Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

A & B v. The International Protection Appeals Tribunal & Ors.

Headline
The Supreme Court today has ruled that the International Protection Appeals Tribunal (IPAT) acted *ultra vires* when it did not allow the appellants to apply for an extension of time to appeal the negative first instance recommendations, in circumstances where the Minister for Justice had already accepted the recommendations and issued deportation orders.

Composition of the Court
MacMenamin J., Dunne J., Charleton J., Baker J., Hogan J.

Judgments
MacMenamin J. (with whom Dunne, Baker and Hogan JJ. agree); Charleton J. (concurring for different reasons).

Background to the Appeal
Mr. A and Ms. B arrived in this State and sought international protection. International Protection Officers recommended to the Minister for Justice that they be refused international protection and subsidiary protection. The appellants did not appeal these recommendations to IPAT within the time provided, and a number of months elapsed. The Minister for Justice accepted the recommendations and made orders for the appellants' deportation.
The appellants then wrote to IPAT seeking an extension of time to file appeals. IPAT refused to consider this as the Minister had made a decision under s. 47 of the Act such that the appellants no longer had recommendations *simpliciter* under s. 39 against which to appeal.
The appellants sought an order of *certiorari* in the High Court. Barrett J. found that the appellants had ceased to be "applicants" and could therefore not come within reg.4(5) of the 2017 Regulations which permits applications for extensions of time to be made by "*applicants"*. Section 2(2) of the Act states that "*A person shall cease to be an applicant on the date on which (…) the Minister refuses (…) both to give a refugee declaration and to give a subsidiary protection declaration to the person".*
The High Court found that IPAT did not err in law and that the appellants' applications were also impermissible collateral attacks. Barrett J. refused to grant certificates for leave to appeal to the Court of Appeal, and the appellants appealed to the Supreme Court where leave was granted.

Judgment of MacMenamin J.

The Court is asked to determine whether s.2(2) is in breach of EU law, and/or unconstitutional, and/or incompatible with the State's obligations under the ECHR Act 2003. The Court is also requested to determine whether the challenge amounts to a collateral attack on previous, unchallenged decisions, and whether the appellants are entitled to orders of *certiorari* **[58]**.

MacMenamin J. begins by tracing the legislative history of the International Protection Act, 2015, examining what constitutes an "applicant" in the 2015 Act and in previous legislation. Under the Refugee Act, 1996, an applicant was defined as "*a person who has made an application for a declaration under section 8".* In *M.A.R.A.*, this Court observed that the term was "*surprisingly wide*" and allowed a person whose refugee application had failed to retain her status as "applicant" for all subsequent litigation **[11-15].** MacMenamin J. notes that the drafters of the 2015 Act had thus sought to place a limit on how long a person remains an "applicant" **[17].**

MacMenamin J. does not believe that a consideration of EU law Directives (specifically the Procedures Directive 2005/85/EC) or CJEU case law aids the appellants' case. Addressing the CJEU judgments in *Abdoulaye Amadou Tall* and *Dangua* amongst others, he holds that these do not provide a clear basis for concluding that the terms of the Act undermine EU law principles of legal certainty or the right to an effective remedy **[68-86].** He observes that time limits are not always final, and that fair procedures may allow for extensions of time **[87].**

MacMenamin J. proceeds to deal with preliminary issues. He finds that the s.39(3) recommendation by the IPO has been superseded by the Minister's refusal under s.47(5)(b), and that s.47(5)(b) is now operative. He holds that there is no lacuna in the Act in terms of providing periods in which to bring appeals. He is not convinced that the appeal is a collateral attack—the appellants cannot reset the clock and have their appeals allowed by IPAT; the most they can achieve is for IPAT to *consider* their applications to extend time in which to appeal **[89-95].**

MacMenamin J. sets out observations from a survey of the legislation. Section 47(5)(b) makes no mention of precluding an extension of time. Neither s.2(2) nor s.47(5)(b) sets out a timeframe in which the Minister may issue a refusal. Sections 21 and 22 do make provision for persons (not only 'applicants') to apply for extensions of time. Prior to the 2015 Act, people in the appellants' positions could apply for extensions of time after the Minister' refusal. Neither s.2(2) nor s.47(5) in isolation have express words which purport to exclude persons such as the appellants from applying for extensions of time. He describes the appellants as being caught "in an effective "*pincer*" movement between s.2(2) and s.47(5)(b), not because of anything *prima facie* unconstitutional in s.2(2) but, rather, because of IPAT's interpretation of the two sections in conjunction **[106-115].** MacMenamin J. rejects the respondents' contention that s.2(2) is a pure definitional section, holding that both provisions, acting together, are operative **[116-119].** Were the respondents' submissions to be accepted the Minister could make her decision at any point after the expiry of the 15-day time limit, leaving certain persons with no way to apply for extensions of time. The respondents' suggested resolutions (writing to the Minister or judicial review) are too ill-defined and amorphous, MacMenamin J. holds **[123-125].**

MacMenamin J. rules that the 2015 Act lies within the class of legislation where courts may apply a fair procedures approach with regard to time limits. He rules that the impugned provisions in the Act enjoy a presumption of constitutionality unless the contrary is clearly established. The appellants' request that s.2(2) be declared unconstitutional is described as "utilising a very large hammer to crack a very small nut". Instead, he rules that the double-construction rule of interpretation allows for judges to interpret a provision that deviates to a degree from the ordinary and plain meaning of the provision, within the limits permitted by the Constitution. He concludes that persons, formerly applicants, may apply to extend time to appeal, as a matter of fair procedures and constitutional justice. He refuses to issue a declaration of unconstitutionality but grants a declaration that IPAT erred in law in precluding the appellants from applying to extend the time to file appeals.

Judgment of Charleton J.

In his judgment, Charleton J. finds that the Act cannot be declared unconstitutional, on different grounds to MacMenamin J. He holds that the matter should be returned to the Minister who can decide whether to uphold or to alter the s.47 order on foot of the new information regarding the appellants' intention to seek to extend time **[21].**

Charleton J. notes the practical necessity to determine a stage at which an individual can no longer apply for international protection to ensure that the system functions properly. He highlights the "shared burden" of responsibility in such a system between the State and the applicant to minimise delay, an issue that was significantly criticised prior to the introduction of the 2015 Act, and one that the Act sought to address. However, a reasonable method of appeal is crucial to protect individuals' fundamental rights within the international protection framework **[4-8].**

Cases such as *Bode v Minister for Justice* and *Osheku v Ireland* show that the Supreme Court consistently recognises that control over immigration vests in the State as a cornerstone of governmental power. Charleton J. finds that the Minister retains a power to grant permission to an individual to remain in the State. While executive discretion does not extend to repealing legislation, discretion is only removed where it is expressly overridden by statute. The fact that this is not done by the 2015 Act, and that immigration policy constitutes a core executive function means that this threshold is not met in this instance **[9-11].**

Charleton J. holds that a constitutional interpretation in this instance is demanded if not contradicted, and that the absence of a clear removal of the Minister's discretion means that there is no prohibition on an executive decision to suspend the operation of the original trial under Article 28.2. Any other interpretation would be an excessive restriction of a fundamental State power. Alternatively, it is held that the Minister may amend the regulations to enable a discretionary appeal. However, it is also stated that the Minister is not required to overturn the original decision if IPAT does not find

that there are exceptional circumstances, as required by the 2015 Act, for extending the time to pursue an appeal **[15-18].**

Applying these findings to the facts of the case, Charleton J. holds that the Minister retains the power to temporarily suspend an order where an application to extend time is set to be made, and discretion is also retained to rescind the order made under s.47 if a recommendation is changed subsequent to such an appeal. Such a decision would then be subject to the clear disregard test of constitutional rights, as it involves the exercise of executive power under Article 28.2 **[20].**

Case history

27th January 2022	Oral submissions made before the Court
[2021] IESCDET 114; [2021] IESCDET 119	Supreme Court Determination granting leave
[2021] IEHC 25	Judgment of the High Court