THE HIGH COURT

CIRCUIT APPEAL

[RECORD NO. 2020 137 CA]

IN THE MATTER OF THE EQUAL STATUS ACTS 2000 – 2015 AND IN THE MATTER OF AN APPEAL UNDER S. 28 (3) OF THE EQUAL STATUS ACTS 2000 - 2015

BETWEEN

A.B.

APPELLANT

AND

ROAD SAFETY AUTHORITY

RESPONDENT

JUDGMENT of Ms. Justice Creedon delivered on the 25th day of March 2021;

Background

1. The Appellant referred to only for the purposes of this judgment as A.B., to protect their identity, applied for asylum in the State in 2015 and has lived in Ireland continuously since that date. They instituted a complaint under the Equal Status Acts 2000 – 2015 (the "Equal Status Acts") against the Respondent which was the subject of a decision from the Workplace Relations Commission ("WRC") on the 28th January 2020.

2. The Respondent appealed the decision of the W.R.C to the Circuit Court pursuant to s. 28 of the Equal Status Acts. By judgment delivered the 30th July 2020, the Circuit Court allowed the Respondent's appeal.

3. By notice of appeal dated the 6th August 2020, the Appellant has, pursuant to s. 28 (3) of the Equal Status Acts, appealed the whole of the Circuit Court decision to this Court on the points of law enumerated therein as follows: -

    (i) The Circuit Court erred in law in its interpretation of the Road Traffic (Licencing of Drivers) Regulations 2006 (as amended). More particularly;

        (a) The Circuit Court erred in law in concluding that the said regulations imposed a "*requirement to provide evidence of residency entitlement in Ireland*";
        (b) The Circuit Court erred in law in its interpretation of the concept of residence for the purposes of the regulations, including by adopting, expressly or by implication, an interpretation of the concept of "*normal residence*" that is contrary to its plain meaning and contrary to EU law.

    (ii) The Circuit Court erred in law in its interpretation of the Equal Status Acts 2000 – 2015, more particularly;

        (a) The Circuit Court erred in law in its conclusion that the conduct of the Respondent did not discriminate against the Appellant on the ground of race.
        (b) The Circuit Court erred in law in its conclusion - without any reference to the decision - that the decision of the W.R.C went substantially beyond its remit.

Agreed factual background

4. The parties submitted to the Circuit Court an agreed statement of facts as follows.

5. The Appellant, A.B., applied for international protection in Ireland in 2015. A.B. lives in Munster and works in Co. Dublin. A.B. was unable to move to Dublin due to a lack of direct provision accommodation in that area.

6. A.B. holds a Temporary Residence Certificate (TRC) under s. 16(1) of the International Protection Act 2015, which allows her to remain in the State pending the determination of her application for international protection.

7. A.B. applied to the National Driver Licence Service (NDLS) which is a registered trademark of the Respondent for a learner driver permit on the 31st October 2018. This application was not accepted by the NDLS on the basis that the application had failed to include valid evidence of A.B.'s residency entitlement. A.B. had provided the NDLS with her TRC in support of her application.

8. A.B. notified the Road Safety Authority (the Respondent) of a complaint pursuant to the Equal Status Acts 2000 – 2015 using the form ESI dated the 7th November 2018. The Road Safety Authority responded using Form ES2 on the 4th December 2018.

9. A.B. filed a complaint to the W.R.C on the 28th March 2019 in which they complained that the refusal of their application for a learner permit by the Road Safety Authority amounts to discrimination on grounds of race contrary to the Equal Status Acts 2000 – 2015. This complaint was heard on the 4th September 2019.

10. The decision of the W.R.C was further appealed by the respondent Road Safety Authority to the Circuit Court which gave its decision on the 30th July 2020. It is from this Circuit Court decision that the Appellant appeals to this Court.

Appellant's Arguments

11. The Appellant lodged written submissions in which it stated *inter alia*:

12. That s. 28(3) of the Act states that following an appeal from the W.R.C to the Circuit Court, no further appeal lies other than an appeal to the High Court on a point of law. In *Stokes v. Christian Brothers High School Clonmel* [2015] 2 IR 509 at p. 536, Clarke J., in interpreting, held that the principles governing the scope of such an appeal under s. 28 (3) were those identified in *Deely v. Information Commissioner* [2001] 3 IR 439 at p.452. The Appellant therefore confirmed that this appeal is confined to a point of law that the Circuit Court erred in its interpretation of the Road Traffic (Licencing of Drivers) Regulations 2006 (S.I. no. 537/2006) (the 2006 Regulations) as amended, hereinafter referred to as the 2006 Regulations and the Equal Status Acts.

13. The Appellant emphasised both at first instance, before the W.R.C and on appeal before the Circuit Court, that the claim is a claim of discrimination under the Act and not a challenge to the validity of the 2006 Regulations. The Appellant stated that the issue in the case does not lie in the 2006 Regulations themselves, but rather in the application and the interpretation of the 2006 Regulations by the Respondent. The Appellant argued that the Respondent's practice and policy in this regard constitutes discrimination on the ground of race contrary to the Equal Status Acts.

14. In circumstances where the Circuit Court concluded that the claim was " *in effect a challenge to the law governing the issuing of driving licences and the requirement to provide evidence of residency entitlement in Ireland*" and that the W.R.C went "*substantially beyond its remit"* the Appellant argued that the Circuit Court erred in law in its characterisation of the Appellant's challenge and in concluding that the W.R.C went substantially beyond its remit.

15. The Appellant argued further that the Circuit Court erred in law in concluding that the 2006 Regulations imposed a "*requirement to provide evidence of residency entitlement in Ireland".*

16. The Appellant argued that Regulation 20 (1) of the 2006 Regulations requires that an applicant for a learner permit have his or her "*normal residence*" in the State, a concept that derives from the EU law governing driving licences. Notwithstanding the terms of the Regulations, for non – nationals the RSA imposes a requirement which goes beyond normal residence, that is a requirement of "*residency entitlement*" which the appellant argues is not found in the Regulations themselves.

17. The Appellant argued that it is in this subtle way that the Respondent excludes all Applicants for international protection from access to driving licences in the State. The Appellant argued that if the Respondent expressly and openly adopted a policy or practice excluding access to Applicants for international protection there would be no question but that such a policy or practice would be discriminatory on the ground of race contrary to the Equal Status Acts. The Appellant argued that the fact that the Respondent does so in practice indirectly by imposing an additional requirement going beyond those described in the 2006 Regulations is no less discriminatory.

18. The Appellant stated that the Road Traffic (Licencing of Drivers) Regulations 2006 (S.I. no. 537/2006) (the 2006 Regulations) as amended, govern the granting of driving licences in the State. The Regulations give effect to a series of EU Directives now recast as Directive 2006/126/EC. Regulation 20 (1) provides for learner permits as follows: -

> *"A person making an application for a provisional licence shall:*
>
> *(a) Have his or her normal residence in the State, or;*
>
> *(b) Have been studying in the State for at least six months prior to the date of the application".*

19. Regulation 3 defines normal residence as follows: -

> *"normal residence" means the place where a person usually lives, that is for at least 185 days in each year, because of personal and occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he or she is living. However, the normal residence of a person whose occupational ties are in a different place from his or her personal ties and who consequently lives in turn in different places situated in 2*

or more Member States shall be regarded as being the place of his or her personal ties where the person returns there regularly. This last condition need not be met where the person is living in a Member State in order to carry out a task of a definite duration. Attendance at a university or school does not imply transfer of normal residence".

20. The Appellant argued that this definition in Regulation 3 reflects the terms of Article 12 of Directive 2006/126/EC. The Appellant further argued that it is clear that "*normal residence*" in Regulation 3 and Article 12 is essentially a question of fact.

21. The Appellant referred to the Road Traffic (Licensing of Drivers) (amendment) (no. 2) Regulations 2016, S.I. 656/2016 (the "2016 Regulations") which came into effect on the 1st January 2017. It is not disputed between the parties that these Regulations were in effect when the Appellant applied for a provisional licence. Schedule 2 of this statutory instrument substituted a new form DT01 as the application for a learner permit which includes a checklist for a learner permit.

22. The Appellant argued that the reference to "residency entitlement" in the application checklist at Schedule 2 of the 2016 Regulations cannot change the substantive requirements of the regulations themselves all the more so where such requirements derive from EU law and that in any event this concept of "*residency entitlement*" is nowhere defined in either the Regulations or the checklist. The Appellant argued further that the application form DT02 makes reference to accompanying guidance notes which form no part of the Regulations.

23. The list of proofs of residency laid down in the NDLS guidance notes for the completion of learner permit application forms for non – EEA/ Swiss citizens require:

"current certificate of registration (Garda National Immigration Bureau/GNIB card) or residence permit (IRP) for non – EU/EEA/Swiss citizens (the GNIB and IRP cards must be presented with a current passport valid for international use or a public service card)".

24. The Appellant argued that while this list has been updated to include a public service card, this is only accepted as evidence of residency where the place of birth or nationality is within the EU/EEA/Switzerland. The Appellant argued that Regulation 20(5) refers simply to a registration certificate while the guidance notes only accept two specified forms of registration certificate GNIB and IRP cards.

25. The Appellant therefore argued that the requirement under the 2006 Regulations is that an applicant for learner permit or driver licence is "*normally resident in the State*" and not that they have a particular form of "*residency entitlement"* to be in the State. The Appellant argued therefore that in concluding that there was a requirement to provide evidence of "*residency entitlement*" under the 2006 Regulations the Circuit Court erred in law.

26. The Appellant went on to argue that the Circuit Court erred in law in its interpretation of the concept of residence for the purposes of the 2006 Regulations contrary to EU law. The Appellant argued that the definition, as contained in the 2006 Regulations, contains no reference to the precise legal status and quality of a person's residence. They argued that the Respondent's definition as adopted by the Circuit Court seeks to redefine the concept of normal residence by imposing an additional requirement not found in the Regulations.

27. The Appellant referred to the Respondent's assertion before the Circuit Court that an asylum seeker never enjoys the status of resident. The Appellant referred to the case law opened by the Respondent before the Circuit Court namely *GAG v. Minister for Justice* [2003] IR 442, *Sofroni v. Minister for Justice and Equality and Law Reform* (Unreported, High Court, Peart J., 9th July 2004). *Simeon v. Minister for Justice Equality and Law Reform* [2005] IEHC 298 and the Immigration Act 1999. The Appellant argued that in making its case, the Respondent relied on the concept of residence under an entirely different statutory code. The Appellant said that while issues of "*legality and/or reckonability of residence"* are relevant for the purposes of immigration law, that concept and definition cannot simply be transposed to an entirely different statutory framework.

28. The Appellant said that while the definition of normal residence under the 2006 Regulations has yet to be interpreted by the Irish courts, they referred to a quote from the judgment of Lord Slynn in the English case of *Mohammed v. Hammersmith and Fulham*, LBC 2002 1 AC 547 where he considered the definition in the context of the Housing Act 1996 (UK). In that case, Lord Slynn stated *inter alia*: -

> *"It is clear that words like ordinary residence and normal residence may take their precise meaning from the context of the legislation in which they appear but it seems to me that the prima facie meaning of normal residence is a place where at the relevant time the person in fact resides".*

29. The Appellant went on to argue that the concept of "*normal residence*" in the 2006 Regulations is based on and must be interpreted in a manner compatible with the definition in Article 12 of the 2006 Directive. The Appellant said that the Court of Justice has provided guidance on the interpretation of this concept under the Driving Licence Directives in a series of cases and in its most recent judgment on this issue, case C – 664/13 Nīmanis EU; C; 2015; 4. In that case the Court observed that while Article 12 defined the criteria for determining what is meant by "normal residence" for the purposes of the application of that Directive, the Directive does not specify the conditions and proof of normal residence. While the conditions for proving compliance with the normal residence condition come within the powers of the Member State and the Directive sets out only the minimum conditions it followed from Article 12 read in conjunction with Article 7 that: -

> *"The result to be achieved by the Member States in accordance with those provisions is to determine whether the criteria for establishing that a person has his normal residence in their territory listed in Article 12 are satisfied in order to establish whether the person meets the normal residence condition".*

30. On this basis, the Court continued at para. 44: -

> *"Accordingly, the conditions for proving compliance with the normal residence condition must not go beyond what is necessary to enable the Member State authorities responsible for issuing and renewing driving licences to satisfy themselves that the person concerned meets that condition in the light of the criteria set out in Article 12 of Directive 2006/126".*

31. The Appellant accepted that the facts of this case are very different from the Nīmanis case, however the Appellant argued that the Directive applies to Member State's systems of issuing driving licences generally, it does not differentiate according to whether those licences are issued to a Member State's own nationals other EU nationals or third country nationals and accordingly the legal definition of "normal residence" for the purposes of the Directive does not change according to the particular type of applicant and the definition laid down by the Court of Justice in Nīmanis is binding on this State for the purposes of the 2006 Regulations.

32. The Appellant argued accordingly that the concept of normal residence under the Regulations is concerned with a question of fact, not a question of law and that the Circuit Court erred in interpreting the requirement otherwise and in particular in reframing the requirement as a requirement of "*residency entitlement*".

33. The Appellant went on to argue further that the Circuit Court erred in law in its interpretation of the Equal Status Acts in its conclusion that the conduct of the Respondent did not discriminate against the Appellant on the ground of race. In this regard, the Appellant argued that the Equal Status Acts prohibit discrimination in access to goods and services including on the ground of race. Insofar as the ground of race is concerned the Act gives effect to the Race Directive 2000/43/EC and the State's obligation under the UN Convention on the Elimination of all forms of Racial Discrimination. The Appellant went on to state that S. 5 (1) of the Equal Status Act provides: -

> *"A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public".*

34. "Service" is defined in s. 2 of the Equal Status Act as meaning: -

> *"a service or facility of any nature which is available to the public generally or a section of the public".*

The Appellant stated that there does not appear to be any dispute between the parties that the issuing of learner permits is a service within the meaning of the Act.

35. The Appellant further argued that under s. 38 A (1) of the Equal Status Acts where in any proceedings facts are established by, or on behalf of a person from which it may be

presumed that prohibited conduct has occurred in relation to him or her, it is for the Respondent to prove the contrary.

36. The Appellant confirmed that while the policy and practice of the Respondent may be regarded as direct or indirect discrimination, the Appellant confined their appeal to the claim of indirect discrimination on which the W.R.C found in their favour.

37. The Appellant argued that while the Respondent accepts a residence certificate as proof of normal residence for certain categories of non – nationals lawfully resident in the State, it refuses to do so in the case of non – nationals who are applicants for international protection. The Appellant argued that in this way a particular category of non – national's resident in the State is placed at a particular disadvantage compared to other non – nationals resident in the State and indeed compared to students who are in the State for a period of six months or longer. The Appellant argued that this additional administrative requirement which is not derived from the 2006 Regulations excludes applicants for international protection and constitutes prima facie indirect discrimination on the grounds of race as defined in the Equal Status Acts.

38. Further, the Appellant argued that having established a prima facie case of indirect discrimination it will, in the ordinary course, fall to the Respondent to establish through evidence that its practice or policy is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The Appellant stated that while before the W.R.C the Respondent asserted that its requirement of residency entitlement was objectively justified, it did not pursue this argument in oral submission before the Circuit Court and that it critically put forward no evidence in support of objective justification. In those circumstances the Appellant argued that the issue of objective justification does not properly arise and that the Respondent cannot rebut the presumption of discrimination which arises.

39. The Appellant referred to s. 14 (1) (a) of the Equal Status Acts and noted that under this provision, nothing in the Act should be construed as prohibiting the taking of any action that is required by or under "*any enactment or order of a court*". The Appellant argued that the Respondent has submitted that it is "*required by law to ensure that evidence of applicant's normal residence is provided in applications for driving licences*". But, the Appellant argued the 2006 Regulations themselves impose no obligation on the Respondent to seek the particular forms of proof of residence *"still less a particular form of residency entitlement"* which it requires of applicants such as the Appellant. For these reasons, the Appellant argued that s. 14(1)(a) of the Equal Status Acts does not avail the Respondent.

40. Further, the Appellant argued that s. 14 (1) (a) (ii) is cast in apparently broad terms and that under this provision nothing in the Act shall be construed as prohibiting on the basis of nationality any action taken by a public authority in relation to a non – national *"in accordance with any provision or condition made by or under any enactment and arising from his or her entry to or residence in the State*".

41. The Appellant argued that the Respondent has stated that the "*requirement for evidence of residency entitlement constitutes a provision in accordance with an enactment which arises from the respondent's entry to or residence in the State"*. The Appellant argued however that the 2006 Regulations do not lay down any requirement for evidence of residency entitlement and that insofar as the Respondent guidance imposes such a requirement, it goes beyond the scope of those regulations. Further it states that the requirements for access to a driving licence under the regulations cannot properly be understood as arising from an Applicant's entry or residence in the State unless this term is to be interpreted in the broadest possible way. For this reason, the Appellant argued that this provision must be interpreted strictly and does not avail the Respondent.

Respondents' arguments

42. The Respondent argued that it is obliged by law to seek evidence of the Applicant's normal residence pursuant to Regulation 20 (1) of the Road Traffic (Licensing of Drivers) Regulations 2006 (SI 537/2006 as amended), which requires a person making an application for a provisional licence to: -

    (a) Have her "*normal residence*" in the State

    or;

    (b) To have been studying in the State for at least six months prior to the date of the application.

43. The Respondent set out again the definition of normal residence as defined by Regulation 3 of the Regulations and stated that more generally Regulation 12(2) (b) of the Regulations provides that the application shall "*contain the information requested*" by the Respondent.

44. The Respondent argued that the Regulations transpose the EU Driver Licensing Directive 2006/126/EC of the European Parliament and of the Council of the 20th December 2006 on Driving Licenses (RECAST) into Irish law which Directive is concerned with the mutual recognition of driving licenses within EU Member States as part of the objective of the free movement of EU citizens. The Respondent stated that the Directive is an essential element of the Common Transport Policy of the EU and is concerned with setting the minimum requirements for the issuance of driving licences and the mutual recognition of driving licences between EU Member States as part of the objective of facilitating the exercise (by those entitled to do so only) of rights of free movement within the EU. Article 2(1) of the Directive provides that driving licenses issued by Member States shall be mutually recognised.

45. The Respondent went on to argue that Regulation 20 (2) of the Regulations provides that an application for a provisional licence shall be made on the scheduled form and contain the information requested. They argued that it is clear from the context that *"the information requested"* means "*the information requested on the form*". The Respondent stated that the plain meaning of Regulation 20 (2) is that an Applicant for a provisional license must complete and sign the application form. The Respondent argued that the

Appellant erroneously submitted that the regulations and the application form do not contain a requirement for proof of residency entitlement.

46. The Respondent went on to state that the Road Traffic (Licensing of Drivers) (Amendment) (No. 2) Regulations 2016, SI 656/2016 (the 2016 Regulations) came in to effect on the 1st January 2017 and again substituted a new Form D – 201 as the application form for a learner permit. It is not in dispute that these regulations (and the version of Form D – 201 scheduled thereto) were in effect when the Appellant applied for a provisional licence. The Respondent went on to state that the declaration which is now at Part 5 of form D – 201 (which is part of the 2016 Regulations) refers to an applicant's "*normal place of residence".* Under the appended "*Application checklist for driving license*" it is stated that: -

> *"For all applications for learner permit you must supply . . . evidence of residency entitlement (see List 4 on p. 2 of guidance notes)".*

47. The Respondent went on to state that the form then refers to the documents set out in the Respondent's guidance notes ("the guidance notes") and on the Respondent's National Driver License Service ("NDLS") website as to what can be accepted to prove this entitlement. The documents which are required as evidence of residency entitlement are: -

(a) Public Services Card/ where place of birth or nationality is within European Union ("EU") European Economic Area ("EEA") or Switzerland;

(b) Irish or UK (long form) birth certificate or adoption certificate;

(c) Driving license or learner permit where same shows place of birth as within EU, EEA or Switzerland;

(d) Certificate of entry in the Irish Foreign Births Register;

(e) Irish passport or passport card (current or expired by no more than 12 months);

(f) Current passport for all EU, EEA or Swiss citizens (valid for international use);

(g) Current National Identity Card for EU, EEA or Swiss citizens;

(h) Irish certificate of naturalisation or;

(i) Current certificate of registration (Garda National Immigration Bureau Card), or Irish residence permit for non – EU, EEA or Swiss citizens. These documents must be presented with a current passport valid for international use or a public service card.

48. The Respondent said that s. 5(2) of the Interpretation Act 2005 provides that a statutory instrument should be given a construction that reflects the plain intention of the maker of the instrument in the context of the enactment as a whole. As such, the statutory

instrument must be considered as a whole and the requirement to prove a residency entitlement reflects the plain intention of the maker of the instrument as to what is required by "normal residence".

49. The Respondent argued that the application form for a learner permit has been amended on a number of occasions, it refers to "residency entitlement" and underlines their correct interpretation of "normal residence". The Respondent argued that the submission made by the Appellant before the WRC and more recently the Circuit Court, to the effect that the guidance notes are discriminatory in a manner that is not required by the Regulations or law is erroneous.

50. The Respondents point out that this appeal is not a challenge to the constitutionality of the relevant legislation and that the issue in this appeal is not only a question of compliance or otherwise with the Equal Status Acts but is a question of law as to whether the interpretation by the Respondent (and the State) of the meaning of "normal residence" (which interpretation is that it does not extend to persons in the special position of the appellant) is correct in law.

51. The Respondent went on to argue that the Appellant's complaint before the WRC comprised an argument that she is normally resident in the State within the meaning of the regulations, however, the Respondent argued that as an asylum seeker she is not "resident" and says that a person who has a temporary permission to remain in the State in the status of an asylum seeker is not considered "resident" in the State under the well – established authorities which the Respondent opened later in its submissions.

52. The Respondent contended that the appeal should be rejected in its entirety and the judgment of the Circuit Court upheld in full. In particular, the Respondent rejects the Appellant's assertion that the refusal of the Appellant's application for a learner permit amounts to discrimination on the ground of race under the Equal Status Acts and does not accept that it has acted in any way in breach of the Equal Status Acts as alleged or at all.

53. The Respondent went on to argue that without prejudice to the generality of the foregoing, the Respondent relies on the following core arguments in support of its appeal herein: -

    (a) The Appellant in the first instance as an asylum seeker at all relevant times is not "normally resident" in the State;

    (b) Further or in the alternative the actions of the Respondent as they relate to the Appellant are required by legislative enactment and are accordingly not prohibited under the Equal Status Acts;

    (c) Further or in the alternative the Respondent's requirement for evidence of residency entitlement constitutes provision in accordance with an enactment which arises from the Appellant's entry to or residence in the State and is accordingly not prohibited under the Equal Status Act;

(d) Without prejudice to the foregoing, should this Court find that the Respondent has treated the Appellant less favourably than a comparator on discriminatory grounds (which is denied) on the basis of indirect discrimination, the respondent submits that such a differential treatment is objectively justified in accordance with the Equal Status Acts.

54. The Respondent argued that without prejudice to the totality of the Appellant's grounds of appeal, the Appellant in the present case is not "normally resident" in the State in circumstances where she is an asylum seeker. They argued that under s. 16 (1) of the International Protection Act 2015 a person who has made an application for international protection under the 2015 Act and who has not ceased to be an applicant under the 2015 Act is required to be given by or on behalf of the Minister for Justice a permission allowing her to remain in the State for the sole purpose of the examination of her application. Such residence permission, the Respondent argued, is of a permissive character only until the determination of the application for international protection.

55. The Respondent argued that this is consistent with a number of authorities from the Superior Courts including the comments of MacMenamin J. in *Simion v. Minister for Justice Equality and Law Reform* [2005] IEHC 298 at p. 28 in which it was stated that: -

> *"The true meaning of "residence" must be seen in the light of the authorities (from the Superior Courts) . . .In each of these cases the courts have been careful to outline and distinguish the precise basis upon which presence in the jurisdiction does not constitute "residence" for the purpose of computation under the Acts in issue".*

56. The Respondent further argued that in the case of *G.A.G v. Minister for Justice, Equality and Law Reform* [2003] IR 442, Murray J. (as he then was) made the following comments in respect of those whose application for asylum had been refused and who had sought leave to remain at p.474: -

> *"Persons seeking asylum status are permitted. . .. to enter the State for the purpose of having their application for asylum examined by a fairly elaborate independent procedure so that those genuinely entitled to asylum may be granted permission to enter and stay in the State on those grounds.*
>
> *Persons allowed to enter the State for such a limited purpose are subject to a variety of restrictions . . ..*
>
> *It seems to me quite clear that the foregoing restrictions highlight and confirm that persons who are allowed enter the State for the purpose of making an application for asylum fall into a particular category and never enjoy the status of residents as such who have been granted permission to enter and reside in the State as immigrants. Even though such immigrants may be subject to certain limitations as to time and requirements as to renewal of work permits, they nonetheless enjoy legitimate residence status. In fact, the very purpose of an application for refugee*

status is to seek permission to be allowed to enter and reside in the State as immigrants and benefit from such a status".

57. In this regard, the Respondent opened further the comments of Stanley "Immigration and Citizenship Law" (Round Hall 2017) para. 7-03 viz.: -

"Persons who are allowed to reside in the State 'solely' for seeking international protection do not enjoy the status of residents who have been granted permission to enter and reside in the State as immigrants and are not to be construed as 'settled migrants'. . . a person or resident in the State under s. 15 of the 2015 Act is not 'habitually' resident for the purposes of the Social Welfare Consolidation Act 2005 to qualify for certain welfare benefits".

58. The Respondent argued that these authorities support the submission that the character of the Appellant's residence cannot amount to "normal residence" within the meaning of the Regulations insomuch as she is an asylum seeker. In this regard they refer to the judgment of Peart J. in *Sofroni v. Minister for Justice Equality and Law Reform* (Unreported, High Court, Peart J. 9th July 2004) is apposite. Section 3 (9) (b) of the Immigration Act 1999 provided that: -

"A person who is ordinarily resident in the State and has been so resident for a period of not less than 5 years and is for the time being employed in the State or engaged in business or the practice of a profession in the State . . ..

. . . shall not be deported from the State under this section unless 3 months' notice in writing of such deportation has been given by the Minister to such person".

59. The Respondent argued that Peart J. ruled that the section applied only to those who are resident in the State on foot of legal permission and not to asylum seekers or to persons whose application for asylum had been refused and that by parity of reasoning, the Appellant in the instant case cannot be "*normally resident*" for the purposes of the Regulations in circumstances where they are an asylum seeker.

60. Without prejudice to the foregoing, the Respondent argued that the manner in which the Appellant's application was processed arose from the legal requirements imposed on the Respondent by virtue of the regulations. S. 14 (1) (a) of the Equal Status Acts provides that nothing in the Equal Status Acts should be construed as prohibiting: -

"the taking of any action that is required by or under—

(j) any enactment or order of a court,".

61. The Respondent argued further that the requirement for evidence of normal residence arising from Regulation 12 of the Regulations by using the imperative "shall" is a mandatory one and arises under legislative enactment. Accordingly, the Respondent argued s. 14 (1) provides a complete defence to any allegation that the requirement to provide evidence of normal residence is discriminatory as the requirement arises under

statute i.e. "enactment" in accordance with s. 14 (1) and, is as such, exempt from the application of the Equal Status Acts.

62. The Respondent argued that as a public body it is obliged to ensure that a consistent approach is maintained by it in all applications for driving licenses and that the nature of the information which may be requested by the Respondent as evidence of normal residence in this regard ought properly to be informed by Regulation 12 (2) (b) of the Regulations which vests discretion in the Respondent to request information in the course of an application for a driving licence.

63. The Respondent referred to the case of *G v. Department of Social Protection* [2015] 4 IR 167 where the provisions of s. 14 (1) (a) of the Equal Status Acts were the subject of comment by O'Malley J. where she stated at para 142 that the Equal Status Acts could not override the terms of another statutory scheme, in that case the Department of Social Protection statutory scheme for Maternity Benefit and Adoptive Benefit, in the following terms: -

> *"Since both are Acts of the Oireachtas, embodying policy choices made by the legislature, it is not open to a court to make a finding of unlawfulness in one on the basis of the policy of the other. . ..*

At p. 145 she continues to say: -

> *"… that raises the problem of whether the Equal Status Act can be relied upon in this fashion, to find that there is discrimination contrary to that Act embodied in another Act. In my view it cannot. . .".*

64. Accordingly, the Respondent argued that the actions of the Respondent as they relate to the Appellant are required by legislative enactment and cannot be the subject of an adverse finding pursuant to the Equal Status Acts.

65. Without prejudice to any of the arguments canvassed on behalf of the Respondent, it was submitted further, or in the alternative, that it's treatment of the Appellant is consistent with s. 14 (1) (aa) (ii) of the Equal Status Acts. That provision states that nothing in the Equal Status Acts shall be construed as prohibiting on the basis of nationality the taking of any action "*by a public authority*" in relation to "*a non – national" . . . "in accordance with any provision or condition made by or under any enactment and arising from his or her entry to or residence in the State".*

66. The Respondent argued that this reflects the inclusion in Article 3(2) of the Council Directive 2000/43/EC of the 29th June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the race directive) which is implemented by the Equal Status Acts that the race directive does not cover: -

> *"difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States and to any treatment*

which arises from the legal status of the third country nationals and stateless persons concerned".

67. The Respondent further referred to the Supreme Court case of Re*: The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, at 383 where the Court said: -

> *". . . in the sphere of immigration, its restriction or regulation, the non-national or alien constitutes a discrete category of persons whose entry, presence and expulsion from the State may be the subject of legislative and administrative measures which would not, and in many of its aspects, could not, be applied to its citizens".*

68. The Respondent went on to state that s. 14 (3) of the Equal Status Acts provides that: -

> *"Nothing in subsection (1) (aa) shall derogate from any of the obligations of the State under the treaties governing the European Communities within the meaning of the European Communities Acts 1972 to 2003 or any act adopted by an institution of those Communities".*

69. Indeed, the Respondent argued that pursuant to Article 17 (5) of the Directive 2013/33/EU of the 26th June 2013 (the Reception Conditions Directive Recast), the State is entitled to treat applicants for asylum less favourably than its own citizens and indeed the European Communities (Reception Conditions) Regulations 2018 do not entitle an applicant for international protection to a driving license or learner permit while within the State.

70. The Respondent opened the case of *Osheku v. Ireland* [1986] IR 733/746 where Gannon J. stated at p. 746: -

> *"The control of aliens which is the purpose of the Aliens Act, 193,5 is an aspect of the common good related to the definition, recognition, and the protection of the boundaries of the State. That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter".*

71. The Respondents argued that in this case it being a public authority lawfully and indiscriminately applied the State's requirement to the appellant who is a non – national and its actions are therefore in accordance with the provisions or conditions made by or under the Regulations and accordingly no complaint pursuant to the Equal Status Acts can be sustained. Without prejudice to the arguments raised above, the Respondent submitted further that even if it is accepted that discrimination has occurred in relation to the Appellant (which for the avoidance of doubt the Respondent does not accept), such differential treatment amounts to indirect discrimination only and can be objectively

justified. The Respondent stated that the requirement for proof of normal residence applies to all applicants for driving licences and does not directly discriminate against the Appellant on the grounds for race, contrary to s. 3 (2) (h) of the Equal Status Acts.

72. The Respondent confirmed that three requirements of objective justification have been set out by the Court of Justice of the European Union in the seminal case of *Bilka Kaufhaus GMBH v. Weber von Hartz* [1986] ECR 1607 (C- 170/84) as follows: -

    (i) The aim of the measure is legitimate.

    (ii) The means of achieving that aim are appropriate and,

    (iii) The means of achieving that aim are necessary.

73. The Respondent argued that pursuant to Directive 2011/94/EU (the 2011 Directive) which was transposed into Irish law by the Road Traffic (Licensing of Drivers) (Amendment) Regulations 2012, the EU operates a common licensing system such that an Irish driving license (which now takes the form of a standardised plastic card driving license) can be used in every Member State and vice versa. The 2011 Directive is premised upon the principle of mutual recognition of driving licences and Member States may not go behind a license issued by another Member State or investigate whether the conditions for issue laid down by the Directive had been met. Accordingly, the Respondent argued that it has the responsibility of ensuring that the integrity of the process of issuing and renewing driving licences is safeguarded by a robust verification process particularly given the continuously evolving nature of threats to the security and integrity of the common driving license such as theft and forgery and other associate security concerns.

74. The Respondent submitted the requirement for evidence of residency entitlement pursues a series of legitimate aims, including but not limited to the following: -

    (a) The law surrounding driving licenses is fundamentally premised on the need to ensure road safety and to prevent against discretionary approaches being taken to the issuing of driving licenses. There is an ever – increasing need for security regarding both the process of the licensing of driving and the driving license itself. Indeed, a driving license is a privilege (as opposed to a right or an entitlement) and if granted is recognised across Europe;

    (b) The requirement to show residency entitlement is an appropriate means to facilitate verification of compliance with the normal residence condition, and/or to enable due diligence be applied when issuing driving licenses such that an applicant does satisfy the normal residence condition. The underlying objective is to *inter alia* prevent against the phenomenon of driving license tourism. Licenses may be used not only to drive within Ireland but in other countries within the European Union and may be exchanged in any EU country as set out in Article 11 of the Directive;

    (c) In addition, a driving license is also a form of identity validation process. The requirements prevent a driving license being incorrectly used as proof of a

residency entitlement in the Irish State on an application for right of residency in another Member State of the EU. In the context of asylum seekers there is a particular difficulty with substantiating identity;

(d) The Respondent has an important responsibility to ensure that the integrity of the process of driving licensing is safeguarded not only under national law but under EU and international law. Indeed, if Ireland failed to meet its obligations under the Directive a license could for instance be granted to a person who is illegally resident in Ireland which would then be recognised in another EU Member State allowing the person to drive there notwithstanding that the Member State concerned would not have granted a driver's license to that person. S. 97 (a) of the Road Traffic Act 1998 (as inserted by the Immigration Act 2014) requires an applicant for a driving license in the United Kingdom to show that he or she is lawfully resident and under the section a person is not lawfully resident if he or she requires leave to enter or remain in the United Kingdom;

(e) Driving licenses are used as formal identification for a host of services and accordingly have a value significantly beyond allowing the holder to drive a vehicle in the territory. This is especially so given that a driving license can satisfy certain airline's requirements for the purpose of travelling from Ireland to the United Kingdom. As such the appellant's requirement for evidence of residency entitlement is appropriate in light of *inter alia* the significance attached to driving licenses generally and to ensure that the processes concerning international protection are not circumvented.

75. Accordingly, the Respondent argued that in accordance with the second limb of the test of objective justification, the requirement for evidence of residency entitlement is both an appropriate and necessary means of pursuing the legitimate aims enumerated above. The respondent argues that the word "appropriate" requires that the measure is suitable for achieving the aim in question and that the provision in fact advances the aim. The Court of Justice of the European Union has acknowledged that it is important that the authorities responsible for issuing and renewing driving licenses in a Member State can reliably ensure that the applicant does in fact satisfy the normal residence condition for the avoidance of doubt as confirmed by the decision of Judge O'Connor in the Circuit Court not all employment requires an employee to have a driving license as such there is no necessary interference with a right to work.

76. The Respondent stated that a provision will be necessary where there are no alternative less discriminatory ways of achieving the applicant's aim. In this regard the list of documents in the guidance notes which are acceptable as evidence of residency entitlement have been carefully considered and compiled to reflect the need for the respondent to act at all times in accordance with its obligations under Irish and European law.

77. The Respondent went on to argue that there is a clear distinction between the verifiability and reliability of the documents listed by the Respondent in the guidance notes and those

documents which were appended to the Appellant's original application. They argue that under the 2015 Act, an asylum seeker is given permission to remain in the State while their application is being examined and a temporary residence certificate is issued. This is an immigration registration certificate. Thereafter the needs of the asylum seeker are assessed and the person will then be relocated to accommodation where they must stay until their application for international protection has been processed. The Respondent stated that under s. 17 (3) of the 2015 Act a temporary residence certificate remains the property of the Minister and must be surrendered on request of the Minister. Whereas such documents as the Irish residence permits or Irish certificate of naturalisation are only obtained following an exacting process such a temporary residence certificate is subject to an uncertain asylum process and must be surrendered upon request by the Minister for Justice.

78. Similarly, the Respondent argued a self – employment permission or a letter of permission issued by the Department of Justice is valid for a period of six months (i.e. less than 185 days) and is obtained by simply certifying that an applicant for international protection has complied with the International Protection Process and has registered with the Revenue Commissioners.

79. The Respondent argued that the distinction between those documents and those which actually establish residency entitlement is clear in that the former are issued for a limited purpose following a truncated application process. Accordingly, the means used by the Respondent to ensure the requirement of "normal residence" is satisfied are a necessary means of pursuing the legitimate aims enumerated above and are therefore proportionate.

80. The Respondent further pointed out that it should be noted that Article 7 (5) of the Directive obliges member states when issuing a license to "*apply due diligence to ensure that a person fulfils the requirements set out in para. 1 of this article*" (the latter includes Article 7 (1) (e) the requirement that applicants for a driving license have their normal residence in the territory of the Member State). The Respondent argued that there can be no question of the Respondent having exceeded its powers regarding the extent of due diligence given the lack of any definition thereof under the Directive nor can there be any question of discrimination in circumstances where the requirements for evidence of normal residence are applied by the respondent to all applications for driving licenses.

81. In conclusion, the Respondent submitted that the decision of the Circuit Court should be upheld and that it contains no identifiable errors of law, that the complaint made by the Appellant is misconceived as in effect it is a challenge to the regulations governing the issue of driving licenses and the requirement thereunder to provide evidence of residency entitlement and if there was to be such a challenge, it ought to involve the Minister for Transport and indeed the State.

82. The Respondent went on to say that even if this Court finds that the Appellant can bring such a claim, there is a full defence to same based on the requirements of the said regulations and that further in order for this Court to uphold this appeal, not only does it

need to dispose of the foregoing primary arguments but it needs to find as a matter of law that the Appellant is "normally resident" by virtue of having been given permission to remain in the State pending determination of her asylum application. The Respondent submitted that it is clear that the complaint under the Equal Status Acts made herein is misconceived as to what is in issue, which is the meaning and effect of the statutory enactments and not the individual treatment of the Appellant by the Respondent.

Discussion and Decision

83. This is an appeal pursuant to s.28(3) of the Equal Status Acts 2000 – 2015 of a judgment of the Circuit Court delivered on the 30th of July 2020 on the points of law set out in full at paragraph 3 *supra*.

84. The Appellant emphasised that the claim is one of discrimination and not a challenge to the legislation.

85. The agreed factual background is set out in full at paragraphs 4 to 10 *supra*.

86. EU Driver Licensing Directive 2006/126/EC of the European Parliament and of the Council of 20th December 2006 (RECAST) (The Directive) is concerned with the mutual recognition of driving licenses within EU Member States as part of the objective of the free movement of EU citizens.

87. The Directive is transposed into Irish law by the Road Traffic (Licensing of Drivers) Regulations 2006 (SI 537/2006 as amended) (The Regulations). Regulation 20 (1) of the Regulation provides for learner permits as follows: -

> *"1. A person making an application for a learner permit shall:*
>
> *(a) have his or her normal residence in the State, or,*
>
> *(b) have been studying in the State for at least six months prior to the date of the application.*

88. Regulation 20 (2) provides as follows: -

> *"(2) The application shall -*
>
> *(a) be made on scheduled form D.201,*
>
> *(b) contain the information requested,*
>
> *(c) contain the declaration indicated on that form duly completed by the applicant, and*
>
> *(d) contain a declaration that the applicant has a satisfactory knowledge of the Rules of the Road".*

89. Regulation 3 defines normal residence as follows: -

"normal residence" means the place where a person usually lives, that is for at least 185 days in each year, because of personal and occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he or she is living. However, the normal residence of a person whose occupational ties are in a different place from his or her personal ties and who consequently lives in turn in different places situated in 2 or more Member States shall be regarded as being the place of his or her personal ties where the person returns there regularly. This last condition need not be met where the person is living in a Member State in order to carry out a task of a definite duration. Attendance at a university or school does not imply transfer of normal residence".

90. Regulation 20 (5) (d) provides that an application for a provisional licence shall be accompanied by: -

"(d) a birth certificate, passport or registration certificate in relation to the applicant, where the applicant has not held a driving licence within the period of 10 years, or a provisional licence within the period of 5 years, preceding the date of application and is not the holder of a recognised driving licence".

91. The Road Traffic (Licensing of Drivers) (Amendment) (No. 2) Regulations 2016 S.I. 656/2016 (The 2016 Regulations) came into effect on the 1st January 2017, and it is not disputed between the parties that these regulations were in effect when the Appellant applied for a learner permit.

92. The 2016 Regulations amend the 2006 Regulations in s. 3 as follows: -

"3. The Regulations of 2006 are amended in Schedule 1—

(i) by substituting for form D302, the form set out in Schedule 1, and

(ii) by substituting for forms D201, D401, D501 (substituted by Regulation 3 (o) of the Regulations of 2013), the forms set out in Schedule 2".

93. Schedule 2 of the 2016 Regulations is headed "Application Form for Learner Permit D201". The application form has a list of 40 individual questions which are required to be answered by the applicant and then contains a declaration at para. 41 in which *inter alia* the Applicant is required to confirm that this jurisdiction is their normal place of residence and that the address given is their normal residence. On the following page of the statutory instrument an application checklist for learner permit is set out. Bullet point no. 9 of the checklist states "Evidence of residency entitlement (see List 4 on p. 2 on guidance notes).

94. The document headed "Guidance notes for the completion of your learner permit application form" were opened to the court. On p. 2 of that document under the heading of "Residency entitlement" it states as follows: -

"To make an application for a driving licence or a learner permit you must be able to show that you are a national of the European Union, European Economic Area or Switzerland or have leave to remain in Ireland.

You may present your Irish driving licence or learner permit where your place of birth recorded on it is within the EU, EEA or Switzerland, or a public service card where your place of birth or nationality are recorded as within the EU, EEA or Switzerland.

Please see List 4 on p. 4 of the application guidance notes for the full list of documents which can be accepted as evidence of residency entitlement".

95. On p. 4 of the guidance note document, it states under the heading "List 4 evidence of residency entitlement": -

a) Public service card where place of birth or nationality is within EU/EEA/Switzerland.

b) Irish/ UK (Long form) birth certificate or adoption certificate.

c) Driving licence/ learner permit where No. 3 shows place of birth is within EU/EEA/Switzerland.

d) Certificate in the Irish Foreign Births Register.

e) Irish passport/passport card (current or expired by no more than twelve months).

f) Current passport for all EU/EEA/Swiss citizens (valid for international use).

g) Current national identity for EU/EEA/Swiss citizens.

h) Irish certificate of naturalisation.

i) Current certificate of registration (Garda National Immigration Bureau/GNIB card) or Irish residence permit (IRP) for non – EU/EEA/Swiss citizens (the GNIB and IRP cards must be presented with a current passport valid for international use or a public service card).

96. Section 2 of the Interpretation Act 2005 was opened to the court. Section 2 deals with interpretation. The section states as follows: -

"2. — (1) In this Act—

"Act" means—

(a) an Act of the Oireachtas, and

(b) a statute which was in force in Saorstát Éireann immediately before the date of the coming into operation of the Constitution and which continued in force by virtue of Article 50 of the Constitution;

"enactment" means an Act or a statutory instrument or any portion of an Act or statutory instrument;

"repeal" includes revoke, rescind, abrogate or cancel;

"statutory instrument" means an order, regulation, rule, bye-law, warrant, licence, certificate, direction, notice, guideline or other like document made, issued, granted or otherwise created by or under an Act and references, in relation to a statutory instrument, to "made" or to "made under" include references to made, issued, granted or otherwise created by or under such instrument".

97. The Court finds that the legislative provisions governing an application for a learner permit are set out *inter alia* under Regulation 20 (1) which provides: -

"1. A person making an application for a learner permit shall:

(a) Have his or her normal residence in the State, or,

(b) Have been studying in the State for at least six months prior to the date of the application, and,

2. The application shall:

(a) Be made on scheduled form D201,

(b) Contain the information requested,

(c) Contain the declaration indicated on that form duly completed by the applicant,

(d) Contain a declaration that the applicant has satisfactory knowledge of the Rules of the Road".

98. Statutory Instrument S.I. no. 656 of 2016 (the 2016 Regulations) contains the current form D201 at Schedule 2 which requires evidence of residency entitlement by reference to guidance notes referred to in the statutory instrument. Those guidance notes as set out above state that to make an application for a driving licence or learner permit you must be able to show that you are a national of the European Union, European Economic Area or Switzerland or have leave to remain in Ireland and further provides a detailed list of documents which can be accepted as evidence of residency entitlement as set out earlier.

99. The Respondent is a public authority with responsibility for the issuance of driving licenses in this jurisdiction in accordance with law. The Respondent lawfully and indiscriminately applied the statutory requirements to the Appellant. The statutory requirements do differentiate between nationals of the European Union, European Economic Area or Switzerland and nationals from other areas. It is this distinction which lies at the centre of the Appellant's case.

100. Despite the Appellant's assertion that this is a claim of discrimination under the Equal Status Acts and not a challenge to the 2006 Regulations this assertion is not borne out by the Appellants arguments which go to the principles and policies underpinning the statutory framework. These arguments cannot be advanced in a claim of discrimination under the Equal Status Acts.

101. In this regard the Court notes the decision of O'Malley J. in the High Court case of G. v. the Department of Social Protection [2015] 4 IR 167 and in the matter of Section 14 (1) (a) of the Equal Status Acts, O'Malley J. stated that the Equal Status Acts could not override the terms of another statutory scheme in the following terms: -

> *"Since both are Acts of the Oireachtas, embodying policy choices made by the legislature, it is not open to a court to make a finding of unlawfulness in one on the basis of the policy of the other. . . . that raises the problem of whether the Equal Status Act can be relied upon in this fashion, to find that there is discrimination contrary to that Act embodied in another Act. In my view it cannot".*

102. The Court finds that the actions of the Respondent as they relate to the Appellant are required by legislative enactment and cannot be the subject of an adverse finding pursuant to the Equal Status Acts. The Court therefore agrees with the Respondent that the complaint under the Equal Status Acts made herein is misconceived as to what is in issue, which is the meaning and effect of the statutory enactments and not the individual treatment of the Appellant by the Respondent.

103. Accordingly, the court refuses the appeal and answers the points of law raised in this appeal as follows: -

i. The Court finds that the Circuit Court did not err in law in its interpretation of the Road Traffic (Licensing of Drivers) Regulations 2006 (As amended), more particularly;

   (a) The Circuit Court did not err in law in concluding that the said regulations imposed "*requirement to provide evidence of residency entitlement in Ireland".*
   (b) The Circuit Court did not err in law in its interpretation of the concept of residence for the purposes of the Regulations including by adapting expressly or by implication an interpretation of the concept of "normal residence" that is contrary to its plain meaning and contrary to EU law.

ii. The Circuit Court did not err in law in its interpretation of the Equal Status Acts 2000-2015 more particularly:

iii. (a) The Circuit Court did not err in law in its conclusion that the conduct of the Respondent did not discriminate against the Appellant on ground of race.

iv. (b) The Circuit Court did not err in law in its conclusion – without any reference to the decision- that the decision of the WRC went substantially beyond its remit.

The attention of the parties is drawn to the Practice Direction issued on the 24th of March 2020 in respect of the delivery of judgments electronically as follows:

> *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*

104. The parties are requested to correspond with each other on the question of the appropriate form of Order, and on the question of costs. In default of agreement between the parties on these issues, short written submissions should be filed in the Central Office within 21 days of today's date.