directive, which do not result in a breach of Article 4 Charter, do not prevent Member States from exercising the option to deem an application inadmissible [*Ibrahim*, at para. 92]. The Tribunal referred to ECRE/AIDA's most recent report citing research to the effect that 18 out 64 beneficiaries of international protection were homeless or in precarious housing conditions (ECRE/AIDA – 2023, p. 244) but observed that this suggests that 46 out of 64 were not homeless. It was noted that that a total of 32 out of 64, i.e. 50% of all beneficiaries of international protection. live in precarious housing conditions, but the Tribunal considered taking the statistics into account that [at para. 4.32]:

> *"It cannot be said that it is the case that all beneficiaries of international protection face destitution or homelessness."*

58. The Tribunal acknowledged therefore that while it is undoubtedly very difficult for beneficiaries of international protection in Greece to set themselves up following receipt of international protection, given the COI before the Tribunal, it was apparent that this is not the situation for all individuals who have been recognised as refugees. Noting that beneficiaries of international protection are not automatically rendered homeless, from one day to the next, the Tribunal observed that Mr. A is a young, able-bodied, capable person

with no dependents and no apparent special vulnerability. It was noted that he now also has the benefit of work experience from Ireland, he can apply to renew his residence card online and make other preparations from Ireland relating to housing and employment opportunities prior to his return.

59. In the circumstances, the Tribunal found that there was a reasonable chance of the Appellant finding housing for himself in Greece and it could not be said, based on the evidence before the Tribunal, that there are substantial grounds for believing that this Mr. A would be rendered homeless on his return leading to a real risk of treatment contrary to Article 4 CFEU/ Article 3 ECHR [at para. 4.33].

60. As for Mr. A's fears of not getting employment in Greece, it was noted by the Tribunal that he did not provide any examples of any attempts made by him to get employment in Greece following his refugee status. It was noted that as a person with protection status, Mr. A was entitled to apply for a tax identification number, which in turn would allow him access to employment. With regard to his employment prospects, it was acknowledged that the COI before the Tribunal indicated that there is extremely high unemployment in Greece, particularly in the Attica region, in which returnees arrive (Pro-Asyl – 2023, p. 27). Research cited indicated that 14 out of 65 were working when a survey was continued, and 23 out of 64 had been able to work during the previous six months (ECRE/AIDA – 2023, p. 247). It was further observed, however, that neither the Charter nor the Convention creates a positive obligation on States to provide employment to all beneficiaries of international protection, and poor employment prospects do not of themselves equate with inhuman or degrading treatment. The Tribunal observed that the fact that a minimum monthly allowance is payable to beneficiaries in the same way as it is paid to Greek nationals also suggests that the Greek State is making some effort to alleviate the poverty that may arise from unemployment [at para. 4.36].

61. In terms of medication and healthcare and the complaints made in relation to these areas, it was noted Mr. A had been able to access medication and assistance from Doctors without Borders. Reference was made to the latest AIDA Report from which it is clear that Mr. A would have free access to healthcare and medication in the same way as Greek nationals, but that the healthcare sector had been adversely affected by austerity measures. The Tribunal noted that there was no evidence before it that Mr. A had been denied access

to healthcare [at para 4.39].

62. In relation to the claim of mutual trust based on a number of judgments from across the EU, the Tribunal noted that different approaches appear to be taken by different courts in different EU States. Considering the decision of the Bremen Court, the Tribunal noted that it was two years old (dating to November, 2021) with the result that more up to date COI was available to the Tribunal. The Tribunal accepted that a small number of countries appear to have ceased all returns, while others have allowed some returns and prevented the return of more vulnerable individuals. The Tribunal observed that there is no "*one size fits all approach*" and an individualised assessment must be carried out in every case [at para. 4.41].

63. Regarding the previous Tribunal decision (Decision No: 1946562-IAAP-19) in which the Tribunal had refused to make a recommendation of inadmissibility in a Greek transfer case, it was noted that the appellant in that case was particularly vulnerable as the young adult survivor of both sexual and domestic violence without family support with minor dependents observing that the Appellant in this case was not in a similar category stating:

> *"He is a young able-bodied man, who is capable of work. He now has the benefit of training and work experience. He has been able to navigate the complex administrative ADET system and was granted a residence and a travel permit, both of which come with several benefits and rights which would allow the Appellant to access other opportunities such as work , access to a bank account and a social security number."*

64. In conclusion, the Tribunal observed that not all refugees in Greece are homeless, unemployed and/or destitute. On an individualised assessment of Mr. A's situation, the Tribunal was not satisfied that there are substantial grounds for believing that there is a real risk of treatment contrary to Article 4 of the Charter / Article 3 of the Convention if the Appellant is returned to Greece.

65. Thus, in both cases before me, applying the test set down in the judgment of the

CJEU in *Ibrahim*, and having considered the Applicants' evidence of their experiences in Greece and relevant country information – in particular, the *the AIDA Report*) regarding key matters such as access to housing, employment, healthcare, safety and the availability of social welfare supports for international protection beneficiaries in Greece – the Tribunal found no real risk of a breach of either Applicants' fundamental rights if returned to Greece, and affirmed the IPO recommendation in both cases. In concluding, the Tribunal stated [at para. 4.45]:

> *"The Tribunal is acutely aware of the many COI reports that highlight the difficulties faced by some beneficiaries experience in Greece. However, not all refugees in Greece are homeless, unemployed and/or destitute. Given all of the reasons set out above in the context of the COI and an individualized assessment of the Appellant's situation, the Tribunal is not satisfied that there are substantial grounds for believing that there is a real risk of treatment contrary to Article 4 CFEU/Article 3 ECHR if the Appellant is returned to Greece."*

<u>*Mr. H's Case*</u>

66. Mr. H's grounds of appeal were summarised by the Tribunal in the Decision in that case at [3.1] as follows:

> *(a) The Appellant will be subject to extreme material poverty on his return;*
> *(b) The Appellant fears for his safety.*
> *(c) The right to family life.*

67. It was noted by the Tribunal that the Applicant had submitted photographs of himself beside UNHCR tents and a letter from Travelodge and his employer in support of his appeal. For its part, the Decision records that the IPO submitted the AIDA Report and the US Department of State's Report on Greece [noted at paras. 3.2-3.3 of the Decision].

68. Although the Tribunal was satisfied that the Applicant had received refugee status in Greece in 2021, a residency permit valid until 4th May, 2024, and a travel document valid until 6th October, 2026, [at paras. 4.5-4.6], it noted that Mr. H claimed

that he would be at risk of "*extreme material poverty*" if returned to Greece and the Tribunal proceeded on this basis to assess the issues raised in the Notice of Appeal on the accepted basis that the Tribunal is required to apply Article 1 of the Charter, Article 4 of the Charter/Article 3 of the Convention (including procedural aspects reflected in it) and/or Articles 18, 19, and/or 52(3) of the Charter in making an inadmissibility determination.

69. The Tribunal noted [at para. 4.9] that it must ask itself the question whether Mr. H had shown that there were substantial grounds for believing that there was a real risk of treatment contrary to Article 4 of the Charter/Article 3 of the Convention, claims which the Tribunal is required to subject to "*close scrutiny*". In assessing the personal circumstances of Mr. H and the objective situation in Greece, the Tribunal cited in particular the AIDA Report, 2023 and Pro-Asyl, 2023. It was further noted from his Questionnaire that the Applicant claimed to have a medical ailment, diagnosed in Somalia, including "*sadness, headaches, insomnia and a continual concern for his family's safety*" but that there was no medical report on file [at para. 4.11].

70. The Tribunal specifically referred to the procedure to obtain a residence permit ("ADET") in Greece which requires a "*series of difficult steps*". As the Applicant had obtained an ADET and travel documents previously, the Tribunal concluded that he had "*demonstrated the capacity to navigate the somewhat complicated bureaucratic structures in Greece*" [at para. 4.12]. The Tribunal found that the fact that he already had an ADET meant that it required only to be reissued and this "*puts him a more favourable position than most, in that regard*" [at para. 4.13]. The Tribunal observed that Mr. H "*seems to not have taken it any further once he heard it might be difficult to have the documents reissued*". The Tribunal found that he should *"also be in a position to obtain the documents necessary to apply for an AMKA [social security number]"* [at para. 4.14].

71. As he had not submitted any medical reports to suggest he is suffering from mental or physical incapacities and is now working "*which suggest[s] that he is physically capable of entering the workforce*", the Tribunal found that he is in "*a very different situation*" to those who have "*severe mental health problems, post- traumatic stress or physical medical issues*" or who have never been issued with a residence permit (at para. 4.15).

72. The Tribunal further noted from COI that the "*system for reception of refugee in Greece*" is "*far from perfect*" but that this was not directly relevant as the Applicant "*would*

not be returning as an asylum seeker" [at paras. 4.17 - 4.19] and that the "*real question then for the Tribunal is what is the current situation in Greece for beneficiaries of international protection in terms of healthcare, jobs, hygiene and accommodation*" [at para. 4.19].

73. Whilst referring to COI which attests to difficulties encountered by recognized refugees in Greece, the Tribunal noted eligibility for guaranteed minimum income and while the minimum income is low in comparison to what a person might receive in this jurisdiction, it is not the case that no financial assistance is available in terms of a guaranteed minimum income [at para. 4.21].

74. The Tribunal noted COI showing high risks of homelessness and destitution among people who have been granted refugee status in Greece. The Tribunal noted further, however, that there was no evidence on the Applicant's file to suggest he made any efforts to secure alternative accommodation during the six-month period he remained at Moria camp after being granted status. In addition, the Tribunal noted that no evidence had been offered of any attempts whatsoever by Mr. H to apply for jobs or find accommodation. Despite high rates of homelessness, the Tribunal observed that figures in COI confirmed that 46 out of 64 were not homeless albeit that 50% of all beneficiaries of international protection live in precarious housing conditions but "*taking the statistics into account it cannot be said that it is the case that all beneficiaries of international protection face destitution or homelessness*" [at para. 4.26].

75. The Tribunal determined that, as the Applicant was a "*single, able- bodied, capable person with no dependents here and no evidence of any particular vulnerability which would prevent him from working*" and had "*the benefit of work experience from Ireland*" and could apply to renew his residence card online and make other preparations relating to housing and employment opportunities prior to his return, there was "*a reasonable chance*" of him finding housing in Greece [at para. 4.27].

76. The Tribunal further found that Greece does not treat beneficiaries any differently to Greek nationals in terms of access to employment and has plans to implement proactive employment policies through training of refugees in agriculture, construction and tourism sectors, among others. However, it was accepted that "*his path to finding a job will not be easy, given the COI*" [at para. 4.30]. It was noted that the minimum monthly allowance payable to beneficiaries also suggests that the Greek

State is making some effort to alleviate the poverty that may arise from unemployment [at para. 4.30].

77. Similarly, it was found that COI "*clearly states that the Appellant is entitled to equal treatment with Greek citizens, in terms of healthcare*" and there was "*no clear evidence*" to suggest that he was prevented from accessing healthcare in Greece in the past. He was given a residence permit, which he is entitled to renew and "*healthcare and other social benefits flow from this*" [at para. 4.33].

78. It was noted further that there was no evidence that the Applicant had a family in Ireland *"or that his private life would be interfered with"* if he returned to Greece [at para. 4.34].

79. The Tribunal found that Greece is a democratic EU country with a functioning police force and judiciary, and there was *"no specific evidence to suggest that the there is no effective State protection in relation to threats to safety/gangs"* [at para. 4.35].

80. The Tribunal noted cases from across the EU where inadmissibility recommendations were set aside "*based on evidence that the Appellants were particularly vulnerable*" but the Applicant was not in a similar category as he was a young able-bodied man, capable of work, with the benefit of work experience, who was "*able to navigate the complex administrative ADET system in Greece*" and has residency and a travel permit which can be renewed and come with *"several benefits and rights"* [at para. 4.36].

81. The Tribunal affirmed the recommendation that the Applicant's international protection application be deemed inadmissible [at para. 5.1].

STATUTORY FRAMEWORK

82. Section 21 of the 2015 Act provides the statutory basis for treating an application for international protection as inadmissible on grounds which include in s. 21(2)(a) where the person who is the subject of the application has been granted refugee status or subsidiary protection status in another Member State of the EU. By reason of s.

21(1A) such a person is not excluded where the person is deemed under ss. 50A(4) or 51C(5), as the case may be, to have made an application for international protection in accordance with s. 15, namely, where the prohibition on *refoulement* applies or where a return is not effected within the prescribed period of the Return Order.

83. Under the general scheme of s. 21 a first instance opinion as to whether an application for international protection is inadmissible resulting in a recommendation to the Minister is made by an international protection officer (s. 21(3)). Where the IPO recommends that an application be treated as inadmissible, s. 21(4) mandates the preparation of a report in writing which shall include the reasons for the recommendation and requires the Minister to notify the person concerned and his or her legal representative (if known) of the recommendation as soon as practicable. Section 21(4)(b)(i)-(iv) requires that the notification shall include:

(i) *a statement of the reasons for the recommendation*;

(ii) *a copy of the report prepared by the IPO*;

(iii) *a statement informing the person of his or her entitlement under s. 21(6) of the 2015 Act to appeal to the Tribunal against the recommendation, and*

(iv) *where applicable, a statement of the effect of s. 21(13) advising that the s. 15 application for protection has been determined, examination of the application has been terminated and accordingly a s. 39 report shall not be prepared.*

84. Under s. 21(7) of the 2015 Act provision is made for the conduct of an appeal against the decision of the recommendation of the IPO as notified by the Minister. Of importance, s. 21(7)(a) precludes the conduct of an oral hearing providing:

(i) "*the Tribunal shall make its decision without an oral hearing;*"

85. Section 21(8) requires the Tribunal to consider the following before determining an appeal, namely:

(i) *the notice of appeal*,

(ii) *all material furnished to the Tribunal by the Minister that is relevant to the decision as to whether the application for international protection concerned is admissible*,

(iii) *any observations made to the Tribunal by the Minister or the High Commissioner, and*

(iv) *such other matters as the Tribunal considers relevant to the appeal.*

86. Under s. 21(9) of the 2015 Act, the Tribunal's powers are limited to deciding to:

(i) *affirm the recommendation of the international protection officer, or*

(ii) *set aside the recommendation of the international protection officer*.

87. Section 21(10) requires that the decision of the Tribunal on an appeal and the reasons for the decision shall be communicated by the Tribunal to the person concerned and his or her legal representative (if known), the Minister and the High Commissioner.

88. Where a recommendation is made under s. 21(3) and the Tribunal affirms the recommendation under s. 21(9), s. 21(11) provides in mandatory terms that:

"*the Minister shall determine the application to be inadmissible*."

89. Under s. 21(12), following determination by the Minister that an application is inadmissible, he or she shall, as soon as practicable, notify the person concerned and his or her legal representative (if known) of the determination and of the reasons for it, which notification shall, where applicable, include a statement of the effect of *subsection (13)*.

90. Also pertinent to issues arising in these proceedings, ss. 21(7) and/or 46(8) of 2015 Act provide that:

> "*Sections 41 , 44 , 45 and 46 (8) shall apply to an appeal under subsection (6) subject to the following modifications, and any other necessary modifications:*

(a) *the Tribunal shall make its decision without an oral hearing;..*"

91. No provision is made for a personal interview or oral hearing in the context of a decision under s. 21 of the 2015 Act. Both Applicants were, however, interviewed by the International Protection Office (IPO) under ss. 13(2) (preliminary interview) and s. 15 of the 2015 Act. Both were also aware of the absence of an oral hearing at appeal stage before the Tribunal and the requirement to submit all documentation sought to be relied upon in support of their cases in advance.

92. For its part, s. 46(8) provides that:

> *"The Tribunal shall furnish the applicant concerned and his or her legal representative (if known), and the High Commissioner whenever so requested by him or her, with—*
>
> *(a) copies of any reports, observations, or representations in writing or any other document furnished to the Tribunal by the Minister, copies of which have not been previously furnished to the applicant and his or her legal representative (if known), or as the case may be, the High Commissioner, and*
>
> *(b) an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of an appeal."*

93. In Mr. A's case, reliance was placed on an EUAA Report in the Tribunal decision, without advance notice to him and without affording him an opportunity to address submissions to the contents of the Report.

94. Under s. 50A(1) of the 2015 Act (as amended by s. 9 of the Courts, Civil Law, Criminal Law and Superannuation (Miscellaneous Provisions) Act, 2024) which provides for a prohibition of *refoulement* where an inadmissibility finding under s. 21 has been made, a person shall not be expelled or returned in any manner whatsoever to the frontier of a territory where, in the opinion of the Minister:

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

(ii) *there is a risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, or*

(iii) *a serious and individual threat to his or her life or person by reason of indiscriminate violence in situations of international or internal armed conflict, or*

(iv) *where the Minister is of the opinion that such expulsion or return would be prohibited under any enactment or rule of law as a breach of the person's fundamental rights.*

DISCUSSION AND DECISION

<u>*Preliminary Matters*</u>

<u>*Grant of Leave*</u>

95. These matters come before me by way of "*telescoped"* hearing as leave to proceed by way of judicial review has not yet been granted. By law, the Applicants are required to demonstrate "*substantial grounds*" for contending that leave should be granted pursuant to ss.5(1)(b) and (c) of the Illegal Immigrant (Trafficking) Act 2000 (hereinafter "the 2000" Act). The "*substantial grounds*" test, while more onerous to satisfy than the arguable grounds test developed under Order 84, Rule 20, of the Rules of the Superior Courts, 1986 on an application of the dicta in *G v. DPP* [1994] 1 I.R. 274, consistent with the constitutional right of access to the Courts, requires only that an applicant in judicial review proceedings demonstrate that the ground advanced is reasonable and not tenuous or trivial. To obtain leave on the application of a substantial grounds test, it is not necessary for an applicant to demonstrate that they are likely to succeed at full hearing. The threshold remains modest.

96. The issues canvassed in these proceedings are of a serious nature and weighty. Similar or related issues now arise in a significant number of cases before the courts. They involve questions of law at a point of intersection of EU law, Convention law and domestic statutory and constitutional law. The case advanced on behalf of the Applicants, were it to be substantiated, is that there has been a failure to properly consider and determine whether

the level of risk of harm they are subjected is of a nature whereby the State could not lawfully transfer them to another EU Member State. This could not be characterized as trivial or of other nature than weighty in view of a concerning picture which it must be accepted emerges on the COI in relation to conditions in Greece, leading courts in other jurisdictions to refuse to return refugees to Greece. I am satisfied that the threshold of substantial grounds within the meaning of ss.5(1)(ob) and (oc) of the 2000 Act is met in these two "*pathfinder*" or lead cases.

Extension of Time

97. The decision in Mr. A's case was notified to his solicitors on or about the 15th November, 2023 and later to Mr. A. The time to bring the proceedings on his behalf expired in or about the 13th December, 2023. The application for leave was opened on the 19th January, 2024. Mr. A accordingly requires an extension of time of about 37 days (from the date on which his solicitors were notified) spanning the Christmas vacation period. An explanation for delay was put forward to ground an application for an extension of time on Affidavit by the Applicant's solicitor (at para. 4) together with reasons for exercising a power to extend time. These include that while instructions were received in early course and counsel instructed to draft proceedings on the 22nd November, 2023, counsel contacted the solicitor's office on the 19th December, 2023, to say that he was unable to finalise draft proceedings before Christmas due to illness. Settled draft proceedings were only received by Mr. A's solicitor from counsel on the 5th January, 2024. It was confirmed by Mr. A's solicitor that he was not at fault for any of the delay.

98. It is also relevant and as clear from the proceedings that the issues which arise for determination in these proceedings did not arise for the first time in these cases but have been the subject of earlier litigation. However, earlier cases were compromised. Accordingly, there are neither weighty concerns such as surprise nor prejudice resulting from the delay in moving to commence proceedings within 28 days in accordance with the statutory time limited fixed under s. 5(2) of the Illegal Immigrants (Trafficking) Act, 2000 (as amended). The issues arising require to be determined and have the potential to assist in resolving many other cases.

99. While a time issue is raised on behalf of the Respondents in written submissions in Mr. A's case, it was not pressed in oral argument and the Respondents were satisfied to rely on

the written submissions. In written submissions, reliance was placed on *G.K. v. IPAT* [2022] IEHC 204 and *W.P.L. v. IPAT* [2024] IEHC 163.

100. In deciding that it is appropriate to make an order extending time in this case pursuant to s. 5(2)(a) of the 2000 Act, I have had regard to the nature of the case as a "*pathfinde*r" case raising concerns in relation to fundamental human rights and issues which have the potential to affect a wide number of cases, the fact that delay arose through no fault of Mr. A, but was contributed to by the illness of counsel and occurred over the Christmas vacation together with the fact that no specific prejudice has been identified on behalf of the Respondents as arising from the delay. In view of these factors and having regard to the length of delay, I am satisfied that good and sufficient reason exists for extending the period within which the application on behalf of Mr. A may be made.

101. No time issue arises in Mr. H's case.

The Common European Asylum System (CEAS)

102. Intrinsic to the entire operation of the EU, Article 2 TEU states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are said to be common to the Member States. These common values are the bedrock upon which the Union has developed and absent the ability to rely on the observance of these common values throughout the EU, the mutual trust upon which the functioning of the Union depends for its existence, not just in relation to asylum and immigration matters but across a broad spectrum of activity, evaporates.

103. Following on from the Lisbon Treaty, Article 78 TFEU provided for the establishment of the CEAS. Article 80 TFEU reiterated the principle of solidarity and fair sharing of responsibility between the Member States. A series of Regulations and Directives were adopted to provide for minimum standards across the Member States including: Council Directive 2004/83/EC of 29th April, 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; Council Directive 2005/85/EC of 1st December, 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status and Council Directive 2001/55/EC of 20th of July, 2001, on minimum standards for giving temporary

protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof; and Regulation (EC) No 2725/2000 of 11th December, 2000, concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention).

104. The various measures adopted refer in their first recitals to the fact that a common policy on asylum, including a CEAS, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community. Each of those texts states that it respects the fundamental rights and observes the principles recognised, in particular, by the Charter. Among others, recital 15 in the preamble to Regulation No 343/2003 states that it seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter and recital 10 in the preamble to Directive 2004/83 states that, in particular, that directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members. Article 1 of Regulation No 343/2003 lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.

105. These provisions (and similar) which together establish the CEAS are grounded in the *raison d'être* of the European Union, being the creation of an area of freedom, security and justice based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights. This places mutual trust at the centre of the CEAS and the duties on the State in participating within it. In *Opinion 2/13* (EU:C:2014:2454), the CJEU described mutual trust as "*of fundamental importance*", not merely for certain areas of law, but for the entire EU legal order. The principle requires each Member State "*save in exceptional circumstances, to consider all the other Member States to be complying with EU law….*" (*Opinion 2/13* at para. 192).

106. As it has developed, the CEAS has been built, in direct reliance on the principle of mutual trust, around the objective that only one Member State is responsible for an asylum application. In general, therefore, EU law does not allow a beneficiary of international

protection to lodge a second asylum application in another Member State based on the same claims as in the first application. These applications may be considered inadmissible and do not have to be re-examined by the second State (Revised Asylum Procedures Directive (2013/32/EU), Article 33(1), (2)). Indeed, the Dublin system was established to avoid secondary movements and guarantee that only one Member State is responsible for an asylum application. As noted in the Introduction to the EUAA Guide to Jurisprudence on Secondary Movements by Beneficiaries of International Protection (2022, p. 12) illegal cross-border movement and resubmitting another application for international protection can create many practical challenges. Further measures directed to streamlining the processing of applications and controlling illegal secondary movements are anticipated as part of the New Pact on Asylum and Migration. It has come to be recognized, nonetheless, that there may be circumstances where an individual who has applied in or been granted status in one Member State, may face risks of extreme material poverty in that State which in turn may trigger movement to another EU State to legitimately seek an adequate standard of life.

107. The general EU legal and policy background is rehearsed in the decision of the CJEU in Joined Cases C-411/10 and C-493/10 *NS (Afghanistan) v. Secretary of State for the Home Department* (December, 2011), a case in which Ireland intervened. There the CJEU set out (from para. 75) that the CEAS is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted. It is noted that Article 18 of the Charter and 78 TFEU provide that the rules of the Geneva Convention and the 1967 Protocol are to be respected (see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, [at para. 53] and Case C-31/09 *Bolbol* [2010] ECR I-5539, [at para. 38]. The Court further noted that according to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law, but also ensure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law (Case C-101/01 *Lindqvist* [2003] ECR I-12971, [at para. 87], and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, [at para. 28]. At paras. 78-80 of the judgment the CJEU observed:

"Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard….In those circumstances, it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR."

108. Having said this, however, the CJEU acknowledged that it was not inconceivable that the system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.

109. Noting the *raison d'être* of the European Union and the creation of an area of freedom, security and justice, most specifically the CEAS, underpinned by mutual confidence and a presumption of compliance, the CJEU found that it was not a mandatory consequence of any infringement of the individual provisions of EU prescribed standards that a Member State be precluded from transferring an applicant to the responsible State. Such a result would deprive the common obligations agreed between Member States of the EU of their substance and endanger the realisation of the objectives of the CEAS but [at para. 86]:

"By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision."

110. The CJEU noted that in 2010, Greece had been the point of entry in the European Union of almost 90% of illegal immigrants, resulting in a disproportionate burden on it compared to other Member States at that time and a consequential inability to cope with pressure of numbers. It was noted that in a situation similar to those at issue a transfer, in

June 2009, of an asylum seeker to Greece by the Belgian State, had been found to infringe Article 3 of the Convention, first, by exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece, since the Belgian authorities knew, or ought to have known, that he had no guarantee that his asylum application would be seriously examined by the Greek authorities and, second, by knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment (a reference to *M.S.S.* v. *Belgium and Greece* [2011] 53 EHRR 2, *Application no. 30696/09*).

111. The CJEU observed that the extent of the infringement of fundamental rights described in *M.S.S.* showed that there existed in Greece, at the time of the transfer of the applicant *M.S.S.*, a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers. In finding that the risks to which the applicant was exposed were proved, the European Court of Human Rights took into account the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the CEAS in Greece, the correspondence sent by the UNHCR to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights (*M.S.S.* v *Belgium and Greece*, at paras. 347-350). The CJEU observed that information such as that cited by the European Court of Human Rights, enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate those risks.

112. On the basis of the reasoning developed in its judgment, the CJEU duly found that in situations such as those at issue in *N.S.*, the Member States, including the national courts, may not transfer an asylum seeker where they could reasonably be aware that systemic deficiencies in the asylum procedure and in the reception of conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter. A preclusion on transfer in those circumstances was necessary to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers.

113. It has been clear, at least since the decision of the CJEU in *N.S.* that the mutual confidence and a presumption of compliance with fundamental human rights within the territory of the EU upon which the CEAS is founded in not conclusive. The CJEU pointed out [at para. 100] that a conclusive presumption of compliance with fundamental rights, could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States with the result. The presumption must therefore be regarded as rebuttable.

114. In C-163/17 *Jawo v. Germany* [2019] 1 WLR 3925 (concerning question of transfer to Italy) this line of jurisprudence was developed further by addressing the nature and evidence required to rebut a presumption of compliance, again in the context of the transfer of an asylum seeker. The CJEU confirmed (see, by analogy with its jurisprudence concerning European Arrest Warrants and its reasoning in judgment of C-404/15 and C-659/15 *Aranyosi and Căldăraru*) that where the court or tribunal hearing an action challenging a transfer decision has available to it evidence provided by the person concerned for the purposes of establishing the existence of serious risk of infringements of Article 4 of the Charter that court or tribunal is obliged to assess, on the basis of "*information that is objective, reliable, specific and properly updated*" and having regard to the standard of protection of fundamental rights guaranteed by EU law, whether there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people.

115. It was further confirmed that in order to fall within the scope of Article 4 of the Charter, which corresponds to Article 3 of the Convention, and of which the meaning and scope are therefore, in accordance with Article 52(3) of the Charter, the same as those laid down by the Convention, the deficiencies identified must attain a particularly high level of severity, which depends on all the circumstances of the case. The CJEU observed that a particularly high level of severity is attained where the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, *inter alia*, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity. The CJEU added [at para. 93]:

> *"That threshold cannot therefore cover situations characterised even by a high degree of insecurity or a significant degradation of the living conditions of the person concerned, where they do not entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment….."*

116. It was clarified that the absence of forms of support in family structures, available to the nationals of the Member State normally responsible for examining the application for international protection to deal with the inadequacies of that Member State's social system, which are generally lacking for the beneficiaries of international protection in that Member State, is not sufficient ground for a finding that an applicant for international protection would, in the event of transfer to that Member State, be faced with such a situation of extreme material poverty [at para. 94]. Notwithstanding the very high threshold set, the CJEU allowed [at para. 95]:

> *"it cannot be entirely ruled out that an applicant for international protection may be able to demonstrate the existence of exceptional circumstances that are unique to him and mean that, in the event of transfer to the Member State normally responsible for processing his application for international protection, he would find himself, because of his particular vulnerability, irrespective of his wishes and personal choices, in a situation of extreme material poverty meeting the criteria set out in paragraphs 91 to 93 of the present judgment after having been granted international protection."*

117. In *Jawo,* the CJEU concluded that the existence of shortcomings in the implementation, by the Member State normally responsible for examining the application for international protection, of programmes to integrate the beneficiaries of that protection cannot constitute a substantial ground for believing that the person concerned would be exposed, in the event of transfer to that Member State, to a real risk of being subjected to inhuman or degrading treatment, within the meaning of Article 4 of the Charter. The mere fact that social protection and/or living conditions are more favourable in the requesting Member State than the Member State normally responsible for examining the application for international protection is not capable of supporting the conclusion that the person

concerned would be exposed, in the event of transfer to the latter Member State, to a real risk of suffering treatment contrary to Article 4 of the Charter.

118. While the *ratio* in *N.S. (Afghanistan)* and subsequent cases such as *Jawo* were developed in cases concerning asylum seekers, the question of a transfer of a person who has the benefit of protection status has also been addressed in similar terms by the CJEU.

119. In *Ibrahim,* in a judgment delivered contemporaneously with the judgment in *Jawo,* the CJEU considered a request for a preliminary ruling concerning the interpretation of Article 33(2)(a) and of the first paragraph of Article 52 of Directive 2013/32/EU (hereinafter "the Recast Procedures Directive"), and of Articles 1, 4 and 18 of the Charter. The referring court sought to ascertain whether Article 33(2)(a) of the Revised Procedures Directive must be interpreted as precluding a Member State from exercising the option granted by that provision to reject an application for the grant of refugee status as being inadmissible on the ground that the applicant has already been granted subsidiary protection by another Member State, where the living conditions of those granted subsidiary protection in that other Member State are in breach of Article 4 of the Charter, or do not satisfy the provisions of Chapter VII of the Qualification Directive, without however being such as to be in breach of Article 4 of the Charter. The referring court also queried whether, in some cases, the position is the same where those granted such protection do not receive, in that other Member State, any subsistence allowance, or where such allowance as they receive is markedly inferior to that in other Member States, though they are not treated differently, in that regard, from the nationals of that Member State [see para. 81].

120. In addressing the first of these questions, the CJEU recalled that EU law is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States, that those values will be recognised, and therefore that the EU law that implements them will be respected, and that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter, including Articles 1 and 4 of the Charter, which enshrine fundamental values of the European Union and its Member States (para. 83).

121. The Court recalled that the principle of mutual trust between the Member States is in EU law, of fundamental importance, given that it allows an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.

122. Based on mutual trust, the Court therefore found that in the context of the CEAS, it must be presumed that the treatment of applicants for international protection in each Member State complies with the requirements of the Charter, the Geneva Convention and the ECHR. Article 33(2)(a) of the Revised Procedures Directive, which empowers a Member State to treat an application as inadmissible where protection has been granted in another Member State, was considered, in the context of the CEAS established by that directive, to be an expression of the principle of mutual trust.

123. While the presumption that fundamental rights will be respected in each Member State applies, the Court went on to acknowledge (as in the context of the asylum seeker) that it is not inconceivable that the protection system may, in practice, experience major operational problems in a given Member State, such that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights. The Court found accordingly, having regard to the general and absolute nature of the prohibition laid down in Article 4 of the Charter, which is closely linked to respect for human dignity and which prohibits, without any possibility of derogation, inhuman or degrading treatment in whatever form, that where a court or tribunal hearing an action brought against a decision rejecting a new application for international protection as being inadmissible has available to it evidence produced by the applicant for the purpose of establishing the existence of such a risk in the Member State that has previously granted protection status, that court or tribunal is obliged to assess the risk to establish if protection under Article 4 is triggered. This assessment must be conducted on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law. This assessment is directed to establishing whether there are deficiencies in

the other Member State, which may be systemic or generalised, or which may affect certain groups of people [at para. 88].

124. The Court elaborated that if the deficiencies giving rise to risk are to fall within the scope of Article 4 of the Charter, which corresponds to Article 3 of the Convention, and the meaning and scope of which is therefore, under Article 52(3) of the Charter, the same as those laid down by the Convention, those deficiencies must attain a particularly high level of severity, which depends on all the circumstances of the case. At paras. 90-91 of its judgment, the CJEU observed:

> *"that particularly high level of severity is attained where the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and his personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity….That threshold cannot therefore cover situations characterised even by a high degree of insecurity or a significant degradation of the living conditions of the person concerned, where they do not entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment..".*

125. The Court clarified again that, having regard to the importance of the principle of mutual trust for the CEAS, infringements of the provisions of Chapter VII of the Qualification Directive which do not result in a breach of Article 4 of the Charter do not prevent the Member States from exercising the option granted by Article 33(2)(a) of the Procedures Directive. Importantly, in view of the issues presenting in these cases, the Court found that where [at para. 93]:

> *"those granted subsidiary protection do not receive, in the Member State which granted such protection to the applicant, any subsistence allowance, or that such allowance as they receive is markedly inferior to that in other Member States, though they are not treated differently from nationals of that Member State, that can lead to the finding that that applicant is exposed in that Member*

State to a real risk of suffering treatment that is in breach of Article 4 of the Charter only if the consequence is that the applicant is, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, in a situation of extreme material poverty…".

126. The Court made clear that the mere fact that social protection and/or living conditions are more favourable in the Member State in which the new application for international protection has been made, than in the Member State that has previously granted subsidiary protection, this cannot support the conclusion that the person concerned would be exposed, in the event of a transfer to the latter Member State, to a real risk of suffering treatment in breach of Article 4 of the Charter. Indeed, general and systemic conditions of material extreme poverty affecting a significant proportion of the population or groups within the population alone will not suffice. Something more in the form of an assessment of the applicant's particular vulnerability placing that person at an individual level of probable, serious or real risk is required.

127. It is central to the finding of the CJEU in *Ibrahim* that a finding of a real risk of suffering treatment in breach of Article 4 of the Charter such as would preclude transfer of a refugee to another Member State is a finding which can only be made having regard to the special circumstances and vulnerabilities of an individual applicant rather than by reason of systemic deficiencies considered to present general risks alone. This is a high threshold which reflects the context of mutual trust and confidence as it exists between Member States.

128. The obligation on Member States under *Ibrahim* is to assess the evidence presented by an applicant to establish if there is a risk of their suffering in the Member State which first granted them protection. As already noted, Member States must make this assessment based on information that is objective, reliable, specific, and updated to check if systemic or general deficiencies exist. The deficiencies must attain a particularly high level of severity. Since *Ibrahim*, it has been generally understood that Article 33(2)(a) of the Recast Procedures Directive must be interpreted as precluding a Member State from rejecting an application for international protection as inadmissible on the ground that the applicant has already been granted refugee status in another Member State, where the foreseeable living conditions in that other Member State would expose the applicant to a serious risk of

suffering inhuman or degrading treatment within the meaning of Article 4 of the Charter (see, C-540/17 and C-541/17 *Hamed and Omar v. Germany*)

129. In terms of the emphasis on an individual assessment conducted on the basis of evidence presented by the applicant coupled with an assessment based on information that is objective, reliable, specific and updated to check if systemic or general deficiencies, it bears note that other mechanisms exist within the EU legal order for situations of general and systemic breach of values referred to in Article 2 of the TEU which inform the approach of the CJEU in requiring an individual assessment.

130. Specifically, Article 7 TEU provides for a mechanism for the determination of a breach of the values on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission. Article 7 TEU envisages that the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 of the TEU. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. In addition, there is also the possibility of an infringement action being commenced by the Commission.

131. The case-law of the CJEU does not envisage a Member State deciding that there is, in general, a clear risk of a serious breach by a Member State of fundamental values untied from an assessment of the individual and circumstances of a given case. This means that, save in exceptional circumstances, each Member State is required to consider that another is complying with European law, and with fundamental rights guaranteed under that law as an incident of mutual trust. Mutual trust does not constitute blind trust and in exceptional circumstances and in an individual case only, the Tribunals or courts of a Member State may decide that in the event of transfer, an individual would be exposed to a real risk of a violation of Article 4 of the Charter such that it is no longer proper to rely on principles of mutual trust.

132. Apart from the difficulties involved in attempting to analyse the system in another Member State, there are significant difficulties in applying a test which requires not just a breach, but a breach of such a degree as to reach a particular threshold. As observed by O'Donnell C.J. in the different, but nonetheless somewhat analogous. legal context of

surrender on foot of a European Arrest Warrant considered in *Minister for Justice v. Celmer* [2019] IESC 80, this necessarily involves a qualitative assessment. Notably, the caselaw of the CJEU in the European Arrest Warrant context also requires any inquiry from the Court of a Member State considering a refusal to transfer by reason of a real risk of a breach of fundamental rights in another Member State to focus on the individual case. In assessing the individual case, however, connections may be drawn between systemic deficiencies identified and the circumstances of the individual case to identify the likely level of risk for the individual in question.

133. It is against this background that we come to consider the decision of the CJEU in Case C-563/22 *S.N. v. Zamestnik-predesdael na Darzhavna agentisa za bezhantsite*. Although cited before me, it bears note that this case was not made in the context of mutual trust as it concerned the circumstances in which the Geneva Convention may be disapplied by Article 1D of the Convention to persons receiving protection or assistance from organs or agencies of the UN other than the UNHCR. Nonetheless, the decision of the CJEU, albeit in the specific legal and factual context arising in that case, serves to reinforce the centrality of an individualised assessment of conditions, the specific situation and degree of vulnerability of the applicant when deciding whether a person should be admitted to the protection process of a Member State. The CJEU found that a stateless person of Palestinian origin must be considered as being unable to return to the sector of UNRWA's area of operations where this means that the person is at real risk of being exposed to living conditions which do not ensure his or her essential needs in terms of health, education and subsistence, taking into account specific essential needs due to persons belonging to a group of people being characterised by a reason of vulnerability, such as age.

134. Despite the different context, the Opinion of Advocate General Emilou in *S.N.* is helpful when I consider the issues before me in these proceedings, because he engages with the question of systemic or widespread issues (such as issues affecting the position of Palestinians in the Gaza Strip in that case) of a nature which displaces a requirement for individual and personal assessment, finding that in such circumstances it must be established that the conditions can be deemed undignified and incompatible with Article 4 of the Charter for virtually everyone, in the sense that they must be of such gravity that they are liable to concern people irrespective of their personal circumstances or identity. Accordingly, in Advocate General Emilou's Opinion, the level of gravity which needed to

be demonstrated to be sufficient to trigger an entitlement to international protection elsewhere without demonstrating a personal and particular vulnerability was both very serious, and to a standard of almost certainty.

135. Several generally applicable principles may usefully be identified in the above caselaw in guiding the application of the test identified in *Ibrahim* as follows:

(i) The starting point of any analysis is that the CEAS creates a presumption of mutual trust to the effect that all Member States will treat beneficiaries of international protection in accordance with the Charter, Geneva Convention and European Convention on Human Rights, which is a foundational EU law principle of constitutional significance;

(ii) The burden of proof in rebutting that presumption rests with an applicant alleging a real risk of a breach of his fundamental rights: for a national tribunal to conclude, contrary to the presumption just referenced, that there is in fact a "*serious risk of suffering ... treatment*" contrary to Article4 of the Charter in a Member State having granted protection, depends on the existence of "*evidence produced by the applicant in order to establish the existence of such a risk*" [*Ibrahim* at para. 88];

(iii) In terms of what must be established by an applicant, the bar is set particularly high: deficiencies in a Member State allegedly giving rise to such a risk "*must attain a particularly high level of severity, which depends on all the circumstances of the case*" [at para. 89];

(iv) Even a "*high degree of insecurity*" or a "*significant degradation of the living conditions*" are insufficient to establish the relevant risk, unless they "*entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment*" [at para. 90].

(v) any disparity in the subsistence allowance for beneficiaries of international protection as compared with Member State nationals does not establish the relevant risk, unless "*because of [the applicant's] particular vulnerability, irrespective of his or her wishes and personal choices*", he/she is placed in such a situation of "*extreme material poverty*" [at para. 93].

(vi) A risk may be systemic, i.e. applicable to all, or individualised, i.e. applicable to an applicant.

(vii) Absent the, hopefully, very unusual situation whereby conditions in an EU

Member State have broken down so systemically that a beneficiary of international protection would face a breach of fundamental rights merely by virtue of being present in the State granting them protection – an example given by Advocate General Emiliou in the analogous case of C-563/22 *S.N. & LN* [at para. 81] being a situation of gravity created by "*an armed conflict or a military blockade or … an 'unprecedented humanitarian crisis'*" [at para. 81] – then the analysis must be individualised, examining whether (for example) the applicant belongs to a "*particularly vulnerable group*" for whom general living conditions are incompatible with Article4 of the Charter , even though they are not so for others, or whether the applicant is somehow "*specifically affected … because of his personal circumstances*" [*SN & LN*, at paras. 84 and 90];

(viii) For this reason, *Ibrahim* demands a consideration of the individual circumstances of an applicant granted protection in another Member State and who claims that their fundamental rights will nonetheless be breached if returned there, and any particular vulnerabilities experienced by that applicant;

(ix) It is therefore appropriate for the decision-maker to weigh both an applicant's evidence, and also objective country information before coming to a conclusion on the ultimate issue of whether there is "*a real risk*" of a breach of Article 4 of the Charter facing that applicant on return;

(x) Case-law subsequent to *Ibrahim* has underlined the requirement for a "*real and proven risk*" of a breach of Article 4 of the Charter. In *DG & Ors.* the CJEU stated that a pleaded risk of a breach of Article 4 of the Charter depends on establishing either "*substantial grounds for believing that there are systemic flaws in the Member State*" concerned or, alternatively, that "*the transfer … might entail a real and proven risk that that person will, as a result, be subjected to inhuman or degrading treatment within the meaning of that article*".

The Irish Context and the Power to Refuse to make an Inadmissibility Recommendation

136. It is now necessary to place s. 21 of the 2015 Act in the wider context of EU law. No provision is made in s. 21 of the 2015 Act for a discretion to refuse to make an inadmissibility finding in respect of a person who has obtained status in another EU Member State by reason of breach of his or her rights under Article 4 of the Charter and/or Article 3 of the Convention and/or rights protected under the Constitution. The language

of s. 21 makes clear the Legislature's intention that where protection status has been granted in another EU Member State, any further application for protection in this State must be treated as inadmissible. As originally enacted, the position was clear-cut and no exception was envisaged.

137. Through subsequent amendment of s. 21, the only exception now expressly envisaged by the statutory language is where a decision is made by the Minister under ss. 50A(4) or 51C(5) of the 2015 Act with the effect of rendering an otherwise inadmissible application, admissible. where the Minister is of the opinion that expulsion is prohibited on *non-refoulement* grounds by reason of a breach of the person's fundamental rights or a Return Order ceases to have effect by reason of efflux of time. Accordingly, as drafted, it remains the case that no discretion to refuse to affirm a recommendation because the Tribunal is satisfied that there is a real risk of breach of fundamental rights presented by a return to the EU Member State where protection has been offered has been prescribed.

138. The approach set out in s. 21 of the 2015 Act in its strict literal terms is manifestly incompatible in certain respects with the requirements of EU law as developed by the CJEU and set out above. Nor does it accord with the practice of the IPO or the Tribunal as evidenced by these proceedings. It is now manifestly clear from a series of cases, most notably, *Ibrahim et al* and *Jawo* that it is necessary for the Tribunal in making an admissibility decision to have a jurisdiction to refuse to make a recommendation that the application be treated as inadmissible, notwithstanding that protection has been granted in another Member State of the EU, where there are substantial grounds for believing that there is a real risk of treatment contrary to Article 4 of the Charter. No significance was attached to the fact that Ireland has not adhered to the Revised Procedures Directive in argument before me, although the applicable provision of secondary EU law relevant to the Irish context is Article 25 of Directive 2005/85 EC which, in like terms to Article 33(2)(a) of the Recast Procedures Directive considered in *Ibrahim*, provides for a finding of inadmissibility under Article 25(2)(a) where another Member State has granted refugee status.

139. The fact that the duty on the Tribunal to consider risk and to disapply s. 21(2)(a) arises, even though the Minister is also separately obliged to consider whether such a risk arises, before making a Return Order is not in issue before me. Indeed, the duty on the Tribunal has been accepted in cases such as *H.Z. (Iran) v. IPAT* [2020] IEHC 146.

140. In his judgment in *H.Z. (Iran)*, Humphreys J. stated:

> *"It is accepted by both sides in the present case that, given that inadmissibility is a creature of European law, the Irish legislation giving effect to that principle, while unqualified in its terms, should be read in the light of the decision of the CJEU in Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 Ibrahim v. Bundesrepublik Deutschland, which provides that in a return or inadmissibility decision, the member state's competent authority should have regard to art. 4 of the EU Charter of Fundamental Rights which prohibits torture or inhuman and degrading treatment and thus prohibits treatment of that kind in another member state which "must attain a particularly high level of severity" in the limited number of cases where that may apply (see in particular paras. 86, 87 and 94). The principle of a conforming interpretation set out in Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-04135 is, therefore, the relevant one here, although not specifically referred to by the tribunal member in this case."*

141. As Humphreys J. observed, even apparently unqualified words in an Irish statute must be read as subject to European law. In effect, s. 21(2)(a) is therefore capable of being interpreted on a *Marleasing* basis in line with EU law, so as not to apply if the particularly high level of severity amounting to torture or inhuman or degrading treatment in another Member State is demonstrated.

142. Despite the statutory language used in s. 21 expressly limiting jurisdiction to a recommendation based on whether protection status has been granted in another EU Member State, both the IPO and the Tribunal proceeded to apply the case-law of the CJEU

in considering whether there is a real risk of treatment contrary to Article 4 of the Charter, only making and affirming recommendations that the applications are inadmissible having expressed themselves satisfied that no such risk has been established. The jurisdictional basis for the application of this test, notwithstanding the language of s. 21, is not in issue in these proceedings and has been identified as deriving from the directly effective requirements of EU law.

143. I consider the fact that s. 21 remains unchanged in its terms despite the broader jurisdiction now vested under its terms to be unhelpful and to be undermining of legal clarity and accessibility of the law. Through the language used it gives rise to an apprehension that the correct test has not been applied and it is necessary to turn to the Decision itself to be satisfied that the decision-maker has not been misled as to the parameters of its jurisdiction deriving from EU law as developed through the case-law of the CJEU by the narrow terms of s. 21(2)(a).

144. As accepted in the premise for the decision in *H.Z. (Iran)*, however, the limiting language of s. 21 does not result in unlawful decision making if the IPO and the Tribunal, mindful of the requirements of EU law, have been assiduous in exercising a broader jurisdiction as required under EU law by disapplying the restrictive language used in s. 21(2)(a) when making, affirming or setting aside a recommendation on admissibility. It would not be surprising given the clear language of s. 21(2)(a), however, if applicants for protection were to harbour a concern in relation to the true breadth of the Tribunal's jurisdiction and, indeed, the Tribunal's readiness to assume a wider jurisdiction and follow the evidence in reaching a conclusion that an application not be treated as inadmissible on terms which involve the exercise of a competence by the Tribunal beyond that originally envisaged under the statutory scheme.

145. In these cases, however, it is clear from the terms of both the IPO and the Tribunal recommendations that the decision makers were properly aware of the requirements of EU law and the correct principles are clearly identified in each of the decisions of the Tribunal before me in these cases with reference to the decisions of the CJEU. While it is desirable in the interests of clarity and in promoting legal certainty, that domestic legislation be properly aligned in its terms with the requirements of EU law it purports to provide for, no breach of the Applicants' rights has occurred in the cases before me where it is clear that the correct test has been identified throughout the decision-making process in these two

cases. Indeed, their dispute on the cases advanced before me is not with the identification of the applicable legal test which it is common case has correctly occurred in both cases, but with its application on the facts and circumstances of these cases.

Stating and Applying the Legal Test in the Cases of Mr. A and H

146. The legal test correctly identified by the Tribunal as applicable in both cases was the test pronounced in C-297/17, C-218-17 and C438-17 *Ibrahim et al.* considered in some detail above. The complaints agitated on behalf of the Applicants in these cases turn in large part on the correct approach to the application of the test identified in *Ibrahim* and related case-law in the individual cases before me such that it is appropriate to first consider whether the test was properly applied in each case with reference to the grounds of complaint advanced.

Mr. A's Case

147. From the Statement of Grounds in Mr. A's case, the primary challenge advanced with regard to the application of the legal test is, at its core, an irrationality challenge or a failure to have regard to evidence and consider relevant matters. In the way these issues are presented both in pleadings and submissions, however, it is difficult to avoid the conclusion that the the case mutates into a challenge to the decision on its merits. There are as many as 26 separate grounds pleaded in the Statement of Grounds. In view of the broad ranging nature of the rationality challenge made, I propose to address more fully only the more significant specific issues raised on behalf of Mr. A, being satisfied that other issues raised are amenable to being disposed of in similar terms.

148. At its heart, the Applicant's complaint is that the Tribunal, having looked at the COI arrived at a decision with which he disagrees. This much is clear from the Applicant's apparent acceptance that the Tribunal formulated the legal test accurately, but he says (for example) "*this test was not ... applied properly ... in relation to housing*" (the Applicant's written submissions at para. 20). The Applicant similarly accepts that the Tribunal considered it should apply "*close scrutiny*" or "*rigorous and/or thorough scrutiny*", but submits "*we say that there was not adequate scrutiny of the COI in this case*" (also Applicant's written submissions at para. 20). With all due respect to the endeavours of counsel, a complaint of this nature does not establish error amenable to judicial review as it is little more than disagreement with the merits. While Mr. A may strongly disagree with

the outcome of the Tribunal's assessment of country information relating to conditions for beneficiaries in Greece, a challenge to a decision on the merits, is not a permissible use of judicial review as a remedy.

149. Over 23 pages, the Tribunal considers the entirety of Mr. A's circumstances as presented by him up to the time of the Tribunal hearing, as well as COI regarding material conditions for beneficiaries of international protection in Greece. This case is therefore entirely distinguishable from cases like that of *M.A.H. v. Minister for Justice* [2021] IEHC 302, where it was found that there had been a failure to consider COI relating to general and systemic issues in the other Member State, erroneously excluding that COI on an incorrect factual basis whereby it was determined not to be relevant. As apparent from the Decision itself (summarized above), the Tribunal:

(i) articulates the test under *Ibrahim*;

(ii) records (and accepts) Mr. A's account of his experiences in Greece, i.e. that he continued to live in poor conditions in refugee camps, where he did not re-locate even after obtaining refugee status;

(iii) notes that Mr. A has received training in the security industry and has work experience in the State;

(iv) records that the Mr. A previously held an 'ADET' (residence permit) and has a current travel document;

(v) observes that renewal of an ADET – necessary to obtain an 'AMKA' or Social Security Number, the key to unlocking access to social benefits – is possible through online procedures;

(vi) analyses Mr. A's "*personal circumstances*", i.e. he is a "*literate, able-bodied person who was able to navigate the administrative hurdles to obtain a residence permit*" and so "*should also be in a position to obtain the documents necessary to apply for an AMKA*";

(vii) notes the absence of "*any medical reports to suggest he is suffering from mental or physical incapacities*";

(viii) accepts Mr. A's account of difficult living conditions in the refugee camps, but considers this less relevant than country information addressing the conditions for a beneficiary of international protection in Greece today, where Mr. A would not be returning to Greece as an international protection applicant;

(ix) analyses key issues relevant to the prospects of Mr. A's basic needs being met in Greece as follows:

i. as regards safety, the Tribunal notes that the Applicant did not report his friend's murder to the Greek police, and there is no "*objective evidence*" to suggest a lack of State protection in Greece, "*a democratic EU country with a functioning police force and judiciary*", regarding this or other criminality.

ii. as regards accommodation, the Tribunal notes that the Applicant did not suggest that he made "*any efforts to secure alternative accommodation during that time*" after he received refugee status, or "*any attempts whatsoever ... applying for jobs or seeking accommodation*", or "*of any further attempts to try and get out of the camp.*" Housing support assistance is available equally to all foreign nationals in Greece, where statistics did not suggest that all beneficiaries of international protection face homelessness. There was nothing to prevent the Applicant, a "*young, able-bodied capable person with no dependents and no particular vulnerability*", with "*the benefit of work experience from Ireland*" from applying to renew his ADET "*and mak[ing] other preparations from Ireland relating to housing and employment opportunities prior to his return.*"

iii. as regards employment, the Tribunal records the lack of evidence of attempts by the Applicant to obtain a job in Greece. Country

information confirms "*full and automatic access to the labour market for recognised refugees and subsidiary protection beneficiaries under the same conditions as nationals, without any obligation to obtain a work permit*", albeit high unemployment rates prevail due to "*competition with Greek-speaking employees*". There was nothing to prevent the Applicant from applying for new documentation to permit him to open a bank account and obtain a Tax Identification Number.

iv. the Tribunal notes "*extremely high unemployment*" in Greece generally, but poor employment prospects do not themselves equate to inhuman or degrading treatment, particularly where there is a "*minimum monthly allowance which is payable to beneficiaries in the same way as it is paid to Greek nationals*". There was no evidence before the Tribunal that the Applicant had ever applied for this.

v. as regards healthcare, the Tribunal noted that the Applicant had been sick in the camp and not brought to hospital, but had received medication and assistance from Doctors Without Borders. Furthermore, country information confirms "*free access to healthcare and medication is available to all*", albeit "*the healthcare sector have been adversely affected by austerity measures*", something affecting "*all Greek citizens.*"

Based on the careful assessment carried out by the Tribunal of the material put before it on behalf of Mr. A, the evidence was of an applicant who:

(i) spent eleven months in Greece following the grant of refugee status;

(ii) did not provide any evidence of having ever applied for social assistance, a job, housing or other material supports from the Greek authorities outside the camp environment designed for international protection applicants;

(iii) appeared to have not even investigated the degree of assistance available in Greece for beneficiaries of international protection (e.g. monthly minimum financial allowance for unemployed persons);

(iv) did not present with any particular vulnerabilities or health difficulties;

(v) did not provide any evidence of having sought to re-locate and make a living outside the camps.

150. I have taken some time to consider the numerous complaints made directed towards the rationality of the Decision on an application of the identified legal test. Following careful consideration, I am satisfied that the Decision in Mr. A's Case is a detailed application of *Ibrahim* to the relevant facts in circumstances where no real attempt had been made by Mr. A to provide information particular to his own experiences in Greece. While Mr. A sought to introduce new evidence, not before the Tribunal, in these proceedings by way of an affidavit, sworn on the 14th October, 2024, (just two weeks before the hearing date), wherein he purports to provide *further* evidence relating to the bureaucratic processes he actually negotiated in order to obtain documents in Greece and unsuccessful efforts he made to obtain accommodation in Greece, the Tribunal's decision cannot be faulted on rationality grounds in reliance on this new evidence when it was not before the Tribunal.

151. It is manifestly clear from the replying affidavit filed that Mr. A could have provided additional information in relation to his personal experiences but did not do so. If anything, this serves to highlight the inadequacy of engagement with the inadmissibility process up to that point. In circumstances where this information was not before the Tribunal, it could not be considered in the decision-making process. The rationality of the Tribunal decision cannot be impugned by reason of a failure to consider evidence which had not been adduced when the Tribunal made its decision. The legality of the Decision falls to be judged by reference to the evidence put before the Tribunal, not evidence subsequently put before the High Court by an applicant who belatedly seeks to improve the state of his evidence [*Jahangir v. MJE* [2018] IEHC 37, at para. 7; *SM v Minister for Justice* [2022] IEHC 611, at para. 60]. Granted, a separate issue arises as to whether the Tribunal ought to have directed questions to Mr. A to ascertain his evidence in relation to matters

such as efforts to obtain accommodation, employment or social assistance and his experience with the bureaucratic processes in Greece, a matter I return to below.

152. The question of ADET renewability is an important issue, given the reliance placed by the Tribunal on access to an ADET, and the objections repeatedly taken to this by Mr. A in these proceedings. Mr. A retrospectively raised the possibility that the bureaucratic obstacles which he had to navigate to obtain his ADET in the first place may not be comparable to those he would have to navigate to obtain renewal. He objects that the Tribunal "*assume[d]*" a renewal application "*can be made online from Ireland*". This submission lacks merit for a number of reasons.

153. Firstly, the Applicant offered no evidence to the Tribunal to suggest there is any material difference between the application and renewal processes for obtaining an ADET, or why he would be unable to navigate the latter having been able to navigate the former. Were he able to contradict the factual basis for the conclusions drawn, an issue might arise as to whether he should have been afforded an opportunity to address this question before the decision was made, but he does not provide an evidential basis to make a complaint in this regard.

154. Furthermore, contrary to the Applicants' complaints, the Tribunal did not "*assume*" the two procedures were identical but had regard to country information that renewal could be effected online. Even now, more than one year since expiry of Mr. A's ADET, he offers no evidence of any efforts by him to renew his ADET online or even to commence the process which he says may incur delay. He does not explain why it cannot be done either on the basis attempts made by him or at all.

155. Similarly, I do not accept that there was any error apparent in the Tribunal's approach to Mr. A's "*past experiences*" in the camp. They were not treated as irrelevant but instead were correctly considered not to be "*directly relevant*" where it is "*the conditions that are likely to be experienced by a recognised refugee*" which fall for consideration. This was a correct approach for the Tribunal to take. Insofar as Mr. A suggests his "*past experiences ... go to his vulnerability*", he points to no part of the Decision where the Tribunal rejected or failed to consider those experiences.

156. While Mr. A submits that there are "*difficulties with social welfare*" and "*various*

hurdles with for [sic] *persons seeking to avail of guaranteed minimum income*", referring to the ProAsyl Report, he has offered no evidence in relation to his efforts to obtain social welfare in Greece. He relies exclusively in this regard on COI. The difficulty with this is that the Tribunal expressly considered the ProAsyl Report on availability of social welfare, and expressly acknowledged the "*administrative difficulties which beneficiaries encounter*". The reality is that the Applicant simply disagrees with the Tribunal's evaluation regarding the degree of risk arising.

157. As for issues relating to housing, Mr. A takes issue with the phrasing by the Tribunal of its analysis of the risk of homelessness. However, the Tribunal repeatedly articulated the relevant test correctly as being one of a "*substantial risk*", a "*serious risk*" or "*substantial grounds for believing there is a real risk of treatment contrary to Article 4 CFEU/Article 3 ECHR.*" Specifically in relation to housing, the Tribunal underlined that the test was whether there are "*substantial grounds for believing that this particular Appellant would be rendered homeless on his return leading to a real risk of treatment contrary to Article 4 CFEU/Article 3 ECHR.*" While Mr. A complains that the Tribunal did not address "*how exactly*" he "*might access*" "*alternative accommodation*" or "*what accommodation is available*", he put no evidence before the Tribunal of any unsuccessful efforts to obtain alternative accommodation in Greece or investigated what accommodation was available.

158. In arriving at its decision, the Tribunal reviewed statistics on homelessness for beneficiaries and considered the Applicant, being a "*young, able-bodied, capable person with no dependents and no particular vulnerability*" could "*make ... preparations from Ireland relating to housing*". I cannot conclude as a matter of law that this was a conclusion which it was not open to the Tribunal to arrive at on the evidence before it which demonstrated that a significant proportion of recognized refugees are not homeless in Greece. It has not been explained on behalf of Mr. A why no reasonable decision-maker could have concluded against a real risk of homelessness, based on that evidence.

159. Similarly, in relation to findings on extreme material poverty, as pointed out on behalf of Mr. A, the Tribunal did not reach a definitive conclusion on his employment prospects, but the Tribunal acknowledged a "*path to finding a job will not be easy*", considering COI. The Tribunal placed greater weight on the availability of a "*minimum monthly allowance*" for unemployed persons – a benefit which the Applicant apparently

never sought in Greece (at least not so as he has said in his evidence), but which would be available as a means of avoiding extreme material poverty.

160. Acknowledged deficiencies in the general capacity of the Greek healthcare system do not create a real risk of a breach of Article 4 of the Charter for an individual not presenting with any health-related conditions which might require treatment under that system. I am satisfied that the Tribunal considered this issue lawfully and carefully in Mr. A's case.

161. Insofar as Mr. A claims that he is "*vulnerable*", it must be noted that the arguments contained in submissions made on his behalf were never made to the Tribunal but, in any event, the Tribunal did not reject the idea that Mr. A had a "*lack of resources*" or was "*an uprooted person*" or "*lack[ed] ... family or network o[f] support in Greece*" or did "*not speak Greek*". Rather, the Tribunal rejected the notion that Mr. A was in the category of "*more vulnerable individuals*" whose return to Greece had been halted in some foreign case-law, observing that different approaches had been taken in different EU Member States. Mr. A does not explain how this involves any error of law, and he does not address the Tribunal's point that many of the foreign cases involved remittal to the first instance decision-maker.

162. I agree with the Respondent's submission that Mr. A cannot avoid the significant implications of the complete lack of evidence of any attempts by him to improve his living situation in Greece. Had Mr. A provided cogent evidence of such efforts, the Tribunal could have considered whether country information regarding the supports available to refugees deserved to be accorded lesser weight in Mr. A's case. Mr. A did not do so. As *H.Z. (Iran)* makes clear that [at para. 26]:

> "*It is not obviously impermissible to expect an applicant to have at least some documentary material in relation to at least some of his attempts to obtain accommodation. Therefore, it is not obviously impermissible to hold against an applicant the failure to produce any such documentary material.*"

163. It is ultimately a matter of judgment as to whether the threshold in *Ibrahim* has been reached on an assessment of the evidence on an individual basis. While an applicant in one

case might be able to establish, by reason of special vulnerabilities, that he or she faces a serious risk of extreme material poverty amounting to a breach of Article 4 of the Charter when those special vulnerabilities or individual circumstances are considered in the context of objective and up to date COI, another applicant not suffering from those same vulnerabilities or individual characteristics might be well able to access housing and social supports if an attempt is made to do so (including in another part of the country if the municipality in which they are living is overburdened or under-resourced). An applicant who suffers from no physical or mental incapacities, and who offers no objective evidence of having ever made any attempt to access available supports while living in Greece, cannot successfully impugn a decision which:

(i) takes a comprehensive look at the evidential picture relating to conditions for international protection beneficiaries in Greece; and

(ii) balancing the positive and negative aspects of that evidence, arrives at the conclusion that, while there may be a risk of poverty for some beneficiaries in Greece, there is not a real risk of *extreme* material poverty for the *Applicant*, on the facts of his case.

164. Principles of mutual trust do not require a Tribunal in Ireland to refuse to make an inadmissibility decision in a Greek transfer case, as was contended on behalf of Mr. A, simply because some courts in other jurisdictions have done so, while others have not. There is no frailty in the decision of the Tribunal by reason of the fact that courts in other jurisdictions have refused to treat applications as inadmissible from persons with protection status in Greece. It is clear that at least in the one case referred to in the papers (albeit in Mr. H's case), the Tribunal has also. It is for the Tribunal to apply the correct legal test to the facts of the case presenting before it. Each case falls to be determined on the basis of the facts and circumstances of that case provided always that the correct legal test is applied, and the process is fair.

165. The only question for me in circumstances where I am considering the sustainability of a decision of the Tribunal on rationality grounds in judicial review proceedings where the correct legal test has been identified and applied and presuming compliance with fair procedures in the decision making process, as found in *HZ (Iran),* is whether it was

reasonably "*open to the tribunal to find that the allegation that the applicant was facing torture or other treatment in breach of art.4 of the Charter was not established*": As stated in *HZ (Iran)*[at para. 18]:

> "*a decision is not rendered irrational solely by reason of [the possibility of] taking a different view*."

166. The assessment of the evidence is quintessentially a matter for the decision-maker. No error of law has been demonstrated in either case of Mr. A or Mr. H.

Mr. H's Case

167. In his separate proceedings, under the heading "*illegality/irrationality*", Mr. H pleads from a number of different angles. I propose to now address these under broad headings.

Failure to Apply the Relevant Test

168. A claim is advanced on behalf of Mr. H that the Tribunal misapplied the test identified in *Ibrahim*. No error of law has been identified on behalf of Mr. H in this regard. Indeed, it is not disputed that the Tribunal correctly identified the legal test. Rather, it is clear from the manner in which the case was advanced that the essence of the challenge in this regard is that the Tribunal misapplied the test because the Applicant had "*clearly established that he was unable on return, to access basic needs such as adequate access to food, personal hygiene or an adequate place to live, which left him in a state of degradation incompatible with human dignity*" (see para. 13, Written Submissions on behalf of the Applicant). To substantiate this claim, it is contended that the Tribunal erred in relation to the burden of proof. To this end, it is submitted on behalf of Mr. H that the Tribunal incorrectly required Mr. H to establish a real risk of fundamental breach of his rights if returned to Greece by placing an undue onus on him to provide "*sufficiently cogent evidence*" of his living conditions and experience in Greece and any efforts made to "*ameliorate his situation*".

Burden of Proof

169. In advancing an argument based on the imposition of an undue burden on the Applicant, counsel for Mr. H relies on the provisions of EU asylum law governing the assessment of protection applications such as Article 4(1) of the Qualifications

Directive (duty of co-operation), the benefit of the doubt concept in international protection claims and Article 8 of the Procedures Directive (assessment of facts and circumstances based on precise and up to date information). It is claimed that these provisions are reflected in s. 28(7) of the 2015 Act. Although no reference is made to s. 28(7) of the 2015 Act in the Statement of Grounds in Mr. H's case, in submissions advanced on his behalf, it is further contended that the Tribunal was in breach of this provision in failing to consider his past experiences and risk of harm in light of COI and other supporting evidence.

170. Reliance on Article 8 of the Procedures Directive, Article 4 of the Qualification Directive or s. 28(7) of the 2015 Act in challenging the decision of the Tribunal is fundamentally misconceived. These provisions relate to consideration of a substantive claim for international protection, not the threshold rejection of the claim as inadmissible. The assessment of the protection claim itself has already occurred in Greece and Mr. H was successful in having his protection need recognised. In *H.Z. (Iran)*, Humphreys J. [at para. 28] found that the reliance on s. 28(7) of the 2015 Act in the applicant's submissions was misplaced as that relates to the substantive consideration of an asylum claim, "*not the threshold rejection of the claim as inadmissible*". I respectfully agree.

171. No authority has been identified to support the claim made on behalf of Mr. H that these provisions have any application beyond the assessment of the protection claim itself. Notably, C-277/11 *M.M. v. Minister for Justice, Equality and Law Reform* is authority only for the application of a shared burden of proof and a duty of co-operation in relation to the evaluation of the asylum claims, not admissibility decisions. These provisions have no application to the determination that an application is inadmissible. Furthermore, these provisions do not operate to displace the burden of proof on an admissibility application which requires the provision of evidence of a serious risk of treatment contrary to Article 4 of the Charter which, as clearly held in *Ibrahim*, rests with an applicant. Notwithstanding that the Tribunal has functions of an inquisitorial nature under s. 61(3)(a) of the 2015 Act and is under an independent obligation, resting on the Tribunal, to assess the risk to the applicant on the basis of information which is objective, reliable, specific and up to date to check if systemic or general deficiencies exist in accordance with the requirements of *Ibrahim*, the burden

remains on the applicant insofar as his individual experiences and vulnerabilities in the other Member State are concerned, and require to be proven as attaining a high threshold level of severity and to the requisite standard, the standard of serious or real risk in the case of an apprehended breach of Article 4 of the Charter.

172. Reliance on the decision of the European Court of Human Rights in *El-Masri v. Former Republic of Yugoslavia* [2012] ECHR 2067, does not assist Mr. H either because it relates to a burden arising for authorities to rebut factual presumptions arising from injuries, deaths and disappearances where "*the events in issue lie within the exclusive knowledge of the authorities, as in the case of persons under their control in custody*". This authority is simply of no relevance here.

173. As pointed out on behalf of the Respondents, even if the Applicant could point to relevant case-law of the European Court of Human Rights, it would not operate to cast a burden of proof on a Member State examining the question of admissibility under EU law because it has been found in that Article 3 of the Convention does not apply to a refusal of asylum or a declaration that an asylum application is inadmissible [at para. 22)(see *H.Z. (Iran)*]. No basis for departing from the decision of the High Court in *H.Z. (Iran)* has been identified in accordance with established *Worldport* principles and it is an authority binding on me. Accordingly, the test at s. 21 admissibility consideration stage is that prescribed under Article 4 of the Charter and laid down in *Ibrahim* and subsequent case-law of the CJEU.

174. It is clear from the terms of the Decision in both cases that the Tribunal conducted an extensive examination of objectively reliable, specific and up to date country information regarding generally applicable living conditions for international protection beneficiaries living in Greece, taking account of the Applicant's personal and individual circumstances in proper discharge of by the Tribunal of the duty on it to assess the evidence presented by the applicant establishes a risk in Greece based on objective, reliable, specific COI addressing issues of systemic or general deficiencies. There was nothing improper in the Tribunal requiring the Applicant to provide clear evidence to substantiate his claims about his living conditions and experiences in Greece and rejecting his application as inadmissible when the information provided, properly assessed, was not considered to demonstrate a real or serious risk of extreme material poverty of a type which reaches the threshold triggering protection under

Article 4 of the Charter.

175. I am satisfied that there was no error on the part of the Tribunal when considering whether a claim is admissible under s. 21 in requiring an applicant to provide clear and compelling evidence of a lack of State protection. This evidence may include objective COI identified as helpful, but should include an applicant's personal account and supporting evidence where available.

176. In this case, the claim was advanced almost exclusively in reliance on COI and was not supported to any significant degree by Mr. H's own evidence in relation to his experiences in Greece, despite being interviewed at IPO stage and having the benefit of legal representation in advance of submission of his appeal.

177. It is a striking feature of his own evidence that he never appears to have attempted to obtain employment or housing or other social assistance. While the COI undoubtedly painted a mixed and disturbing picture in which a risk of homelessness and unemployment was confirmed, it did not support a conclusion that every refugee returned to Greece would encounter a real risk homelessness or destitution such that the Tribunal could conclude on a personal and individual assessment of Mr. H's case, that he had established to a requisite degree of probability that he would suffer such a risk just by virtue of being a young, male, able-bodied, Somalian recognised refugee in Greece.

178. Without evidence from Mr. H as to his own experience in accessing social benefits said by COI to be available in Greece, it was not possible for the Tribunal to conclude that a real risk that these benefits would not be available to Mr. H had been substantiated on a proper application of the approach prescribed by the CJEU in *Ibrahim.* Afterall, the approach prescribed in *Ibrahim* envisages the possibility of a real or serious risk of suffering treatment in breach of Article 4 of the Charter being established only if the consequence is that the applicant, because of his or her particular vulnerability, irrespective of his wishes or choices, will be in a situation of extreme material poverty. This test requires evidence from Mr. H as to the difficulties he encountered in accessing social benefits otherwise said by COI to be available in Greece.

179. There may well be claims where objective evidence points to systemic flaws, inadequate living conditions or access to rights of a generalized and entrenched nature on such a widespread basis that the burden of demonstrating individual circumstances will be reduced, albeit *Ibrahim* nonetheless requires a case-by-case individual consideration. The COI in these cases is not of this nature. While there are widespread documented difficulties and pressure on the Greek system, based on the COI it is not inevitable that all or even a high proportion of recognised refugees will be exposed to extreme material poverty. The COI demonstrates that refugees can access accommodation, the workplace, social assistance and other social services, albeit with some difficulties in many cases. This being the case, more is needed in terms of an assessment of the personal circumstances and particular vulnerability of an applicant to establish that the said applicant is exposed to risk of extreme material poverty.

180. It is recognised in the COI cited by the Tribunal and fully considered in the decisions under review that refugees have rights under Greek law, but it is equally recognised that due to high unemployment rates and high levels of homelessness, there is a real risk that many recognised refugees will find themselves unemployed, homeless and in some cases in conditions of extreme material poverty. However, this is not a universal risk which either Mr. H is almost certain to experience with many recognised refugees finding accommodation and accessing social assistance and services in a like manner to Greek nationals. In the instant cases that are before me, the Tribunal fully assessed the risks facing the applicants in the light of the information they provided and COI. The information available was sufficient for the Tribunal to conclude that the Applicants, if returned to Greece, would not run a real or serious risk of treatment contrary to Article 3 of the Convention.

181. As reiterated in *H.Z. (Iran)*, the assessment of COI and the weight to be attached to different elements of the evidence is "*quintessentially a matter for the decision-maker*" [at para. 18]. No unlawfulness has been demonstrated in the Tribunal's consideration of the evidence.

Conflicting Case-Law

182. It is contended on behalf of Mr. H that the Tribunal failed to deal adequately with the conflicting caselaw from other EU States where inadmissibility decisions were set aside (reportedly Germany, the Netherlands and Belgium) in relation to return to

Greece. It is not suggested, however, that the Tribunal was somehow bound by the decisions of Swiss and Norwegian courts also referenced in the AIDA Report, to the effect that "*conditions for beneficiaries [in Greece] do not infringe the prohibition on inhuman and degrading treatment*" (AIDA Report, p.245). I further note that the AIDA Report relied upon for case-summaries also reports that in 2022 close to 100 refugees were deported from European states to Greece (p. 246).

183. It is further contended that the Tribunal erred in that such cases referred to in the AIDA Report where inadmissibility findings were set aside, have not been limited to vulnerable applicants, contrary to the terms of the Tribunal's finding. It is pleaded that the Tribunal was obliged to engage in a consideration of these cases and provide an explanation for departing from the reasoning in each of them. It is noteworthy in this regard, however, that no attempt has been made on behalf of Mr. H to provide any further particulars in evidence in relation to the cases identified, with reliance placed only on the summary description of cases contained in the AIDA Report (even though footnoted citations for these cases means that they may be readily accessible through hyperlinks).

184. The complaint that the Tribunal failed to adequately address conflicting case-law from other EU states rings hollow in circumstances where no decisions were ever put before the Tribunal or, for that matter, before me for consideration of their full terms. It bears note in this regard that Mr. A, for his part, submitted a decision of a German Court (Bremen) to the Tribunal and has exhibited it in these proceedings. This permits of some greater understanding of the process of reasoning engaged in on the facts of that case but does not detract from the requirement, identified by the Tribunal to conduct a case-by-case individual assessment in each case with the result that decisions on different facts from other jurisdictions are of limited value only.

185. Indeed, even while complaining about the Tribunal's failure to address the detail of decisions in other cases from tribunals or courts in different countries, it bears emphasis that the only reference to a decision of a different tribunal or court before me was based not on court reports but on a summary of decisions contained in the AIDA Report. Clearly the decisions in these cases can only have been based on an assessment of the facts and evidence in individual cases and must be afforded a high degree of

caution when information in this regard is not available.

186. As noted above, the AIDA Report records that some countries have refused to return refugees to Greece, whilst others continue to do so. The basis upon which different approaches have been taken in the different cases in various jurisdictions is not amenable to real scrutiny from the truncated way this information is presented in the AIDA Report alone. To attach any real significance to these reported cases would require a detailed consideration of the decisions themselves and the basis upon which they were taken – an exercise which neither the Tribunal nor this Court could do in the absence of evidence in relation to the law and practice in these other countries, including the full terms of the decisions relied upon.

187. Furthermore, it is well established that it is not open to an applicant to condemn a decision based on a point that was not made to the decision maker.

188. In this regard, it requires to be stated that the Tribunal did have regard to the discussion of other cases in the AIDA Report. As the legal test laid down in *Ibrahim* requires an individual assessment in each case and does not envisage a blanket-refusals on an *a priori* basis of all returns to a Member State of the EU, the Tribunal's conclusion, without cases being properly provided to her in a manner in which she could assess them as to their detail, that such cases as were referred to in the AIDA Report were decided on the basis of the vulnerabilities of particular applicants, is not an unreasonable one. Even if that is not what occurred in each case cited in the AIDA Report (and I cannot comment from a position of any knowledge or expertise), that is what *Ibrahim* requires.

189. In any event, the decisions of other domestic tribunals and courts whilst potentially carrying some persuasive force when properly accessible and dealing with comparable legal provisions have no precedential value and could not displace the primary obligation on the Tribunal to assess the facts and circumstances of the case presenting before the Tribunal. The Tribunal cannot be faulted for discharging this task with regard to the individual circumstances of the case before it and on the evidence available.

190. As for the plea that it is a breach of the principle of mutual trust to fail to accord

persuasive force to decisions from other countries by refusing to return a recognised asylum seeker, this argument is difficult to reconcile with the fact that other EU Member States continue to return those individuals to Greece, no decision has been made at EU level that returns cannot lawfully be effected and EU law requires an individual and personal assessment of risk in each case. The argument based in reliance on the fact that it is reported that there have been non-return decisions in other countries is tantamount to suggesting that the State should refuse to return any recognised refugee to Greece because of conditions in Greece without individual consideration of the circumstances of that case. There is no authority for such a far-reaching proposition which is manifestly incompatible with the system of mutual trust upon which the EU is founded.

191. I would not find that the Tribunal failed to discharge this obligation in the case of Mr. H by reason of the treatment of decisions of courts and tribunals in other member states. Ultimately, each case is decided on its own merits.

Medical Issues

192. There is no clear basis for the submission advanced that there was a failure to consider medical issues in Mr. H's case. The Tribunal correctly recorded, as a matter of fact, that no medical report had been furnished to suggest that the Applicant was suffering from "*mental or physical incapacities*". Whilst noting that the Applicant had referred to suffering from "*sadness and insomnia*", the Tribunal also observed that the Applicant was working in the State and was thus obviously physically capable. Had the Applicant wished the Tribunal to consider medical issues further, it was open to him to provide medical evidence. The Tribunal is entitled to rely on the absence of such evidence in recording, correctly, that there was no evidence to suggest that he was suffering from severe mental health problems.

193. Acknowledged difficulties in the Greek healthcare system do not create a real risk of a breach of Article 4 of the Charter for an individual not presenting with any evidence of significant health related conditions which might require treatment under that system. In cases identified on behalf of the Applicants where access to medical treatment was a factor leading to a finding of a real risk of inhuman and degrading

treatment such as *Application no. 59841/19 A.R. & Ors. v. Greece*, the existence of a serious medical condition known to the authorities was central to the decision. There are no similar circumstances here.

Private Life Rights

194. There is no requirement on the Tribunal to assess rights beyond rights coming within the umbrella of rights protection required by the *Ibrahim* decision when making an admissibility decision. Any scrutiny of impact on broader rights falls to be conducted not by the Tribunal under Article 4 of the Charter but by the Minister pursuant to s. 50A(1)(b) of the 2015 Act. That decision making process has not yet commenced. It is hard to avoid commenting, however, that even if the Tribunal had some function in assessing the Applicant's private life rights in the State under s. 21 of the 2015 Act in either of these two cases, the evidence of same put forward was minimal and was not of a nature as could support any finding of engagement of private life rights, let alone interference with same.

Irrationality in the Assessment of Risk of Poverty

195. Mr. H contends that the decision was irrational on various grounds, but points in particular to the assessment of the risk of poverty. True it is that the COI supports a conclusion that some recognised refugees in Greece are exposed to homelessness and there are difficulties in accessing services and employment. In contending, however, that the COI cannot rationally be construed as supporting a finding that Mr. H is not exposed to a real risk of extreme material poverty if returned to Greece, is to ignore the fact that COI also allows for a conclusion that the Applicant has a reasonable chance of avoiding "*extreme material poverty*" in view of his individual circumstances which include that he is young and able bodied, enjoys an entitlement to access the labour market, an entitlement to non-discriminatory access to social assistance payments and health care coupled with the absence of any particular, identified vulnerability on his part.

196. Mr. H alleges unreasonableness in the Tribunal's conclusion that he had demonstrated a capacity to navigate Greek bureaucratic structures and could do so again, to obtain the documents necessary to apply for social security benefits: principally, a

renewal of his ADET to obtain an AMKA. He challenges the Tribunal's conclusion by reference to the "*difficulties*" in renewing residence permits outlined in the AIDA Report. Again, however, Mr. H provided no evidence of any attempts by him to obtain renewal of his ADET, after it was burnt in the fire. *Ibrahim* precludes an inadmissibility finding where an applicant "*wholly dependent on State support find[s] himself, irrespective of his wishes and his personal choices, in a situation of extreme material poverty….*"[*Ibrahim*, at para. 89].

197. If an applicant loses his residence permit and makes no effort over a lengthy period to renew it, the Tribunal is not simply obliged to accept that situation as conclusively establishing a real risk of extreme material poverty. In this case, the Tribunal fairly acknowledged that there are procedural obstacles to be negotiated for renewal of an ADET in Greece but it was reasonably open to the Tribunal to have regard to the fact that Mr. H had previously negotiated such obstacles, and to conclude that he could do so again if he wished, in the absence of any evidence in this regard as to impediments to him doing so.

198. Patently, Mr. H attacks the weight accorded by the Tribunal to COI, rather than identifying some relevant factor erroneously left unconsidered by the Tribunal. This is from several of the arguments made in his submissions: e.g. it is accepted on Mr. H's behalf that the Tribunal noted the "*significant barriers to employment faced by beneficiaries*" but claims it "*downplays*" these. It is not suggested, however, that the Tribunal somehow failed to consider the high unemployment rate or the barriers to finding work in Greece. It was not irrational for the Tribunal to have regard to Mr. H's work history in Ireland, which can reasonably be expected to be of advantage to him in seeking employment in Greece. Furthermore, as noted by the Tribunal, if unemployed Mr. H would be entitled to social welfare on the same terms and conditions as Greek citizens.

199. Furthermore, it is accepted on behalf of Mr. H that the Tribunal "*noted the [ ] statistics*" regarding access to housing for international protection beneficiaries but claims there was still a "*failure to consider adequately the high likelihood or homelessness or precariousness of access to accommodation….*". It is not suggested, however, that the Tribunal failed to consider the "*documented challenges in accessing housing for beneficiaries*". In this regard, it is accepted that the Tribunal "*acknowledged the need for a residence permit*" to "*obtain a Social Security Number*", but it is alleged on Mr. H's behalf that the Tribunal wrongly "*assum[ed] that the Applicant could easily navigate*" processes

required to obtain renewal of his ADET and thus obtain an AMKA. The Applicant does not suggest, however, that there was no evidence on which the Tribunal could reasonably rely to conclude that the Applicant could navigate a pathway to obtaining social benefits, nor could he plausibly do so when he had previously demonstrated ability in this context.

200. It is claimed on behalf of Mr. H that the Tribunal did not "*adequately address*" challenges in accessing healthcare. Apart from the fact Mr. H presented with no documented health issues, he does not suggest that the Tribunal failed to acknowledge and weigh the capacity problems in "*cover[ing] all the needs for health care services, be it of the local population or of migrants*", nor could he when this issue is directly addressed by the Tribunal [at para. 4.32].

201. Although it is accepted on behalf of Mr. H that the Tribunal acknowledged his "*concerns about safety and security*", it is claimed these "*should have been given more weight.*" It is not complained, however, that the Tribunal failed to consider relevant country information regarding his safety or security on return to Greece. Instead, Mr. H effectively takes issue with the ultimate conclusion of effective State protection because he disagrees with this conclusion.

202. Further, while it is contended that the Tribunal failed "*to adequately consider*" a number of "*barriers to employment, housing, social services, healthcare and safety documented in the COI, including the AIDA report and the USDOS Report,*" it is a fact that the Tribunal cited both reports as having been considered in the Decision. It is not enough for the Applicant to contend for a failure to consider a report by simply quoting from certain sections of the AIDA Report which he believes favoured a different outcome. The suggestion that the Tribunals' "*conclusions are not supported by the evidence*" is simply not made out when one considers the detailed consideration of that evidence [at paras. 4.22-4.36 of the Decision] and the full terms of the reports which were considered by the Tribunal.

203. I have not been persuaded that the Tribunal "*erred in the consideration of ... COI and other evidence*" in concluding that very high threshold in *Ibrahim* had been reached in the case of Mr. H. While an applicant in one case might be able to establish, by reason of certain vulnerabilities experienced by him or her, that he or she faces a serious risk of extreme material poverty amounting to a breach of Article 4 of the Charter, another applicant not suffering from those vulnerabilities might be well able to get a job (if an

attempt is made to do so) or access housing and social supports (if an attempt is made to do so), potentially in another part of the country if the municipality in which they have been living is overburdened or under-resourced.

204. I agree with the Respondent that it cannot be the case that an applicant, who refers to no particular vulnerabilities impacting his ability to access resources in Greece, and who offers no basis for believing he ever attempted to get a job or made any effort to access available supports while living in Greece, can nonetheless successfully impugn a decision which:

(i) takes a comprehensive look at the evidential picture relating to beneficiaries of international protection generally; and

(ii) balancing the positive and negative aspects of that evidence, arrives at the conclusion that, while there may be some risk of poverty for international protection beneficiaries in Greece, there is not a real risk of extreme material poverty for the Applicant, on the facts of his case.

205. No error of legal principle warranting interference by me in granting relief in judicial review proceedings has been identified in the case of the Tribunal decision in Mr. H's case.

Procedural Safeguards and the Right to an Oral Hearing

206. In view of the case made on behalf of both applicants (to varying degrees), as to the absence of adequate procedural safeguards by reason of a failure to convene an oral hearing at Tribunal stage, it is particularly noteworthy that s. 21 of the 2015 Act not only makes no provision for a personal interview or oral hearing in respect of the admissibility decision process, but expressly precludes the conduct of an oral hearing at Tribunal stage.

207. In the Tribunal's Administrative Practice Note (Update-May, 2023) which is available to appellants, the absence of an oral hearing before the Tribunal is referred to. It is stated (at p. 10):

"Section 21 of the 2015 Act deals with applications for international protection

that have been deemed inadmissible by an International Protection Officer. An appeal to the Tribunal against a recommendation that an application be determined to be inadmissible will take place without an oral hearing (section 21(7)(a) of the 2015 Act). For that reason, appellants are advised to submit in a timely manner, together with the Notice of Appeal (Schedule 2 to the 2017 Regulations), all documentation upon which they wish the Tribunal to rely. While the Tribunal may seek further information in appeals of this type, an appellant should not expect that there will in fact be any communication between the Tribunal and an appellant from the time the Notice of Appeal and any supporting documentation or submissions are lodged until the time the decision is made."

208. The exclusion of an oral hearing is not surprising in the statutory scheme envisaged by s. 21 in its terms as enacted. A very net issue of law and fact was envisaged as arising for determination *viz.* whether protection status had been granted elsewhere, a fact readily independently verifiable and not in dispute in either of the two cases before me. Self-evidently, an oral hearing would not be required at Tribunal stage to decide this fact.

209. The statutory preclusion of an oral hearing before the Tribunal sits less comfortably with the exercise of a broader jurisdiction deriving from the requirements of EU law when the Tribunal is considering whether a real risk of treatment contrary to Article 4 of the Charter has been established. This is not necessarily always a net question of law or fact. It is conceivable that the Tribunal might, on the facts of a given case, find itself making determinations which require it to resolve conflicts of fact.

210. Under EU law, however, it has not been found by the CJEU that there is a requirement for an oral hearing at Tribunal stage when determining whether or not a real risk of treatment contrary to Article 4 of the Charter / Article 3 of the Convention has been established. Instead, the case-law establishes a duty on the State to ensure a personal interview as part of the decision-making process. Thus, in *C-517/17 Addis v. Bundesrepublik Deutschland,* the CJEU found, with reference to Articles 14 and 34 of Directive 2013/32 (not adhered to by Ireland), that to be compatible with the requirements of EU law, procedures must ensure an opportunity to set out in person all arguments against a decision in a hearing which complied with the applicable conditions and fundamental

guarantees set out in Article 15 of that Directive.

211. In *Addis,* the CJEU held in reliance on *Ibrahim v. Germany* that the personal interview provided for in Articles 14 and 34 of Directive 2013/32, was intended to give the applicant the opportunity not only to state whether international protection had already been granted to him or her in another Member State, but in particular to present all of the factors which differentiated his or her specific situation in order to enable the determining authority to rule out the possibility that the applicant, if transferred to that other Member State, would be exposed to a substantial risk of suffering inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the EU. As transfer is precluded as a matter of EU law where this risk is established, the personal interview was considered by the CJEU to be of fundamental importance.

212. On the facts in *Addis*, there had been no personal interview as part of the process and in consequence, a hearing at appeal stage was necessary if the process was to be brought into compliance with the requirement for a personal interview established under EU law. It is clear from the judgment, however, that had there been a personal interview at an earlier stage of the process, then no requirement for an oral hearing at appeal stage arose, provided the opportunity had been afforded to the person to be heard as to whether the application was inadmissible on the grounds relied upon for the finding.

213. Applying the reasoning developed in *Addis* to the facts of this case (and ignoring for present purposes that Ireland has not adhered itself to Directive 2013/32 with the result that the heightened requirements under that Directive are not binding but proceeding on the basis that those rights may in any event derive from the Charter and from Article 47 of the CFEU), the applicants are entitled to be heard in person as to why applications for protection submitted by them should not be treated as inadmissible by reason of protection status having been given in another Member State at some stage in the inadmissibility decision making process. The requirement for an oral hearing at appeal stage would only arise had there not been a personal interview at an earlier point in the process.

214. More recently, in Cases C-228/21, C-254/21, C-297/21 and C -328/21 *D.G.* [at para. 117], the CJEU, in the context of transfers under the Dublin III Regulations, made clear that the purpose of the personal interview is to ensure that the applicant has been invited to provide, in cooperation with the authority responsible for that interview, all information

that is relevant to the assessment of admissibility "*which gives that interview paramount importance in the procedure for examination of that application*".

215. In *D.G.*, the CJEU considered the legal position when documents which ought to have been provided before the interview were not provided resulting in a procedural irregularity. The CJEU found that to satisfy the requirements arising from the principles of effectiveness, it was necessary to ascertain whether, had it not been for such an irregularity, the outcome of the procedure might have been different.

216. It is clear, however, that the necessity or otherwise of an oral hearing as part of an effective remedy depends on the circumstances of a case. As noted in *AD v. Refugee Applications Commissioner* [2009] IEHC 77 [at para. 19]:

> "*[the] fact that [an] appeal does not provide for an oral hearing, while relevant, is not itself a ground granting relief. An oral hearing is not always an essential ingredient of a fair appeal.*"

217. In *XLC v. Minister for Justice, Equality and Law Reform* [2010] IEHC 148 [at para. 37], the Court emphasised that there is more than one method of participation in a decision-making process, observing that the "*exclusion of an oral hearing does not preclude the applicant giving evidence*" where the applicant:

> "*is entitled to require the Tribunal to consider such testimony as he wishes to have taken into account by way of written statement….the absence of an oral hearing is only a disadvantage where the contested issues of fact depend upon an appreciation of the personal truthfulness of an applicant.*"

218. In *MOOS v. Refugee Applications Commissioner* [2008] IEHC 399**,** the Court considered that an oral hearing was not an essential element of an appeal, where discrete problems arising with the applicant's credibility were capable of being dealt with fairly by way of written submissions. Birmingham J. refused leave to argue unconstitutionality regarding the removal of an entitlement to an oral hearing on appeal, where the applicant had previously been refused in another Member State, relying upon *VZ v. Minister for Justice, Equality and Law Reform* [2002] 2 IR 135, where the Supreme Court had rejected

the suggestion that the failure to provide for an oral hearing for an asylum claim considered to be manifestly unfounded was unconstitutional. McGuinness J stated in *VZ*:

> "*There is no authority to establish that an oral hearing on appeal is necessary in all cases. The applicant is not in the position of an accused person facing prosecution. There are no witnesses against him. He is not in a position to cross examine the assessors of his claim and it is difficult to see how in these circumstances a right to cross examine is relevant. He may certainly wish to expand on either his own evidence or independent evidence concerning the conditions prevailing in his country of origin but it is open to him to provide this information in writing.*"

219. *VZ* was referenced in *Sen He v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Hogan J, 7 October 2011) where Hogan J. explained that, while oral argument "*undoubtedly forms the backbone of the common law system of advocacy, it cannot be said that a purely papers based appeal in itself is necessarily unfair*" (as summarised in *UP v Minister for Justice, Equality and Law Reform* [2014] IEHC 567, the "*key point*" being that "*the applicant must be given a fair opportunity to make his case on appeal.*"

220. While the Respondents acknowledge that *SUN v. Refugee Applications Commissioner* [2013] IEHC 338, [2013] 2 IR 555 suggests that, where an applicant has been "*disbelieved when recounting*" certain "*events and facts*" which "*are of a kind that could have taken place*", an applicant should have "*an opportunity of persuading the deciding authority on appeal that he or she is personally credible in the matter*" [at para. 40], they point out that a key part of the legislative framework at issue in *SUN* was that an applicant would have had an oral hearing at first instance, and the effectiveness of his remedy was thus being reduced through the unavailability of an oral hearing on appeal, triggered by reason of the applicant's nationality being that of a safe country, an issue which Cooke J considered [at para. 41] had "*no necessary or logical connection with the issue to be raised on appeal.*"

221. In *ZK v. Minister for Justice* [2023] IECA 254, the Court of Appeal observed [at

para. 78] that "*it is where contested issues of fact could only be reconciled through cross-examination of the parties, that issues of credibility will give rise to a requirement for an oral hearing.*" Significantly, Power J. added [at para. 185], the Court must "*consider what it is that would be achieved by an oral hearing and without which a breach of natural and constitutional justice would occur*".

222. These above authorities underline how the boundaries of fairness are dictated by what is being sought to be proved and what stands to be rejected in the absence of an oral procedure. This brings us to a consideration of the material facts arising on this appeal, the issues which the Tribunal had to determine in order fairly to resolve the appeal and whether such a resolution necessitated an oral hearing as a matter of fairness.

223. In Mr. H's case it is clear from the very first sentence of his submissions that his argument in this context is entirely predicated on the contention that an oral hearing is required where the Tribunal is "*required to consider the personal credibility of an international protection applicant in the consideration of whether Art.3 ECHR/Art.4 CFR could be breached*". Having said this, Mr. H does not point to any aspect of the Decision where the Tribunal rejected his credibility, or refused to accept any of his statements regarding his experiences in Greece. To simply refer to "*adverse credibility findings against the Applicant in respect of his experience in Greece*", in advancing a claim that the process is flawed by the absence of an oral hearing at appeal stage without explaining at all what those "*adverse credibility findings*" are supposed to be fails to properly ground the challenge made in facts which can support any relief.

224. In this case, the Tribunal did not reject the credibility of Mr. H's experiences in the camp, the fact he had lost his documents, or his living conditions following his exit from the camp. The Applicant submits that "*the unfairness at issue is that he was given no further opportunity ... to provide testimony in respect of the hardships he experienced in Greece.*" But this is simply untrue: as recognised in *XLC*, testimony does not need to be furnished orally for it to be fully capable of being considered. There is no constitutional entitlement to "*meet the decision-maker, in person, so that one's personality, general appearance or demeanour might be assessed*" [per Power J. in *ZK* at para. 181].

225. The reality is that Mr. H is unable to point to any actual element of his case which could only fairly have been advanced by way of oral hearing, as opposed to through provision of documentation. Had he wished to elaborate on "*the hardships he experienced*

in Greece", it was open to him at any point to provide written statements and/or documentary evidence to the Tribunal. The Applicant was legally represented in connection with his appeal, and his solicitor furnished supporting documentation with his Notice of Appeal. The Tribunal proceeded on the basis that his accepted experiences were ultimately outweighed by objective country information.

226. In *H.Z. (Iran)* – where it was claimed the Tribunal "*breach[ed] fair procedures [by] rejecting the credibility of the applicant's claims that he had sought and failed to obtain accommodation and welfare supports in Greece without permitting the applicant an opportunity to provide oral evidence on the question as requested by him*" – the Court explained that a finding that there is "*a lack of documentary support*" for a claim is not a rejection of credibility: it "*is a fact, not impugned as such*". Humphreys J found there is ([at para. 30]):

> "*no obligation in law, under the Constitution, in EU law or under the ECHR to have an oral hearing in circumstances such as in this case.*"

227. Nothing on the facts or circumstances of Mr. H's case would allow him to successfully distinguish his case from *H.Z. (Iran)*. Mr. H did not even claim to have sought accommodation and welfare supports in Greece, as the applicant in *H.Z. (Iran)* had done. It is thus clear that there is no element of Mr. H's account, the credibility of which could be said to have been rejected by the Tribunal. He was simply considered not to have discharged his burden of proof of establishing that he would face a real risk of extreme material poverty in Greece placing him in a position of such gravity that he would suffer a breach of his fundamental rights under Article 4 of the Charter.

228. To the extent that the duty identified in *Addis* applies as a matter of EU law or the requirements of constitutional justice may require an oral hearing, I am satisfied that it is discharged on the facts of these cases through the conduct of a personal interview under ss. 13(2) and 15 of the 2015 Act with each of the applicants before making an admissibility decision. In the cases before me the applicants had the benefit of not one but two personal interviews in one case and maybe three in the other. The record of those interviews was available to both the IPO and the Tribunal. The fact that the domestic scheme allows for the conduct of a personal interview and a personal interview occurred in these cases meets the requirement for an oral stage to the process under EU law. In this regard, I am referred

to the decision of Humphreys J. in *H.Z. (Iran)* in a judicial review arising in respect of a decision under s. 21 of the 2015 Act where he found [at para. 30] that there is no obligation in law, under the Constitution, in EU law or under the ECHR to have an oral hearing in the circumstances of that case.

229. Recalling the prime purpose of an oral interview where no credibility issues arise is to allow for the provision of relevant information, I am satisfied that an opportunity was provided during the process, which includes an oral stage, to provide information that is relevant to the assessment of admissibility, no frailty arises as a matter of EU law by reason of the absence of an oral hearing before the Tribunal. Once an opportunity is afforded to the Applicants during the process to be heard in person as to why applications for protection on their behalf should not be found inadmissible because of the protection status accorded to them in Greece, the requirement giving rise to an oral hearing identified in *Addis* is met.

230. Furthermore, there are means open to the Tribunal of ensuring fair procedures in the decision-making process short of convening an oral hearing should issues arise at appeal stage which have not already been addressed during the personal interview carried out by the IPO. There will be circumstances where it will be necessary for the Tribunal to put certain matters to an applicant before reaching a conclusion based on information before it but there are means short of an oral hearing before the Tribunal whereby this can be achieved. The practice of the Tribunal in corresponding with applicants to ask specific questions and inviting responses in writing demonstrates ways in which the process can be adapted to ensure fairness when the facts and circumstances require.

Constitutionality of s. 21(7) of the 2015 Act

231. Although it is pleaded on behalf of Mr. H that s. 21(7) of the 2015 Act is unconstitutional because it precludes an oral hearing before the Tribunal in any circumstances, this is not a question which I can properly entertain in the abstract and in a case in which a conflict of fact requiring cross examination does not exist or adverse credibility findings have not been made, such as this one. Curiously, the plea of unconstitutionality is advanced in reliance on Article 40.1 (equality guarantee) of the Constitution and not Article 40.3 (personal rights). The basis for a plea that the absence of an oral hearing is in breach of the equality clause of the Constitution is nowhere expanded upon. The plea remains entirely unsubstantiated.

232. This pleading issue aside and presuming that a basis for constitutional argument were disclosed (perhaps in reliance on Article 40.3 of the Constitution which might be construed as embracing a right to an effective remedy), it must be recalled, as pointed out on behalf of the Respondents, that s.21(7) benefits from a presumption of constitutionality. In *Pigs Marketing Board v. Donnelly (Dublin) Ltd* [1939] IR 413, it was found that a statutory provision "*is presumed to be constitutional unless and until the contrary is clearly established*". As found in *Lowth v. Minister for Social Welfare* [1998] IESC1, [1998] 4 IR 321, "*the burden of establishing the unconstitutionality of a law is a formidable one*". This constitutional analysis falls to be conducted by reference to the individual facts of a case and is not an abstract legal exercise (see *Tuohy v. Courtney* [1994] WJSC-SC 4178, [1994] 3 IR 1).

233. Legal arguments on behalf of Mr. H have not engaged in any meaningful way (in fact, not at all) with these issues and the basis for a constitutional challenge has not been pursued in any serious or meaningful manner. Cases identified on behalf of Mr. H in support of a right to an oral hearing in particular circumstances rest entirely on the existence of disputed facts or adverse credibility findings which are simply not present in these cases. Contrary to the position urged in argument upon me, however, I am quite satisfied that there is no evidence of the Tribunal rejecting either application as inadmissible on the basis of adverse credibility findings or because it does not accept the account given. The inadmissibility decisions in both Mr. H's and Mr. A's cases were squarely taken based on the cases at their height having regard to the material presented. Counsel of behalf of Mr. H does not even mention the decision in *VZ*, still less engage with it in submissions.

234. No grounds have been identified on behalf of Mr. H which can support a challenge to the decision of the Tribunal by reason of the absence of a platform for an oral hearing before the Tribunal and thus this aspect of the claim made must fail. It warrants mention also that no relief has been sought under s. 5 of the European Convention on Human Rights Act, 2003, despite repeated references to Article 3 of the Convention in the pleadings. This may be consequent upon an acknowledgement on behalf of Mr. H that Article 3 of the Convention only applies to removal decisions, as found in *H.Z. (Iran)* and not to decisions that an asylum application is inadmissible.

Obligation to make further Inquiries

235. The question remains, however, as to whether the Applicants were provided with sufficient opportunity to provide all information that is relevant to the assessment of admissibility. This is core to the effectiveness of the remedy and is an issue which arises both as a matter of domestic and EU law. It has been submitted, most forcefully in the case of Mr. A, that that the Tribunal "*was required to make appropriate inquiries*" and reference has been made to the Tribunal practice in corresponding with Applicants with additional questions, a practice apparent in some cases, which did not occur in either of these cases.

236. Whether an obligation to seek further information was triggered in either of these cases turns on (i) whether an adequate opportunity was provided to put relevant information before the decision maker; and/or (ii) whether there were matters intended to be relied upon by the Tribunal in reaching its decision adverse to the Applicants' interests which fairness required they be afforded an opportunity to address. In short, my role on this question is to consider whether the Applicants (or one or other of them) have been deprived of a fair opportunity to put forward information relevant to their applications. If they have, the next question is whether the failure occurs in circumstances where information potentially capable of effecting the outcome of the process is in issue. Where the outcome could have been different had the opportunity to provide the information in question been provided, then it must follow that the decision may be vulnerable to being quashed in judicial review proceedings.

237. I note that in both cases the Tribunal reached conclusions based on the absence of elaboration or detailed information. The Tribunal observed, for example, that Mr. H "*seems to not have taken it any further once he heard it might be difficult to have the documents reissued*". The Tribunal found that he should *"also be in a position to obtain the documents necessary to apply for an AMKA [social security number]"* [at para. 4.14]. It was noted by the Tribunal that there was no evidence on the Applicant's file to suggest he made any efforts to secure alternative accommodation during the six-month period he remained at Moria camp after being granted status. In addition, the Tribunal noted that no evidence had been offered of any attempts whatsoever by Mr. H to apply for jobs or find accommodation.

238. I have considered whether, in the light of these conclusions, there was a duty deriving from the requirements of fairness and the obligation to provide effective remedy

for the Tribunal to raise these matters directly with Mr. H before arriving at conclusions based on the lack of evidence submitted. Specifically, the question for me to determine is whether the Tribunal ought to have directed further enquiries or probed Mr. H's evidence to ascertain matters relevant to findings the Tribunal contemplated making, such as whether Mr. H took any steps when he heard that it would be difficult to have his official documents re-issued and, if not, why not; whether he would be in a position to obtain the necessary documents to apply for an AMKA again and if not, why not and what efforts he made to secure alternative accommodation during the six months he remained at Moria.

239. It seems to me that an obligation arises to seek further information or to present information for consideration to the Tribunal which suggests a particular conclusion where the Tribunal proposes to rely on a matter which Mr. H could not have anticipated, is not otherwise known to him and is adverse to the claim he makes. In such circumstances, I am satisfied that he ought properly to be provided with an opportunity to address that matter.

240. In Mr. H's case it is important to recall that the IPO had considered COI in relation to living conditions, medical care, access to education and training programmes (including language programmes), social assistance and access to the labour market before concluding that no real risk of a breach of rights protected under Article 4 of the Charter arose. A copy of the report of the IPO was sent both to the Applicant and to his solicitors. In the appeal submissions lodged on Mr. H's behalf by his solicitors by letter dated the 5th of July, 2023, extensive reference was made by his solicitors to the same report considered by the IPO and subsequently by the Tribunal. The submissions addressed difficulties accessing social assistance, housing, the labour market, healthcare and basic services in reliance on the COI but without once elaborating on Mr. H's own experiences. The failure to expand on Mr. H's own experiences if relevant instructions had been obtained is surprising considering that the same submission also referred to the decision in Ibrahim in which the burden of demonstrating a real risk having regard to the personal and individual circumstances of the applicant are made crystal clear.

241. In view of the conclusions of the IPO and the issue which the Tribunal was obliged to consider on his appeal, it seems to me that Mr. H cannot reasonably claim to be surprised that the Tribunal would consider evidence of his efforts, or rather lack of evidence, to access accommodation, work, health services and financial support to be relevant. These

considerations flowed from the terms of the application, the IPO decision and the appeal submitted on Mr. H's behalf in reliance on COI. The need to address these factors ought to have been anticipated and the failure on the part of the Applicant, with the benefit of legal advice, to put that information before the Tribunal does not constitute a failure of enquiry on the part of the Tribunal where the Tribunal relies on the information provided in the process having afforded a proper opportunity for information to be presented.

242. Counsel on behalf of Mr. H sought to contend in argument and on his feet that efforts to seek accommodation or employment were pointless and this is borne out by the COI but, with respect, while the COI certainly supports the fact that there are difficulties in accessing employment or accommodation in Greece, it does not support the universal conclusion that efforts in this regard are futile (a non-negligible percentage are working and a significant percentage have access to accommodation) so as to relieve an applicant for admission to the asylum system in the State from any obligation to make efforts to find accommodation or employment and to address those efforts in evidence where relying on extreme material poverty by reason of an absence of same to resist a finding that an asylum claim is inadmissible here.

243. In relying on certain elements of the AIDA Report in support of his claim to be at real risk of a breach of his rights, Mr. H must be taken to be on notice of other elements which did not support that claim. Mr. H had the opportunity to explain why, notwithstanding the statistics set out in the Report which demonstrate that accommodation is available for a significant proportion of recognized refugees, he was at particular risk of homelessness. The contention that the Tribunal ought to have enquired further before reaching a decision was rejected by Humphreys J. in *H.Z. (Iran)* [at para. 31] where he likened the argument to being akin to asserting a right to see and comment on a draft decision, a position rejected in the case law, citing *M.M. v. Minister for Justice and Equality* [2018] IESC 10.

244. Likewise, although he might have been questioned further on behalf of the Tribunal in an exercise of diligence and completeness as to why he did not access the social supports evidenced in the COI (the same COI relied upon by him in relation to other elements), he must be taken to have known that the documented existence of social supports was a factor to which the Tribunal was likely to have regard and to have therefore been on notice of the

requirement to explain why those supports were not available to him (if not) without being expressly asked about this by the Tribunal. I note in this regard that in its report, the IPO rehearsed COI in relation to the availability of State supports, including financial assistance, such that in my view Mr. H was on express notice in advance of submission of his appeal that reliance was being placed on the fact that beneficiaries of refugee status enjoy the same rights and receive the necessary social assistance according to the terms that apply to nationals, without discrimination.

245. I am satisfied that there is no requirement on the Tribunal to ask further questions where a reasonable opportunity has been provided to an applicant to explain why he faces a risk of extreme material poverty in breach of Article 4 of the Charter on the facts and circumstances of their individual cases in advancing a claim to be admitted to the Irish protection system, notwithstanding already having status elsewhere within the EU. Where an applicant does not avail of this opportunity by providing further information to assist their claim, the Tribunal cannot be faulted for proceeding on the basis of the information it has.

246. It bears note that unlike Mr. A, Mr. H has not sought to identify on affidavits factual matters which he might have advanced by way of evidence before the Tribunal, had any further questions been asked of him and he has not identified any material evidence which he could have offered in relation to his personal circumstances and the particular difficulties he encountered in seeking to access work, accommodation, health services or financial support. Even at this stage, after the conclusion of a two-day hearing, it is not clear that there is anything relevant Mr. A might have added had he been asked and therefore it is not possible for me to conclude that the failure to ask has resulted in a substantive unfairness.

247. While it is good practice to ask further specific questions of the Applicant before reaching a conclusion grounded on a lack of evidence, especially where all relevant questions have not been asked at interview stage and further explanation of answers provided is necessary to ensure that material information has been overlooked by failure to appreciate its significance at an earlier stage in the process, whether it is necessary to do so depends on the facts and circumstances of the case. It does not seem to me that it was necessary to probe further with Mr. H what efforts he had made or could have made to pursue options open to him in Greece to improve his conditions as an incident of the requirements of constitutional justice. In my view the failure to do so does not render the

Tribunal decision unsustainable in law. Circumstances as between cases differ, however, and where reliance in placed on a matter which an applicant could not reasonably have anticipated and which transpires to be material to an adverse decision, then it is quite likely that a right of reply will be required as an incident of constitutional justice and access to an effective remedy. Nothing of that nature is evident on the facts of Mr. H's case.

248. In contrast to Mr. H, in Mr. A's case, he offered additional information (by affidavit sworn on the 14th October, 2024 just two weeks before the date assigned for hearing of this action) in the context of these proceedings in response to certain findings made by the Tribunal which he challenges as unlawful. While the information contained in this late affidavit was not before the Tribunal and therefore cannot be relied upon to impugn the rationality of the Tribunal decision, it is nonetheless helpful in identifying those areas in respect of which Mr. A would have liked to have been heard for the purpose of assessing the fair procedures claims advanced in parallel in these proceedings.

249. It is noted in this context that Mr. A contends that it was assumed by the Tribunal that he had made no efforts to secure accommodation, but in fact he now confirms on affidavit that he had attended at the office in the camp many times without any positive response and he made efforts to secure accommodation by registering at an office run by the authorities, without avail. He contends that had he been asked by the Tribunal, prior to its decision, about these matters, he would have been able to clarify them for the benefit of the Tribunal. He refers to the more recent practice of the Tribunal in writing letters with certain queries to applicants or their solicitors and complains that he did not have "*the benefit from such practice and no such letter was sent to me by my solicitor*" (para. 6, Affidavit of Mr. A sworn on the 14th October, 2024).

250. As already noted above, there are certainly circumstances where an unanticipated issue arises which will require, in fairness, that a right of response be afforded. Mr. A's accommodation situation as a recognized refugee, however, was clearly something which was relevant to the Tribunal's considerations. It can have come as no surprise to Mr. A, who was legally represented, that the Tribunal would have regard to COI in this regard in arriving at its decision. Insofar as it confirmed in the COI that accommodation is available for a percentage of recognized refugees, it clearly behooved Mr. A to elaborate on his efforts to get accommodation, and to demonstrate why he was at risk of homelessness and destitution even though others had secured accommodation. Having claimed that he had

nowhere to go, it ought to have been clear to Mr. A and his legal advisors that any unsuccessful attempts to obtain accommodation were relevant and important, yet he did not provide any information whatsoever in this regard. It must also be pointed out that the Tribunal did not conclude that Mr. A had made no efforts to obtain accommodation, rather it recorded that there was no evidence on file that he had made efforts to secure alternative accommodation during the period after he had been granted refugee status and before he left Greece. This was simply a statement of fact.

251. Similarly, insofar as the ADET card (residence card) was concerned, the Tribunal correctly stated that there was no evidence before the Tribunal to suggest that Mr.A had made an application for the reissuance via email from Ireland noting that the renewal process for travel documents is also done via email (ECRE/AIDA – 2023, p.242) and observing that as it is an online system, it appeared that Mr. A could arrange this, if necessary, from Ireland. In his recent, late Affidavit, Mr. A does not contradict the fact that this is a possibility, as suggested by the terms of the Tribunal decision. The Tribunal further noted that it is also apparent from COI that, once a person is granted a residence permit, they are notified that they are the beneficiary of an AMKA (social security number) and they are notified of the steps that they must take to have that number issued (see ECRE/AIDA - 2023, p. 222-224). Mr. A does not contradict this statement of fact on affidavit. Nor does he engage with the Tribunal's statement that it is not clear if the Appellant took the necessary steps to have the number issued before he left Greece. The Tribunal further observed that even if Mr. A did lose his travel document, it is still valid and there is nothing to prevent the Appellant from requesting the authorities to re-issue same. Her conclusion that this would allow him to get a tax identification number and would allow him access to employment is not engaged with by Mr. A at any stage on affidavit in these proceedings.

252. It is impossible to ignore that in Mr. A's case, an almost blank Notice of Appeal had been filed against the recommendation which was received by the Tribunal on the 14th of July 2023. Submissions were filed later, following a request by the Tribunal. They did not materially advance Mr. A's position in terms of his attempts to secure accommodation, access social assistance, services or employment. There were issues that were not probed with Mr. A in interview or subsequently. I note, for example, that Mr. A was not specifically asked during his personal interview nor subsequently in correspondence on

behalf of the Tribunal questions such as whether and, if not, why not, he did not apply for social assistance after he obtained refugee status in circumstances where he had claimed that he got no help from the authorities. Despite repeating on affidavit in these proceedings, however, that he was not able to obtain financial support, he does not set out what efforts he made to obtain social assistance or explain why he could not access it despite what is said in the COI in this regard as to the availability of a minimum income payment.

253. It should be recalled that much of the same COI relied upon by the Tribunal to ground its conclusions was previously referenced in the IPO Report. It was not produced for the first time by the Tribunal in its decision. Indeed, the same COI was cited by Mr. A's solicitors in submissions in support of his appeal to the Tribunal. Accordingly, Mr. A has had ample opportunity to put forward such evidence as to his personal circumstances, difficulties and experiences in Greece as he wishes and has not availed of that opportunity. His failure to do so does not render the decision of the Tribunal unsustainable in law.

254. While decision makers must act fairly and if a decision maker needs clarification or further explanation of material provided, the provider should be given an opportunity to comment, this does not extend to an obligation to seek out information which has been omitted or inadequately explained. Professionals representing parties seeking decisions from quasi-judicial decision makers, courts or tribunals should not be permitted to turn the consequences of failures of presentation into judicial review points.

<u>Due Process Requirements in relation to Documents relied upon by Tribunal</u>

255. In her affidavit sworn on the 14th October, 2024 (just two weeks before the hearing date herein), Mr. A's solicitor referred to reliance placed on the EUAA's report on Jurisprudence on Secondary Movements by Beneficiaries of International Protection, June 2022 in the Tribunal decision, pointing out that this had not been notified in advance to Mr. A or his lawyers, thereby depriving them of an opportunity to make submissions in relation to the relevant jurisprudence. It was contended that notice of the said document was required pursuant to ss. 21(7) and/or 46(8) of the 2015 Act which require the Tribunal to provide an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of the appeal. No complaint in this regard had been made in the proceedings as issued, but the Applicant sought to amend the Statement of Grounds to include a plea that the document had not been

notified to the applicant or his solicitors as required by s. 21(7) and/or 46(8) of the 2015 Act. The Statement of Opposition was amended (by Order of Gearty J. made on the 18th October, 2024) and filed shortly before the hearing before me in response to this proposed new plea.

256. Article 11 Regulation (EU) No 2021/2303 obliges Member States to take account of common analysis and guidance notes developed by the EUAA. The EUAA Report referred to by the Tribunal is such a report. Ireland opted in to Regulation (EU) No 2021/2303 on the 28th July, 2023 - Commission Decision (EU) 2023/1576, before the Tribunal decisions challenged in these proceedings.

257. It is long established that fair procedures do not require that publicly available, demonstrably relevant country information which a decision-maker is obliged to consider must be specifically drawn to an applicant's attention: *YY v. MJE* [2018] 1 ILRM 109 and *MAA v. MJELR* [2011] IEHC 560. The EUAA Report is entirely mainstream in nature and the jurisprudence of Member State courts was always relevant where Mr. A had himself submitted a judgment from a German court. However, in this instance, reliance is placed not on the requirements of fair procedures but on express statutory protections under ss. 21(7) and 46(8) of the 2015 Act.

258. It is not immediately clear to me whether these provisions impose an obligation to provide documentation in advance of the Tribunal decision, or whether it is possible to comply with the requirements by referring to any such report in the decision of the Tribunal. The reference to the report in the Tribunal decision satisfies a literal requirement to provide an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal during an appeal, on the basis that the provision does not require notice in advance but simply a recording of material considered. It is noted that the provision is placed in the statutory scheme after the provisions requiring a decision and the notification of a decision and the reasons for it. This does not suggest that the intention was that the requirement in s. 46(8) of the 2015 Act would be given effect to before the decision.

259. It would be strange, however, that the Legislature prescribes a requirement to give notice of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal during the appeal after the Tribunal decision when it is

too late to address that information in submissions to the Tribunal. Indeed, I note that the Tribunal does not make the case that the requirements of s. 46(8) are met by the reference to the report contained in the Tribunal decision, presumably on the basis that they construe the statutory requirement as being to give advance notice.

260. Assuming therefore that the legislative intention is that information should be furnished in a manner which allows representations to be made in respect of same before a decision is taken, then there has been technical non-compliance with the requirements of s. 46(8) of the 2015 Act. Depending on the nature of the information not provided and its significance to the issues under consideration, such non-compliance may be fatal to the sustainability of a decision. It seems to me, however, that Mr. A must, as a matter of law, be taken to be on notice of the requirement that the Tribunal have regard to EUAA reports without being expressly notified of reports which have come to the Tribunal's attention during the appeal.

261. The EUAA Report in question was publicly accessible and available to Mr. A and his legal advisors. There is no basis, therefore, upon which it could be contended that reliance on information contained in the report resulted in any substantive unfairness and such procedural non-compliance as may have occurred does not result in injustice or materially affect the fairness of the process in a manner which would warrant relief by way of judicial review. This is borne out by the fact that Mr. A has not identified any particular submission he would have wished to advance with reference to the content of the said report but has been prevented from doing so to his detriment. The report was relied on by the Tribunal for its treatment of Jurisprudence on Secondary Movement by Beneficiaries of International Protection (EUAA, 2022) in circumstances where Mr. A has himself sought to rely on this jurisprudence, albeit as addressed in a different report. The Tribunal was not therefore considering information which Mr. A could not have anticipated in any manner which undermined his ability to secure an effective remedy. Furthermore, the Applicant was not prejudiced by the Tribunal's approach whereby the Tribunal simply concluded that there were different approaches taken by different EU Member State courts and tribunals in this context (a submission already made by Mr. A) and concluding that an individualised assessment was required to be carried on in the Applicant's case – a statement which merely reflects the law in accordance with the decision of the CJEU in *Ibrahim*.

262. I have concluded that technical non-compliance with the requirements of s. 46(8) of the 2015 Act of the kind seen in this case is not such as would justify me quashing the decision of the Tribunal in exercise of a discretionary remedy by way of judicial review.

Constitutional Right – Article 40.3 of the Constitution

263. Counsel on behalf of Mr. A pleaded reliance on the Articles 40.1, 40.3 and 40.5 of the Constitution, contending that these had not been properly applied by the Tribunal. In submissions, particular emphasis was placed on the decision of the Supreme Court in *Simpson v. Ireland* [2019] IESC 81, [2020] 3 IR 113, where the Supreme Court found that prison conditions to which the appellant was exposed diminished the right of privacy and the value of dignity due to him as a person, even seen within the limitations which necessarily arose from the fact of his detention with the result that his rights under Article 40.3 (to privacy and dignity) of the Constitution were thereby violated. Arguments with reference to Articles 40.1 and/or 40.5 were not developed and I am treating them as having been abandoned.

264. While it is clear that the Constitution also provides protection against treatment otherwise characterised as inhuman and degrading under the Convention and requires the vindication of a right to dignity in a manner which undoubtedly overlaps with Article 4 of the Charter, it is not clear to me how it is contended that the Decision of the Tribunal is flawed by reason of its failure to properly apply the identified provisions of the Constitution. It is noted that in Mr. A's case the Tribunal considered the submission made in reliance on constitutional rights and with impeccable reasoning concluded [at para. 4.43]:

> *"The Tribunal has assessed the Appellant's rights in this respect and finds that in circumstances where the Appellant has refugee status, a residence card (to be renewed) and a travel card, these are a gateway to other rights in Greece, such as the ability to access the labour market, open a bank account and obtain a social security number. The Appellant is not a vulnerable person nor does he have any physical or mental impediments. He is a young able-bodied man, who will undoubtedly have difficulties setting up a new life for himself in Greece but there is no clear evidence before the Tribunal to suggest that these difficulties would reach such a high threshold that his right to life, human dignity, bodily integrity or constitutional or fair procedures will be breached by a return."*

265. The Tribunal is a creature of law with a defined, statutory competence. Insofar as it enjoys statutory discretion, such discretion requires to be exercised in accordance with the requirements of the Constitution. In the context of a decision under s. 21 of the 2015 Act, it seems to me that the Tribunal enjoys no discretion other than that deriving directly from EU law on foot of an obligation to safeguard against a breach of Article 4 of the Charter recognized in *Ibrahim* and subsequent case-law. It is at least highly questionable as to whether the Tribunal enjoys any similar jurisdiction to consider constitutional or, for that matter, convention rights in determining whether the statutory test for inadmissibility is met because s. 21 requires the Tribunal to decide on inadmissibility within narrowly prescribed parameters which do not envisage a wider rights consideration. Tribunal members do not take an oath under Article 34.6.1 of the Constitution and I do not see a platform upon which to anchor a Tribunal jurisdiction in this regard akin to the Third Schedule of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act"), Reference No. 6. This was relied upon in *Savickis v. Governor of Castlerea Prison* [2016] IECA 372 to ground a jurisdiction to grant relief in damages for breach of constitutional rights provides in the case of the Circuit Court as it provides that the Circuit Court has a jurisdiction (subject to appropriate geographical and monetary limits) in respect of "*an action (other than an action for wrongful detention or matrimonial proceedings) founded on tort…*".

266. It seems to me that it is not open to Mr. A to challenge the Tribunal decision as flawed because the Tribunal did not consider the exercise of a jurisdiction it does not have to treat the application as admissible in vindication of asserted constitutional rights or alternatively rights safeguarded under the Convention (as distinct from the Charter). Questions of scope of protection addressed in *H.Z.(Iran)* apart, the Convention is not directly effective before the Tribunal. Although the Applicants may of course rely on interpretative obligations under ss. 2 and 4 of the European Convention on Human Rights Act, 2003 in like manner to invoking a requirement to interpret s. 21 in a manner which is compatible with the Constitution in argument before the Tribunal, a remedy for breach of constitutional rights or rights safeguarded under the Convention lies elsewhere. Indeed, the Tribunal may also consider Article 3 (involving like considerations to Article 4 of the Charter) as an aid to its interpretation of Article 4 of the Charter having regard to the Article 52(3) of the Charter which provides that insofar as the Charter contains rights which correspond to rights guaranteed by the Convention (such as Article 4 of the Charter and

Article 3 of the Convention) the meaning and scope of those rights shall be the same as those laid down by the Convention, subject to the right of Union law to provide more extensive protection.

267. This does not mean that the Applicants are without a remedy in respect of an inadmissibility decision which fails to vindicate constitutional rights or rights safeguarded under the Convention. Where it is considered that returning an applicant for international protection in the State to another Member State breaches constitutional rights or rights protected under the Convention, a case may be made to the Minister in the context of the exercise of powers under s. 50A of the 2015 Act which precludes the making of a return order where the Minister is of the opinion that return would be prohibited under any enactment or rule of law as a breach of the person's fundamental rights. Accordingly, the fact that the Tribunal has not been vested with a jurisdiction to refuse to find an application inadmissible in vindication of constitutional rights (or indeed rights safeguarded under the Convention) does not preclude a case being made to the Minister that an applicant should not be returned in vindication of rights safeguarded under the Constitution.

268. Any decision of the Minister on such an application requires to be taken in accordance with law and is amenable to review in like manner to the exercise of other statutory discretions. In exercise of a discretion under s. 50A, the Minister is required to vindicate not only constitutionally protected rights but she is also required by s. 3 of the European Convention on Human Rights Act, 2003 to consider whether rights under the Convention risk being interfered with in a manner which warrants the refusal to make a return order in protection of any such rights. It seems to me that it is at this stage of the process, and not before the Tribunal, that constitutional rights and Article 3 rights properly arise for consideration, albeit it is noted that the Tribunal in the instant cases purported to align Article 4 of the Charter with Article 3 of the Convention and consider the position under both in identical terms as part of its inadmissibility assessment. This is unsurprising and not problematic where the scope of protection under Articles 3 of the Convention informs the base level of protection afforded by Article 4 of the Charter (by reason of Article 52(3) of the Charter).

269. In Mr. A's case, as set out above, the Tribunal also considered the constitutional protections invoked in submissions on Mr. A's behalf and found no violation. The question

of the Tribunal's jurisdiction to protect against a violation of said rights does not therefore strictly or necessarily arise on these proceedings. It is appropriate to await a case in which it properly arises for consideration for a concluded view, with the benefit of legal submissions from the parties, on this question.

270. In terms of the Minister's separate and future consideration of Article 3 of the Convention at removal stage, the critical test remains that articulated in *Soering v. United Kingdom* [1989] 11 EHRR 439 as it has evolved and as more recently enunciated in *Paposhvili v. Belgium*, *Application no. 41738/10* (involving the removal of a very seriously ill person), namely that the removal of a person from a member state of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to Article 3 of the Convention.

271. In constitutional terms, not unlike the position under the Charter and the Convention, to preclude the making of a removal or transfer order it would be necessary to establish a likely infringement of a constitutional right based on cogent, coherent evidence, sufficient to meet the significant evidential threshold. Although not addressed in any real way submissions before me in these cases, the test in cases of a real risk of inhuman or degrading treatment or treatment otherwise in breach of fundamental human rights is well established and finds clear exposition in cases such as *Finucane v. McMahon* [1990] 1 I.R. 165 and *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45, [2010] 3 I.R. 783. The high evidential threshold established in our constitutional jurisprudence requires it to be proven that in the event of removal from the State, the person objecting would be exposed to a real risk (as in probability) of being subjected to treatment contrary to fundamental rights protected under the Constitution. In assessing the evidence due regard must be had to the presumption that another EU State would act in good faith and respect the fundamental rights of a person in line with the principle of mutual trust, reciprocity, and confidence. The duty to rebut this presumption is on the objector. The mere possibility of ill-treatment is not sufficient.

CONCLUSION

272. I am acutely aware, as the Tribunal member also expressed herself to be, of the difficulties highlighted in COI that some beneficiaries of protection experience in

Greece. Despite information available on the difficulties for beneficiaries of international protection in Greece to access housing, employment, social services and medical treatment, not all refugees experience these difficulties, and each case must be assessed individually. It is for each applicant to provide concrete and personal evidence of a risk of treatment contrary to Article 4 of the Charter.

273. In these cases, the Tribunal correctly identified the test to be applied, namely whether there are substantial grounds for believing there is a real risk of treatment contrary to Article 4 of the Charter. The Tribunal further noted that it is required to subject the Applicant's complaint of breach of Article 4 of the Charter to "*close scrutiny*" and/or independent and/or rigorous and/or thorough scrutiny. To rebut a presumption that a status holder in Greece can rely on the protection granted, a beneficiary of international protection must demonstrate a personal exposure to a real or serious risk of inhuman or degrading treatment upon return to Greece by reason of severe material deprivation. I see no error of application of this test on the Tribunal decision in either of the Applicants' cases.

274. In these cases, the evidence before the Tribunal allowed for a conclusion that the Applicants had a reasonable possibility of avoiding severe or extreme material deprivation if returned to Greece in view of the COI and their personal circumstances. The Tribunal found, on the basis of the evidence before it and on an application of the correct legal test, that in these two cases the Applicants did not establish individual circumstances sufficient to prove a real or serious risk of inhuman or degrading treatment upon their return to Greece.

275. These were findings which I have concluded were open to the Tribunal on the evidence before it in each case, characterized in both cases by a paucity of information regarding the Applicants' efforts to obtain supports while in Greece, objectively reliable and up to date COI on the supports available to beneficiaries of international protection in Greece generally and the absence of any evidence of or substantiated vulnerability on the part of either Applicant.

276. The essence of the complaints agitated on behalf of both Applicants in advancing rationality challenges related more to the weight afforded to elements of the evidence. The Tribunal decision is not rendered irrational or unreasonable solely by

reason of the possibility of a different view being taken on the evidence. The evaluation of evidence and the weight to be attached to evidence is a matter for the Tribunal as decider of fact.

277. I am satisfied that the decision in neither case was unreasonable nor tainted by error of law. Both decisions were properly grounded in and flowed from the assessment of the Applicants' personal circumstances and the absence of any vulnerabilities on their parts, judged in the context of COI in relation to living conditions for beneficiaries of international protection in Greece. In the circumstances, the Tribunal's conclusions against a real risk of extreme material poverty placing the Applicants in situations of such gravity that it may be equated with inhuman or degrading treatment does not disclose irrationality or other unlawfulness.

278. The decisions in each case were taken on a proper identification of and application of the burden of proof in cases of this nature where, in the mutual trust context where a presumption that fundamental values are safeguarded in other Member States applies, the individual who asserts a real risk or serious risk of harm reaching the threshold for protection under Article 4 of the Charter, must establish a risk which arises in his individual or personal circumstances as assessed in the light of up to date, objective COI in respect of general or systemic deficiencies in the other Member State.

279. I am satisfied that the decisions in both cases were taken following a procedurally fair process in which an oral stage was provided and in which sufficient opportunity was afforded to the Applicants to provide information relevant to the fair and proper assessment of their claims. No circumstances have been disclosed which would give rise to a requirement for an oral hearing before the Tribunal as an incident of the requirements of constitutional justice. Although the Tribunal ought properly to have notified Mr. A of the EAUU Report where it came to its attention during the appeal process and had not previously been notified to him, no unfairness or prejudice has been demonstrated such as to undermine the sustainability of the decision in his case.

280. In the case of Mr. A, a more far-reaching challenge is brought in that it is contended that s. 21(7) is unconstitutional by reason of its exclusion of an oral hearing at Tribunal stage. Despite the heavy burden on a litigant in challenging the

constitutionality of legislation which benefits from a presumption of constitutionality, no argument of any substance has been pressed in relation to this claim. While I have posited above that the enlarged Tribunal jurisdiction raises the possibility that the Tribunal might conceivably be required to determine disputed facts and make findings of credibility, I am not here engaged in determining hypotheticals or abstract questions of law and these questions do not arise on the facts of the case in which the plea is made.

281. For all of the above reasons and as no sufficient basis for interfering with either decision by way of judicial review proceedings has been established, although I have determined that both Applicants established substantial grounds for maintaining a challenge by way of judicial review and were entitled to an order granting leave to proceed on all grounds and I am satisfied to extend time for the bringing of proceedings in the case of Mr. A, I am dismissing both proceedings. I will hear the parties in relation to the form of order and any matter arising.