

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 275

**Record no. 2019/907 JR**

**BETWEEN:**

**MK**

**APPLICANT**

**AND**

**MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Ms Justice Tara Burns delivered on 16th day of April, 2021**

**General**

1. The Applicant is a national of Albania who entered the State in September 2016 as an unaccompanied minor and was assisted by Tusla in making an application for international protection in June 2017.
2. The Applicant was granted permission to access the labour market from 13 August 2018 as his international protection claim had not by then been determined.
3. On 26 September 2018, an International Protection Officer (hereinafter referred to as "an IPO"), Ms Caroline McGlinchey, recommended that the Applicant be refused a refugee or subsidiary protection declaration.
4. On 30 October 2018, Mr Shay Fitzgerald, a case worker within the International Protection Office, determined that the Applicant should not be given a permission to remain in the State pursuant to s. 49 of the International Protection Act 2015 (hereinafter referred to as "the 2015 Act").
5. The Applicant lodged a notice of appeal against the recommendation of the IPO on 21 November 2018.
6. The International Protection Appeals Tribunal affirmed the recommendation of the IPO on 7 October 2019 recommending a refusal of refugee and subsidiary protection declarations.
7. An application under s. 49(9) for a review of the refusal of permission to remain was submitted on 18 October 2019. This application drew attention to the fact that the Applicant had been residing in the State for over three years; had arrived in the State as an unaccompanied minor and was assisted by Tusla in making an application for international protection; and had been working in the Beachcomber restaurant in Malahide since he was granted permission to access the labour market. It was submitted that he was a hard worker and wanted to someday open up his own business. He was very popular in his community and believed that he made a positive contribution to the State and society.
8. This application was accompanied by supporting documentation, notably in the form of 13 reference letters attesting to the Applicant's activities in the State; his integration into

Irish society; his connections with the State; his good character and conduct; his educational background; and his employment activities and future prospects.

9. On 25 November 2019, Ms Ruth Byrne, a Case Worker in the International Protection Office affirmed the earlier s. 49 refusal and refused the Applicant permission to remain having conducted a review pursuant to s. 49(7) of the 2015 Act. The statement of reasons in relation to this s. 49 review decision, was signed by "Ruth Byrne, Case Worker, International Protection Office" and concluded with a paragraph headed "Decision under Section 49(4) of the Act" which stated, inter alia:-

"The applicant's case was considered under Section 49 and Section 50 of the International Protection Act 2015, on review. Refoulment was not found to be an issue in this case. Consideration was also given to private and family rights under Article 8 of the European Convention on Human Rights (ECHR).

Having considered the applicant and the particular circumstances of this case and the applicant's right to respect for his private and family life, I affirm the decision dated 31/10/2018 that the Applicant MK should not be given a permission to remain in the State under section 49 of the 2015 Act." (*emphasis added*).

10. On 4 December 2019, the Applicant was notified of the outcome of the s. 49(7) review by a letter from the Department of Justice and Equality in the following terms:-

"Permission to Remain Decision

You were previously informed by the International Protection Office that the Minister had decided to refuse you a permission to remain in the State under Section 49 of the 2015 Act. This decision was reviewed because you submitted further information under section 49(9). Having considered this information, the Minister has decided that there has been no material change in your personal circumstances or country of origin circumstances concerning prohibition of refoulement contrary to section 50. Consequently, I must inform you that the Minister has decided, pursuant to section 49(4)(b) of the 2015 Act, to refuse you permission to remain in the State. A statement of reasons for this decision is enclosed."

11. On 17 February 2020, a deportation order issued against the Applicant.
12. Leave was granted by the High Court to the Applicant to apply by way of Judicial Review for an order of Certiorari quashing the s. 49(7) review decision and the deportation order. Leave was not sought to challenge the original s. 49 refusal of permission to remain decision.
13. In summary, the grounds of challenge to the s. 49 (7) decision and the deportation order are that there is there is a procedural right to have a proportionality assessment conducted in relation to Article 8 of the European Convention on Human Rights (hereinafter referred to as "the ECHR") in the case of a non-settled migrant or a person

with a precarious residence status, pursuant to the ECHR and/or the Constitution, which was not carried out in the instant matter; that there was a failure to give reasons to explain why the interests of the State outweighed the Applicant's rights pursuant to Article 8 ECHR and Article 40.3 of the Constitution; that the s. 49(7) decision was not lawfully made as it was made by an IPO who cannot lawfully act for and on behalf of the Respondent; that the manner in which the 2015 Act is operated by the Respondent has incorrectly blurred the distinction between international protection and permission to remain decisions thereby rendering the decision invalid; and that there is an error on the face of the s. 49 decision.

**Section 49(7) decision**

14. In summary, the s. 49(7) review decision noted the submissions made on behalf of the Applicant by his solicitor, his personal statement, various personal references and Country of Origin Information. Under s. 49(3)(a), it noted the various positive personal references regarding the Applicant indicating how well he had integrated into Irish society and how hard working and friendly he is. It recorded the Applicant's hopes to open his own business some day and that he was saving his money and working hard. His private accommodation and work status were also noted. Humanitarian considerations were noted pursuant to s. 49(3)(b) which repeated the Applicant's integration into Irish society, his work status and his claim that if he returned home, he would be subjected to serious harm as a son of a policeman who had encountered threats and attacks. The fact that he was of good character was noted pursuant to s. 49(3)(c) and that considerations of national and public order pursuant to s. 49(3)(d) did not arise. No further submissions had been made regarding s. 49(3)(e), namely the common good. Accordingly, it was noted that the consideration previously undertaken in the initial s. 49 decision remained valid.

15. With respect to Article 8, the following was stated:-

"Article 8 (ECHR) – Private Life

The applicant made the following submissions regarding their private life. The applicant is living in private accommodation and working in the Beachcomber restaurant in Malahide. The applicant spent two years in St David's secondary school in Bray, before leaving to try something different. The applicant is employed within the State at the Beachcomber Restaurant. The applicant has made many friends in the state.

Having considered and weighed all the facts and circumstances in this case, it is not accepted that such potential interference will have consequences of such gravity as potentially to engage the operation of Article 8(1).

Having considered and weighed all the facts and circumstances in this case, a decision to refuse the applicant permission to remain does not constitute a breach of the right to respect for private live under Article 8(1) of the ECHR.

## Article 8 (ECHR) – Family Life

The previous consideration under Article 8 Family life, contained in the s. 49(3) decision, found that the circumstances of the applicant's case did not constitute a breach of Article 8(1).

The applicant has not submitted any information under this heading in accordance with section 49(9), therefore the consideration previously undertaken under this heading remains valid and requires no additional consideration."

16. The s. 49(3) finding is recorded as:-

"While noting and carefully considering the submission received regarding the applicant's private life and family life and the degree of interference that may occur should the applicant be refused permission to remain, it is found that a decision to refuse permission to remain does not constitute a breach of the Applicant's rights. All of the applicant's family and personal circumstances, including those related to the applicant's right to respect for family and private life, have been considered in this review and it is not considered that the applicant should be granted permission to remain in the State."

### **Article 8 of the ECHR**

17. Article 8 ECHR provides:-

- "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

### **The Test in *R (Razgar) v. Home Secretary* [2004] 2 AC 368**

18. In the seminal case of *R (Razgar) v. Home Secretary* [2004] 2 AC 368, Lord Bingham identified five questions which arise for a decision maker when Article 8 is relied upon to contest a decision to deport. These are:-

- "(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
- (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
- (3) If so, is such interference in accordance with the law?
- (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

19. The Applicant's submission is that the jurisprudence of the European Court of Justice has moved on in respect of non-settled migrants and that in respect of such persons there no longer is a requirement to establish that the interference with a non-settled migrant's right to respect for his private or family life is of an exceptional nature to engage Article 8. It is argued that a decision maker should consider the proportionality issues set out at questions 3) to 5), once an interference with private or family life is established.

**The jurisprudence of the Irish Courts regarding the engagement of Article 8**

20. The Court of Appeal in *CI v. Minister for Justice* [2015] 3 IR 385 conducted a detailed analysis of relevant judgments of the European Court of Human Rights to decide the appropriate manner in which to determine whether Article 8 of the ECHR is engaged. Ms Justice Finlay Geoghegan initially set out the legal framework applicable with respect to the Court's consideration of Article 8, which is of particular importance having regard to the argument made by the Applicant in the instant case. She stated at paragraph 21 of the judgment:-

"Article 8 of European Convention on Human Rights is not part of the domestic law of the State. However, the Minister and her officials are obliged to perform their functions in a manner compatible with the State's obligations under the Convention pursuant to s. 3(1) of the European Convention on Human Rights Act 2003. Further, s. 4 of the Act of 2003 requires this court in interpreting and applying the Convention to take due account of the principles laid down in the judgments of the European Court of Human Rights. Hence these judgments are of importance in deciding the extent of the State's (and the Minister's) obligations under the Convention."

21. With respect to the engagement of Article 8, Ms Justice Finlay Geoghegan continued at paragraph 29:-

"If the applicants were settled migrants then it would appear that in accordance with the principles stated by the European Court of Human Rights in *Balogun v. United Kingdom* (App. No. 60286/09) (2013) 56 E.H.R.R. 3, the interference which must be considered in assessing the gravity of the proposed deportation (question 2 in *R. (Razgar) v. Home Secretary* [2004] UKHL 27, [2004] 2 A.C. 368) is the interference with the immigrant's right to an actual established private life being the social and educational ties of the applicants with the community in which they are living. It appears to follow from *Balogun v. United Kingdom* (App. No. 60286/09) that article 8 encompasses a right to the actual private life established.

- [30] The European Court of Human Rights, however, has not directly addressed the question as to whether or not, in relation to a person who has never been a lawful migrant, but whilst living unlawfully (or without a legal right to be present) establishes social ties with members of a community, such social ties constitute part of the concept of a private life protected by article 8. There is no positive assessment by the European Court of Human Rights similar to that in *Balogun v. United Kingdom* (App. No. 60286/09) (2013) 56 E.H.R.R. 3 in relation to social ties established by unlawful migrants or persons claiming asylum.
- [31] Whilst the European Court of Human Rights has on many occasions repeated that the Convention does not guarantee the right of an alien to enter or to reside in a particular country, nor oblige a State to respect the choice of residence of aliens, nevertheless it does not appear to have ruled out the possibility that an unlawful migrant may, during a stay, develop social ties which could be considered as constituting private life to which they have a right within the meaning of article 8(1) of the Convention. In *Nyanzi v. United Kingdom* (App. No. 21878/06) (2008) 47 E.H.R.R. 18, it had the opportunity to do so and did not. The applicant had been in the United Kingdom pursuing an asylum claim for almost ten years. She had never been a lawful migrant. She was the daughter of a government Minister in Uganda. She contended *inter alia*, that her expulsion to Uganda violated her right to respect for her private life pursuant to Article 8. That contention was based upon an established private life in the United Kingdom which involved close ties with her church, her part qualification as an accountant and the relationship with a male friend which she hoped would develop. She also relied upon delays by the State in the asylum process. Finally she contended that her expulsion would be traumatic and exacerbate an asthmatic condition. The ECtHR assessment of that part of her claim was succinct in paragraphs 72-78:-

"1. Relevant Principles

- "72. The Convention does not guarantee the right of an alien to enter or to reside in a particular country. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8(1) of the Convention (see *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A, No. 193, p. 18, 36). The Court has also recognised that, regardless of the existence or otherwise of "family life", and depending on the circumstances of a particular case, such removal may also give rise to an infringement of an applicant's right to respect for his private life (see *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006-, 59).
73. The Court also reiterates its finding in *Bensaid v. the United Kingdom* (no. 44599/98, judgment of 6 February 2001 at 46) that 'not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8'.
74. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article

8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity (see *Costello-Roberts v. United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, pp. 60-61, 36).

75. Any interference with Article 8 rights will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 8. It is therefore necessary to determine whether the interference was 'in accordance with the law', motivated by one or more of the legitimate aims set out in that paragraph, and 'necessary in a democratic society'.

2. Application of the above principles to the present case

76. The Court does not consider it necessary to determine whether the applicant's accountancy studies, involvement with her church and friendship of unspecified duration with a man during her stay of almost ten years in the United Kingdom constitute private life within the meaning of Article 8(1) of the Convention. Even assuming this to be the case, it finds that her proposed removal to Uganda is 'in accordance with the law' and is motivated by a legitimate aim, namely the maintenance and enforcement of immigration control. As to the necessity of the interference, the Court finds that any private life that the applicant has established during her stay in the United Kingdom when balanced against the legitimate public interest in effective immigration control would not render her removal a disproportionate interference. In this regard, the Court notes that, unlike the applicant in the case of *Üner* (cited above), the present applicant is not a settled migrant and has never been granted a right to remain in the respondent State. Her stay in the United Kingdom, pending the determination of her several asylum and human rights claims, has at all times been precarious and her removal, on rejection of those claims, is not rendered disproportionate by any alleged delay on the part of the authorities in assessing them.

77. Nor does the Court find there to be sufficient evidence that the applicant's removal with her asthma condition, which she asserts is exacerbated by stress, would have such adverse effects on her physical and moral integrity as to breach her rights under Article 8 of the Convention.

78. Accordingly, the applicant's removal to Uganda would not give rise to a violation of Article 8 of the Convention."

[32] The above analysis is of assistance in deciding this appeal. Firstly, at para. 72 it supports the approach taken by the Minister in considering deportation "may" give rise to an infringement or as put on behalf of the Minister "may engage" their right to respect private life under article 8(1). Secondly, paras. 73 and 74 make clear the necessity of addressing the "gravity" or "sufficiently adverse effects" question i.e. question 2 in *R.(Razgar) v. Home Secretary* [2004] UKHL 27, [2004] 2 A.C. 368.

[33] Thirdly, and perhaps most importantly, in a case where the private life primarily relied upon was established social ties and connections in the host State, the European Court of Human Rights identified, at least at the level of principle, that

what has to be considered is the gravity of adverse impacts on the "physical and moral integrity" of the individual (para. 74). Hence, whilst the inevitable consequence of expulsion may be the severing of the social ties which may be considered to form part of the private life, it appears that what requires to be examined by the decision maker is not just the obvious impact on the private life in the sense of the social ties but rather the gravity of the impact of severing the social ties on the proposed deportee or on his or her physical and moral integrity.

...

[40] What will or will not constitute "sufficiently adverse effects" or have "consequences of such gravity" as to engage Article 8, will depend upon the individual facts and circumstances. It also appears that it may depend upon the circumstances in which the alleged interference occurs. I say this because in *Costello-Roberts* the ECtHR appears to have taken into account the fact that sending a child to a school necessarily involves some degree of interference with his or her private life (see para. 36). In a similar way it appears to me that if an individual decides to travel to a new State and claim asylum the permissible and inevitable application to him of immigration laws, if he fails, will necessarily involve some degree of interference with any private life established in the host State in which he is permitted to remain pending a decision on his asylum claim.

[41] This analysis also informs my conclusion that in considering the gravity of the consequences of deportation on the right to respect for private life of an individual who has never been permitted to reside in the host State (other than pending a decision on an asylum claim), it is permissible to take into account that it is a private life consisting of relationships including educational and social ties formed at a time when the right of the individual to remain in the State is precarious."

22. In *P.O. & Anor v Minister for Justice and Equality & Ors* [2015] 3 IR 164, the Supreme Court stated:-

"[24] The fact that an applicant may derive benefits from continuing residence in the State, whether they be social or educational, did not amount to exceptional circumstances as would give rise to an entitlement to remain in Ireland. As a general principle, a state is entitled to control entry into its territory. Article 8 does not entail a general obligation for a state to respect choice of the country of their residence, or to authorise family reunions in that territory."

23. The Court of Appeal again addressed the issue of when a non-settled migrant, although in the context of a student, can claim engagement of Article 8 ECHR rights when his or her deportation has been ordered in *Rughnoonauth v The Minister for Justice and Equality* [2018] IECA 392. Peart J stated as follows at para 67 of the judgment:-

"[I] feel that the particular words used to describe the quality of a person's status can distract from the more fundamental question as to whether or not a particular



person's residence in the State has been such as to not only give rise to the existence of Article 8 rights (question 1 of *Razgar*), but are of such gravity as to engage the requirement for proportionality under Article 8.2 ECHR. That is the question that the Minister must ask when giving consideration to whether an applicant is entitled to have private life rights assessed for proportionality, and not simply (as in the case of the present applicants) determine that there is no such entitlement because the applicant has been in the State on foot of a student permission.

[68] I would therefore conclude that while in the vast majority of cases of persons in the State on foot of a student permission, such private life rights under Article 8 as may have been acquired while here will not be such as to engage the right to an assessment (the second *Razgar* question) one could never rule out the possibility that in an exceptional case, such an assessment might not be required."

24. The Supreme Court, in its determination on an application for leave to appeal in *Rughoonauth v. Minister for Justice and Equality* [2019] IESCDET 124 stated:-

"For the purposes of Article 8(2), the underlying point is the distinction between the situation of persons who create a family life within the host jurisdiction at a time when they are lawfully resident, and perhaps have a history or an expectation of long-term residence, and those who do so when they are aware that the continuation of that life within that State is precarious. The jurisprudence of the ECtHR has established that in the latter circumstances the removal of a non-national family member will constitute a violation of Article 8 rights only in exceptional circumstances."

25. In *S.A. (South Africa) v The Minister for Justice* [2020] IEHC 571, Humphreys J. extensively reviewed the jurisprudence of the European Court of Human Rights in light of a similar type argument, as in this case, which had been made before him. He stated at para 14 of his judgment:-

"The other misconception in the ground as pleaded is that during a period of unsettled status the applicant "had acquired private life rights during this period which have not been considered." That unfortunately is a misunderstanding of the logic of the Strasbourg caselaw in relation to the application of art. 8 of the ECHR to the context of removal decisions. I will discuss this in more detail below, but for present purposes it is sufficient to summarise the position by saying that the kind of family and private life rights that are intended to be protected by art. 8(1) are those acquired during an applicant's period of settled residence in a contracting party's territory, leaving aside the question of exceptional circumstances. The reason why a proportionality analysis is not required, save in such exceptional circumstances, for an unsettled migrant, is that an applicant is not permitted to assert under the heading of art. 8 such personal interests as might have accrued during a period of unlawful or otherwise temporary or precarious presence. Such interests simply do not constitute the sort of "rights" which art. 8(1) is intended to

protect and, therefore, the question of a proportionality analysis does not arise. This hopefully will become clearer below when I discuss the Strasbourg caselaw more specifically.

26. Having conducted this review, Humphreys J provided the following helpful summary of the law regarding Article 8 rights at paragraph 35 of his judgment:-

"The principles in relation to the ECHR caselaw relevant to the present application can be summarised as follows:-

- (i). "Settled migrants" as this notion has been used in the Strasbourg court's caselaw means persons who have already been granted formally a right of residence in a host country (*Jeunesse* para. 104).
- (ii). All other migrants can be described as precarious, unsettled, non-settled, insecure or uncertain in their status (all being interchangeable terms). It is clear from the Strasbourg caselaw that non-settled status covers in essence two categories - those who are unlawfully present and those who have a lawful permission (either express or by operation of law), that is temporary and provisional in nature and falls short of a formal grant of a right of residence.
- (iii). In general (that is, absent exceptional circumstances), asserted private and family life interests cannot be taken into consideration in the court's examination, if they occurred at a time when the applicant's right to stay was precarious in the Strasbourg sense, that is presence that falls short of a formal grant of a right of residence (*Udeh*, para. 50).
- (iv). In the case of settled migrants, subsequent withdrawal of a formally granted right of residence in a host country will constitute an interference with his or her right to respect for private or family life within the meaning of art. 8 requiring a proportionality analysis. This is not so in relation to non-settled migrants (*Jeunesse* para. 104).
- (v). In the case of non-settled migrants, removal of a non-national family member will constitute a violation of art. 8 only in exceptional circumstances (*Jeunesse* para. 108, *A.S.* para. 48). This means that no proportionality analysis is required for the removal of non-settled migrants in the absence of exceptional circumstances. That follows logically from the applicant being unable to rely on such asserted interests or rights built up during a period of precariousness.
- (vi). The domestic authorities must conduct an analysis of art. 8 claims (*Paposhvili* para. 224). That involves using the same methodology as Strasbourg caselaw which in the absence of exceptional circumstances involves asking firstly what the status of the person was at the time the asserted private and family life was built up. It follows that there is not a mandatory duty to conduct a proportionality analysis in every case, but only where one is required by the ECHR, which is where either the person had settled status or where exceptional circumstances apply.

(vii). A decision which (as here) concludes that such private and family rights as the applicant wished to rely on where built up at a time when he or she lacked settled status and, therefore, art. 8(1) is not infringed, is not invalid simply because the Minister did not expressly articulate that the applicant was not considered to be an exceptional case requiring a proportionality assessment (unless the applicant has demonstrated that such an implied failure to find an exceptional case was unreasonable, which this applicant has not)."

27. Accordingly, the jurisprudence of the Irish Courts is extremely well settled to the effect that a migrant with a non-settled or precarious residential status cannot assert Article 8 rights unless exceptional circumstances arise. Accordingly, a proportionality assessment does not arise.

**Does recent case law of the European Court of Human Rights alter the assessment required to be undertaken by decision makers?**

28. As already stated, Mr Justice Humphreys conducted an extensive analysis of the judgments of the European Court of Human Rights regarding this issue, thirty five judgments in total, in *SA v. Minister for Justice and Equality*, which he delivered very recently, on 18 November, 2020.
29. The Applicant asserts that the case of *Pormes v. The Netherlands (No. 25402/14)*, which was delivered on 28 July 2020, develops the ECHR jurisprudence and establishes that non-settled migrants have Article 8 rights engaged and are entitled to have a proportionality assessment conducted without the necessity to establish exceptional circumstances. A reading of the judgment does not reveal that to be the case. At para 56 of the judgment, the Court sets out a detailed analysis of the general principles which apply to Article 8 and private life considerations. However, it concludes at paragraph 58 by stating:-
- "Equally, if an alien establishes a private life within a State at a time when he or she is aware that his or her immigration status is such that the continuation of that private life in that country would be precarious from the start, a refusal to admit him or her would amount to a breach of Article 8 in exceptional circumstances only".
30. With regard to the facts of *Pormes*, the Court found that as the applicant was unaware that his status was illegal, having lived in the Netherlands since a very young age with family members who were legal residents, he did not fall within the category of persons who are so aware and accordingly exceptional circumstances did not have to be established for Article 8 to be engaged.
31. The *Pormes* case does not develop or change the jurisprudence of the European Court of Human Rights, which is obvious from its considerations of the general principles. The judgment of the Court turns on quite specific and unusual facts which are not applicable in the instant case.

32. Accordingly, I am not of the view that the long standing settled jurisprudence of the Irish Courts is in conflict with the jurisprudence of the European Court of Human Rights: the requirement to establish exceptionality in the case of a non-settled migrant or person with a precarious residence, for Article 8 rights to become engaged has not been disapplied. Inferentially, until such time as Article 8 is actually engaged, there is no necessity to conduct a proportionality assessment as otherwise such an assessment would be conducted without Article 8 having been established.

#### **Article 14 ECHR**

33. The Applicant seeks to rely on Article 14 ECHR in support of an argument that because the Applicant had been granted a permission to access the labour market as an asylum seeker whose international protection claim had not been determined within nine months, he should not be discriminated against in the exercise of his Article 8 rights. It is submitted that his Article 8 rights are engaged because of this permission.

34. Granting the Applicant access to the labour market does not alter his residency status within this jurisdiction. He remains an individual who does not have a permission to be within the State save for the determination of his application for international protection which has now been determined against him.

35. Therefore, he is a person with no legal status within the State, who only ever held a precarious status arising for the purpose of his international protection claim. Accordingly, the requirement to establish exceptional circumstances for the engagement of Article 8 rights remains. Article 14 ECHR only becomes engaged when another ECHR right is engaged. As Article 8 has not been engaged, Article 14 is not applicable in the instant matter.

#### **Constitutional Rights**

36. It is further submitted that the Applicant has a constitutional right pursuant to Article 40.3 of the Constitution to respect for his private life which was interfered with in an unjustified and disproportionate manner in light of Article 40.1.

37. While *NHV v. Minister for Justice* [2018] 1 IR 246 recognises that a non-citizen can rely on constitutional rights, the Court fails to see how Article 40.1 of the Constitution is engaged in this instance to require a proportionality assessment be carried out. Indeed in *NHV*, O'Donnell J stated at p 312 of the judgment:-

“For present purposes, I would be prepared to hold that the obligation to hold persons equal before the law “as human persons” means that non-citizens may rely on the constitutional rights, where those rights and questions are ones which relate to their status as human persons, but that differentiation may legitimately be made under Article 40.1 having regard to the differences between citizens and non-citizens, if such differentiation is justified by that difference in status.

38. It follows that differentiation between non-citizens with legal status and non-citizens with illegal status can also legitimately be made, if such differentiation can be justified by their status.

39. In a situation where Article 8 rights are found not to be engaged and any private rights arising under the Constitution were acquired in a situation when the Applicant knew that his legal situation was precarious, the Court fails to see that the Applicant has acquired a procedural right guaranteed under the Constitution to have a proportionality test conducted.

**Failure to give reasons**

40. The s. 49(3) finding is set out earlier in this judgment at paragraph 16. The finding deals with the Applicant's private and family life and the fact that it has been found that a refusal to grant permission to remain does not constitute a breach of his rights.
41. The "Decision" pursuant to s. 49(4) has also been set out earlier in this judgment at paragraph 9. It recites, in summary, that having considered the applicant and the particular circumstances of the case and his right to respect for his private and family life, nonetheless, a permission to remain should be refused. The reasons for refusing permission to remain have not been set out however.
42. The Applicant submits that there has been a failure to provide a reason for this decision. If this decision stood by itself, the decision could be found to be defective for failure to provide reasons for the refusal to grant permission. However, the s. 49(7) decision at issue, is a review decision of the original s. 49(4) decision.
43. The original s. 49(4) decision stated under the heading "Section 49(3)(e) – The Common Good

"It is in the interest of the common good to uphold the integrity of the international protection and immigration procedures of the State and to protect the economic well-being of the State.

The applicants legal representatives have submitted that the applicant is keen to progress in his studies and be given permission to work so he can be gainfully employed and not be a burden on the State. They also submitted that granting the applicant permission to remain would have a positive net effect on the common good, given his good character, employability and level of integration."

44. The s. 49(7) review decision recited under the same heading (s. 49(3)(e):-

"The applicant has not submitted any information under this heading in accordance with section 49(9), therefore the consideration previously undertaken under this heading remains valid and requires no additional consideration."

Accordingly, it is expressly stated that the considerations in the original s. 49(4) decision carry over into the s. 49(7) review decision.

45. In the original s. 49(4) decision, under the heading "Consideration under Article 8 of the European Convention on Human Rights (ECHR)", after setting out the applicable case law,

the facts pertaining in this case, and the determination that exceptional circumstance did not arise, the following paragraph appears:-

“It is in the interest of the common good for the State to maintain control of its own borders and to operate a regulated system of control, processing and monitoring of non-national persons in the State. It is consistent with the Minister’s obligations to impose those controls and is in conformity with all domestic and international legal requirements.”

46. In a judgment delivered by this Court, *SKS v. International Protection Appeals Tribunal* 2020 IEHC 560, I stated the following regarding the duty to give reasons:-

“21. The duty to give reasons is so well established that perhaps an engagement with the essence of the duty is sometimes overlooked. In *Connelly v. An Bord Pleanala* [2018] IESC 31, Clarke CJ set out, at paragraph 5.4 of the report, the purpose behind the duty to give reasons which illuminates a decision maker’s duty in this regard. He stated:-

“One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will be rarely sufficient simply to indicate the factors taken into account and assert, that as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision maker clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons.”

Having considered a number of cases in this area, Clarke CJ continued at paragraph 6.15 of the judgment:-

“Therefore it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Clearly related to this latter requirement, it also appears from the case law that the reasons

provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review.”

22. Dealing with a situation where the reasons for a decision are not apparent on the face of a document issuing a determination, Clarke CJ referred to the decision of Fennelly J in *Mallak v. Minister for Justice* [2012] IESC 59 wherein Fennelly J stated at paragraph 66 of the judgment:-

“The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.”

23. In *YY v. Minister for Justice* [2017] IESC 61, O’Donnell J., made the following remarks regarding the question of whether adequate reasons had been given for the issuance of a deportation order, at paragraph 80 of the report:-

“I consider that a court should be astute to avoid the type of over-refined scrutiny which seeks to hold civil servants preparing decisions to the more exacting standards sometimes, although not always achieved by judgements of the Superior Courts. All that is necessary is that a party, and in due course a reviewing court can genuinely understand the reasoning process.”

Having analysed the reasons given in that case, O’Donnell J continued:-

“I cannot have the level of assurance that is necessary that the decision sets out a clear and reasoned path, and moreover one that was not flawed or incorrectly constrained by unjustifiable limitations of irrelevant legal considerations.”

47. Applying that analysis to the instant matter, while the reason for refusing permission to remain may not be stated in the s. 49(7) review decision, having regard to the original s. 49(4) decision it is obvious that permission was refused because the Respondent determined that the Applicant’s personal circumstances did not outweigh the State’s interest in upholding the integrity of the international protection and immigration procedures of the State and protecting the economic well-being of the State.
48. Accordingly, I do not accept that there has been an inadequacy to provide reasons in the s. 49(7) review decision having regard to the contents of the original s. 49(4) decision.

**Lawfulness of the s. 49(7) decision in light of it being taken by a person who is also appointed as an IPO**

49. Section 49 of the 2015 Act places an onus on the Respondent, exercising the executive power of the State, to consider whether a failed asylum seeker should be given a permission to remain in this jurisdiction having regard to an applicant’s personal circumstances and matters of State policy. In the first instance, this onus arises when a

recommendation has been made by an IPO that an asylum seeker be given neither a refugee or a subsidiary protection declaration. The onus again arises if an appeal to the International Protection Appeals Tribunal affirms the negative recommendation of the IPO and the applicant thereupon submits further information to the Respondent regarding permission to remain in the State.

50. The 2015 Act saw the introduction of a unitary process in respect of an application for international protection and permission to remain whereby an application for a declaration of refugee status results in that application together with a subsidiary protection application being considered at the same time by an IPO. In the event of such an application being unsuccessful, an onus then devolves onto the Respondent to consider whether permission to remain should be granted without the necessity for a further application to be made in this regard. This unified approach has reduced in a very significant manner, the extremely long delays which had become endemic in the previous system.
51. The 2015 Act is clear regarding the designation of responsibility with respect to the two separate decisions at issue in the 2015 Act: an IPO has responsibility for the international protection decision whereas the Respondent has responsibility for the permission to remain decision.
52. In practise, the s. 49 decision is taken on behalf of the Respondent by an officer of the Respondent who works within the International Protection Office. Such person will also have been appointed as an IPO.
53. The exercise by an officer of the Respondent, who is also appointed as an IPO, of the Respondent's s. 49 decision making power was commented upon, without negativity, by the Supreme Court in *IX v. IPAT* [2020] IESC 44 as follows:-

"Leave to remain is a matter of domestic law and a matter for the discretion of the Executive, exercised in this case by the Minister, and the Act therefore constitutes the IPO as, also an officer of the Minister for the purposes of such an application."
54. In summary, the issue which the Applicant raises regarding the operation of the system, is that the decision pursuant to s. 49 was unlawfully made on behalf of the Respondent by a person who also was appointed as an IPO. The Applicant accepts, having regard to the Carltona principle, that the s. 49 decision can be made by an officer on behalf of the Respondent and does not have to be taken by the Respondent herself. However, it is asserted that it is inappropriate that the decision be taken by an IPO as this fails to respect the separate and distinct roles of an IPO determining an international protection claim and the Respondent, exercising the executive function of the State, permitting a person to remain in the State on humanitarian grounds.

**Relevant sections of the 2015 Act**

55. The long title to the 2015 Act includes the following in its description of the Act:-



“An Act to restate and modify certain aspects of the law relating to the entry into and presence in the State of persons in need of international protection, while having regard also to the power of the Executive in relation to these matters...”

56. The following sections of the 2015 Act are relevant to the argument before the Court:-

Section 2 provides *inter alia* that:-

“International Protection Officer” means a person who is authorised under section 74 to perform the functions conferred on an International Protection Officer by or under this Act”;

Section 35 provides *inter alia*:-

“(12) Following the conclusion of a personal interview, the interviewer shall prepare a report in writing of the interview.

(13) The report prepared under subsection (12) shall comprise two parts—

- (a) one of which shall include anything that is, in the opinion of the International Protection Officer, relevant to the application, and
- (b) the other of which shall include anything that would, in the opinion of the International Protection Officer, be relevant to the Minister’s decision under section 48 or 49 , in the event that the section concerned were to apply to the applicant”.

Section 39 provides *inter alia*:-

“(1) Following the conclusion of an examination of an application for international protection, the International Protection Officer shall cause a written report to be prepared in relation to the matters referred to in section 34.”

Section 49 provides:-

“(1) Where a recommendation referred to in section 39(3)(c) [that the applicant should be given neither a refugee declaration nor a subsidiary protection declaration] is made in respect of an application, the Minister shall consider, in accordance with this section, whether to give the applicant concerned a permission under this section to remain in the State (in this section referred to as a “permission”).

(2) For the purposes of his or her consideration under this section, the Minister shall have regard to—

- (a) the information (if any) submitted by the applicant under subsection (6), and
- (b) any relevant information presented by the applicant in his or her application for international protection, including any statement made by him or her at his or her preliminary interview and personal interview.

- (3) In deciding whether to give an applicant a permission, the Minister shall have regard to the applicant's family and personal circumstances and his or her right to respect for his or her private and family life, having due regard to—
  - (a) the nature of the applicant's connection with the State, if any,
  - (b) humanitarian considerations,
  - (c) the character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions),
  - (d) considerations of national security and public order,  
and
  - (e) any other considerations of the common good.
- (4) The Minister, having considered the matters referred to in subsections (2) and (3), shall decide to—
  - (a) give the applicant a permission, or
  - (b) refuse to give the applicant a permission.
- (5) The Minister shall notify, in writing, the applicant concerned and his or her legal representative (if known) of the Minister's decision under subsection (4), which notification shall be accompanied by a statement of the reasons for the decision.
- (6) An applicant—
  - (a) may, at any stage prior to the preparation of the report under section 39(1) in relation to his or her application, submit information that would, in the event that subsection (1) applies to the applicant, be relevant to the Minister's decision under this section, and
  - (b) shall, where he or she becomes aware, during the period between the making of his or her application and the preparation of such report, of a change of circumstances that would be relevant to the Minister's decision under this section inform the Minister, forthwith, of that change.
- (7) Where the Tribunal affirms a recommendation referred to in section 39(3)(c) made in respect of an application, the Minister shall, upon receiving information from an applicant in accordance with subsection (9), review a decision made by him or her under subsection (4)(b) in respect of the applicant concerned.
- (8) Subsections (2) to (5) shall apply to a review under subsection (7), subject to the modification that the reference in subsection (2)(a) to information submitted by the applicant under subsection (6) shall be deemed to include information submitted under subsection (9) and any other necessary modifications.
- (9) An applicant, for the purposes of a review under subsection (7), and within such period following receipt by him or her under section 46(6) of the decision of the Tribunal as may be prescribed under subsection (10)—

- (a) may submit information that would have been relevant to the making of a decision under paragraph (b) of subsection (4) had it been in the possession of the Minister when making such decision, and
  - (b) shall, where he or she becomes aware of a change of circumstances that would have been relevant to the making of a decision under subsection (4)(b) had it been in the possession of the Minister when making such decision, inform the Minister, forthwith, of that change.
- (10) The Minister may prescribe a period for the purposes of subsection (9) and, in doing so, shall have regard to the need for fairness and efficiency in the conduct of a review under this section.
- (11)(a) A permission given under this section shall be deemed to be a permission given under section 4 of the Act of 2004 and that Act shall apply accordingly.
- (b) A reference in any enactment to a permission under section 4 of the Act of 2004 shall be deemed to include a reference to a permission given under this section."

Section 50 provides:-

- "(1) A person shall not be expelled or returned in any manner whatsoever to the frontier of a territory where, in the opinion of the Minister—
- (a) the life or freedom of the person would be threatened for reasons of race, religion, nationality, membership particular social group or political opinion, or
  - (b) there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.
- (2) In forming his or her opinion of the matters referred to in subsection (1), the Minister shall have regard to—
- (a) the information (if any) submitted by the person under subsection (3), and
  - (b) any relevant information presented by the person in his or her application for international protection, including any statement made by him or her at his or her preliminary interview and personal interview.
- (3) A person shall, where he or she becomes aware of a change of circumstances that would be relevant to the formation of an opinion by the Minister under this section, inform the Minister forthwith of that change.
- (4) A person who, but for the operation of subsection (1), would be the subject of a deportation order under section 51 shall be given permission to remain in the State.
- (5) A permission given under this section shall be deemed to be a permission given under section 4 of the Act of 2004 and that Act shall apply accordingly.

- (6) A reference in any enactment to a permission under section 4 of the Act of 2004 shall be construed as including a reference to a permission given under this section.
- (7) In this section "person" means a person who is, or was, an applicant."

Section 51(1) provides:-

- "(1) Subject to section 50, the Minister shall make an order under this section ("deportation order") in relation to a person where the Minister —
- (a) has refused under section 47 both to give a refugee declaration and to give a subsidiary protection to the person, and
  - (b) is satisfied that section 48(5) does not apply in respect of the person, and
  - (c) has refused under section 49(4) to give the person a permission under that section."

Section 74 provides:-

- "(1) The Minister may authorise in writing such and so many persons as he or she considers appropriate to perform the functions conferred on an International Protection Officer by or under this Act.
- (2) An authorisation under this section shall cease—
- (a) where the Minister revokes, under this section, the authorisation,
  - (b) in the case of a person who is an officer of the Minister, where the person ceases to be an officer of the Minister, or
  - (c) in the case of an authorisation that is for a fixed period, on the expiry of that period.
- (3) The Minister may revoke an authorisation under this section.
- (4) An International Protection Officer shall be independent in the performance of his or her functions."

Section 75 provides:-

- "(1) The Minister shall appoint a person, being an International Protection Officer, to perform the functions conferred on the Chief International Protection Officer by or under this Act.
- (2) The Minister may revoke an appointment under this section.
- (3) The functions of the Chief International Protection Officer under this Act shall include the management of the allocation to International Protection Officers, for examination under this Act, of applications for international protection.
- (4) The Chief International Protection Officer shall be independent in the performance of his or her functions."

Section 76 provides:-

- “(1) The Minister may enter into contracts for services with such and so many persons as he or she considers necessary to assist him or her in the performance of his or her functions under this Act and such contracts with such persons shall contain such terms and conditions as the Minister may, with the consent of the Minister for Public Expenditure and Reform, determine.
- (2) The Minister may authorise a person with whom the Minister has entered into a contract for services in accordance with subsection (1) to perform any of the functions (other than the function consisting of the making of a recommendation to which subsection (3) of section 39 applies) of an International Protection Officer under this Act.”

#### **Other Relevant Legislation**

57. Section 4(1) of the Immigration Act 2004 provides:-

“Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as “a permission”).”

#### **The Operation of the International Protection Office**

58. Mr Paraic O’Carroll, Assistant Principal Officer in the International Protection Office, swore an affidavit on behalf of the Respondent which sets out the workings of the International Protection Office. Counsel on behalf of the Respondent was at pains to emphasise that the 2015 Act did not establish the International Protection Office and that it is not a legal entity, nor a statutory office: that the statutory functions created by the 2015 Act relate to the Chief International Protection Officer and IPOs. This is clearly the case, however it is equally clear that such an office does exist and that correspondence issues from this office notifying applicants for international protection of the outcome of their application together with the outcome of the Respondent’s permission to remain consideration pursuant to s. 49(4), if this arises. Mr O’Carroll avers that the International Protection Office is a dedicated office within the Immigration Service Delivery division of the Department of Justice.

59. Mr O’Carroll further avers that initially, the Chief International Protection Officer, in addition to managing and overseeing the IPOs’ functions under the 2015 Act, was assigned as an officer of the Respondent for the purpose of performing the functions of the Respondent under the 2015 Act, including the functions of the Respondent under s. 49. However, a reorganisation of the office in 2019 resulted in the responsibility for overseeing and managing the functions of the Respondent under the 2015 Act, including those under section 49 and 50, and the management of staff in their roles as officers of the Respondent when performing ministerial related functions, being transferred to the Head of Operations.

60. Mr O'Carroll explains the determinative process in respect of an application for international protection within the International Protection Office as follows at paragraph 7 of his affidavit:-

"Under the single procedure, in place under the 2015 Act, an applicant makes only one application, and has all grounds for seeking international protection (refugee status and subsidiary protection) as well as permission to remain examined and determined in one process. In effect the civil servants in the International Protection Office of the Immigration Service Delivery division in the Department of Justice have two separate roles under the 2015 Act. They are IPOs for the purpose of dealing with applications for international protection (refugee status and subsidiary protection) having all been so appointed by the Chief International Protection Officer and they are also civil servants and officers of the Minister for Justice for the purposes of the Minister's functions under the 2015 Act."

61. He proceeds to explain at paragraphs 14, 15 and 16 of his affidavit, the situation pertaining since 2018 regarding the determination of an international protection and permission to remain application:-

- "14. A Case Processing Unit, solely responsible for examining an applicant's application for International Protection was established. This unit is staffed by Civil Servants/caseworkers who examine applications for international protection and make recommendations in their capacity as International Protection Officers. These caseworkers in their capacity as International Protection Officers act independently of the Minister. The overall management of this Unit is the responsibility of the Chief International Protection Officer. Where an International Protection Officer makes a recommendation referred to in section 39(3)(c) (i.e., that the applicant should be given neither a refugee declaration nor a subsidiary protection declaration), the applicant's file is then passed to a different unit being the Permission to Remain Unit. This is a separate and distinct unit from the Case Processing unit and is staffed by different civil servants. The overall management of this Unit is the responsibility of the Head of Operations.
15. The Permission to Remain unit is a dedicated unit responsible for making decisions on whether or not an applicant should be given permission to remain in the State under section 49 of the 2015 Act. The caseworkers/Civil Servants in this unit make decisions in respect of permission to remain in their capacity as Officers of the Minister under the authority of the Minister. Where an officer of the Minister makes a decision under section 49, he or she is not exercising the functions of an IPO but is acting solely in his/her role as an officer of the Minister, although all caseworkers have also been formally appointed as IPOs.
16. Where the International Protection Appeals Tribunal affirms a recommendation of an International Protection Officer that an applicant should be given neither a refugee declaration nor a subsidiary protection declaration, the Minister reviews the permission to remain decision provided that the applicant has submitted new

information that would have been relevant to the making of the original decision or has informed the Minister of a change of circumstances that would have been relevant to the making of the original decision. A review of a permission to remain decision is made by a different caseworker acting as officer of the Minister within the Permission to Remain Unit, and not by the officer who made the original Permission to Remain decision.”

### **The Carltona Principle**

62. The Carltona principle recognises that suitably experienced officers of a Government Minister can exercise that Minister’s functions on his or her behalf within the realm of their expertise.

63. The principle was considered by the Supreme Court in *W.T. v. Minister for Justice & Equality and Ors.* [2015] 2 ILRM 225. In that case, the issue to be determined was whether the decision of the Respondent to make a deportation order pursuant to section 3(1) of the Immigration Act 1999 had to be taken personally by the Respondent. The Supreme Court held it did not have to be taken by the Respondent personally and could be taken by an official of the Respondent in accordance with the Carltona principle. MacMenamin J stated:

“1. It is now well recognised in the law that each minister must both bear political responsibility to the Dáil, and legal responsibility in the courts, for actions taken by their own departments. In law, ministers are regarded as being one and the same as the government departments of which they are the political heads. Conversely, departmental officials act in the name of the minister. In making administrative decisions, therefore, discretion is conferred on a minister, not simply as an individual, but rather as the person who holds office as head of a government department, which collectively holds a high degree of collective corporate knowledge and experience, all of which is imputed to the political head of the department. Frequently a minister's officials will prepare documents for consideration, consider objections, summarise memoranda, and outline a policy approach to be taken by the Minister as an integral part of the decision-making process. Part of this arrangement, identified as the eponymous Carltona principle, is that the functions entrusted to departmental officials are performed at an appropriate level of seniority, and within the scope of responsibility of their government department. No express act of delegation is necessary. When the principle became a recognised part of Irish law, it was characterised as being a “common law constitutional power” (see *Carltona Ltd v Commissioners of Public Works* [1943] 2 All E.R. 560; *Bushell v Secretary for State for the Environment* [1981] A.C. 75; *R. v Home Secretary, ex p. Oladehinde* [1991] 1 A.C. 254 at 282 approved by Hamilton C.J. in *Tang v Minister for Justice* [1996] 2 I.L.R.M. 46 and in *Devaney v Minister for Justice* [1998] 1 I.R. 230; [1998] 1 I.L.R.M. 81). The constitutional origins of the power derived from the executive power of the State, identified, *inter alia*, in Art.28 of the Constitution.

2. The principle, clearly, involves a significant degree of reciprocal trust between ministers and officials. An actual decision-maker is vested with the Minister's devolved power. As a matter of prudence, if no more, a minister may often put in place sufficient procedures to ensure that decisions taken, which are of high significance to individuals (such as deportation), are actually reflective of government policy, and are, truly, exercised in a manner which is genuinely discretionary.

### **The Test for Excluding Carltona**

3. In law, the principle, thus expressed, is capable of being negative or confined by express statutory provision to the contrary, or by necessary implication (see generally, Chapter 11 Administrative Law in Ireland 4th Edition, Hogan & Morgan, Roundhall Press). In such cases, then, the test is whether it can be established that a statute clearly conveys that the Carltona principle is not to be recognised, or clearly implies such a conclusion. Although the doctrine was devised under the exigencies of administration in the United Kingdom in World War II, it is now seen as a judicial recognition of the complexity of the administration of modern states, where it would be impractical that a minister, as a political head of a department, could personally take every decision.
  4. In identifying the scope of this principle, a distinction is made when a decision maker is a statutory office holder: then different considerations arise. For present purposes, I distinguish between devolved Carltona powers and what I characterise as delegated statutory powers. The Carltona principle does not apply to statutory office holders exercising decision-making functions delegated by Statute. If, on the other hand, the decision-maker is a civil servant assigned specific duties under Statute, but who operates a devolved power vested in the Minister then the Carltona principle will apply.
  5. The Oireachtas can, by legislation, restrict or prohibit a Minister's power to devolve a decision, and may require the Minister to exercise such decision making power in person. This will require very clear statutory terminology; for example, words to the effect that a direction, or decision, should be made or performed by a Minister "and not by a person acting under his authority". It follows that a Court will be very slow to read into a statute any such implicit limitation; providing that the devolved power does not conflict with the duties of an official in the discharge of their specific functions, and that the decision in question is suitable to their grading and experience."
64. In summary, to ensure the effective administration of a Minister's power, a suitably experienced official of a Minister can make decisions within the power of such Minister without the necessity of the power being expressly delegated to the official. The application of the Carltona principle is assumed to apply unless there is an express statutory derogation from the principle or derogation arises by way of necessary implication from the terms of the statute provided that the devolved power does not



conflict with the other duties imposed on the official in the discharge of his or her specific functions.

**Does the 2015 Act prohibit the derogation of the Respondent's s. 49 power?**

65. In the first instance, the 2015 Act does not expressly state that the decision to grant permission to remain to a failed asylum seeker, pursuant to s. 49 of the 2015 Act, can only be taken by the Respondent. Indeed, it would be absurd if that was the case. While figures have not been placed before me, the Court is well aware of the large number of failed asylum seekers who launch Judicial Review proceedings each year: it would be impossible for the Respondent to personally take s. 49 decisions in each individual case which by implication must be greater than the number of such Judicial Review applications brought before the Court, as well as attending to the vast number of other functions which she is mandated to carry out. Further, the decision to grant a permission to land pursuant to s. 4 of the Immigration Act 2004, which a s. 49 permission to remain is deemed to be pursuant to s. 49(11)(a), is taken by immigration officers acting on behalf of the Respondent. It would be non-sensical that an immigration officer is expressly required to take a s. 4 permission to land decision on behalf of the Respondent but only the Respondent acting personally could take a s. 49 permission to remain decision when they are deemed to be one and the same permission.
66. Indeed, Counsel for the Applicant, in oral argument before the Court clarified his position in this regard indicating that he was not making the submission that a s. 49 decision could only be made by the Respondent personally: rather his argument was that IPOs could not make this decision. Accordingly, a misplaced argument that *NVU v. RAT* [2020] IESC 46 is authority for the proposition that this executive power could not be exercised by the Respondent's officials does not arise.
67. Therefore, with respect to the first part of the test to establish a statutory derogation from the Carltona principle, the 2015 Act does not expressly prohibit IPOs from making the s. 49 decision.
68. Accordingly, the second part of the test to establish a statutory derogation from the Carltona principle arises, namely whether the 2015 Act, by necessary implication, prohibits IPOs from taking a s. 49 decision. In determining this issue, having regard to *WT*, the Court is required to be slow to read into the 2015 Act any implicit limitation. Nonetheless, the devolved power must not conflict with the specific duties and functions of IPOs.
69. In light of the fact that the 2015 Act introduced a unitary system whereby a single application for international protection results in refugee status; subsidiary protection; and permission to remain being considered (if the applicant is unsuccessful in his international protection claim), the Court would have expected the Oireachtas to have been explicit in restricting a consideration of the s. 49 permission to remain decision to officers of the Respondent who were not IPOs, if that had been their intention. The Oireachtas did not legislate in this manner which raises a serious issue against the

argument that the 2015 Act, by necessary implication, prohibits IPOs from making s. 49 decisions.

70. Further, s. 74(2) of the 2015 Act clearly envisages that an IPO can also be an officer of the Respondent. Accordingly, while pursuant to s. 74(4) of the 2015 Act, IPOs are required to be independent in the exercise of their functions, they can also be officers of the Respondent. This implies that they are envisaged by the Act as being capable of carrying out other functions on behalf of the Respondent separate to their independent function as IPOs. In light of that statutory provision, the Court would have expected the Oireachtas to have been explicit in limiting the functions of the Respondent which an IPO is permitted to carry out, if the intention of the Oireachtas was that they should not make s. 49 permission to remain decisions.
71. It is noteworthy that the Oireachtas was mindful of restricting the functions of other actors envisaged by the 2015 Act. Section 76(2) of the 2015 Act restricts persons engaged on a contract for services by the Respondent from making the ultimate recommendation pursuant to s. 39(3) of the 2015 Act regarding an international protection claim, although such persons can be authorised to carry out any other function of an IPO. However, the option of restricting IPOs from making a s. 49 decision was not availed of by the Oireachtas.
72. A further point of note with respect to the 2015 Act is that s. 35(13) creates an interlink between the s. 35 interview report, compiled for the purpose of an international protection claim, and the s. 49 decision to be taken by the Respondent. The sub-section requires the IPO to indicate anything that would in his or her opinion be of relevance to the Respondent's decision pursuant to s. 49. The Applicant submits that this implies that an IPO is not to be further involved in the s. 49 process, however, I do not agree with this interpretation of that provision. Rather, the sub-section recognises the expertise and experience which IPOs possess with respect to s. 49 decisions such that they are mandated to draw the Respondent's attention to matters relevant to that issue. Accordingly, I fail to see that that sub-section necessarily implies a statutory derogation from the Carltona principle.
73. The Applicant seeks to place reliance on a judgment of the CJEU, namely *B and D*, *C-57/09* and *C-101/09*:*C:2010:66* in support of his argument. In this case, the CJEU stated that state protection which a member state has discretion to grant in accordance with its own national law must not be confused with international protection within the meaning of Directive 2004/83 and that there must be a clear distinction between both. Aside from the very different underlying factual situation relating to the national permission arising in this case, the 2015 Act does draw a clear distinction between international protection and permission to remain setting out two separate processes with separate criteria made by separate decision makers, namely IPOs in the former instance and the Respondent in the latter. *B and D* is not supportive of the argument which the Applicant seeks to make that an IPO, in his separate role as an officer of the Minister, cannot take s. 49 decisions.

74. Accordingly, I am of the view that the 2015 Act does not raise any necessary implicit limitation on an IPO making s. 49 decisions.
75. However, a further question remains, as identified in *WT* and the English authorities of *R v. SSHD (ex parte Oladehinde)* [1991] 1 AC 254 and *R (Bourgass) v. SSJ* [2015] UKSC 54, namely whether the devolved s. 49 power conflicts with the duties and functions of an IPO which the official has separately been specifically assigned. If so, the Carltona principle cannot apply and the official is prohibited from making the s. 49 decision on behalf of the Respondent.
76. With respect to the specific duties and functions at issue in the instant case, IPOs have a skill and expertise in dealing with international protection claims. As averred to by Mr O'Carroll, on behalf of the Respondent, they receive extensive training on various topics regarding international protection claims including the applicable legal framework, the assessment of credibility, and Country of Origin Information research. The question naturally arises as to why a body of persons who have received such extensive, detailed and particularised training in the area of international protection claims, as detailed in the affidavit of Mr O'Carroll, are prohibited from making a related though distinct decision regarding granting permission to remain to failed asylum seekers on humanitarian grounds. The answer posited by the Applicant is that acting in these two roles breaches the independence of IPOs, creates a conflict in the performance of their statutory functions and causes an embarrassment in the operation of the 2015 Act. However, I fail to see how. The decisions at issue are separate and distinct raising different issues, although inter-related at the same time: the international protection deliberation determines the question of whether a person qualifies for a refugee or subsidiary protection declaration based on a defined European regime whereas the permission to remain deliberation determines whether a person should be permitted to remain in this jurisdiction having regard to their personal circumstances and State policy.
77. There is a suggestion underlying the Applicant's claim, that because a fellow IPO has refused the international protection claim, another IPO working in a separate division which deals solely with permission to remain applications, somehow is unable to act independently, in a detached manner and apply the correct criterion to the decision at issue. That suggestion fails to recognise the different systems in being with respect to each determination and the separate, distinct and defined criteria applicable. It is nonsensical to suggest that trained, experienced, detached, professional officers of the Respondent will refuse an applicant permission to remain simply because a colleague working in another division has recommended against giving that applicant a refugee or subsidiary protection declaration.
78. The real concern of the Applicant perhaps is that of re foulment and the determination of this issue within the s. 49 decision making process. The question is raised by the Applicant as to how the IPO determining the s. 49 issue can decide that re foulment arises when another IPO has determined that international protection is not warranted in the matter. The difficulty with this argument is that the Respondent is entitled in any event

to have regard to the determination of the IPO with respect to the issue of refoulement. In *Kouaype v. Minister for Justice Equality and Law Reform* [2011] 2 I.R. 1, Clarke J expressed the view: -

“that it would be unlikely that an unsuccessful applicant for international protection who, having benefitted from a quasi-judicial international protection process in substance amounting to a finding that the prohibition of refoulement does not arise, would be in a position to challenge a deportation decision on reasonableness grounds, although it will be incumbent on the Minister to consider any matters coming to his or her attention which tend to show a change in circumstance from the position which obtained when the decision to refuse refugee status was made in the first place.”

79. In *M.N. (Malawi) v The Minister for Justice & Equality* [2019] IEHC 489, Humphreys J developed this point further at paras 26 and 29 of his judgment stating: -

[26] More broadly, it is certainly not correct to say that the Minister, in making a deportation order or refusing permission to remain, cannot rely on protection decisions including IPAT decisions. A deportation order is the end-stage of a lengthy process of carefully calibrated steps. It is clear that any decision-maker can consider appropriately what happened during previous steps.

[29] In relation to those concerns, one can say as follows. Firstly, s. 50 does not require a *de novo* reconsideration of all matters at this stage of making the deportation order. The Minister can consider all of the relevant circumstances of the case. That is implicit, and by definition that must include the decisions or recommendations of the IPO and IPAT. It is open to the Minister to in effect adopt the reasoning and conclusions of a protection decision for the purposes of the deportation order, and indeed, this is normally implicit in the Minister's decision-making. Furthermore, in particular, the outcome of the refoulement consideration can normally be determined by reference to the outcome of the protection claim, unless exceptional circumstances arise such as the application of the exclusion clause or anything distinctly new or additional presented such as to persuade the Minister otherwise: see the point made in *Meadows v. Minister for Justice and Equality* [2010] IESC 3 [2010] 2 I.R. 701 at 731 per Murray C.J., citing *Baby O v. Minister, Equality and Law Reform* [2002] IESC 44 [2002] 2 I.R. 169 at 193, to the effect that if the applicant did not make submissions regarding refoulement, the decision ‘would have been one of form only and not required any rationale’. That clearly implies that it is not necessary to reconsider the matters *de novo* and that there is an entitlement to rely on previous rejections.”

80. Accordingly, as a point of principle, this fact alone is not sufficient to establish that an IPO should not be permitted to make a s. 49 decision. The principle of *nemo iudex in causa sua* does not arise as the s. 49 decision is not an appeal decision from a refusal of international protection and whilst the question of refoulement arises in each separate decision, the decision maker in the s. 49 decision making process is entitled to have

regard to the earlier decision with respect to refoulement in the international protection decision. There is no evidence to suggest or infer that should an additional consideration arise in relation to refoulement that the decision maker in the s. 49 process would not properly and appropriately consider that issue afresh. Judicial review, would in any event, be available should a consideration in this regard raise issues of unreasonableness or irrationality.

81. The Applicant further argues that IPOs are effectively exercising deportation powers when making a negative s. 49 decision which is a conflict with and embarrassment to their statutory IPO functions and duties. Whilst the automatic effect of a negative s. 49 decision is that a deportation order must ensue, this is by operation of law pursuant to s. 51(1) of the 2015 Act rather than being a decision determined by an IPO. Accordingly, the decision at issue remains that of permission to remain.
82. Therefore, it seems to me that by exercising the Respondent's devolved power pursuant to s. 49 of the 2015 Act, an IPO is not conflicted with the duties and functions he is mandated to execute in his role as an independent IPO pursuant of the 2015 Act. His independence pursuant to s. 74(4) of the 2015 Act relates to his role as an IPO who is determining a completely different issue (international protection) to the decision at issue pursuant to s.49 (permission to remain). Hence the cases of *Oladehinde* and *Bourgass* are not apposite to the instant decision as they both considered situations where the devolved decision maker also was assigned a specific decision making role relating to, in essence the same issue: in *Oladehinde* immigration officers were devolved deportation powers (although this was found to be lawful); in *Bourgass* prison officers with a power to order solitary confinement for a specific period of time were devolved a power to determine an extended period of time (this was found to be unlawful).
83. I am supported in my view by the judgment of McDermott J. in *MI v Minister for Justice* [2017] IEHC 570 where he rejected the contention that the deportation decision maker must be a different individual from the international protection decision maker. He stated:-

[96] It is alleged that the decision-makers lacked independence because they were simultaneously looking at questions of deportation and subsidiary protection. I am not satisfied that this was so. Furthermore, I am not satisfied that the evidence establishes that the consideration of the application for subsidiary protection by the first respondent and his officials or the involvement of the same officials in making recommendations in both would lead inevitably to bias. The decisions concern significantly different issues determined at clearly defined and different stages which render them completely separate.

[99] The court is not satisfied that a decision maker in respect of subsidiary protection lacks independence because they are at the same time vested with the decision in respect of deportation. The decision to deport is the final decision made in the immigration process. There is no requirement on a member state to establish a decision-making process which is independent of the first respondent. Different

procedures apply amongst the European Union Member States. In some states provision is made for the Minister for Justice or his/her equivalent to act through their officials and I do not consider that of itself to be legally objectionable under domestic or European Union law.”

84. Accordingly, I am of the view that the Carltona principle has not been displaced in this instance and that IPOs, acting in their separate role as officers of the Respondent, to that of an IPO in respect of which they have independence, can make decisions on behalf of the Respondent pursuant to s. 49 of the 2015 Act.
85. With respect to the submission that the manner in which the Respondent has purported to implement the 2015 Act has blurred or obscured the division between IPOs and the Respondent, the affidavit evidence of Mr O’Carroll reveals this not to be the case. It is clear that the International Protection Office now operates on a divisional basis with separate divisions making international protection decisions; permissions to remain decisions and review of permission to remain decisions. It is clear that training is provided relating to the different functions which staff within the office perform and the roles which they have. Accordingly, I do not accept that there is a lack of clarity regarding the roles which each division perform or that there has been a blurring of the distinction provided for in the 2015 Act.

**Error on the Face of the Record**

86. The Applicant also challenges the s. 49 decision as being unlawful as it is claimed that it contains an error on the face of the record. It is asserted that it is stated to be signed by an IPO rather than a person acting for and on behalf of the Respondent.
87. The factual position, which has been earlier recited, is that the statement of reasons regarding the s. 49 decision is signed by “Ruth Byrne, Case Worker, International Protection Office”. Contrary to what is asserted by the Applicant, she is not stated to be an International Protection Officer and does not sign the statement of reasons as such. The statement of reasons concludes with a paragraph headed “Decision” which states, inter alia “I affirm the decision dated 31/10/2018 that the applicant... should not be given permission to remain in the State under section 49 of the 2015 Act”.
88. In a letter to the Applicant dated 4th December 2019, which emanated from the Department of Justice and Equality, a clear indication is given that “the Minister has decided that there has been no material change in your personal circumstances or country of origin circumstances concerning prohibition of refoulement contrary to section 50” and that “the Minister has decided, pursuant to section 49(4)(b) of the 2015 Act, to refuse you permission to remain in the State”. Reference is made to a statement of reasons for this decision which is enclosed.
89. Accordingly, the Applicant has been notified that the Respondent has refused his review application and on foot of that determination, the Respondent has refused him permission to remain pursuant to s. 49 of the 2015.

90. The assertion that the Applicant would be unaware that the Respondent made this determination is not well founded having regard to the letter of 4 December 2019. Further, Part 9 of the questionnaire form which is required to be completed by an applicant for international protection, and which was completed by this Applicant on 27th June 2017, relates to permission to remain. It sets out the procedure regarding this part of the application, should it arise. It states:-

“If, following the examination of your application for international protection, the IPO recommends that you are not entitled to refugee status or subsidiary protection, the Minister may still give you permission to remain in Ireland on other grounds.

The IPO will assess this matter on behalf of the Minister.....

The IPO and the Minister will also respect the prohibition of refoulement and will have regard to any matter raised by you which is relevant to that issue.”...

91. Having regard to this factual scenario, no error appears on the face of the record. As an aside, no confusion could have arisen for the Applicant as to who was determining this issue as it is clearly set out in Part 9 of the questionnaire form which was completed by him.

92. Accordingly, the grounds of challenge to the s. 49 decision relating to the Applicant have not been made out. I will therefore refuse the relief sought and make an order for the Respondent’s costs as against the Applicant.