[2021] IEHC 25

THE HIGH COURT

[2019 No. 650 JR;

2020 No. 119 JR]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED) AND IN THE MATTER OF THE INTERNATIONAL PROTECTION ACT 2015

BETWEEN

(1) A

APPLICANT

– AND –

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

RESPONDENTS

(2) B

APPLICANT

– AND –

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

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 19th January 2021.

I. Mr A's Application

1. On 26/8/2019, Mr A, a Georgian national, made application under reg.4(5) of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 for an extension of the prescribed period for the bringing of an appeal to the IPAT against a recommendation made by the IPO under s.39 of the International Protection Act 2015. By the time of this application the relevant s.39 recommendation had been considered and acted on by a decision of the Minister under s.47 of the Act of 2015. On 27/8/2019, the IPAT wrote a reply letter, the key line of which was that "*[T]he recommendation under s.39 has been superseded by the Minister's decision under s.47 such that an appellant no longer has a recommendation simpliciter under s.39 against which to appeal*" [emphasis in original], *i.e*. the IPAT was not going to deal with the application because it would be pointless to do so as the Minister had made his decision under s.47 (with the result that any appeal against the recommendation would be moot/futile).

2. The within judicial review proceedings, in which *certiorari* and various other reliefs are sought, concern the letter of 27/8/2019 and raise three key questions, considered later below. However, a preliminary issue arises. That issue is this: an application under reg.4(5) falls to be made by an "*applicant*". But, by virtue of s.2(2) of the Act of 2015, one effect of the Minister's s.47 decision was that, by 26/8/2019, Mr A had ceased to be an "*applicant*" and so was no longer eligible to make application under reg.4(5). That is a complete answer to any complaint that Mr A makes regarding his reg.4(5) application: he was ineligible to make that application and has no grounds for complaint. The court respectfully does not see how it can correctly be contended, by reference to Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Arts. 2 and 46, that the operation of the foregoing domestic provisions has the result that Mr A was denied a right to an effective remedy before a court/tribunal, or that the time limits or other rules

considered in the within application are less than reasonable or render impossible or excessively difficult the exercise of a right to an effective remedy before a court/tribunal.

3. In passing, the court respectfully does not accept the proposition advanced for Mr A that as there is no express provision in the Act of 2015 stating that a s.39 recommendation is superseded by a s.47 decision, it follows that this supersession does not present. Three points might be made in this regard (1) there does not need to be such an express provision – the position is evident from a reading of the provisions of the Act; (2) what the applicant is asking the court to do in this regard is to ignore unambiguous statutory provisions and apply a contrary interpretation; (3) to permit the applicant to appeal a s.39 recommendation superseded by a later s.47 decision by the Minister would have the effect of allowing the reg.4(5) appeal procedure to be used to quash the Minister's refusal (and the later deportation order), rather than lawfully appeal a recommendation; this would be unlawful, *ultra vires* the provisions of the Act of 2015 and the Regulations of 2017 and run contrary to the legislative intent.

4. Three key questions were contended by Mr A to arise in the within proceedings:

   [1] *Did the IPAT err in law insofar as it failed [if it failed] to apply the actual test prescribed by reg.4(5) of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017? [2] Did the IPAT err by failing correctly to apply reg.4(5)?* The court's answer to each of Questions [1] and [2] is 'no', for the reason that the IPAT never applied reg.4(5). It refused to proceed with the application for an extension of time on the basis that at the time of the application the IPO's s.39 recommendation had been superseded by a s.47 decision by the Minister, making it pointless to proceed (as any appeal against the recommendation would then be moot/futile).

   [3] *Is reg.4(5) invalid?* The court's answer to Question [3] is that this question does not arise for determination as reg.4(5) was not relied upon by the IPAT.

5. Mr A's application also fails by virtue of its being an impermissible collateral attack whereby his true objective is to re-set the clock so that he can retrospectively invoke a statutory appeal process which he failed to invoke within the requisite time period or prior to the Minister's s.47 decision. That is not permitted; see *XX v. Minister for Justice and Equality* [2019] IESC 59, paras. 23-31.

6. Some play was made by Mr A of the fact that (a) because of his move from his apartment in late-June 2019, he did not receive notification of the IPO's recommendation and (b) despite first presenting at the IPO on 31/5/2018, he did not apply for legal aid until 18/7/2019, was approved for legal aid on 21/8/2019 and had his first meeting with his current solicitor on 26/8/2019. There are a number of notable features to his evidence in this regard: (1) the more than one-year delay between Mr A's initial presentation at the IPO and his application for legal aid was Mr A's delay alone and occurred after he was

advised of his eligibility to seek legal aid; (2) Mr A offers no reason as to how his understanding as to legal aid changed in summer 2019, leading to his making application for same on 18/7/2019; (3) there is a want of clarity on Mr A's part as to when he moved from the address that he had identified to the IPO; his second affidavit suggests it was in "*late June*", whatever exactly that means; (4) no reasonable explanation has been offered by Mr A as to how, despite living at the address which he identified to the IPO as late as "*late June*", he did not receive the recommendation sent/re-sent by the IPO; (5) no explanation has been provided as to how it was that Mr A, after moving from the address he provided to the IPO and returning to check his mail, happened on one attempted delivery notification but not the others. There is also a contemporaneous memorandum on the IPO's files that Mr A was contacted by phone on 8/5/2019 to confirm his address (which he did), the recommendation being re-issued to that address on the same day; Mr A maintains that this call was never made.

7. It is clear from the Supreme Court's decision in *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360, at p. 395 that an asylum applicant is not a "*passive participant*". For Mr A to provide an address and fail adequately and/or routinely to monitor his post on a consistent basis flies in the face of s.16 of the Act of 2015 and the spirit of that enactment.

II. Ms B's Application

8. Not a lot of time was spent on Ms B's application as her case presents broadly the same issues as that of Mr A. She arrived in Ireland on 2/8/2017, presented at the IPO on 29/6/2018, and despite having been expressly advised as to her ability to seek free legal aid did not do so until late-2019. On 6/12/2019, Ms B made application under reg.4(5) of the Regulations of 2017 for an extension of the prescribed period for the bringing of an appeal to the IPAT of a recommendation made by the IPO under s.39 of the Act of 2015. By the time of this application the IPO's recommendation under s.39 had been considered and acted on by a decision of the Minister under s.47 of the Act of 2015. The key message in the IPAT's reply letter of 11/12/2019 was that "*the recommendation under s.39 has been superseded by the Minister's decision under s.47 such that…[the] applicant no longer has a recommendation simpliciter under s.39 against which to appeal*" [emphasis in original], *i.e*. it was not going to deal with Ms B's application because it would be pointless to do so as the Minister had made his decision under s.47. As can be seen, Ms B's case raises much the same key issues as are at play in Mr A's case and must fail, *mutatis mutandis*, for the reasons identified at paras.2-7 above.

III. Conclusion

9. The court respectfully declines to grant any of the reliefs sought by either applicant in their notices of motion. The court, in the Appendix hereto, considers in still more detail the facts and issues presenting in the within applications. That Appendix and this and the preceding paragraphs together comprise the court's judgment in these proceedings.

10. Given all the foregoing it is not necessary for the court to consider such European Convention on Human Rights issues as were contended to present.

APPENDIX

1. MR A'S CASE

1. In this Part 1 of this Appendix, the court considers the case of a Georgian gentleman who is styled as 'A'/'Mr A' herein to preserve his anonymity. References in this Part 1 to the applicant are to Mr A.

A. Reliefs Sought

2. By notice of motion dated 15/10/2019, the applicant seeks the following reliefs:

> *"1. An Order of Certiorari quashing the decision of the first named respondent dated the 27th August 2019 (the 'Impugned Decision') made pursuant to Regulation 4(5) of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 (S.I. No. 116 of 2017) and communicated to the Applicant on that date.*
>
> *2. An Injunction restraining the Second Named Respondent, her servants or agents, from taking any further steps in relation to the removal of the Applicant from the State pending the determination of the within proceedings; and in the event of certiorari being granted, pending the determination of the remitted application of the late appeal.*
>
> *3. A Declaration that Regulations 3(b) and 4(5) of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations (S.I. No. 116 of 2017) are ultra vires and/or void.*
>
> *4. An Order of Certiorari quashing the Deportation Order made by the Second Named Respondent on July 12th 2019 and notified to the Applicant under cover of a letter of the 27th September 2019.*
>
> *5. Such Declaration(s) of the legal rights and/or legal position of the Applicant and/or persons similarly situated as this Honourable Court considers appropriate.*
>
> *6. Such further or other Order as to this Honourable Court may seem meet, including an extension of time if necessary.*
>
> *7. Costs."*

B. Background Facts

3. In his grounding affidavit, the applicant avers, *inter alia*, as follows:

> *"2. I am a national of Georgia….I left that State on the 16th May 2018, arriving in Dublin Airport on the 30th May 2018….*

3. *I presented at the International Protection Office (hereafter the 'IPO') on the 31st May 2018, seeking international protection.*

4. *On the 14th June 2018, I was interviewed by that Office pursuant to section 13(2) of the International Protection Act 2015.*

5. *In the course of my application I submitted a Questionnaire for International Protection and was thereafter interviewed by the IPO.*

6. *Apparently I was notified of the IPO's recommendation pursuant to section 39 of the 2015 Act that I should be neither given a refugee declaration nor a subsidiary protection declaration. I did not in fact receive this. I did try to but was unable to. I have received in the post notification of registered post and I attended [a] post office in Dublin 1 (as requested in the said postal notification) and was then told the envelope was returned to sender. This was over 3 days from the date of postage and therefore returned to sender. I say this is due to my having changed address. I say I notified the IPO on the 1st of July 2019 of my change of address, receipt notification of same confirmed by IPO letter of the 3rd July 2019. I beg to refer to a true copy of [a] registered post slip, notice of change of address and IPO confirmation receipt of notification of change of address upon….*

7. *I did not have any legal representation at the time as I could not afford same and did not realise I was entitled to legal aid. I beg to refer to a true copy of my application with the Legal Aid Board dated 18th of July 2019 and Legal Aid Board letter to my solicitor dated 21st of August 2019….*

8. *An email communication from the IPO, dated the 29th of August 2019, informs that this recommendation was returned to its office on the 8th May 2019 by An Post marked "not collected for" and further informs that on even date the IPO reissued the recommendation, which also in turn came back to it on a similarly marked "not called for basis".*

9. *On the 21st August 2019 I was approved for legal aid. On the 26th of August I first met with my solicitor and following a consultation with the assistance of an engaged translator, a notice of appeal against the aforementioned recommendation of [the] IPO was submitted to the Tribunal on the 26th August 2019 against the recommendation that I should be given neither a refugee declaration nor a subsidiary protection declaration. I say that my solicitor also sought to explain the reasons for the late submission of same….*

10. *On the 27th August 2019, the Tribunal responded indicating that it would not accept the late appeal for the reasons offered in the body of its letter".*

4. The letter of 27/8/2019 from the IPAT to the applicant's solicitor states, inter alia, as follows:

> *"Dear Sir/Madam*
>
> *We refer to your emailed correspondence of 26 August 2019.*
>
> *Having considered the matters set out by you in your letter, I am instructed by the Chairperson of the Tribunal to inform you that the Tribunal is of the view that per regulation 3(d) of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 (S.I. No. 116 of 2017) (the 2017 Regulations) an appeal under s.41(1) of the 2015 Act shall be brought within 10 working days of the date of the sending to the applicant of the notification under s.40 of the 2015 Act.*
>
> *Regulation 4 of the 2017 Regulations provides for the manner in which an applicant may seek to bring an appeal outside the prescribed period, and the legal test for refusing such requests, or extending the period.*
>
> *In particular, regulation 4(5) of the 2017 Regulations provides that the Tribunal shall not extend the prescribed period except where it is satisfied that–*
>
> (a) the applicant has demonstrated that there were special circumstances as to why the notice of appeal was submitted after the prescribed period had expired, and
> (b) in the circumstances concerned, it would be unjust not to extend the prescribed period.
>
> *This is the test that the Tribunal applies.*
>
> *An extension of period may be sought days or exceptionally even weeks after the prescribed period, and while the s.39 recommendation has yet to be or is being considered by the Minister.*
>
> *However, in the circumstances of your client an extension has been sought some 16 weeks after the expiry of the prescribed period, and after the s.39 recommendation has been considered and acted on by way of a decision of the Minister under s.47 of the 2015 Act and a deportation order appears to have been made.*
>
> *Thus, persons seeking to make a late appeal fall broadly into two categories, i.e:*
>
> i. persons in default of the prescribed period in respect of whom the Minister has not made a decision under s.47 of the 2015 Act.
> ii. persons in default of the prescribed period in respect of whom the Minister has made a decision under s.47 of the 2015 Act.

In the latter circumstance, the decision by the Minister under s.47 of the 2015 Act will have been made consequent on the s.39 recommendation of an international protection officer.

In such circumstances, including those of your client, the recommendation under s.39 has been superseded by the Minister's decision under s.47 such that an appellant no longer has a recommendation simpliciter under s.39 against which to appeal.

Therefore, application by the Tribunal of the test at regulation 4(5) of the 2017 Regulations cannot allow a late appeal against a recommendation under s.39 of the 2015 Act that has been superseded by a ministerial decision under s.47.

It further seems to the Tribunal that an appropriate course for some persons who fall into this category and who belatedly seek to advance their claim for international protection may be found in s.22 of the 2015 Act, specifically an application for consent to make a subsequent application on the ground (per s.22(4)(a)) that since the determination of the previous application new elements or findings have arisen or have been presented that make it significantly more likely that the person will qualify for international protection. Alternatively it could be open to a person to request the vacating of, or to seek to quash, the s.47 decision.

Yours sincerely*…". [Emphases in original].*

5. Any fair-minded reader of the above letter of reply would conclude that the central message being conveyed by the IPAT was that it was not going to deal with the extension application because it would be pointless to do so as time had moved on and the Minister had made his decision under s.47 (with the result that any appeal against the recommendation would be moot/futile).

6. Much was made at the hearing of the within application about the ultimate paragraph in the above-quoted letter and whether the author was correct in identifying the potential alternatives open to the applicant. Whether she was or not does not impact on the correctness of the central message that it was (and it was) pointless for the IPAT to consider the time extension application given that the Minister had proceeded to make his decision under s.47 (with the result that an appeal against the recommendation would then be moot/futile).

7. Counsel for Mr A contended that under s.61(3) of the Act of 2015 the IPAT is required to be "*independent in the performance of its functions*". However, that obligation does not require that the IPAT proceed oblivious to facts. Here the critical fact presenting is that when the extension application was made it was pointless for the IPAT to consider that application because time had moved on and the Minister had made his decision under

s.47 (with the result that an appeal against the recommendation would then be moot/futile).

8. In passing, the court respectfully does not accept the proposition contended for by counsel for the applicant that as there is no express provision in the Act of 2015 stating that a s.39 recommendation is superseded by a s.47 decision it follows that such supersession does not present. In this regard the court respectfully accepts the following contention of counsel for the respondents in their written submissions:

> *"40. There does not need to be such an express provision – the position is evident from a reading of the provisions of the Act. What the Applicant is asking the court to do is ignore the clear and unambiguous statutory provisions and instead apply a contrary interpretation. The words used in the relevant provisions of the Act are clear and unambiguous and thus in accordance with the well-established principles of statutory interpretation should be given their literal meaning. [See Howard v. Commissioners of Public Works* [1994] 1 I.R. 101]. *This was most recently reiterated by the Supreme Court in the context of the 2015 Act in* AWK (Pakistan) v. Minister for Justice and Equality, Ireland and the Attorney General [[2020] IESC 10, paras.33-35].
>
> 41. To permit the Applicant to appeal a recommendation that has subsequently been superseded by the Minister's lawful refusal under section 47(5) of the Act would have the impermissible effect of allowing the Regulation 4(5) appeal procedure to be used to quash the Minister's refusal and indeed the subsequent deportation order, rather than to lawfully appeal a recommendation. This would be entirely unlawful and ultra vires the provisions of the 2015 Act and the 2017 Regulations and lead to [a result]…contrary to the legislative intent."

9. In an affidavit of 7/2/2020, an INIS official avers, inter alia, as follows:

> *"3. By registered letter, dated 24th April 2019 the applicant was sent the requisite statutory notification of the recommendation that was made at first instance, pursuant to section 39(3)(c) of the International Protection Act 2015 (hereafter 'the 2015 Act') that he should be neither given a refugee declaration nor a subsidiary protection declaration….*
>
> *4. On the 8th May 2019 the recommendation was returned to sender marked "not called for"….*
>
> *5. I say and believe that the applicant was then contacted by phone on the 8th May 2019 to confirm his address which he did and the recommendation was re-issued on the same day. I beg to refer to a true copy of the internal memo from the International Protection Office to this effect, together with proof of postage for the recommendation….*

6. *On the 20th May 2019 the recommendation was returned to sender marked "not called for"….*

7. *By registered letter dated the 27th June 2019 the Deciding Officer wrote to the Applicant informing him of the Minister's decision to refuse to give a refugee or subsidiary declaration….*

8. *I say and believe that this correspondence was again marked "not called for" and returned to sender on the 3rd July 2019….*

9. *A deportation order was signed in respect of the applicant on the 12th July 2019.*

10. *An application to extend time to appeal was submitted on behalf of the Applicant on the 26th of August 2019….*

11. *On the 27th of August 2019 the Tribunal responded indicating that it would not accept the late appeal.*

12. *The applicant was sent a copy of the deportation order by registered post, dated the 27th September 2019….".*

10. The memorandum on file referred to at point 5 above is headed "*Returned Recommendation Letter*" and states, *inter alia*, as follows:

> "*rec*[ommendation] *letter and pack issued to the applicant on 23/4/19 to the address at* [Stated Address]. *It was returned to the IPO by An Post on 8/5/19. I rang the applicant's phone number and he confirmed that the address is accurate. Letter has been resent to the same address on 8 May 2019.*
>
> …*rec*[ommendation] *letter and pack was returned again to the IPO by An Post on 20 May 2019 marked; not called for*".

11. There is no suggestion that the memorandum is anything other than it purports to be, viz. a contemporaneous file-note by an IPO official of the events described.

12. In a second affidavit of 25/2/2020, the applicant avers, *inter alia*, as follows:

> *"2. I came to Ireland on the 30th May 2018. I applied for protection at Dublin Airport and, once admitted to the process, I was provided with accommodation at* [Centre A]…*before being transferred to* [Centre B]. *I remained there only three days* [thereafter living initially at] [Stated Address] *and remained there until in or around June 2019. I completed a change of address form when I moved to this address and this was acknowledged*….

3. *I did not receive any An Post attempted delivery notification in respect of the letter from the International Protection Office dated the 24th April 2019, which apparently went back "not called for" and is referred to in the* [above-mentioned affidavit sworn by the INIS official]….

4. *I further say that I did not receive a telephone call in respect of this. I have had the same phone number since I came to Ireland.*

5. *I did not receive any An Post attempted delivery notification in respect of the letter from the International Protection Office dated the 8th May 2019, which apparently went back "not called for" and is also referred to in the* [above-mentioned affidavit sworn by the INIS official]….

6. *I say that I did in fact receive other post at this address in my name in May and July of 2019….I resided at* [Stated Address] *with my girlfriend and no-one else. I moved out of this accommodation in late-June 2019. I notified the International Protection Office of this change on the 1st July 2019*….

7. *Shortly after moving out, I returned to* [Stated Address] *for the purpose of checking for any mail addressed to me. I came upon an An Post attempted delivery notification, dated the 28th June 2019 and I immediately went to the post office only to be informed that it was too late, and that the letter had been returned to sender. I then considered that I should instruct a solicitor and went to obtain legal aid. It took about two weeks before the Legal Aid Board arranged reconstruction.*

8. *I beg to refer to paragraph 6 of my grounding affidavit wherein I say that "apparently I was notified of the IPO's recommendation pursuant to section 39 of the 2015 Act that I should be neither given a refugee declaration nor a* "subsidiary protection declaration," *and I go on to say* "I did not in fact receive this. I did try to but was unable to. I have received in the post notification of registered post and I attended [the] post office in Dublin 1 (as requested in the said postal notification) and was told the envelope has returned to sender". *As I did not have sight of the actual correspondence in June 2019, I mistakenly assumed it to be the notification of the IPO decision, but it is clear now from the* [above-mentioned affidavit sworn by the INIS official]….*that the June 2019 letter referred to the Minister's proposal to deport*".

13. There is a lot in the foregoing. The following summary chronology may assist:

16/5/2018. Applicant leaves Georgia.

31/5/2018. Applicant presents at IPO.

14/6/2018. Applicant interviewed by IPO pursuant to s.13(2) of the Act of 2015. Notably, the applicant was also provided with a free legal aid leaflet at this time. Even so,

it took the applicant over a year before he decided to seek legal aid. The State in its various guises is not to blame that this is so: an applicant for asylum must to some extent take ownership of the pursuit of her/his application. As the Supreme Court observed in Re Illegal Immigrants *(Trafficking) Bill 1999* [2000] 2 IR 360, at p. 395, an applicant is not a "passive participant", though that does not mean that the courts must invariably condemn applicants for every perceived instance of impassivity; as ever, a rounded and reasonable consideration falls to be brought to bear when considering the consequences of any (if any) impassivity encountered.

23/4/2019. Applicant notified of IPO recommendation pursuant to s.39 of the Act of 2015. It is important to note that the issuance of this recommendation is a significant matter and doubtless treated with all due seriousness by the Minister but ultimately it is but a recommendation, following which the Minister makes application pursuant to and under s.47 of the Act of 2015. The notification was sent to the address provided by the applicant and stated, inter alia, that the applicant had 10 working days to appeal and if he did not appeal within that timeframe a decision on his protection application would be made by the Minister.

8/5/2019 The IPO recommendation sent to the applicant was returned, marked "*not called for*". A contemporaneous memorandum on file at the IPO indicates that the applicant was then contacted by phone to confirm his address which he did, the recommendation being re-issued on the same day. (The applicant denies that this call ever occurred). The re-sent recommendation was also returned.

27/6/2019. Department writes to the applicant to advise of Minister's decision to refuse refugee status and subsidiary protection declaration. At the time when this decision was made the applicant had not yet elected to seek an appeal within the 10-day limit, nor had he sought an extension of time.

3/7/2019. Return of letter of 27.06.2019 marked "*not called for*". By this time the IPAT has been advised of the applicant's change of address.

12/7/2019. Deportation order issues.

18/7/2019. Applicant makes application for legal aid.

21/8/2019. Applicant approved for legal aid.

26/8/2019. Applicant meets with present solicitor. On same date a notice of appeal against the IPO recommendation is lodged. (It is perhaps worth noting in passing that the appeal process is not automatic; it is a process that may be commenced at an applicant's election; if it was automatic the facts at play in the within proceedings would not have occurred).

27/8/2019. IPAT indicates that it will not accept the late appeal for the reasons offered in its letter. (This is the challenged decision for the purposes of the within application).

29/8/2019. IPO internal communication indicates return of recommendation on 8.5.2019 marked "*not collected for*" and that reissued recommendation was returned on 8.5.2019 marked "not called for".

27/09/2019. Deportation Order communicated to the applicant.

14. A number of points might be made by reference to the background facts. These are set out hereafter.

15. First, what the applicant is seeking to do in effect is to re-set the clock so that he can now avail of the elective statutory appeal process that he failed to invoke within the 10-day period or prior to the s.47 decision of the Minister.

16. Second, as mentioned above, there was a delay (in excess of one year) between the applicant's initial presentation at the IPO and his application for legal aid. That delay was his delay alone and occurred after he was expressly advised of his eligibility to seek free legal aid.

17. Third, it is a feature of the within proceedings that the applicant continues to offer no reason as to how his understanding as to legal aid changed in the summer of 2019, leading to his making application for same on 18/7/2019.

18. Fourth, there is a want of clarity on the applicant's part as to when he moved from the address that he had identified to the IPO; his second affidavit seems to suggest that it was in "*late June*", whatever exactly that means.

19. Fifth, no reasonable explanation has been offered by the applicant as to how it could be that despite living at the address which he had identified to the IPO (and to which the IPO sent its communications) as late as "*late June*" he did not receive the recommendation originally sent or as re-sent.

20. Sixth, no explanation is provided as to how it was that the applicant, after moving from the address he had provided to the IPO and returned to check his mail, happened upon the attempted delivery notification of 28/6/2019, yet never happened upon the previous notifications sent.

21. It is clear from the Supreme Court's decision in *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360, at p. 395 that an asylum applicant is not a "*passive participant*". For the applicant to provide an address and fail adequately and/or routinely to monitor his post on a consistent basis flies in the face of s.16 of the Act of 2015 and the spirit of that enactment.

C. Some Statutory Provisions of Relevance

22. Section 16(3) of the Act of 2015 provides, inter alia, that "*Subject to subsection (6), an applicant shall– (c) inform the Minister of his or her address and any change of address as soon as possible"*.

23. Section 41(1), (2) and (4) of the Act of 2015 provide as follows:

"*Appeal to Tribunal*

41(1) *An applicant may, in accordance with regulations under subsection (4) (if any), appeal to the Tribunal against— (a) a recommendation…that an applicant should not be given a refugee declaration, or (b) a recommendation…that an applicant should be given neither a refugee declaration nor a subsidiary protection declaration.*

(2) *An appeal under subsection (1) shall be brought by notice in writing— (a) within such period from the date of the sending to the applicant of the notification under section 40 as may be prescribed under section 77, (b) specifying, in writing, the grounds of appeal and indicating whether the applicant wishes the Tribunal to hold an oral hearing for the purpose of his or her appeal….*

(4) *The Minister may, in consultation with the chairperson and having regard to the need to observe fair procedures, prescribe procedures for and in relation to appeals under subsection (1), including the holding of oral hearings."*

24. Section 77 of the Act of 2015 provides as follows:

"*Period for making appeal under sections 21, 22, 41 and 43*

The Minister may, in consultation with the chairperson and having regard to the need to observe fair procedures and the need to ensure the efficient conduct of the business of the Tribunal, prescribe periods for the purposes of section 21(6), 22(8), 41(2)(a) and 43(a) and, in doing so, may prescribe different periods in respect of different provisions or different classes of appeal."

25. Regulation 4(5) of the Regulations of 2017 provides as follows:

"*Request for extension of prescribed period*

4(5) *The Tribunal shall not extend the prescribed period except where it is satisfied that—(a) the applicant has demonstrated that there were special circumstances as to why the notice of appeal was submitted after the prescribed period had expired, and (b) in the circumstances concerned, it would be unjust not to extend the prescribed period."*

26. As can be seen from the text of reg.4(5), if the IPAT proceeds to consider a request for extension of the prescribed period, something that did not happen here because the decision taken by the Minister under s.47 made it pointless so to proceed (as any appeal against the recommendation would then be moot/futile), it must, in effect, ask itself two questions when determining whether to accede to such a request, viz:

(1) Has the applicant demonstrated that there were special circumstances as to why the notice of appeal was submitted after the prescribed period expired?

and

(2) If the answer to (1) is 'yes', would it be unjust not to extend the prescribed period?

27. If the answer to (2) is that it would be unjust not to extend the prescribed period then presumably the IPAT will accede to the request for the extension of the prescribed period. 'Presumably' because reg.4(5) provides that "*The Tribunal shall not extend the prescribed period except where it is satisfied…*", it does not provide that 'The Tribunal shall extend the prescribed period where it is satisfied…'. However, if the answer to (1) is 'yes' and the answer to (2) is that it would be unjust not to extend, the court struggles to conceive of a situation in which the IPAT would not grant the extension sought. Here, of course, the IPAT properly did not proceed to consider the substance of the reg.4(5) application because it would have been pointless so to do given that the Minister had already made his decision under s.47 (making any appeal against the recommendation moot/futile).

D. Legal Questions/Issues Contended to Arise

i. Introduction.

28. The applicant contends that the following legal questions/issues arise to be addressed and resolved by reference to the above-mentioned facts:

(1) Did the IPAT err in law insofar as it failed [if it failed] to apply the actual test prescribed by reg.4(5) of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017?

(2) Did the IPAT err by failing correctly to apply the said reg.4(5)?

(3) Is the said reg.4(5) invalid?

29. The court addresses these questions later below. Before doing so, it addresses the preliminary issue as to whether Mr A was entitled to make a time extension application under reg.4(5) at all.

ii. The Applicant is not an Applicant Point.

30. Sections 41 and 47(5) of the Act of 2015 and reg.4(5) of the Regulations of 2017 all refer to an "*applicant*". In this regard, it is worth noting the following provision made in s.2 of the Act of 2015:

"2(1) "applicant" means a person who— (a) has made an application for international protection in accordance with section 15, or on whose behalf such an application has been made or is deemed to have been made, and (b) has not ceased, under subsection (2), to be an applicant….

(2) A person shall cease to be an applicant on the date on which— (a) subject to subsection (3), the Minister refuses— (i) under subsection (2) or (3) of section 47 to give the person a refugee declaration, or (ii) under section 47(5) both to give a refugee declaration and to give a subsidiary protection declaration to the person, (b) subject to subsection (3), he or she is first

given, under section 54(1), a permission to reside in the State, or (c) he or she is transferred from the State in accordance with the Dublin Regulation

(3) Where—(a) a recommendation referred to in section 39(3)(b) is made in respect of an applicant, and (b) the applicant appeals under section 41(1)(a) against the recommendation, notwithstanding the giving, under section 47(4)(a), of a subsidiary protection declaration to the applicant on the basis of the recommendation, he or she shall, for the purposes of this Act, remain an applicant until, following the decision of the Tribunal in relation to the appeal, the Minister, under section 47, gives or, as the case may be, refuses to give him or her a refugee declaration."

31. The effect of the foregoing is that by the time the extension application was made, Mr A had ceased to be an "*applicant*" within the meaning of the Act of 2015 and hence did not come within reg.4(5) of the Regulations of 2017. This is a complete answer to any complaint that Mr A makes re. his reg.4(5) application: he was ineligible to make that application and so has no grounds for complaint.

32. The contention has been made by counsel for Mr A, in effect, that the Act of 2015 departs to some extent from what European law requires. Reference was made in this regard to Directive 2005/85/EC but as that Directive ceased to have validity on 20/7/2015, it seems to the court to be more appropriate to look to the not dissimilar requirements in Arts. 2 and 46 of the replacement directive, viz. Directive 2013/32/EU (though it would have reached the same conclusion by reference to the relevant provisions of the earlier directive).

33. Article 2 of the Directive of 2013 states, *inter alia*, as follows:

– *"'applicant' means a third-country national…who has made an application for international protection in respect of which a final decision has not yet been taken", and*

– *"'final decision' means a decision on whether the third-country national…be granted refugee or subsidiary protection status by virtue of Directive 2011/95/EU and which is no longer subject to a remedy within the framework of Chapter V of this Directive, irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome".*

34. Chapter V consists of a single article, Article 46, which provides, *inter alia*, as follows:

"1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following: (a) a decision taken on their application for international protection….

4. Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy

pursuant to paragraph 1. The time limits shall not render such exercise impossible or excessively difficult."

35. The court respectfully does not see how it can correctly be contended that Mr A was denied a right to an effective remedy before a court or tribunal, or that the time limits or other rules considered in the within application are less than reasonable or render impossible or excessively difficult the exercise of a right to an effective remedy before a court or tribunal.

iii. The Three Questions

a. Question 1.

36. Question 1: Did the IPAT err in law insofar as it failed [if it failed] to apply the actual test prescribed by reg.4(5) of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017?

37. The court's answer to this question is 'no', for the simple reason that the IPAT never applied reg.4(5). It refused to proceed with the application for an extension of time on the basis that at the time of the application the IPO's s.39 recommendation had been superseded by a s.47 decision by the Minister, making it pointless to proceed (as any appeal against the recommendation would then be moot/futile).

38. The court has been referred by the applicant in this regard to the decision of the UK Immigration Tribunal in *AK and Ors (Tribunal appeal – out of time) Bulgaria* [2004] UKIAT 00201, in which the Tribunal observed, *inter alia*, as follows, at paras.17-18:

> *"17. The first question we have to consider is whether the Secretary of State's application for an extension of time can be entertained now and, more generally, what are the restrictions on the time at which such an application can be made. It is in the nature of things, particularly in a jurisdiction such as this one, where formal steps have to be taken by the parties within very short time limits, that any application for an extension is likely to be made, if at all, after the expiry of the time limit in question….*
>
> *18. It appears to us, therefore, that an application for the extension of time is not excluded by the fact that the original time limit has already expired. Is there, then, any other period outside which such an application cannot be made? Given the variety of reasons that there may be for the original time limit having been exceeded, it would be extremely dangerous, in the absence of any clear authority, to lay down any rigorous rule."*

39. The court respectfully accepts as correct the logic of the Immigration Appeal Tribunal. However, it does not see that these observations have any relevance to the within proceedings. This is because the within proceedings do not concern a case where the IPAT has refused to extend time. Rather, it refused to proceed with the application for an extension of time on the basis that at the time of the application the IPO's s.39

recommendation had been superseded by the Minister's s.47 decision, making it pointless to proceed (as any appeal against the recommendation would then be moot/futile).

b. Question 2.

40. Question 2: Did the IPAT err by failing correctly to apply reg.4(5)?

41. Again, the court's answer to this question is 'no', for the simple reason that the IPAT never applied reg.4(5). It refused to proceed with the application for an extension of time on the basis that at the time of the application the IPO's s.39 recommendation had been superseded by a s.47 decision by the Minister, making it pointless to proceed (as any appeal against the recommendation would then be moot/futile).

c. Question 3.

42. Question 3: Is reg.4(5) invalid?

43. This issue does not arise for determination as reg.4(5) was not relied upon. The dispute at issue in these proceedings concerns but the IPAT's refusal to proceed with the application for an extension of time on the basis that at the time of the application the IPO's s.39 recommendation had been superseded by a s.47 decision by the Minister, making it pointless to proceed (as any appeal against the recommendation would then be moot/futile)

44. Without prejudice to the foregoing, the court would make the following summary observations in this regard:

a. Time Limits.

45.[1] The need for time limits so that asylum applications are resolved in a timely manner has been recognised by the courts (see the judgment of McKechnie J. in *AWK v. Minister for Justice and Equality and Ors*. [2020] IESC 10, at para.42).

46.[2] The risk of continuation of a process that confronts an applicant who does not challenge a decision within prescribed appeal periods was recognised by the Supreme Court in *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; (here the applicant, consistent with standard procedure, was notified in writing that the Minister would make a s.47 decision, post-s.39 recommendation, if an appeal was not lodged against that recommendation within the applicable timeframe).

47.[3] It is not unlawful or in breach of European Union law to have a situation whereby once an appeal from a recommendation has not been lodged within the timeframe provided by law then, without some action on the part of the applicant, the Minister's powers are not suspended and the Minister may continue the process through to its end. That this is so is clear from *Abdoulaye Amadou Tall (Case C-239/14)* [ECLI:EU:C:2015:824]. That was a case featuring the following chronology:

12/11/2013. Rejection of Mr Tall's application for asylum in Belgium confirmed by a decision of the *Conseil du contentieux des étrangers.*

10/1/2014. Action against that decision declared inadmissible by the *Conseil d'État*.

16/1/2014. Mr Tall submitted a second application for asylum, relying on evidence which he presented as new evidence.

23/1/2014. *Commissariat général aux réfugiés et aux apatrides* refused to take second application for asylum into consideration.

27/1/2014. *Centre public d'action sociale de Huy* withdrew, with effect from 10/1/2014, the social assistance which Mr Tall was receiving, on the ground that, as a result of the second application for asylum submitted by him, that body "[was] *no longer competent to provide social assistance equivalent to income support or to provide medical assistance*".

10/2/2014. Mr Tall served with an order to leave Belgium.

19/2/2014. Mr Tall appealed to the *Conseil du contentieux des étrangers* against the decision refusing to take his second application for asylum into consideration. In parallel with that appeal, Mr Tall brought an action before the referring court on 27/2/2014 against the decision of the CPAS to withdraw his social assistance. The referring court declared that action to be both admissible and well-founded to the extent that it concerned the period running from 10/1/2014 to 17/2/2014 on the ground that, by virtue of the relevant provisions of national legislation, the decision to withdraw social assistance at issue in the main proceedings could not enter into force until the date of expiry of the period for voluntary departure which accompanied the order to leave the territory, namely, 18/2/2014. As regards the social assistance to which Mr Tall claimed he was still entitled after 18/2/2014, the referring court held that, under national law, it was not possible for him to bring a legal action having suspensory effect before a court having full jurisdiction to determine issues of fact and law against the decision refusing to take his second application for asylum into consideration. According to the referring court, the only remedies for which provision was made under applicable national legislation against a decision refusing to take a subsequent application for asylum into consideration were appeals seeking annulment and suspension due to "*extreme urgency*", which, as they did not have suspensory effect, deprived the person concerned of the right of residence and the right to social assistance. In those circumstances the *tribunal du travail de Liège* decided to stay the proceedings and to refer a question to the European Court of Justice for a preliminary ruling.

48. By its question, the referring court asked, in essence, whether Article 39 of Directive 2005/85, read in the light of Article 47 of the CFEU, fell to be interpreted as precluding national legislation which did not confer suspensory effect upon an appeal brought against a decision not to further examine a subsequent application for asylum. In its judgment, the European Court of Justice observed, *inter alia*, as follows:

"*54* *It is apparent from the case-law of the European Court of Human Rights, which must be taken into account, pursuant to Article 52(3) of the Charter, in order to interpret Article 19(2) thereof, that, when a State decides to return a foreign national to a country where there are substantial grounds for believing that he will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR, the right to an effective remedy provided for in Article 13 ECHR requires that a remedy enabling suspension of enforcement of the measure authorising removal should, ipso jure, be available to that foreign national (see, inter alia, judgments of the European Court of Human Rights in* Gebremedhin [Gaberamadhien] v. France, *no. 25389/05, § 67, ECHR 2007-II, and Hirsi Jamaa and Others v. Italy, no. 27765/09, § 200, ECHR 2012-II).*

55 However, it should be noted that, in the present case, the dispute in the main proceedings concerns only the lawfulness of a decision not to further examine a subsequent application for asylum for the purposes of Article 32 of Directive 2005/85.

[Here the dispute concerns but the IPAT's refusal to proceed with the application for an extension of time on the basis that at the time of the application the IPO's s.39 recommendation had been superseded by a s.47 decision by the Minister, making it pointless to proceed (as any appeal against the recommendation would then be moot/futile) which decision per se was not going to lead to the applicant's deportation].

…

59 *It follows that the lack of a suspensory remedy against a decision such as the one at issue in the main proceedings, the enforcement of which is not likely to expose the third-country national concerned to a risk of ill-treatment contrary to Article 3 ECHR, does not constitute a breach of the right to effective judicial protection as provided for in Article 39 of Directive 2005/85, read in the light of Articles 19(2) and 47 of the Charter.*

[It is perhaps worth noting that the lack of a suspensory remedy against the s.39 recommendation only presents because of the failure by the applicant to commence an appeal prior to the s.47 decision being made by the Minister.]

60 *Having regard to all of the foregoing, the answer to the question referred is that Article 39 of Directive 2005/85, read in the light of Articles 19(2) and 47 of the Charter, must be interpreted as not precluding national legislation which does not confer suspensory effect on an appeal brought against a decision, such as the one at issue in the main proceedings, not to further examine a subsequent application for asylum."*

b. The Procedures Directive.

49.[4] The applicant has sought to rely on Art.20 of Directive 2005/85/EC which concerns the procedure applicable where there has been an implicit withdrawal or abandonment of an application; it seems to the court that he ought more appropriately to have sought to rely on Art.28 of Directive 2013/32/EU. Be that as it may, the court considers either such reliance, with respect, to be in any event misplaced because this is not a case where the applicant sought implicitly to withdraw or abandon his asylum application.

c. Breach of Legal Certainty?

50.[5] The applicant contends that reg.4(5) breaches the principle of legal certainty because it does not put a limitation on the time after which the submission of a late appeal will not be considered. However, when one reads the relevant provisions of the Act of 2015 in tandem with reg.4(5) it is clear that an appeal against a s.39 recommendation will be considered up to the moment when the recommendation is superseded by a s.47 decision by the Minister. Additionally, in practice applicants are expressly advised in writing (a) of the timeframe within which an appeal against a s.39 recommendation must be brought, and that (b) if no appeal is brought the Minister will proceed to a s.47 decision.

51.[6] In *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 the Supreme Court concluded, *inter alia*, that a requirement in that Bill to proceed by way of judicial review within a limited period served the legitimate public policy objective of seeking to bring about, at an early legal stage, legal certainty as regards administrative decisions and facilitated the better administration and functioning of the system for dealing with applicants for asylum or refugee status.

52.[7] The requirements of legal certainty must take into consideration the entire procedure and the rights of all parties (see in this regard *Sweetman v. An Bord Pleanála* [2018] 2 IR 250). Those parties include, but are not limited to, the individual asylum applicant seeking relief, to the first, second and third respondents to the within proceedings, and to the interests of all current and future asylum applicants in an asylum system that operates with optimal efficiency – an ideal which, the court cannot but regretfully note, the current asylum system regularly fails to attain.

d. Breach of Right to Effectiveness?

53. The applicant claims, inter alia, that a national procedural rule, such as that at play in reg.4(5), must not render impossible in practice or excessively difficult the exercise of rights conferred by the European legal order. In this regard, he has sought to rely on the judgment of the Court of Justice in Danqua v. Minister for Justice and Equality and Ors. (Case C-429/15) [ECLI:EU:C:2016:789]. In fact, there are a number of decisions of the Court of Justice that are of interest, each of which is considered hereafter.

i. *Kapferer (Case C-234/04)* [ECLI:EU:C:2006:178]

54. In *Kapferer*, Ms Kapferer, a consumer, received advertising material on a number of occasions from Schlank & Schick containing prize notifications. Two weeks after a further

letter addressed to her personally, according to which a prize in the form of a cash credit was waiting for her, Ms Kapferer received an envelope containing, *inter alia*, an order form, a letter concerning the final notice of that cash credit and a statement of account. According to the participation/award conditions on the reverse side of that notice, participation in the distribution of the prizes was subject to a test order without obligation. Ms Kapferer returned the order form to Schlank & Schick after affixing a credit stamp and signing the reverse side of that order form below the words "*I have noted the participation conditions",* but without having read the participation/award conditions. Not having received the prize she believed she had won, Ms Kapferer claimed that prize on the basis of Art.5j of the Austrian Consumer Protection Law, seeking an order directing Schlank & Schick to pay her a certain sum.

55. Schlank & Schick objected that the court seised lacked jurisdiction. It argued that the provisions of Arts.15 and 16 of Regulation No 44/2001 (since repealed by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J. L351, 20.12.2012, 1-32)) were not applicable because they presupposed that there should be a contract for valuable consideration; and that participation in the prize game was subject to making an order, which Ms Kapferer never did. The right deriving from Art.5j of the Austrian Consumer Protection Law was not, in the view of Schlank & Schick, of a contractual nature.

56. The *Bezirksgericht* dismissed the plea of lack of competence and declared itself to have jurisdiction on the basis of Arts.15 and 16 of Regulation No. 44/2001, on the grounds that there was, in its view, a contractual relationship between the parties to the dispute. As regards the merits of the case, the *Bezirksgericht* dismissed all of Ms Kapferer's heads of claim. Ms Kapferer brought an appeal before the referring court. For its part, Schlank & Schick took the view that the *Bezirksgericht's* decision relating to its jurisdiction did not adversely affect it because it had, in any event, succeeded on the merits. For that reason Schlank & Schick did not challenge that decision on jurisdiction. Since Schlank & Schick had not challenged the decision to dismiss the defence of lack of jurisdiction, the referring court wondered whether it nonetheless had an obligation under Art.10 EC to review and set aside a final and conclusive judgment on international jurisdiction if that judgment was proved to be contrary to Community law.

57. The sole question posed by the referring court to the European Court of Justice was, essentially, whether, and, where relevant, in what conditions, the principle of cooperation arising from Art.10 EC imposed on a national court an obligation to review and set aside a final judicial decision if that decision should infringe Community law. In the course of its judgment, the Court of Justice observed, *inter alia*, as follows, at paras. 20-21 of its judgment:

> *"20 [A]ttention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of res judicata. In order to ensure both stability of the law and legal relations and the sound*

administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question (Case C-224/01 Köbler *[2003] ECR I-10239, paragraph 38).*

21 Therefore, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue (see, to that effect, Case C-126/97 Eco Swiss *[1999] ECR I-3055, paragraphs 46 and 47).”*

ii. Virginie Pontin (Case C-63/08) [ECLI:EU:C:2009:666]

58. In Virginie Pontin, the following chronology presented:

Nov. 2005. Ms Pontin was recruited by T-Comalux under a full-time contract for an indefinite period.

18/1/2007. By registered letter of even date, Ms Pontin was informed of her dismissal and given a period of notice beginning 31/1/2007 and ending 30/3/2007.

19/1/2007. Ms Pontin claimed that on this date she sent a medical certificate to T Comalux by ordinary post. The company denied that it received any such certificate.

22/1/2007. Letter of 18/1/2007 received.

24/1/2007. Ms Pontin sent T Comalux an e-mail informing it that her "*health* [had] *hardly improved*", that she would not be able to return to the office the following day and that she would send a medical certificate as soon as possible.

25/1/2007. By registered letter, T Comalux informed Ms Pontin that she was dismissed with immediate effect "*on grounds of serious misconduct*" consisting of "*unauthorised absence for more than three days*".

26/1/2007. By registered letter of even date, Ms Pontin stated that she was pregnant. She claimed that, as a result, the dismissal of which she had been notified by T Comalux was null and void.

30/1/2007. T-Comalux received the letter of 26/1/2007.

5/2/2007. As she had not received a reply from T Comalux to her letter of 26/1/2007, on this date Ms Pontin brought proceedings before the referring court seeking a declaration that her dismissal was null and void. By judgment of 30th March 2007, that court held that it did not have jurisdiction to hear Ms Pontin’s application. Ms Pontin did not appeal against that judgment. At the

hearing before the Court of Justice, she stated that she had chosen to avoid the risks associated with such an appeal. At the same time, she did not wish to allow the period of three months within which an employee may bring an action for damages for wrongful dismissal under the Luxembourg Labour Code to expire.

18/4/2007. By a second action, brought on 18/4/2007, Ms Pontin claimed that the referring court should order T Comalux to pay her damages. In support of that claim, she argued, *inter alia*, that both her dismissal with notice of 18th January 2007 and her subsequent dismissal with immediate effect were contrary to law and thus wrongful. T Comalux contended that ordinary Luxembourg law relating to actions for damages did not apply to a pregnant worker. Under the Labour Code, such a worker did not have a choice between an action for nullity and reinstatement versus an action for damages, but had to provide her employer with a medical certificate as evidence of her pregnancy within eight days of the dismissal being notified and bring an action for nullity and reinstatement before the president of the tribunal du travail within 15 days of the contract being terminated.

59. According to the referring court, it was to be inferred from relevant Luxembourg law that a pregnant employee who, for whatever reason, even one beyond her control, had allowed the periods of 8 days and 15 days to expire no longer had available a legal remedy to challenge her dismissal, so that once those periods had expired the dismissal of such a pregnant employee was neither null and void nor wrongful, but was perfectly valid.

60. Against the above background, the *tribunal du travail d'Esch-sur-Alzette*, uncertain whether Luxembourg national legislation was in compliance with European Community law and, in particular, Directives 92/85 (the Pregnant Workers Directive) and 76/207 (replaced by Directive 2006/54/EC of the European Parliament and of the Council of 5/7/2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)), decided to stay the proceedings and to refer various questions to the Court of Justice for a preliminary ruling.

61. The first two questions of the referring court related in essence to the principle of effective judicial protection of an individual's rights under Community law. In treating with those questions, the European Court of Justice observed, *inter alia*, as follows, at para.47:

> *"As regards the principle of effectiveness, it is apparent from the Court's case-law that cases which raise the question whether a national procedural provision renders the exercise of an individual's rights under the Community legal order practically* impossible or excessively difficult must similarly be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national instances. In that context, it is necessary to take into

consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (see Case C 426/05 *Tele2 Telecommunication* [2008] ECR I 685, paragraph 55, and case-law cited).*"*

iii. *Klausner Holz (Case C-505/14)* [ECLI:EU:C:2015:742]

62. In *Klausner Holz*, the Klausner Group, of which Klausner Holz was part, and the Forestry Administration of the Land Nordrhein-Westfalen concluded, on 20/2/2007 an agreement to supply wood. Under that agreement, the *Land* undertook to sell to Klausner Holz fixed quantities of wood during 2007 to 2014, at predetermined prices depending on the size and quality of the wood. In addition, the *Land* undertook not to make other sales at prices lower than those set in the agreement. On 17/4/2007, Klausner Holz and the *Land* concluded a 'framework sales contract' which supplemented the agreement of 20/2/2007. During the first six months of that year, the *Land* also concluded, with six other large resinous wood purchasers, agreements for the supply of wood for periods from 2007 to, as appropriate, 2011, 2012 and, in one case, 2014. Under those agreements, the prices agreed for the wind-fallen wood supplied in 2007 and 2008 were similar to those fixed in the contracts at issue, while the prices for the fresh wood supplied from 2009 were generally higher than the prices fixed in the contracts at issue, leaving aside the possibility of adjusting those prices on certain conditions and within certain limits. In 2007 and 2008, the Land supplied wood to Klausner Holz, but the purchase amounts of wind-fallen wood provided for were never reached. During 2008, Klausner Holz had financial difficulties, sometimes involving late payments. In August 2009, the *Land* rescinded the framework sales contract which supplemented the agreement of 20/2/2007 and, with effect from the second half of that year, it ceased to supply wood to Klausner Holz on the terms set out in the contracts at issue. By a declaratory judgment of 17/2/2012, the *Landgericht Münster* held that the contracts at issue remained in force. That judgment was confirmed by the *Oberlandesgericht Hamm*, ruling on appeal, by a judgment of 3/12/2012, which became *res judicata*.

63. Klausner Holz subsequently brought an action against the *Land* before the referring court seeking, firstly, payment of damages in respect of the failure to supply wood in 2009, secondly, the supply of pine wood in performance of the contracts at issue for the period between 2010 and February 2013 and, thirdly, information concerning in particular the financial conditions on which the five largest purchasers of resinous wood acquired cut pine wood from the *Land* between 2010 and 2013. The *Land*, for its part, raised the argument before the referring court, which it did not before the *Oberlandesgericht Hamm,* that EU law precluded the execution of the contracts at issue since they constitute state aid, implemented in breach of Art.108(3) TFEU.

64. In July 2013, Germany informed the European Commission of the existence of non-notified aid, namely the contracts at issue in the proceedings, which, in the opinion of Germany, was incompatible with the internal market. Furthermore, in October 2013, the Commission received complaints from a number of the competitors of Klausner Holz

making the same allegations of incompatibility. By letter of 26/5/2014, the referring court sent the European Commission a request for clarification on the basis of a Commission Notice on the enforcement of State aid law by national courts. In reply to that letter, the European Commission stated that, having regard to the stage reached by the procedures initiated following the information provided by Germany and the complaints aforesaid, it was unable to state its definitive position on the application, in the present case, of EU law on State aid, such a statement being reserved in any event to the decision closing the procedures.

65. The referring court took the view, for its part, that the contracts at issue constituted state aid, in particular because of the advantage given to Klausner Holz using State resources and the failure to comply with the private seller test. In addition, it noted that the aid was not covered by any block exemption regulation, nor did it constitute *de minimis* aid. Thus, in the view of the referring court, the state aid was implemented in breach of Art.108(3) TFEU.

66. According to the case-law of the *Bundesgerichtshof*, a private law contract which granted State aid in breach of Art.108(3) TFEU fell to be regarded as null and void. Nonetheless, the referring court regarded itself as prevented from drawing the consequences of the breach of Art.108(3) TFEU because of the declaratory judgment of the *Oberlandesgericht Hamm* of 3/12/2012, referred to in paragraph 8 of the present judgment, which was *res judicata*, by which it was held that the contracts at issue remained in force.

67. In the above-described circumstances, the referring court decided to stay the proceedings and to query with the European Court of Justice, in essence, whether European Union law precludes, in circumstances such as those at issue in the main proceedings, the application of a rule of national law enshrining the principle of *res judicata* from preventing a national court which had held that contracts forming the subject-matter of the dispute before it constituted State aid, within the meaning of Article 107(1) TFEU, implemented in breach of Art.108(3) TFEU, from drawing all the consequences of that breach because of a national judicial decision which had become definitive, which court, without examining whether those contracts constituted State aid, had held that the contracts remain in force.

68. In the course of its judgment, the European Court of Justice observed, *inter alia*, as follows, at para.41:

> *"As regards application of the principle of effectiveness, the Court has held that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the*

*proceedings (se*e, to that effect, judgments in *Fallimento Olimpiclub,* C 2/08… paragraph 27, and Târșia, C 69/14…paragraphs 36 and 37 and the case-law cited)."

69. In *Danqua*, a reference from the Irish Court of Appeal, the facts were as follows:

13/4/2010. Ms Danqua, a Ghanaian national, made an application for refugee status, in Ireland; the reason for the application being her fear of being subjected to *trokosi* practices, a form of ritual servitude practised in Ghana and predominantly affecting women.

16/6/2010. The Refugee Applications Commissioner issued a negative recommendation in respect of that application because of its lack of credibility.

13/1/2011. The Commissioner's recommendation was confirmed on appeal by the Refugee Appeals Tribunal.

9/2/2011. The Minister notified Ms Danqua of a decision rejecting her application for asylum and informed her of his proposal to make a deportation order against her, telling her, *inter alia*, that she had the possibility of making an application for subsidiary protection within a period of 15 working days of that notification. Following that decision, the Refugee Legal Service informed Ms Danqua that because of the rejection of her application for asylum, she would not be assisted in preparing her application for subsidiary protection. The Refugee Legal Service did however submit, in Ms Danqua's name, an application for humanitarian leave to remain.

23/9/2013. By letter of even date, the Minister informed Ms Danqua that that application had been rejected and that a return decision had been issued against her on 17/9/2013.

8/10/2013. Ms Danqua lodged an application for subsidiary protection.

5/11/2013. By letter of even date, the Minister informed Ms Danqua that her application for subsidiary protection status could not be accepted, since that application had not been lodged within the period of 15 working days referred to in the Minister's notification of 9/2/2011 rejecting her application for asylum.

Ms Danqua challenged the refusal decision before the High Court, relying, *inter alia*, on a breach of the principle of equivalence based on the obligation, on an applicant for subsidiary protection, to comply with a time limit such as that at issue in the main proceedings for making an application for subsidiary protection, when compliance with a similar time limit was not required for making an application for asylum.

16/10/2014. High Court dismissed Ms Danqua's action, holding, *inter alia,* that the principle of equivalence was not applicable in the case in point, since Ms Danqua was comparing two procedural rules based on EU law.

13/11/2014. Ms Danqua brought an appeal against that judgment before the Court of Appeal. Ms Danqua reiterated before that court her line of argument that the obligation, on an applicant for subsidiary protection, to comply with a time limit such as that at issue in the main proceedings was in breach of the principle of equivalence, since there was no similar time limit applicable to persons making an application for refugee status.

70. It was against the above-described background that the Court of Appeal decided to stay the proceedings before it and to refer two questions to the European Court of Justice by which, in essence, it asked whether the principle of equivalence fell to be interpreted as precluding a national procedural rule, such as that at issue in the main proceedings, which required an application for subsidiary protection status to be made within a period of 15 working days of notification, by the competent authority, that the applicant whose asylum application had been rejected could make an application for subsidiary protection.

71. In its answer, the European Court of Justice observed, *inter alia*, as follows, at paras. 42-44 of its judgment:

"*42* *In this connection, it must be noted that the Court has held that every case in which the question arises as to whether a national procedural provision renders the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary, inter alia, to take into consideration, where relevant, the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure (see, to that effect, judgment of 11 November 2015*, Klausner Holz Niedersachsen, C 505/14…paragraph 41 and the case-law cited).

43 *In this case, it is appropriate to consider, in particular, whether a time limit such as that at issue in the main proceedings may be justified for the purposes of ensuring the proper conduct of the procedure for examining an application for subsidiary protection, in the light of its implications for the application of EU law (see, by analogy, judgment of 3 September 2009*, Fallimento Olimpiclub, C 2/08…paragraph 28).

44 *As regards time limits, the Court has held that, in respect of national rules which come within the scope of EU law, it is for the Member States to establish those time limits in the light of, inter alia, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be*

taken into consideration (see, to that effect, judgment of 29 October 2009, Pontin, C 63/08…paragraph 48)."

72. In passing, the court notes that the judgment of the European Court of Justice was concerned with the historical arrangement whereby asylum and subsidiary protection applications were subject to different time limits. That of course is no longer the position that pertains under Irish law.

iv. *Cargill Deutschland (Case C-360/18)* [ECLI:EU:C:2019:1124]

73. In *Cargill Deutschland*, Cargill Deutschland, a company producing isoglucose, was subject to the European system of sugar production levies. On 1/5/2014, Cargill Deutschland submitted a request to the Principal Customs Office, Krefeld, asking it to fix the amount of new production levies and to reimburse levies that it had unduly paid in respect of the 2001/2002 to 2004/2005 marketing years. By decision of 18/4/2016, confirmed on 19/9/2016 following an unsuccessful objection procedure, the Principal Customs Office, Krefeld, refused that request on the ground that the 4-year limitation period prescribed for the purposes of annulment, amendment or correction of tax notices had expired for those marketing years, with the result that the corresponding tax notices had become final.

74. Cargill Deutschland brought before the referring court, the *Finanzgericht Düsseldorf* (Finance Court, Düsseldorf, Germany), an action against the decision of the Principal Customs Office, Krefeld, claiming that its right to reimbursement of unduly paid levies followed directly from Regulation No. 1360/2013. That right, it argued, was not subject to any limitation period for assessment and was not affected by the definitive nature of the tax assessments issued by the Principal Customs Office, Krefeld. In that regard, the referring court stated that it had held in previous cases that the question of whether or not a company was entitled to reimbursement of unduly paid levies when the rates of those production levies had been reduced with retroactive effect, pursuant to Regulation No. 1360/2013, had to be decided on the basis of the applicable national law alone, in compliance with the principles of equivalence and effectiveness. In the present case, the referring court found, that approach would result in Cargill Deutschland not being entitled to reimbursement, *inter alia*, on account of the fact that retroactive reduction of the production levies, provided for by Regulation No. 1360/2013, would simply lead to the decisions setting the charges being unlawful, not to the corresponding tax assessments being invalid, since the latter, having been issued on the basis of decisions which had become final, could no longer be subject to amendments, in accordance with the applicable national law. The referring court was uncertain whether, by adopting Regulation 2018/264, the European Union legislature intended to establish a general principle allowing the reimbursement of unduly paid production levies in the sugar sector from that point on, irrespective of the applicable limitation rules under national law. It stated that such an interpretation would thus make it possible for Cargill Deutschland to obtain reimbursement of the production levies which it had unduly paid for the 2001/2002 to 2004/2005 marketing years.

75. In the above-described circumstances, the *Finanzgericht Düsseldorf* decided to stay the proceedings before it and to refer to the European Court of Justice for a preliminary ruling the question whether, in essence, Regulation No. 1360/2013 fixing, *inter alia*, the production levies in the sugar sector for the 2001/2002 to 2005/2006 marketing years fell to be interpreted as meaning that sums unduly paid by economic operators in respect of those levies had to be reimbursed in accordance with national law, in particular within the limitation periods provided for by that law, in compliance with the principles of equivalence and effectiveness. In answering that question, the European Court of Justice observed, *inter alia*, as follows, at para.52:

> *"As regards, in particular, limitation periods or time-bars, the Court has repeatedly held that the setting of reasonable time limits in principle satisfies the requirement of effectiveness since it constitutes an application of the fundamental principle of legal certainty which protects both the person and the administration concerned, even though the passing of such time limits is, by its nature, liable to prevent the persons concerned from asserting their rights in whole or in part (see, to that effect, judgment of 22 February 2018, INEOS Köln, C 572/16…paragraphs 46 and 53 and the case-law cited). In that regard, by way of example, a 3-year limitation period under national law was considered reasonable (judgment of 8 September 2011, Q-Beef and Bosschaert, C 89/10 and C 96/10…paragraph 36 and the case-law cited)."*

76.[8] It seems to the court that the following principles can be identified from the above-considered case-law of the European Court of Justice:

[A] The principle of *res judicata* is important both for the Community legal order and national legal systems (*Kapferer*, at para.20).

[B] To ensure stability of the law and legal relations and also the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of applicable time limits can no longer be called into question (*Kapferer*, at para.20).

[C] European Union law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue (*Kapferer*, at para.21).

[D][a] Cases which raise the question whether a national procedural provision renders the exercise of an individual's rights under the Community legal order practically impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole. (*Virginie Pontin*, at para.47; *Klausner Holz,* at para.41; *Danqua*, at para.42).

[D][b] In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (*Virginie Pontin*, at para.47; *Klausner Holz*, at para.41; *Danqua*, at para.42).

[D][c] It can also be appropriate to consider whether a time limit such as that at issue in the main proceedings may be justified for the purposes of ensuring the proper conduct of the procedure for examining an application for subsidiary protection, in the light of its implications for the application of EU law (*Danqua*, at para.43).

[E] In respect of national rules which come within the scope of European Union law, it is for Member States to establish those time limits in the light of, *inter alia*, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration (*Danqua*, at para.44).

[F] As regards limitation periods or time-bars, the European Court of Justice has repeatedly held that the setting of reasonable time limits in principle satisfies the requirement of effectiveness since it constitutes an application of the fundamental principle of legal certainty which protects both the person and the administration concerned, even though the passing of such time limits is, by its nature, liable to prevent the persons concerned from asserting their rights in whole or in part (*Cargill Deutschland*, at para.52).

77. Having regard to points [1]-[8], a number of observations might usefully be made:

– first, the setting of reasonable time limits satisfies the principles of legal certainty. *All* parties are entitled to the benefit of legal certainty. The ultimate end of what the applicant is contending for in the within application would be to create a situation in which an application to extend the time to appeal a recommendation could be used to advance a process whereby a s.47 decision, perhaps long taken, could potentially be quashed as a consequence of a belated action of the IPAT. That would yield an environment of continuing uncertainty.

– second, the applicant here had 10 days within which to appeal the recommendation and could thereafter have sought an extension up to the moment that the Minister made his s.47 decision. The court sees no credible basis for asserting, never mind concluding, that there was in this case any factor presenting which made it impossible or excessively difficult for the applicant to exercise his rights. He simply did not do so. As counsel for the respondents contended in their written submissions, and the court

respectfully agrees, *"A failure to invoke an effective remedy by an applicant cannot be said to be tantamount to a failure in the effectiveness of a remedy"*.

– third, the court notes that notwithstanding the failure to invoke the statutory protections that he enjoys the applicant could also have commenced (but did not commence) judicial review proceedings in respect of the Minister's s.47 decision.

E. Discretionary Nature of Judicial Review

78. It should be obvious by this point of the court's judgment that the applicant has failed in the within proceedings for all of the various reasons offered herein. However, had the court considered that it was appropriate to grant relief, it would not have declined to do so by reference either to *NM v. Minister for Justice and Equality and Ors*. [2016] IEHC 470 or *Smith v. Minister for Justice and Equality* [2013] IESC 4, two cases to which it was referred by counsel. This is because

– so far as *NM* is concerned, the court does not see in the facts at play in the within proceedings anything akin to the extreme circumstances that appear to have presented in that case (in which the applicant appears in effect to have gone completely 'off the radar' from time to time),

– so far as *Smith* is concerned, it is not even alleged in the within proceedings that the applicant has been guilty of any criminal activity, nor is it clear to the court that he has, to borrow a phrase that was used at the hearing of the within proceedings, been playing 'ducks and drakes' with the immigration system. He has brought the within proceedings, his evidence and the within proceedings present with the deficiencies that the court has identified elsewhere herein but the court does not see that that would disentitle him to relief had the court considered him entitled to such relief (and, again, the court does not see that the applicant is so entitled).

F. Collateral Attack

79. In *XX v. Minister for Justice and Equality* [2019] IESC 59, the appellant, referred to by Charleton J. in his judgment for the Supreme Court as 'Khalid' (not the appellant's real name), had been deported from Ireland on security grounds in 2016. His appeal concerned the proper interpretation of Ireland's asylum legislation insofar as it pertained to applying for refugee status, and then withdrawing that application and subsequently applying again, arises. Since very many asylum applications become judicial review applications in the High Court, the interpretation and application of the legislative provisions requiring such challenges to be taken within a particular timeframe and not later as a collateral attack was also in issue. And, since Khalid had been deported from Ireland, the Minister claimed that Khalid's application was moot, in the sense that no practical result to his benefit would result from any judgment in his favour.

80. In the course of his judgment, Charleton J., in considering the question of judicial review in the context of the Act of 2015 observed, *inter alia*, as follows, under the heading "*Collateral Attack*":

> "23. Where a statute lays down a standard procedure for challenge to a decision, space for deviation from what the legislature has decreed may not be present. In the neighbouring jurisdiction, collateral attack on an administrative decision became easier in consequence of the decision in *O'Reilly v. Mackman* [1983] 2 AC 237. That much considered decision….was not followed in this country….
>
> *24. There are circumstances where people are entitled to know where they stand and that a permission, or other enabling instrument, can be taken as valid because it was not challenged. That principle is of general application to the administration of such difficult and sensitive areas as the grant of refugee status. Were it to be the case that the State, dissatisfied with an analysis whereby an immigrant had been granted refugee status by the Refugee Appeals Tribunal, the time limits and mode of process through judicial review would just as much apply as these constrictions on litigation bind those refused….*
>
> *25. Instead of challenging the relevant decisions under the appropriate statutory procedure, Khalid sought declaratory relief the exclusive effect of which was to collaterally seek to undermine a legal status that required to be then judicially reviewed. Both the High Court and the Court of Appeal found that this was inadmissible. There were no exceptional circumstances justifying in any way a departure from the generally applicable rule. Those decisions are correct.*
>
> *26. In Nawaz v. Minister for Justice [2013] 1 IR 142, the applicant issued plenary proceedings challenging the entitlement of the State to deport non-nationals. Since the applicant was subject to a deportation order, by statute his entitlement to proceed against a deportation decision under section 3 of the Immigration Act 1999 was constricted by section 5 of the Illegal Immigrants (Trafficking) Act 2000. This provided, as it does in this case under appeal, that only judicial review conducted within the time limits prescribed by Order 84 of the Rules of the Superior Courts was available to challenge deportation decisions. Since the applicant was outside the relevant time limit, a plenary action was commenced in its stead. Clarke J for the Supreme Court held that such a collateral attack could not be permitted. To do so would be to undermine the statutory scheme applicable to establishing status within the international protection system. His primary analysis was whether the substance of the challenge mounted consisted of an attack on a decision that section 5(1) of the 2000 Act had ordained could*

only proceed by way of judicial review. Those plenary proceedings were to do just that. At pages 160-161 he stated:

> *The only purpose of Mr. Nawaz questioning the constitutionality of s. 3 of the 1999 Act is so that any measures which might be adopted under that section will be regarded as invalid. If Mr. Nawaz were not exposed to the risk of orders being made under s. 3 then he would, of course, have no locus standi to challenge the constitutionality of the section in the first place. It is only because he is exposed to such orders (dependent on the Minister's decision on humanitarian leave) that he could have locus standi. However, that very fact seems to me to place Mr. Nawaz in a category where it can be said that the only purpose of his constitutional challenge is to render any such measures as might be adopted by the Minister invalid. It is a pre-emptive strike designed to prevent the Minister from making a deportation order at the same time as communicating a decision to decline humanitarian leave (assuming that such be the Minister's decision). It seems to me that such a pre-emptive strike is clearly one designed to question the validity of any order which might be made.*

27. *On behalf of Khalid, it has been asserted that the application of any bar to collateral attack amounts to a form of estoppel in the field of public law. What is claimed is that the failure here to challenge the appropriate decision is no more than something analogous to applying for planning permission while at the same time asserting that such a step was never required. In Fingal County Council v. William P Keeling & Sons Limited [2005] 2 IR 108, the argument advanced to this Court was that since an application for planning permission had been made, this was incompatible with any later assertion that the development proposed fell within the category of those exempted by the legislative code. Commenting on the principle underlying the possible argument at paragraph 19, Fennelly J stated:*

> *In the absence of considered argument and reference to authority in the High Court, it is undesirable that this Court should play the effective role of a court of first instance by determining generally on this appeal whether and to what extent the doctrine of estoppel has a role to play in the field of the relations in public law between an individual and a planning authority. That will have to be determined, on full consideration of the law, by the High Court in this or another case.*

28. *As to the issue raised, the judgment of Fennelly J at paragraph 20 does assist in analysing whether the point raised against the inadmissibility of a collateral attack has validity:*

> *Nonetheless, in the very narrow terms in which the supposed principle of estoppel was expressed in the terms of the preliminary issue*

directed and determined by the High Court, it seems clear ... that it cannot be sustained. If a proposed development is, in fact and in law, an exempted development, no principle has been identified whereby the owner of land should be estopped from asserting the exemption merely by reason of the fact, and by nothing more, that he or she has made a perfectly proper and lawful application for planning permission. That would be to deprive him of a right at law by reason of his exercise of a different right, which would require cogent justification. There could be many perfectly good and even laudable reasons for taking the course of applying for a planning permission, where there is an arguable case for exemption. It might be done through oversight or mistake or merely through an abundance of caution or to ensure that the planning situation was very clear on the sale of a property.

29. *It has also been argued on behalf of Khalid that it is possible in later proceedings concerning an administrative step to validly seek a declaration of invalidity as to an earlier step which then should have been challenged….*

30. *Here, the underlying legislative purpose is the construction of a code for the assessment of claims of persecution which require international protection in Ireland. While the actual procedures have changed following the passing of the International Protection Act 2015, it is clear that the legislation which preceded it that is in issue on this appeal involves a series of steps for ascertaining, with the cooperation of an applicant, whether there are circumstances whereby the State should offer asylum to non-nationals, or should not return a non-national by reason of the need for subsidiary protection. All of these steps, including enquiry, appeal, a proposal to deport, representations concerning subsidiary protection, an order to deport or the granting of humanitarian leave to remain, take time. While the 2015 Act has streamlined many of these and while it is the duty both of the State and of applicants and their legal representatives to operate the legislation so as to ensure fair disposal of cases, no lesser considerations apply under the legislation relevant to this appeal. As each step was taken, the possibility of invoking judicial intervention presented itself. The availability of an appeal on fact is a different consideration. But where judicial review is declared the sole remedy and is bounded by particular time limits, then as each step is taken and a judicial review point presents, an applicant cannot proceed to any subsequent step, take issue with it and proceed to a collateral attack on an earlier decision. The implications of each step in the procedure are clear. As to the method and manner of seeking the intervention of the High Court, the legislation mandates only that specific decisions should be challenged as and when they arise.*

Result

31. In the result, what is involved in this appeal is an impermissible collateral attack on an earlier step in proceedings which should then have been challenged. No indication is possible as to whether any successful outcome could have been anticipated if those steps had been taken. What is not possible in the code of legislation dealing with international protection is a later challenge which has the guise of a separate argument, but which in substance is an attempt to undermine a decision that is within the limits of the boundaries whereby it may be challenged but was not then challenged".

81. What is at play in the within proceedings is an impermissible collateral attack whereby the true objective of the applicant is to re-set the clock so that he can retrospectively invoke a statutory appeal process which he failed to invoke within the requisite time period or prior to the s.47 decision of the Minister. That is not permitted. As Charleton J. observes in the closing paragraph quoted above "*What is not possible in the code of legislation dealing with international protection is a later challenge which has the guise of a separate argument, but which in substance is an attempt to undermine a decision that is within the limits of the boundaries whereby it may be challenged but was not then challenged*". The applicant is seeking to achieve in the within proceedings what the Supreme Court has expressly stated in *XX* is "*not possible*".

G. European Convention on Human Rights

82. Given the conclusions reached above it is not necessary for the court to consider such Convention issues as were contended to present.

H. Conclusion

83. For the reasons indicated, the court respectfully declines to grant any of the reliefs sought by the applicant.

2. MS B'S CASE

84. In this Part 2 of this Appendix, the court considers the case involving a Brazilian lady who has been styled as 'B'/'Ms B' herein so as to preserve her anonymity. Not a lot of time was spent at the hearing on Ms B's application as her case raises much the same key issues as are at play in the case of Mr A. The court therefore confines itself hereafter to a recitation of the applicable facts and an indication of the reliefs sought. For the same reasons, *mutatis mutandis*, as it has offered in the case of Mr A, the court respectfully declines to grant any of the reliefs sought by Ms B.

85. Ms B is a national of Brazil who arrived in Ireland on 2/8/2017. On 29/6/2018, she presented at the IPO seeking international protection. She was notified by letter dated 9th October 2019 that the Minister had received a recommendation from the IPO, made under s.39(3) of the Act of 2015, that she should be given neither a declaration as to refugee status nor subsidiary protection. This s.39 decision was taken on 23/8/2019. The deadline for submitting a notice of appeal was 31/10/2019.

86. Ms B was unrepresented to this point but later sought legal aid representation and was approved for this by the Legal Aid Board on 6/11/2019. On 11/11/2019, the matter was then referred to Ms B's present solicitor. After attempting to contact Ms B, she was

written to on 18/11/2019 and attended her current solicitor on 20/11/2019. Instructions were taken and the matter was referred to counsel on 23/11/2019. Counsel returned papers on 6/12/2019. The late notice of appeal was submitted on that last date, with an explanation for the late filing of same.

87. On 11/12/2019, the IPAT responded, indicating that it would not accept the late appeal for the reasons offered in the body of its letter. The bulk of the text of that letter is set out later below.

88. On 2/12/2019, the Minister informed the applicant that under s.47(5) of the Act of 2015 he was refusing to give a refugee or subsidiary protection declaration and also refusing to grant a permission to remain under s.49 of the Act of 2015, that Ms B was therefore no longer an applicant under the Act of 2015 and that he proposed to make a deportation order in the event that she did not return voluntarily to Brazil. On 31/1/2020, the Minister informed Ms B that a deportation order had been made.

89. The letter of 11/12/2019 states, *inter alia*, as follows:

> *"Dear Sir/Madam*
>
> *I acknowledge receipt of your correspondence of 10 December 2019, together with attached notice of appeal and submissions – and including your affidavit that you are submitting a late appeal on behalf of the above-named client, in circumstances where you state you were only instructed in the matter after the deadline for filing the appeal had passed. The deadline for submission of your client's appeal was 31 October 2019.*
>
> *An extension of the submission period may be sought days or exceptionally even weeks after the prescribed period, and while the s.39 recommendation has yet to be or is being considered by the Minister.*
>
> *However, in the circumstances of your client an extension is sought after the s.39 recommendation has been considered and acted on by way of a decision of the Minister under s.47 of the Act of 2015.*
>
> *The decision by the Minister under s.47 of the 2015 Act has been made consequent on the s.39 recommendation of an international protection officer.*
>
> *In such circumstances, including those of your client, the recommendation under s.39 has been superseded by the Minister's decision under s.47 such that an applicant no longer has a recommendation simpliciter under s.39 against which to appeal.*
>
> *Therefore, application by the Tribunal of the test at regulation 4(5) of the 2017 Regulations cannot allow a late appeal against a recommendation*

under s.39 of the 2015 Act that has been superseded by a ministerial decision under s.47.

The Tribunal is aware of the circumstances behind this late submission; however, this is no longer a matter for the Tribunal, but for the Minister."

90. By notice of motion of 20/2/2020, Ms B seeks the following reliefs:

"1. An Order of Certiorari quashing the decision of the First Named Respondent dated 11th December 2019 made pursuant to Regulation 4(5) of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 (S.I. No.116 of 2017)

2. An Order of Certiorari quashing the decision of the Second Named Respondent dated the 13th December 2019 (the 'Deportation Order') made pursuant to section 51 of the International Protection Act 2015 and communicated to the Applicant by way of letter dated the 31st January 2020.

3. An Injunction restraining the Second Named Respondent , her servants or agents, from taking any further steps in relation to the removal of the Applicant from the State pending the determination of the within proceedings; and in the event of Certiorari being granted, pending the determination of the remitted application of the late appeal.

4. A Declaration that Regulations 3(b) and 4(5) of the International Protection Act 2015 (Procedures and Periods of Appeals) Regulations are ultra vires and/or void.

5. A Declaration, if required, that Regulation 4(5) of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 infringes the principle of legal certainty, and/or the Applicant's right to an effective remedy under Article 47 of the Charter of Fundamental Rights.

6. Such Declaration(s) of the legal rights and/or legal position of the Applicant and/or persons similarly situated as this Honourable Court considers appropriate.

7. Such further or other Order as to this Honourable Court may deem meet, including an extension of time if necessary.

8. An Order providing for an award of the costs of these proceedings to the Applicant."