THE SUPREME COURT

[RECORD NO.: 2021/92]

MacMenamin J.
Dunne J.
Charleton J.
Baker J.
Hogan J.

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

BETWEEN:

A

APPELLANT

V.

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

RESPONDENTS

AND

B

APPELLANT

V.

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

RESPONDENTS

Judgment of Mr. Justice John MacMenamin delivered the 18th day of July, 2022

I. Introduction

1. These two linked appeals arise against a background where the first appellant, Mr. A, is from the Republic of Georgia, and the second appellant, Ms. B, is from Brazil. Both arrived in this State and applied under s.15 of the International Protection Act for international protection in the form of political asylum or subsidiary protection. Their cases were considered by international protection officers ("IPOs"), appointed under the International Protection Act, 2015 ("the 2015 Act" or "the Act"). That consideration took place under

procedures laid down in ss.34 to 38 of the Act. The officers made recommendations that the applications be refused under s.39(3)(b) of the Act. Both officers then issued reports to the Minister under s.40 of the Act, conveying their recommendations that the appellants' applications for international protection be refused.

2. The 2015 Act allows for appeals against such first instance IPO decisions. Such appeals are brought under s.41(1)(a) to the first respondent, the International Protection Appeals Tribunal ("IPAT" or "the Tribunal"). Neither appellant filed notices of appeal within time. A number of months elapsed, longer in the case of Mr. A. The cases were progressed further through the system. Ultimately, the second respondent ("the Minister") accepted the officers' recommendations that neither appellant should be granted international protection. Exercising the power vested under s.47(5)(b) of the 2015 Act, the Minister refused to grant the appellants international protection, and later made orders for their deportation under s.51 of the Act.

3. At that stage, the appellants retained solicitors, who made applications on behalf of their clients to the Tribunal to extend the time within which to appeal the officers' s.39 decisions, as, by then, the time limit for filing appeals had expired.

4. The Tribunal did not refuse to extend the time by virtue of the merits of either application. Instead, it simply refused to even entertain the applications, relying on the provisions of the Act. The High Court judgment upheld those decisions ([2021] IEHC 25, Barrett J.). The judge considered issues of EU and national law in detail. One of the key issues now arising is the definition of "applicant" contained in the Act. The respondents' case is that persons who apply for international protection, and who do not appeal within the time limit provided for appeals, are no longer "applicants" within the meaning of the 2015 Act, and consequently, are thereby precluded from applying for extensions of time. The appellants challenged whether the definition complied with EU law and the Constitution. The High Court judge held that s.2 of the 2015 Act, which defines the term "*applicant*", did not offend against the EU principles of legal certainty or access to an effective legal remedy, and did not infringe the appellants' rights to appeal under the Constitution. The appellants appealed directly to this Court, raising arguments under the same headings as in the High Court.

II. The 2015 Act

5. As its Long Title states, the 2015 Act was enacted in order to restate and modify certain aspects of law relating to the entry into, and presence in, this State, of persons in need of international protection. The intent of the legislation was to give further effect to Council Directive 2005/85/EC of 1st December 2005 on minimum standards and procedures in member states for granting and withdrawing refugee status, as well as to amend "*certain provisions of the previous immigration legislation*", including the Immigration Acts of 1999, 2003, and 2004.

6. As outlined in the introduction, the Act created a system for first instance hearings by IPOs. Such officers, whose functions are defined in s.2, are authorised under s.74 of the Act to carry out examinations of applications. The Act, in turn, provides that IPAT is to

"*determine appeals*" brought under s.41, and as provided in s.61(4), to perform such "*other functions*" as are conferred on it under the Act. The Tribunal is to be "*independent*" in its role (s.61(3)(b)). Among those other functions is the power, conferred by Regulations made under the Act, to extend the time for filing appeals from an IPO's recommendation to the Tribunal.

7. But if there is no appeal, an IPO recommendation goes to the Minister. On the basis of the recommendation, the Minister may grant either a "*refugee declaration*", or "*subsidiary protection declaration*". If an entirely unsuccessful application is not appealed, it will be dealt with under s.47(5)(b) of the Act. In that circumstance, the Minister will "*refuse*" to give any declaration, and the persons affected may thereafter be subject to orders refusing them leave to remain in the State.

8. The appellants did not appeal the IPOs' recommendations within the 15-day time limit stipulated by S.I. 116/2017- International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 (hereinafter "the 2017 Regulations"). They brought judicial review proceedings challenging IPAT's refusal to entertain the applications to extend time to file appeals.

III. Legislative History

9. Any discussion as to what constitutes an "applicant" in the legislation must begin with an explanation as to why the Oireachtas chose to legislate on the issues and set out something of the legislative history of the term, the meaning and effect of which lies at the centre of these appeals. The apparently simple word, "*applicant*", was defined in s.1(1) of the Refugee Act, 1996. But it raised surprisingly complex problems in practice. The term was defined in broad terms in that Act as "*a person who has made an application for a declaration under section 8*". Section 8 of the 1996 Act, in turn, simply provided that people at the frontier of the State might apply for a declaration of refugee status, and that, upon such application, and subsequent investigation and recommendation made in accordance with the Act, a person might "*be declared a refugee*".

Duba

10. I mention here the important point that there was no provision in the Refugee Act, 1996 which prohibited or prevented an application to extend the time for filing an appeal. In *Duba v. The Refugee Appeals Tribunal* (Unreported, 22nd January 2003), Butler J. in the High Court deprecated the utilisation of a "renewed application procedure" under s.17(7) of the 1996 Act for the purpose of extending time as "wholly artificial". He accepted the argument that the respective powers of the Commissioner, the Tribunal, and the Minister, must, insofar as possible, be interpreted to accord with the principles of natural justice, including fair procedures. He pointed out that there was nothing in the statutory scheme which would prohibit the then Refugee Appeals Tribunal from accepting a late appeal to avoid an exceptional injustice. I return to this point later.

M.A.R.A.

11. The meaning and potential effect of the term "*applicant*" eventually came for consideration before this Court in *M.A.R.A. (Nigeria) an Infant v. Minister for Justice &*

Equality [2015] 1 I.R. 561. That appeal concerned the right of a minor applicant to retain anonymity throughout the asylum process, and even thereafter. This Court observed that the term contained in the 1996 Act was "*surprisingly wide*". It was unlimited both as to time and the result of the application for asylum.

12. This Court (Denham C.J., Hardiman, Clarke, Dunne, Charleton JJ.) explained the broad effect of the definition in some detail. Charleton J. pointed out that, notwithstanding that the appellant's application to be recognised as a refugee had failed, her status as "*applicant*" would nonetheless continue for all subsequent appeals and litigation (p.585).

13. In a key passage, Charleton J. observed that, on that interpretation, an "*applicant*" was, and would always be, a person to whom the restriction against the publication of identity, contained in s.19 of the 1996 Act, applied. He observed that s.5 of the Interpretation Act, 2005 did not require the courts to avoid a construction that "*on a literal interpretation would be absurd or would fail to reflect the plain intention of … the Oireachtas*". He concluded that the Oireachtas must be thought to have had good reason to provide that the status would continue to subsist, and that anyone who had applied for refugee status should retain anonymity, no matter how "*apparently outlandish or incredible*" the grounds put forward in an application, or no matter whether the person had thought the better of it and withdrawn the application or not, and notwithstanding there might be subsequent litigation in public as to the validity of a refusal (pp. 585-586). He held the net consequence of this definition was that, even a failed applicant nonetheless remained an "*applicant*" for the purposes of the 1996 Act. Clearly, this had the potential to create legal and administrative problems.

14. The matter was addressed in the 2015 Act, which sought comprehensively to address many of the procedures relating to international protection applications. The broad concept of "international protection" is now sub-categorised, and the Minister can now grant different forms of positive declaration. The first category giving rise to a declaration of "refugee status", relates to someone with a well-founded fear of persecution for Geneva Convention reasons. The second category, "subsidiary protection" is to be understood as relating to a person who is granted a written statement from the Minister as to eligibility for that status, where *substantial grounds* are shown for believing that, if returned to his or her country of origin, such person would face real risk of suffering harm, as defined. (See Case C-353/16 *MP v. Secretary of State for the Home Department,* or Article 2(e) of Council Directive 2004/83/EC.) Both of these two definitions deal wholly or partially with successful applications. But the legislation also had to deal with a third category, where, such as in the present case, the applications are unsuccessful and the Minister refuses to give a refugee or subsidiary protection declaration.

15. In the process of preparing the legislation, the drafters undoubtedly had to address a range of different contingencies or outcomes from an application for international protection. Many of the relevant provisions are, for that reason, replete with rather lengthy sub-sections. If all these were fully recited here, understanding the issues in

these appeals would be more difficult. It is necessary to start from the term "international protection" and then pursue the way in which the term "applicant" is approached.

IV. Main Provisions of the 2015 Act

International Protection

16. Section 2(1) of the 2015 Act defines the term "*international protection*" as meaning:□

> *"status in the State either -*
>
> *(a) as a refugee, on the basis of a refugee declaration, or*
>
> *(b) as a person eligible for subsidiary protection, on the basis of a subsidiary protection declaration;…"*

This does not create any difficulty in this case.

"Applicant"

17. When dealing with the word "applicant", the drafters obviously had the problem discussed in *M.A.R.A.* in mind. Their intention was to place a limit on the duration and consequences for a person who makes an application for international protection and to prevent persons being regarded as applicants indefinitely, irrespective of the outcome of their application. Without ascribing blame, it must be said the amendments which resulted are elaborate to the point of being labyrinthine. I therefore quote only those parts of the definition which are directly relevant. The effect of the amendments will be best understood on a step-by-step basis, hopefully explained in this judgment.

18. Insofar as material to this appeal, therefore, the term "*applicant*" is defined in s.2(1) of the Act as meaning a person who:

> *"(a) has made an application for international protection in accordance with s.15, or on whose behalf such an application has been made or is deemed to have been made, and (b) has not ceased, under* ***subsection (2)****, to be an applicant"* (Emphasis added).

Section 15 deals with the procedure for applications and is not material to this judgment. But the issue of duration, or cessation, is integral to the appeal and is, in part, dealt with in subs.2(2), which deals with the range of potential outcomes.

Cessation

19. Thus, insofar as relevant, s.2(2) provides that:

> *"a person shall cease to be an applicant on the date on which –*
>
> *(a) subject to subsection (3), the Minister refuses –*
>
> *(i) under subsection (2) or (3) of section 47 to give the person a refugee declaration, or*

(ii) ***under section 47(5) both to give a refugee declaration and to give a subsidiary protection declaration to the person****".* (Emphasis added)

The word "*or*" (emphasised) is disjunctive and deals with two broad contingencies: refusal of refugee status, or any other form of international protection. Section 2(a)(ii) is emphasised for the reason that the Minister refused any form of positive declaration to the appellants, as they had been the subject of negative recommendations by the international protection officers and had not appealed. As a result of the Minister's decisions, these became "refusal cases" under s.47(5) of the 2015 Act. Before moving to s.47(5), however, it is necessary to consider s.2(3) of the Act, which requires still further explanation, as it refers to yet other provisions of the Act.

20. By way of preliminary explanation, if an IPO recommends against any form of protection, the position is provided for in s.39(3)(b) of the Act. An unsuccessful applicant may, under s.41(1)(a), however, appeal a negative recommendation.

21. Section 2(3) therefore provides that:☐

"Where-

(a) a recommendation referred to in s.39(3)(b) is made in respect of an applicant, and

(b) the applicant appeals under s.41(1)(a) against the recommendation, …

he or she shall, ***for the purposes of this Act, remain an applicant until, following the decision of the Tribunal in relation to the appeal****, the Minister, under section 47, gives or, as the case may be, refuses to give him or her a refugee declaration."* (Emphasis added)

Thus, an "*applicant*" who appeals a negative recommendation will retain the status of "applicant", whether or not the appeal is successful, and even if the negative recommendation is upheld by IPAT on appeal. Provided there is an appeal, he or she remains an applicant until a refusal by the Minister under s.47(5). It is only on the making of a decision by the Minister to either give or refuse protection that the person ceases to be an "applicant". In these cases, the Minister's refusal was issued under s.47(5)(b) of the Act, which deals with refusal of any form of protection. The question considered later is whether that definition should be given a broad interpretation or a strict interpretation.

Section 47(5)(b) Refusal of Declaration

22. Insofar as relevant, s.47(5)(b) then provides that, in the event that an IPO issues a report with a negative recommendation which is not appealed to IPAT, then:☐

"… The Minister shall refuse both to give a refugee declaration and to give a subsidiary protection declaration to an applicant where -

…

(b) a report under section 39 in respect of the application concerned includes a recommendation referred to in section 39(3)(c), and ***the applicant has not appealed under section 41 against the recommendation****, …"* (Emphasis added)

Section 47(5), therefore, must be seen in conjunction with the definition of "applicant" contained in s.2(2). Thus, when an applicant has failed to appeal, and the Minister later issues a refusal under s.47(5), such person ceases to hold the status of "applicant". The key question addressed later is whether a person who fails to appeal on time and is subject to a s.47(5) refusal, is actually precluded from later applying for an extension of time within which to file an appeal against the IPO's recommendation. The State respondents submit that, subject to a possible (informal and non-statutory) resolution by an application to the Minister, or by way of judicial review, persons who do not appeal within time, being no longer applicants, are simply ineligible to apply for an extension of time to lodge an appeal when the Minister has issued a refusal under s.47(5)(b) of the Act.

V. The Impugned Decisions

23. The decision in relation to Mr. A was set out in a letter dated 27th August, 2019; that in relation to Ms. B in a letter dated 11th December, 2019. There is one feature of the decisions which is significant, but not immediately apparent. Neither letter made any mention of s.2(2) of the Act. Instead, the letters referred to s.47(3), stating that the application was futile, because the Minister had already issued a refusal, which IPAT stated precluded it from considering the application to extend time.

24. IPAT, therefore, informed both solicitors that the Minister had accepted and acted on the international protection officers' negative recommendations, and had refused to grant the appellants any form of international protection orders under s.47(5) of the Act. Thus, the Tribunal concluded it had no further role in the matters.

VI. The Proceedings

25. The appellants initiated judicial review proceedings. The two cases were heard together in the High Court. The applications failed. The High Court judge later rejected an application for leave to appeal to the Court of Appeal. The appellants applied for leave to appeal directly to this Court. They asserted that the cases raised points of general legal importance. The panel of this Court concluded that a matter of general public importance arose, and granted leave to appeal, specifically as to the meaning and effect of s.2 of the Act. The determination concerning the first appellant was dated 26th October, 2021 ([2021] IESCDET 119); that of the second appellant was dated the 13th October, 2021 ([2021] IESCDET 114).

26. At first sight, it might be thought that these appeals simply concern matters of statutory interpretation. There is no doubt that s.2(2) of the 2015 Act does contain a definition of the term "*applicant*", and that the intent behind the amendment of the term was to limit its effect both as to duration and consequence. The State respondents' case is quite simple. Their argument is that the intent of the legislature was that, in the event that

former "applicants" failed to file appeals within time under s.41, and where the Minister then issued refusals under s.47(5)(b), the appellants were precluded from applying for extensions of time.

27. But the case goes further. The respondents now submit that the effect of the two provisions, read together, is that persons who no longer hold the status of "*applicant*" are, by the terms of the legislation itself, ineligible to apply for an extension of time, not only because the Minister had refused to make declarations in their favour under s.47(5), but also that they are not applicants within the meaning of s.2(2).

28. In essence, therefore, the issue in these appeals is whether, properly construed, the 2015 Act creates what might be seen as a legal Rubicon, from which, once crossed, there is no retreat. One the one hand, there are those who are applicants, and who continue to retain rights while progressing through the appeals system, and, on the other, persons who do not appeal negative s.39(3) recommendations and are then subject to refusal by the Minister under s.47(5)(b). The respondents argue that, interpreting the word *applicant* as one of broad application, those in the latter category cease to be applicants under s.2(2), have fallen "outside the system", and cannot apply for an extension of the time within which to appeal.

VII. The High Court

Concerns as to the merits of the appellants' cases

29. The judgment of the High Court is detailed and comprehensive. It contains an analysis of the issues as matters of interpretation under EU law and national law. But the reasoning can only be understood having first considered the other relevant terms of the Act.

30. Before this, it is appropriate to make a preliminary observation. The judge identified a number of unattractive features of Mr. A's case. He criticised the fact that he had not significantly engaged in the international protection process after adverse findings at first instance. He inferred that Mr. A had given the protection authorities wrong information about his address. He was critical of the fact that it had taken Mr. A more than a year to apply for legal aid, in circumstances where he had been advised of his eligibility to obtain such assistance, both at the outset and during the entire protection procedure. The judge took the view that Mr. A had been less than frank at a number of points with IPAT officials. His criticism of the second named appellant, Ms. B, was less stern. But it is apparent he was firmly of the view that both the appellants were out of time for filing appeals, and that this had consequences. One can fully understand the High Court judge's concerns. The international protection system imposes duties, as well as rights. Applicants are under a duty to engage with the process, and not benefit from a partial or total disengagement, whether accidental or otherwise.

A Key Issue

31. The High Court judge identified what he considered a key issue. He held an application to extend time for appeal could be made only by an "*applicant*". He accepted that, by virtue of s.2(2) of the Act of 2015, the effect of the Minister's s.47 decision was that, by the time the appellants received the letters from IPAT, they had ceased to be applicants, and

so were no longer eligible to make an application to extend time under the Regulation 4(5) of the 2017 Regulations. He observed that Mr. A had "*no grounds for complaint*", and that this finding was a "*complete answer*" to any complaint Mr. A might make regarding his application to extend time.

32. This judgment concerns the extent to which their cases concern merits, EU law, and the Constitution; and whether the IPAT decisions were made in reliance upon a misinterpretation or misapplication of the provisions in the 2015 Act. Subject to a proviso considered later, the effect of IPAT's interpretation in these cases was to create an absolute bar to an application to extend the time for an appeal.

IPAT's Reasons

33. In fact, however, the Tribunal's position was somewhat nuanced regarding these questions. Both letters were to the effect that the appellants were ineligible to apply for extensions of time because the Minister had refused to grant international protection orders under s.47(5)(b) of the Act, though they did not explicitly refer to s.2(2) of the Act.

34. In the case of the first appellant, the relevant official set out the relevant terms of the Regulations governing extensions of time, adding that an extension of time might be granted weeks after a negative recommendation provided the Minister had not made a decision, but that because, in that instance, the Minister had made a s.47 decision there was consequently no s.39(3) "*recommendation simpliciter*" to appeal, and that the s.39(3) recommendation had, therefore, been "superseded" by the Minister's s.47(5)(b) decision. The solicitor was advised that, under s.22 of the Act, she could re-apply to the Minister on the grounds that there were new elements or findings in the case, or that it could be open to a person to request the vacating of, or seek to quash, the s.47(5)(b) decision.

35. In the case of the second appellant, the IPAT official stated that this was "no longer a matter for the Tribunal, but for the Minister". The official recommended that Ms. B's solicitor contact the Ministerial Decisions Unit without further delay, describing the reasons for the late submission. The letter concluded that it could be open to an applicant, or their representative, to request the vacating of, or to seek to quash, the s.47(5)(b) decision at the discretion of the Minister.

VIII. Other Relevant Provisions of the Act

36. Later, this judgment considers in more detail how s.2(2) and s.47(5)(b) should be interpreted. But the true meaning and interpretation of these two sections requires consideration of other provisions of the Act, especially those dealing with other forms of appeal, including those against a s.39(3)(c) refusal, and also an analysis of the regulations made under the Act. All require close consideration for the purposes of comparison.

Forms of Appeal other than under Section 41

37. It is important to note, therefore, that the Act not only deals with appeals concerning IPO or IPAT recommendations against granting refugee status, or subsidiary protection status.

Other sections deal with other "*classes*" of applications and appeals. I refer, in particular, to appeals against what are called "inadmissible applications" and "subsequent applications".

Section 21: Appeals against "Inadmissible Applications"

38. Section 21 of the Act deals with "*inadmissible applications*"; for example, one where an applicant for international protection had already been granted protection by another member state. In a situation such as this, the application would become "*inadmissible*" (s.21(1) and (2)). But the section also contains provisions which, as will be seen, are relevant for the process of interpretation of s.2(2) and s.47(5)(b).

39. What is immediately apparent from an examination of this section is that an individual making an inadmissible application is not defined as an "*applicant*", but as a "*person*" who has made an application. If such individuals appeal, they are not applicants in the strict statutory sense. In fact, s.21 provides, rather, that a "*person*", who has received an adverse decision, may appeal to the Tribunal against the recommendation, within such period as "*may be prescribed under s.77*" (s.21(6)).

"Purposes"

40. A second point is also relevant to the interpretation of s.77, which deals with time for appeals. It is that it is the "*notification*" to the person by the Minister under s.21(6) which provides the trigger for time running for the purposes of lodging an appeal. The term "purposes" has a particular meaning. It deals with when time begins to run in the three categories of appeals identified in s.77, namely, those under ss. 21, 22 and 41.

Section 22: Appeals against "Subsequent Applications": "New Elements"

41. Section 22, in turn, addresses a situation where new elements or findings have arisen subsequent to an earlier refusal by the Minister. But, just as in the case of s.21, s.22 provides that a subsequent application may be made by a "*person concerned*", when that "*person*" furnishes all relevant information showing entitlement to international protection, and a written statement drawing to the Minister's attention any "*new elements or findings*", which have arisen since the determination of a previous application for international protection.

42. But there can also be an appeal. Section s.22(8) provides that a *person* to whom a notification of an adverse recommendation is sent may, within such period from the date of notification as prescribed under s.77, appeal to IPAT against that recommendation.

43. For the present, it is sufficient to record that, for the purposes of ss. 21 and 22, persons who are not "*applicants*" can appeal first instance decisions. Whatever about inadmissible applications under s.21, it must be almost inevitable that a person who makes a "*subsequent application*", under s.22, claiming "*new elements*", will very likely be out of time for filing appeals against an earlier negative recommendation by an IPO under s.39(3). In that sense, such individual will come within the same category or class as the appellants.

44. In these appeals, both appellants state they were not in a position to avail of the s.22 "new elements" provision. The IPAT decision letter to the first appellant's solicitor did not mention the suggestion of applying to the Ministerial Decisions Unit. The letter to the second appellant did. Neither appellant actually pursued that course. The existence of such a unit is not mentioned in the Act, which deals with the statutory scope of IPAT's functions, including its independence, and the form and substance of appeals.

45. The term "person" also arises elsewhere. Section 26 of the 2015 Act, like *M.A.R.A.,* deals with protecting the right to anonymity of applicants. But s.26(5) defines an applicant for that section as meaning a *person* who is, or has been, an applicant under the 2015 Act, or its predecessor, the 1996 Refugee Act.

Appeals against Refusal of International Protection Recommendation under Section 39

46. We move next to deal with the class of appeal relevant to the two appellants: that is, an appeal against adverse international protection recommendations under s.39. It will be recollected that in correspondence with the first appellant's solicitor, IPAT referred to this as a "*recommendation simpliciter*". The official contended that recommendation had been "*superseded*" when the Minister made a decision under s.47(5), to the effect that the appellant was not entitled to a declaration. But it is important to bear in mind that, insofar as eligibility or standing to appeal is concerned, the Act does not contain any express words which distinguish, on the one hand, s.39(3) appeals, and on the other hand, those under ss. 21 and 22.

Section 40 Notification

47. The next step in the appeals procedure is s.40 of the Act. This deals with the notification of recommendations in relation to applications made to international protection officers. But, while s.40 lays down what is to be contained in documentation then to be furnished to the applicant, that provision does not, in fact, deal with the time limitation for appeals.

Section 41: Appeals Procedure and Time for Appeals against Section 39 decisions

48. Section 41 deals with the content of appeals and procedure and refers obliquely to time limits. Section 41(a) provides that applicants may appeal to the Tribunal under s.41(1)(b) against recommendations "*referred to in s.39(3)(c) that [applicants] should not be given either a refugee declaration, or a subsidiary protection declaration*". If the appellants had appealed within time before the Minister made her decision, they would, therefore, have come within s.41(b), and would, consequently, have remained "applicants" under s.2(3) of the Act.

49. Section 41(2)(a) deals with time for an appeal. It provides that an appeal under s.41(1) is to be brought by notice in writing within such period from the date of the sending to the applicant of the notification "*under s.40, as may be prescribed under s.77*". Section 41(2)(b) provides that an applicant seeking to appeal should specify in writing the grounds of appeal, indicating whether they wish the Tribunal to hold a hearing for the purpose of his or her appeal.

Amendment to Section 41

50. Section 41 was amended by Statutory Instrument in 2018. This was for the purposes of the European Union (Dublin System) Regulations 2018 (S.I. No. 62 of 2018). The EU Dublin Regulation provides the legal rules for establishing the criteria and mechanisms for determining the state body responsible for examining an application for international protection made in one of the participating states by a third country national, or a stateless person. Regulation 16(5) of the Statutory Instrument deals with Article 18(1)(d), applicants for subsidiary protection under the Dublin Regulations. An appeal is permitted to IPAT which applies the procedure under s.41 with suitable modification. Such appeals may also be brought by a person.

Three Types of Appeal: The "*Purposes*" of s.21(6); s.22(8) and s.41(2)(a)

51. I deal now with appeals from adverse first instance decisions under s.21(6); s.22(8); and s.41(1)(b), which can now be appraised together. Each is mentioned specifically under s.77. In summary, therefore, for the *purposes* of appeals from the class of appeal identified in s.21 ("*inadmissible applications*"), the time for lodging an appeal runs from notification by the Minister (s.21(6). For the purposes of s.22 ("*new elements or findings*"), the time for appeal also runs from the date of notification, as provided for under s.22(8). For the *purposes* of s.41(2)(a) — that is, the appellants' situation — time runs from the expiry of time within which their putative appeals should have been filed. In the case of the first two categories, s.21 and s.22 allow for ap¬¬peals by a person who is not an applicant. This begs a fundamentally important question regarding appeals under s.41(2)(a). Is it necessary to be an applicant in order to appeal or to apply to extend the time for such appeal?

Section 47(5)

52. As already mentioned, the respondents' case is that, in addition to s.2(2), the appellants' position was also governed by s.47(5)(b) of the Act. The relevant words of the provision have already been set out, and do not require repetition. But it must be noted that s.47 does not set out any minimum or maximum time within which the Minister may issue a s.47(5)(b) refusal after an un-appealed decision by an international protection officer.

Fair Procedures: Section 41(4), Section 63, and Section 77

53. To complete this survey, three other provisions, s.41(4), s.63 and s.77, may also be considered together, as they deal with a common subject matter. All make clear that the Tribunal process laid down by the Oireachtas is to be governed by "*fair procedures*". To this end, s.41(4) provides that the Minister may, in consultation with the Chairperson, and having regard to the need to observe fair procedures, prescribe proceedings for, and in relation to, sub-section (1) regarding the holding of oral hearings. Section 63(1) provides that the Chairperson of the Tribunal is to ensure that the business of the Tribunal is disposed of "*as expeditiously as may be consistent with fairness and natural justice*". As well as "*the need to observe fair procedures*", s.77, in turn, adverts to "*the need to ensure the efficient conduct of the business of the Tribunal*". It also provides for time limits for appeals again, as a matter of fair procedures and to again ensure the effective conduct of the business of the Tribunal.

54. Thus, dealing with all three relevant categories of appeal mentioned in s.77, it is provided that, in consultation with the Chairperson, the Minister may "*prescribe periods for **the purposes of**" s.21(6), s.22(8), s.41(2)(a), and (the irrelevant) s.43(a), "and in doing so, may prescribe different periods in respect of different provisions, or different classes of appeal"* (emphasis added). I emphasise the word "*purposes*" as it has a special meaning. It does not simply deal with appeals procedure, but, specifically, the question of when time begins to run for filing an appeal. The 2017 Regulations made under s.77, and agreed between the Minister and the Chairperson, deal specifically with time limits, and for applications to extend time.

The Regulations: International Protection Act, 2015 (Procedures and Periods for Appeals) Regulations 2017, S.I. No. 116/2017

55. Thus, by Statutory Instrument made under s.77, there are time limits, or "*prescribed periods*", for various forms of appeal. The time limit provided for in reg.3 of the Regulations of 2017 for the purpose of s.41(2)(a) is "*15 working days*". The appellants should have filed their appeals within that time. They did not do so.

56. Significantly, the 2017 Regulations clearly provide for applications for extensions of time for filing appeals. Thus, an applicant seeking an extension of time to file appeals of various classes is to "*set out the reasons why he or she was unable to bring the appeal within the prescribed period, and request and extension of that period*" (reg. 4(1)). Under reg. 4(5)(a) and (b), the Tribunal is not to extend the prescribed period unless satisfied that the applicant has demonstrated there were "*special circumstances*" why the notice of appeal had been submitted after the prescribed period has expired, and that, in the circumstances, it would be "*unjust*" not to extend that prescribed period. Even though, in such instances, the time for lodging an appeal may have expired, it is noteworthy that the individual seeking an extension of time is nonetheless referred to as an "*applicant*" in Regulations 4(1), 4(2), 4(3) and 4(5). Like the appellants, such persons will obviously be out of time. It is to be noted that neither s.77, nor the Regulations, refer to s.47(5)(b) of the 2015 Act.

IX. The High Court Proceedings and Judgment Further Analysed

57. The High Court judgment can now be considered against this rather lengthy prologue. The appellants sought a declaration that s.2(2) of the 2015 Act infringed their rights under the Constitution, in that, as interpreted by IPAT, it barred their rights to apply to extend the time to appeal; and sought declarations under EU law and the European Convention on Human Rights ("ECHR").

Issues

58. A "Facts and Issues" document agreed between the parties asked this Court to determine whether the challenge to s.2 is misconceived, in that, the respondents argue s.47(5)(b) is the "*operative section*". This 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. We are also requested to determine whether the challenge amounts to a collateral attack on earlier decisions already made, but not challenged, and whether, in the circumstances, the appellants are entitled to orders of *certiorari* in respect of the impugned decisions.

The High Court judgment on the constitutionality of s.2(2)

59. The High Court judge dismissed the constitutional challenge. He held that the time limits governing applications for appeal set by the Regulations of 2017 were "*reasonable*". As we will see, the Court of Justice of the European Union ("CJEU") discussed time limits for judicial review in *Danqua*, Case C-429/15.

60. But, as mentioned, the judge also held that, by the time the applications to extend time had been made, the Minister had already made adverse findings under s.47(5)(b) on the appellants' applications for international protection, and under s.51, for leave to remain in the State. Deportation orders had been made in each instance. On this basis, he held that IPAT had correctly declined to deal with the applications to extend time, as it would have been pointless to do so, as the Minister had already made adverse decisions under s.47(5)(b) of the Act. On this basis, he held IPAT had correctly determined that any appeal against the s.39 recommendations made by the international protection officers would have been "*moot or futile*", as the s.39(3) recommendations had been subsumed by the Minister's refusals under s.47(5).

61. But a core point of the *ratio* is that the judge held that, by reference to reg.4(5) of the Regulations of 2017, the Tribunal had correctly determined that the appellants were no longer "*applicants*" under s.2 of the Act. To apply for an extension of time, it was necessary to be an applicant. This was a "complete answer". The appellants had no cause for complaint.

62. He concluded that the appellants' aim was, effectively, to "*reset the clock*" so as to put themselves back in a position where they could retrospectively invoke the statutory appeals process. He held they had not availed themselves of that process, either within the requisite time period, or prior to the Minister making a decision under s.47(5)(b) of the Act. Thus, he held that the procedure which the appellants had sought to adopt was unlawful, as they were seeking to engage in a collateral attack on valid orders already made. While not explicitly said, one might almost infer that the judge would have been inclined to reject Mr. A's claim on discretionary grounds, based on misconduct, although the same considerations did not arise to the same degree in Ms. B's case.

63. I now consider how the High Court considered the issues. It is convenient to begin with the judge's findings on EU law.

X. The High Court Judgment on EU Law Issues

64. The judge was not persuaded that either the Procedures Directive 2005/85/EC, or its successor, 2013/32/EU, insofar as applicable in this State, had any direct bearing on the outcome of the cases. For ease of reference, this judgment contains references to Articles of the 2005 Directive. He was of the opinion that neither appellant had been denied the right to an "*effective remedy*" before a national tribunal under EU law. The enacting and application of time limits which were reasonable had not rendered it "*impossible or excessively difficult*" for the appellants to exercise their rights to an "*effective remedy*" before the national court or tribunal.

65. The judgment also contained an extensive survey and summary of EU case law involving effective remedies and legal certainty. But, as the learned High Court judge himself pointed out, none of the cases to which reference was made touches directly on the precise issue of extension of time for an appeal, or the definition of "*applicant*". I deal with them somewhat more briefly than did the High Court judge. In my view, the main area for discussion is not whether the relevant provisions are consistent with the fundamental EU law principles of legal certainty or right to an effective remedy, but, rather, with national law.

The Appellants' Case in this Court on EU Law

66. The appellants' case is that, in this context, the State is administering EU law and that, while the State enjoys a wide margin of procedural autonomy, that principle is subject to the two EU law requirements of effectiveness, equivalence of treatment and certainty. They argued that a national procedural rule must not render impossible or excessively difficult the exercise of rights conferred by the EU legal order, and that, where possible, national provisions must be given a conforming interpretation. Counsel submitted to this Court that there is a right to asylum under Article 18 of the Charter, and that this means that procedures for seeking and addressing asylum claims must operate fairly. The Court was referred to Article 20 of the Procedures Directive 2005/85/EC, which permits an applicant who discontinues a claim, to apply to re-open it, and permits a late appellant to request that their case be re-opened.

67. Article 39 of that Directive guarantees the right to an effective remedy, whereby applicants for international protection can vindicate their rights. It provides that national laws must lay down the conditions under which it can be assumed that an applicant has abandoned or withdrawn his or her remedy (see Articles 39(1), (2) and (6)). The appellants' case is that the provisions of that Directive not only allow for time limits, but also a facility for an effective remedy, including a facility to extend time. As to certainty, the appellants contend that the governing time limits cannot be either so short as to deprive an applicant of an effective remedy, nor can such law be wholly subjective, based solely on when the Minister makes her decision.

Consideration of the EU Law issue

68. The question is whether the terms of the Directive, or any decided CJEU authorities, lead to a conclusion that either s.2(2) or s.47(5)(b) of the 2015 Act *themselves* infringe EU law. There is nothing specific in the Directive that addresses specifically how to treat applications for extensions of time; it only states that applicants have a right to apply.

69. It is true that in *Belgocodex SA v. Belgian State* (Case C-381/97, 3rd December, 1998) the CJEU affirmed the central place of legal certainty in the EU legal order. In *Commission v. Ireland* (Case C-456/08), the CJEU affirmed the need for sufficiently precise, clear, and foreseeable time limits, to enable individuals to ascertain their rights and obligations, and to protect legal certainty. But these do not advance the appellants' case to any significant degree. I now address two other CJEU decisions which do bear some similarities to the circumstances of these appeals.

Tall

70. *Abdoulaye Amadou Tall v. Centre public d'action sociale de Huy (CPAS de Huy)* (Case C-239/14) [ECLI:EU:C:2015:824] was cited to support the proposition that the Minister's s.47(5) and leave to remain decisions should stand suspended pending the Tribunal's determination as to whether to extend time, and that a s.47(5) decision could not pre-empt such a decision.

71. In *Tall*, the applicant, who was living in Belgium, failed to file an appeal against an adverse decision regarding deportation. The question arose whether, absent action on his part, the Belgian Minister's powers of deportation should be suspended, or whether, rather, the Minister was entitled to continue the process through to its conclusion. The applicant argued that the failure to suspend a deportation order contravened his right to an effective remedy under Article 39(2) of the Procedures Directive, in circumstances where it could be assumed that he had abandoned his application.

72. The CJEU noted that there had been amendments to the Belgian domestic law with transitional provisions. These resulted in the fact that Mr. Tall's appeal did have suspensory effect, and that he was entitled to material assistance during the examination of the issue. But the CJEU nonetheless held that it was bound to give a ruling on the Article 267 reference. The interpretation of EU law was still relevant to resolving the issue. The court noted that Article 39(1)(c) of the Procedures Directive obliged member states to ensure that asylum applicants had the right to an effective remedy before a court or tribunal against a decision not to further examine a subsequent application. In Mr. Tall's case, a decision had been made not to further examine his subsequent application, following a preliminary examination, as provided for in Article 32(3) of the Procedures Directive. Thus, Article 7(2) set out an exception to the obligation to permit asylum applicants to remain in the member state pending examination of the application.

73. But the Court of Justice laid emphasis on the principle that it was open to Member States to provide that an appeal against such a decision did not have suspensory effect. Article 7 of the Directive provided that it was in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals than those set out in the Directive. The CJEU held that an appeal would have suspensory effect if it had been brought against a return decision which could have exposed the applicant to a serious risk of being subjected to inhuman or degrading treatment. But no such question arose.

74. At best, *Tall* raises a question relating, but does not provide an answer, to this appeal. I do not read the judgment as providing authority for the proposition that, once a person is an applicant, that person necessarily remains an applicant for all purposes of EU law. Nor does it provide authority for the proposition that, once made, the Minister's decision under s.47(5) of the Act, and decision to deport, should necessarily have been suspended. *Tall* does not address the right to extend the time for an appeal. The judgment does not determine the question whether IPAT's decisions, in themselves, deprived the appellants of an effective remedy, as a matter of EU law. *Tall* does, however,

does provide that, pursuant to Article 7, EU member states must comply with minimum standards. Member States may, however, provide for higher levels of protection.

Danqua

75. In *Danqua v. Minister for Justice & Equality* (Case C-429/15; EU:C:2016:789), the Court of Justice had to consider legal proceedings brought by Ms. Danqua against the Irish Minister under the statutory regime governing asylum applications prior to the Act of 2015.

76. The applicant was refused an application for a review of refugee status in this State. She was informed she could apply for subsidiary protection within 15 days. The then Refugee Legal Service informed her that, because of the rejection of her application for asylum, she would not be assisted in preparing her application for subsidiary protection. However, Ms. Danqua was assisted in submitting an application to the Minister for humanitarian leave to remain.

77. Later, the Minister informed the applicant that her application had been rejected, and that a decision to return her to her native country had been made. She lodged an application for subsidiary protection. By a subsequent letter, the Minister informed her that her application for subsidiary protection could not be accepted, since the application had not been lodged within the period of 15 working days referred to in the Minister's prior notification rejecting her application for asylum.

78. *Danqua* is noteworthy for a number of reasons. Despite the fact that the Court of Appeal, which referred the issue of the equivalence of remedies to the CJEU under Article 267, had not raised the question of effectiveness, the Court of Justice nevertheless reformulated the question before it so as to ask whether the principle of effectiveness must be interpreted as precluding a procedural rule which required an application for subsidiary protection to be lodged within 15 days of notification by the competent authority so that an applicant, whose asylum application has been rejected, may make an application for subsidiary protection.

79. The CJEU held that it was for Member States to apply national rules in relation to time limits, in the light of the complexities of the procedure, the legislation to be applied, the number of persons to be affected, and any other public or private interests which must be taken into consideration. But the Court went on to hold that the time limit was particularly short. It did not have regard to the human and material situations in which applicants might find themselves. As a consequence, it did not ensure, in practice, that all applicants were afforded a genuine opportunity to submit, and where appropriate be granted, subsidiary protection status. Thus, such a time limit could not be reasonably justified for the purpose of ensuring the proper conduct of the procedure for examining an application for that status.

80. The matter came back for further consideration in the light of this opinion. Hogan J., then speaking for the Court of Appeal (Peart, Irvine, Hogan JJ.) held that the effect of the judgment was that the 15 working days rule was inconsistent with EU law (*Danqua v.*

Minister for Minister for Justice and Equality (No.2)[2017] IECA 17, [2017] 3 I.R. 192). It therefore had to be dis-applied according to *Simmenthal* principles, and as part of the Court's duty of sincere cooperation. The Court of Appeal accordingly held it had no option other than to suspend the operation of the 15-day rule, so that it could no longer provide any legal basis for any administrative decision which had previously sought to apply the rule. The court observed that the Minister had refused to permit the applicant to submit an application for subsidiary protection on the ground that it was out of time by reference to the 15-day rule. It followed, by reason of the binding character of EU law, that the Minister's decision was based on a rule which had been conclusively adjudicated to be contrary to EU law.

Earlier Decisions of this Court

81. I might add that, while the issue does not directly arise for consideration in this case, it follows that earlier jurisprudence of this Court, predating *Danqua*, may now have to be reviewed and reconsidered in the light of that decision (cf. *TD v. Minister for Justice & Equality* [2014] 4 I.R. 277). But *Danqua* does not say anything directly regarding a right under EU law to apply for an extension of time within which to file an appeal. It does establish that it is within the jurisdiction of Member States to establish time limits, provided they accord with EU law, including in particular the principles of equivalence and effectiveness.

Further CJEU Jurisprudence

82. The High Court judgment also refers extensively to other CJEU jurisprudence, where the court in Luxembourg has consistently held that, in cases where a question arose as to whether a national procedural provision made the application of EU law impossible or excessively difficult, such issue fell to be analysed by reference to the role of that provision in the domestic procedure, its conduct, and special features, viewed as a whole before the national bodies. Just as in *Danqua*, in such cases it was necessary to take into account the principles underlying the basis of the national legal system, such as the protection of the rights of defence, the principles of legal certainty, and the proper conduct of proceedings, having regard to the rights of parties concerned, the decisions to be taken, the complexity of the procedures, and the legislation to be applied. The court also had to bear in mind the number of persons who might be affected, and any other public or private interests to be taken into consideration. Unless a clear infringement of EU law were to be shown, it was for member states to establish time limits in areas coming within the scope of EU law, having regard to the nature of the decision to be taken, and the complexity of the procedures. (See also *Kapferer* (Case C-234/04) [ECLI:EU:C:2006:178]; *Virginie Pontin* (Case C-63/08) [ECLI:EU:C: 2009: 666]; *Klausner Holz Niedersachsen* (Case C-505/14) [ECLI:EU: C:2015:742].) *Danqua* does not directly address the issues in this appeal. Arguably, the observation as to time limits might assist the respondents more than the appellants.

83. Citing these cases, the High Court judge rejected the proposition that the Regulations made under the 2015 Act breached the principle of legal certainty, because they did not put a specific limitation on the time within which the Minister might make a s.47(5) refusal decision. In his view, read in conjunction with reg. 4(5), the Act provided that a

s.39 recommendation would be considered up to the moment when that recommendation was superseded by a decision by the Minister under s.47. The judge observed that, *in practice*, applicants were expressly advised in writing of the timeframe within which an appeal against a s.39 recommendation must be brought, and that, if no appeal was brought within that time, the Minister would proceed to a s.47 decision.

An Observation on Time Limits

84. I agree with the learned High Court judge that the Regulations do contain time limits which, viewed in isolation, might (*pace* the observations in *Danqua* regarding the 15-day time limit) be in themselves reasonable. But it is important to note that the judge was also correct in holding that s.47 did not contain any minimum time period preventing the Minister from making a decision which, potentially, could be made quite a short time after the 15-day time limit expires. This is an unavoidable consequence of the way the legislation is drafted.

85. I also agree with the learned trial judge's conclusion that the setting of reasonable time limits by national law cannot be seen as inconsistent with either the principles of legal certainty, or the denial of an effective remedy. State parties are entitled to set time limits. While I accept that an arguable case can be made on legal certainty, I am not persuaded s.47(5) can be seen as actually violating EU law, at least insofar as the facts of the appellants' cases are concerned.

Decision on the EU Law Issue in the High Court Judgment

86. While there are certain similarities, none of the CJEU judgments referred to provides a clear basis for concluding that the terms of the national legislation undermined principles of EU law. There is no CJEU authority which bears directly on applications to extend time, or refusal to accept such application, although there is authority on the duty to re-open cases in certain instances, such as those dealt with in s.22 of the 2015 Act. I do not think the facts of these appeals, when analysed, lend themselves to resolution on the basis of want of legal certainty, or the absence of an effective remedy in national law. Referring now to the frequently repeated observations of the CJEU, cited earlier, the Act of 2015 lays down "*national law and procedure*", corresponding with EU principles. The legislation lays down the rights of the parties, including the defence. It outlines the decisions to be taken. It undoubtedly sets out the complexity of the procedures, and the nature of the legislation to be applied. But, even seen at its high point, the CJEU case law just cited skirts, but does not directly address, the core parts of this appeal, which relates to a bar on applications for extensions of time to appeal.

Legal Certainty and Fair Procedures

87. I would add one observation. The High Court judge made a further significant observation that the ultimate end point of the appellants' case would be to create a situation where the application to extend time to appeal the recommendation might be used to advance a process whereby a s.47 decision, perhaps taken long time before, could be quashed as a consequence of a belated action or decision taken by IPAT. He felt this would create an environment of continuing uncertainty. I think this conclusion must be seen within its broader context. In my view, this statement raises the issue of fair procedures, and

access to this important statutory procedure. Those very principles underlie the legislation. There will be occasions where time limits are not final, and where fair procedures allow for extensions of time for appeals.

88. In now turning to national jurisprudence, I would mention that in *Pepper Finance Corporation (Ireland) DAC v. Cannon & Anor* [2020] 2 I.L.R.M. 373, this Court (O'Donnell, McKechnie, MacMenamin, Dunne, O'Malley JJ.) had to deal with the same issue of extensions of time for appeals. In that judgment, the Court was dealing with extension of time on appeals from the High Court. O'Malley J. referred to other CJEU case law, where the court in Luxembourg held that national procedural limitations in Spain should not stand in the way of access to a remedy. She referred to two judgments where the CJEU held that Spanish procedural rules which limited the grounds upon which enforcement proceedings could be defended, and an effective remedy obtained, which breached the principle of effectiveness (see, *Aziz*, Case C-415/11 and *Morcillo and Garcia*, Case C-169/14).

XI. National Law

Three Preliminary Issues

89. Prior to dealing with the core issues which arise in national law on constitutional rights and statutory interpretation, it is helpful to deal with other questions which arose in argument. These are, first, was IPAT correct in holding the s.39(3) recommendation had been "superseded" by the Minister's refusal under s.47(5)(b); second, whether there is a lacuna in the Act; third, whether the appellants' case amounts to a collateral attack on an earlier decision.

Was the s.39(3) recommendation "superseded" by the Minister's refusal under s.47(5)(b)?

90. The term "superseded" connotes that the s.39(3) decision had been replaced as a matter of law. The scheme of the legislation operates upon the basis that there will be, first, an examination of the application, followed by a report, including a recommendation by the officer, either that the applicant be given a refugee declaration, or, alternatively, in the absence of a refugee declaration, should be given a subsidiary protection declaration, or should be given neither a refugee declaration, nor a subsidiary protection declaration. Section 47(5) of the Act is phrased in imperative terms. It provides that the Minister *shall* thereafter refuse both to give a refugee declaration, and to give a subsidiary protection declaration, to an applicant where a report under s.39(3)(b), in respect of the application concerned includes a recommendation referred to in s.39(3)(c), and the applicant has not appealed under s.41 against the recommendation.

91. By necessary implication, the effect of the legislation is that the s.39(3) recommendation has been "superseded" or replaced. Recital 21 to the Qualification Directive (2011/95/EU) provides that the recognition of refugee status is a declaratory act. In my view, the fact that s.47(5) is couched in imperative terms requires that the Minister's decision must follow a recommendation where there has not been an appeal under s.41. The s.39(3) recommendation has indeed, therefore, been superseded. What was "*operative*" was no longer the recommendation but, rather, the Minister's refusal to grant a declaration. But,

even on IPAT's interpretation, this raised the question as to whether it was s.47(5)(b) alone which was operative.

Is there a lacuna in the Act?

92. On one reading, it might be thought that the appellants' appeals were brought under s.41(b), and that s.77, which identifies the classes of appeals, does not deal with an appeal under s.41(b). Here, it is necessary to remember the legislative usage of the word "*purposes*" in s.41(2)(a). This broad term deals with the question of when time begins to run. It will be remembered that s.77 refers to "*classes of appeal*". It provides:☐

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

Section 43(a) is immaterial for present purposes and may be ignored.

93. While it might *appear* that s.77 does not deal with an appeal where there is a negative recommendation by an IPO under *s.41(1)(b)*, such as occurred in these cases, this is not so. Section 41 is perhaps a little deceptive in the sequence of the sub-sections. The question, or "*purpose*", of when time runs is actually dealt with in s.41(2)(a), that is, the period from the sending of notification to the applicant of notification as "*may be prescribed under s.77*". In fact, the two provisions knit together. Section 77, therefore, correctly identifies the relevant section for the *purposes* of time running in this instance. There is no lacuna.

Collateral Attack

94. The respondents submit that the appellants took no steps to protect their position, and that they are now seeking to "*reset the clock*" in order to invoke the statutory appeal process. The State respondents argue that the appellants are seeking to engage in an "*impermissible collateral attack*" on an earlier step in the proceedings, which should have been challenged in a timely way. It is said that the appellants seek to undermine decisions made within the boundaries whereby the decisions may be challenged but were not so challenged (per Charleton J. in *XX v. Minister for Justice & Equality* [2020] 3 I.R. 532).

95. I am not convinced by this contention. The appellants' position is that they wish to challenge IPAT's decision made, *in limine*, not to entertain the applications to extend time. It is true that the *effect* of the application, were it successful, might, *potentially*, be to allow the appellants to avail of the appeal process before IPAT. But this is to presuppose that IPAT would necessarily find that it should entertain the appeals in the first place. This cannot be viewed as a collateral attack on the earlier decision made under s.39(3)(c). The issue here is a distinct one. The essence of the appeal under challenge is not "*collateral*", it is simply that s.2(2) of the Act, and/or IPAT's interpretation of s.2(2) and s.47(5) has the effect of amounting to a refusal even to deal with *applications* to extend time.

XII. The Core Issue: The combined effect of s.2(2) and s.47(5)

96. In my view, the proper resolution of this case lies in national law. But, as the case was argued, the core question involved several others.

97. It was understandable that the legislature should have endeavoured to address the concerns of this Court in *M.A.R.A.* and seek to create legal certainty regarding the status of "applicants". But the question is, did the legislature tilt the balance too far in the opposite direction, by creating what might be seen as a constitutionally impermissible bar to any application for an extension of time for persons who are no longer applicants?

98. Connected to this first question, there lie other related questions. Did IPAT err in its interpretation of the Act? Applications to extend time, as in appeals from the High Court to the Court of Appeal, or this Court, raise matters of constitutional justice, involving the concept of fair procedures, which, as the statute provides, includes the power to extend the time to bring appeals. Was the judge correct in finding that, because the appellants were no longer applicants, they were ineligible to make an application to extend the time to appeal under Regulation 4(5)? Was IPAT's response actually a complete answer, as the judge held?

99. I deal now with the first issue, that is, the alleged unconstitutionality of s.2(2) of the 2015 Act.

The Respondents' Submissions on the constitutionality of s.2(2)

100. The respondents stand over the High Court decision in its entirety. They contend that s.2(2) of the Act simply provides a *definition* or *interpretation* of the term "*applicant*", and that there is a distinct difference between what is a "definition section", and an "operative section" in an Act. They argue, with some subtlety, that only s.2(2) is under challenge. There is no challenge to s.47(5)(b). They argue s.2(2) cannot be understood as denying the appellants any statutory or constitutional right, as it merely defines the term "*applicant*". So, the argument runs, s.2(2) contains a mere definition, or shorthand, which does not deny any entitlement.

101. Counsel refers to observations made by Murray C.J. to this effect in *BUPA Ireland Ltd. & Anor. v. VHI* [2012] 3 I.R. 442, where the then Chief Justice referred to the term "*community rating*" as being merely a "*definition*", or a form of legal shorthand, the purpose of which was to aid the interpreter and drafter by reducing the need for a laborious repetition of text in the operation section of the enactment. (See, Dodd, *Statutory Interpretation in Ireland* (Bloomsbury, 2008), p.276.) Counsel contends that s.47(5)(b) is, in fact, the "*operative section*", and that s.2(2) merely clarifies the situation *after* the Minister has made her decision to refuse declarations under s.47(5)(b). The respondents submit that s.2(2) is "merely a definition section which denotes a more complex concept" to be found in the provisions of s.47(5)(b) of the Act, and that it is to be seen merely as an interpretative device to reduce the need for a laborious repetition of the term in the operative section as to the position when a person is not an "*applicant*". (Bennion, *Statutory Interpretation*, 4th Ed., Butterworths, p.487.) Counsel criticises the

appellants' submission that s.47(5) is a mere "springboard" for the application of s.2(2), which is said to violate the appellants' constitutional rights to fair procedures.

102. The respondents further contend that it follows from this argument that, if s.2(2) were struck down as being unconstitutional, it would not avail the appellants in any case, in that, it was the Minister's s.47(5)(b) refusal decision which was "*operative*", and thus it "superseded" the first instance s.39 decision. Once the Minister's decision was made, appealing the recommendation would be futile. The recommendation by the international protection officers was "*spent*", and there is no jurisprudence of this Court whereby an order which is "*spent*", and has no practical effect, could be the subject of an order of *certiorari* by way of judicial review. The respondents further contend that the appellants were on notice of the fact that, absent an appeal filed within time, the process could, and would, continue, and thus it could not be the case that the Minister's power under s.47(5)(b) could be suspended indefinitely.

103. Counsel refers to the determination of this Court in *PNS v. The Minister for Justice & Equality* [2020] IESCDET 53 (though I note that determinations have no precedential value). There, McKechnie J., speaking for this Court (O'Donnell, McKechnie, Charleton JJ.) referred to C-239/14, *Tall*, wherein the Belgian national legislation, precluding suspensory effect, had been held not to contravene EU law. The position was, rather, that the question of suspensory effect was a matter for each member state and did not disturb EU law in relation to Article 39 of the Directive (para. 24). The appellants had been unsuccessful under all headings and had correctly been refused any form of protection or leave to remain in the State.

104. Counsel refers to the fact that leave to remain in the State is stated to be valid "*until the person to whom it is given ceases, under s.2(2), to be an applicant*". (See subs.16(1) and (2) of the 2015 Act). He submits that this provision supports his contention that, as a matter of simple interpretation, the appellants had ceased to be applicants, and were not eligible to apply for extensions of time. They had earlier been granted temporary leave to remain in the State, on the premise of their being applicants. But this leave was no longer valid. Therefore, deportation orders fell to be made. Because the appellants were no longer applicants, they were outside the protection system. Under the Act, the only method whereby they could re-engage with the procedure was by making an application under s.22, providing a written statement drawing the Minister's attention to any new elements or findings which had arisen since the determination of the previous applications relating to whether or not they were entitled to international protection.

105. In fact, I do not think the reference to s.16 is helpful to the respondents. It deals with a different issue, that is, applications for leave to remain, not applications to appeal to extend time for this purpose. The wording of ss. 21 and 22, by contrast, deals with the issue of appeals, a matter akin to that dealt with in s.41, that is, appeals against decisions by an IPO made under s.39(3). But one further conclusion can be drawn. The interpretation of s.2(2) urged by the respondents is one of broad consequence and raises

questions as to whether what is in issue there should be seen as a simple question of definition.

XIII. Discussion

106. A number of further issues emerges from the survey of the legislation, and the procedure actually adopted. First, as mentioned earlier, the "decision letters" did not, in fact, fully set out the reasons upon which the respondents now rely for non-acceptance of the applications. Section 2(2) was not mentioned. In itself, this arguably creates a frailty by a failure to give reasons.

107. Second, it is not possible to see anything in s.47(5)(b) which, *in itself*, precludes an extension of time. This was a decision with potentially very significant consequences for the appellants. This is not, therefore, a situation where a court should readily imply such words.

108. Third, it is abundantly clear that neither s.2(2) nor s.47(5)(b) contains any words regarding timeframe within which the Minister may issue a refusal, save that, by implication, as a matter of time sequence, a s.39(3) recommendation will be superseded by a decision of the Minister. But no provision places any time limitation on when a minister might make a s.47(5)(b) refusal decision. A refusal could be made within days of the expiration of the 15-day time limit for appeal

109. Fourth, both s.21 and s.22 do actually make provision for appeals by persons other than "*applicants*".

110. Fifth, there are no words in either s.2(2) or s.47(5)(b) which prevent an "*individual*" or "*person*" applying to extend the time after the Minister's s.47(5)(b) decision.

111. Sixth, notably, the Regulations themselves refer to "*applicants*" when referring to persons who may apply to extend time for appeal.

112. Seventh, there are no express words in s.47(5)(b) which state that, once the Minister has issued a refusal, an individual becomes ineligible to apply for an extension of time.

113. In response to questions from the Court, counsel submitted that, even in a hypothetical case where the Minister erroneously made an order under s.47(5), the only resolution might lay in judicial review. Although the letter to Ms. B's solicitors suggested that they might contact the Ministerial Decisions Unit to request the vacating of the s.47 decision at the discretion of the Minister, counsel appeared to lay less emphasis on that suggestion in argument and laid much more emphasis on the proposition that the only resolution was by judicial review.

114. Were the Court persuaded by the argument that s.2(2) is a mere "*labelling section*", then, inevitably, the appellants' case would fail. In those circumstances this Court would necessarily be obliged to hold that s.2(2) does not contain anything which constituted a denial of the appellants' constitutional rights. For all their subtlety and detail, I am not persuaded by the respondents' submissions.

115. The respondents' case must be seen against a background where, prior to the 2015 Act, there was nothing to prevent disappointed applicants applying for extensions of time. What is obvious is that neither s.2(2) or s.47(5), *in isolation*, have the meaning or effect which IPAT sought to ascribe to them. Section 2(2) contains a mere definition involving cessation. Section 47(5) outlines how the Minister will proceed in the circumstances of this case. But neither section contains any express words which purport to preclude persons, such as the appellants, from applying for extensions of time. The Oireachtas could have provided such words in the Act. It did not do so.

The First Respondent's Interpretation and Application of s.2(2) and s.47(5)(b)

116. What can be seen, however, is that the appellants were 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 application of the two sections in conjunction.

117. The core of the respondents' case is that s.2 simply provides a definition of the term "*applicant*", and it follows that s.47(5)(b) must be seen as being an "*operative*" section. But what the learned High Court judge actually decided was revealing. He held that, *by virtue of s.2(2) of the Act of 2015*, one effect of the Minister's "*s.47 decision*" was to render the appellants ineligible to appeal. The judge was correct in conjoining the effect of the two provisions. But this undermines the proposition that s.2(2) and s.47(5)(b)(ii) can, as it were, be segregated.

118. I reject the respondents' case that, therefore, s.2(2) is a pure matter of "*definition*", or "*description*". In *the context in which it appears in the Act*, this broad interpretation of the provision cannot be seen as a mere description or shorthand, the purpose of which is to aid the interpreter and drafter by reducing the need for "laborious repetition" (cf. Dodd, p. 276). As *applied by IPAT* and *used in conjunction with* s.47(5), s.2(2) must be seen, for *that purpose*, as having a substantive legal effect, that is, purportedly to exclude the appellants from even a right to apply for an extension of time.

119. During the course of this appeal, it became clear that the two provisions were to be seen as acting together. But the constitutionality of s.2(2) is impugned by the appellants, while s.47(5)(b) is not. What emerged is that IPAT gave the two provisions a combined effect. Both were, therefore, for that purpose, "*operative*". Section 2(2) cannot, as it were, be "*sheltered*" under s.47(5)(b), any more than s.47(5)(b), which is not challenged, can shelter under the umbrella of s.2(2). The respondents' process of statutory "deconstruction" only deals with the words of the two provisions, if seen separately, and decontextualised. But the unavoidable consequence of the case now made is that IPAT applied s.2(2) and s.47(5)(b) *in conjunction*, in a manner which *operated* against the appellants. Neither provision can be seen as a statutory island. The respondents' argument necessarily creates a bridge between them. The appellants argue the effect was that, combined, they are to be seen as an insurmountable bar against the appellants making an application to extend time.

Other Available Remedies?

120. I pause here to reiterate that, in argument, counsel for the respondents suggested that, in the event of some error being manifest earlier in the process, it might be open to a hypothetical applicant to apply for judicial review of that decision. I confess it is not easy to see the precise basis upon which such applicant could apply to quash what, by then, might be a valid decision under s.47(5)(b). At the very minimum, the basis, still less outcome, of such a judicial review proceeding would be problematic. So, too, would a hypothetical application to the Ministerial Directions Office, the potential outcome of which would be unclear. There is no reference to either suggested remedy in the Act, which refers extensively to fair procedures and natural justice. Section 61(3) provides, in terms, that the *Tribunal* shall be ***independent*** *in the performance of its functions*, as defined. These words speak for themselves. The Tribunal deals with extension of time applications. The Act does not provide that anyone else has that power or function. These "resolutions" are too indeterminate and amorphous to assist the respondents' case.

121. To summarise, the essential issue in this case, therefore, is simply addressed by asking the question "What in IPAT's view actually stopped the appellants from making the application to extend time?". The answer, at least now, as the case is argued in this Court, if not in the decisions issued by IPAT, must be the interpretation and application of s.2(2) in conjunction with s.47(5)(b).

122. Section 2(2) enjoys a presumption of constitutionality. So, too, does s.47(5) of the Act of 2015. In this Act, the legislature has attempted to balance the personal rights of the appellants with the common good. Thus, the presumption of constitutionality applies with particular force. (*Ryan v. Attorney General* [1965] I.R. at 312); *In Re Article 26 and Planning and Development Bill 1999* [2000] 2 I.R. 321). But that does not absolve a court from its duty to interpret the legislation in accordance with the Constitution.

XIV. The duty to act in accordance with the Constitution

123. It is now long-established that State bodies administering statutory schemes are duty bound to act constitutionally and fairly in decision-making (*East Donegal v. Attorney General* [1970] I.R. 317; *Loftus v. The Attorney General* [1979] I.R. 221; *Croke v. Smith (No. 2)* [1998] 1 I.R. 101). One logical consequence of the case made by the respondents would, to say the least, be surprising.

124. Could it be said that a hypothetical "*individual*", or "*person*" – I use the two words advisedly - who was the subject of an adverse international protection decision at first instance, and who, immediately formed the decision to appeal, and so instructed their solicitor, might be debarred from doing so by the simple fact that, even within a few days after the s.39(3) recommendation, the Minister issued a refusal under s.47(5)? Whether such decision could lawfully be made, even after the expiry of two or three days outside the time limit of 15 days for filing an appeal must be very doubtful. Similarly, it must be highly questionable whether such an individual could be barred from even *seeking* to apply to extend time to file an appeal, especially where an international protection officer had erred in a fundamental way, where there was a clear intention to appeal, and where, through illness, an error or oversight, an appeal was not filed within 15 days. On this point, the appellants make the valid observation that the legislation does not provide a

timeframe for a s.47 decision or refusal by the Minister. To take one example, a s.47(5)(b) refusal could be made on the eighteenth day after a first instance decision. On the Minister's argument, such individuals would have very limited and doubtful recourse.

125. Were it to be the case that either s.2(2) or s.47(5)(b), or both combined, in terms, had the effect of precluding such entirely meritorious individual from even making any application for an extension of time, then the question regarding constitutional validity would become very clear. Thus, interpreted and applied, the provision would effectively constitute an absolute bar, even for the purpose of applying to extend the time for an appeal. The two potential resolutions suggested by the respondents (the Ministerial Discretion Unit and/or an application for judicial review) are too ill-defined and amorphous to resolve the problem the respondents face.

AWK (Pakistan)

126. That the Oireachtas is entitled to legislate for time limits in immigration law cannot be doubted. There is a strong public policy in ensuring that such legislation operates effectively and fairly (*AWK (Pakistan) v. Minister for Justice and Equality, Ireland & The Attorney General* [2020] IESC 10). But it is also clear that in the determination of fair procedure, and the right of access to the courts, the Act of 2015 lies within the class or category of legislation where the courts are prepared to apply a fair procedures approach with regard to time limits. This can be illustrated by two examples.

Illegal Immigrants (Trafficking) Bill

127. In *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999),* this Court laid a heavy emphasis on the fact that, while the legislation laid down a 14-day time limit for bringing judicial review proceedings, that time limit was capable of extension. This was among the features which protected the constitutionality of the legislation. The legislation under consideration lies within the same general description and category as the 2015 Act. The court was not dealing with a time limit of the same order as for the various statutes of limitations, which are set out in statutory form often in cases where the time to bring proceedings is considerable.

White v. Dublin City Council

128. In *White v. Dublin City Council* [2004] 1 I.R. 545, this Court held a two-month *statutory* absolute time limit for challenging a decision under s.82(3B)(a)(i) Local Government Planning & Development Act, 1963 could not survive constitutional challenge, as it undermined the applicant's right to challenge the administrative act in question. The Act did not contain any saver for extensions of time, even in the case of an affected third party who did not find out about the decision until the time limit had expired. The Court concluded that it was the "absolute character" of the time limit that created the unconstitutionality. In so concluding, the court relied on the earlier judgment in the Article 26 Illegal Immigrants reference. It is noteworthy that the courts are, in particular, prepared to adopt such an approach in the case of short time limits, such as in judicial review. In this appeal, there is a short 15-day time limit. There are no third party interests. Yet, the respondents maintain that this 15-day time limit is tantamount to being absolute.

129. The High Court judge held that the time limits were "reasonable". But those time limits do actually provide for extension of time for appeals. They were short time limits, very similar in nature to those provided for in the *Re Illegal Immigrants Bill* reference, where this Court clearly admitted of the possibility of extensions of time, as a matter of fair procedure, and the right of access to the courts. They are, for that matter, similar to the time limits in *Danqua*. The Regulations make explicit provision for extensions of time for an appeal.

130. The position in these appeals is slightly different from that in *White*, in that there are no potential third party interests as would be the situation in a planning case. This case instead concerns the right to avail of an appeal to an administrative decision with significant consequences for a person debarred from an appeal. The entirely proper intention of the Oireachtas was to create a system whereby there should be a hearing at first instance, and, where necessary, a right of appeal. The legislature, in terms, intended that there should be fair procedures. The Regulations envisaged applications to extend time. Doubtless, this was because of observations in the *Illegal Immigrants* reference. But to use the terminology in White, it could not have been intended that the legislation as to time limits should be applied, in an absolute way which would be contrary to reason, common sense, clear legislative objective, and constitutional entitlement to fair procedures.

131. The respondents have presented the Court with an interpretation which has but one constitutional consequence – effectively an absolute bar. The words of s.2(2) alone may not violate a constitutional right. Neither, when seen alone, does s.47(5)(b). On the respondents' interpretation, when applied in combination, however, I find that they would violate the appellants' right to fair procedures. The question then arises as to whether the provisions are capable of a constitutional interpretation and application.

XV. The Presumption of Constitutionality

132. Both provisions enjoy a presumption of constitutionality. If, in respect of any provision, two or more constructions are reasonably open, one of which is constitutional, and the other which is unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction (*McDonald v. Bord na gCon (No. 2)* [1965] I.R. 217; *Cullen v. Attorney General* [1979] I.R. 394).

133. A court must grant any impugned provision the presumption of constitutionality, unless and until the contrary is clearly established. It must not declare the impugned provision to be invalid where it is reasonably possible to construe it in accordance with the Constitution. It must favour the validity of the provision in cases of doubt. It must have regard to the fact that the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation is the one intended by the Oireachtas, but also that the Oireachtas intended that proceedings, procedures, discretions, and adjudications, which are permitted, provided for, or prescribed by an Act of the Oireachtas, are to be conducted in accordance with the principles of constitutional justice. This presumption is to be accorded particular weight where the legislature has attempted

to balance or reconcile the exercise of personal rights with other personal rights, or the common good.

134. The double-construction rule operates so that this Court must impart to any section a presumption of constitutionality. Thus, it is to be presumed that s.2 and s.47(5)(b), as properly interpreted, together may act in a manner which is consistent with the Constitution. Ultimately, the difficulty lies in imputing an absolutely exclusionary interpretation to the term "*applicant*", in conjunction with s.47. The 2015 Act simply does not say that only "*applicants*" can apply for an extension of time to appeal from an IPO decision. Neither do the Regulations, which actually refer to persons so applying as "*applicants*", without any mention of s.47(5)(b) having any effect on eligibility.

XVI. Decision

135. In the course of the hearing of this appeal, a member of this Court put matters well when she observed that, in seeking a declaration that s.2(2) violated the Constitution, the appellants were, in fact, "*utilising a very large hammer to crack a very small nut*". I respectfully agree. This case is not about unconstitutionality, but, rather, about interpreting provisions of the Act and the Regulations in a constitutional fashion.

136. Section 21 and s.22 of the 2015 Act, considered earlier, both deal with the situation where persons may make an application for reconsideration where, respectively, there is *inadmissibility*, or where "*new elements or findings*" have arisen since a previous determination. Such individuals, coming within s.21 and s.22, may appeal, yet are not "*applicants*". They will almost inevitably be very significantly "out of time". Why, then, should individuals or persons in the position of the appellants not also be in a position to at least *apply* for an extension of time within which to appeal under s.41, even if they are no longer an "*applicant*"? To discriminate between one category and another, at minimum, creates a statutory incongruity, without a statutory basis in the text of the Act.

137. As Dodd, *Statutory Interpretation in Ireland* (11.43) points out, where the double-construction rule applies, the meaning attributed to an enactment may differ from that which might prevail were the ordinary interpretative criteria to apply. (See *Re Haughey* [1971] I.R. 217.) Where the presumption applies, it is permissible to impart an interpretation on a provision that deviates to a degree from the ordinary and plain meaning of the provision, provided it does so within limits permitted by the Constitution. The presumption can only apply in circumstances where such an interpretation is reasonably open. The interpretation or construction of an Act, or any provision thereof, or a Regulation, in conformity with the Constitution, cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas.

138. In seeking to reach an interpretation or construction in accordance with the Constitution, a statutory provision which is clear and unambiguous cannot be given an opposite meaning (*East Donegal*). It is also long-established that enactments that interfere with constitutional rights are to be strictly construed. If there is a genuine doubt or ambiguity

as to interpretation, a permitted meaning that is less restrictive of a constitutional right should be presumed to be the intended one. Such an interpretation is open in the circumstances of these cases. Here, on the respondents' argument, the term "applicant" is to be given one broad meaning, excluding non-applicants. Such an interpretation, as proposed, would change the prior law, in that, prior to the 2015 Act, the 1996 Act did not contain restrictions on the right to extend time for appeal (*Duba*, cited earlier).

139. Arguably, and were it necessary, it could be suggested that the Constitution might require a *strict* interpretation of the word "applicant" as meaning *only* a person within the meaning of s.2, that is, one who had made an application for international protection under s.2(1), and who has not ceased to be an applicant under s.2(2), and not an "applicant" for the purposes of seeking an extension of time to appeal under the Regulations. But this is not necessary. The plain wording and what is absent from the section are sufficient. Section 2(2) deals with when an applicant ceases to hold that status. In fact, there are no words in the Act that prevent a "*person*" or "*individual*", formerly an applicant, from applying to extend the time for filing a late appeal against a recommendation under s.39(3) of the Act. There is nothing which says a decision under s.47(5) renders such a person ineligible to apply for an extension of time. Neither provision has the restrictive effect for which the respondents contend.

140. The Regulations deal explicitly with the word "applicant" when dealing with applications to extend time. Arguably, the term "applicant", as used in the Regulations, is used there in the context of persons whose *appeals* are out of time who may apply for an extension of time. Such an interpretation, imparting different meanings, would not push the construction of the Act beyond constitutional limits, but it is not necessary to engage in that process. The plain words of s.2 and s.47(5)(b), and what is not said, are sufficient. The logic of the respondents' position, however, is that such persons should be precluded from making an application to extend time, at least once the Minister has issued a s.47(5)(b) refusal. But that would require clear statutory words. Such words are absent. No statutory words preclude individuals or persons who are formerly applicants under s.39(3)(c) from applying for an extension of time to appeal under s.41(2)(a) of the Act. The Regulations do envisage such a contingency. An interpretation permitting persons or individuals to apply is consistent with ss.21 and 22, which also deal with other types of appeal where "persons" no longer coming within s.2(2) can appeal. There cannot be any doubt that when investigating, considering, assessing, and determining applications for international protection, the Tribunal must comply with the requirements of natural and constitutional justice, including affording fair procedures. An interpretation which permits applications for extensions of time accords with the avowed spirit of "*fair procedures*" protected under the Act. I would, therefore, conclude that *persons*, formerly applicants, may, subject to what is said below, apply to extend the time for appeals under s.41(2)(a) of the Act, as a matter of fair procedures and constitutional justice.

141. This case is not about unconstitutionality, *per se,* but, rather, an interpretation of the legislation leading to potential unconstitutionality, where a constitutional interpretation is available which does not run counter to the statutory meaning. I am driven to the

conclusion that, in deciding otherwise in the appellants' cases, IPAT acted *ultra vires*. IPAT is not permitted in law to interpret and apply the two provisions such as to make such applications impossible. I would, therefore, quash the decisions as *ultra vires*. I would add, while this decision is made under national law, it would appear to sit comfortably with the tenor, if not the letter, of the Directives, and CJEU case law, such as *Danqua*. There is nothing in EU law to prevent national law setting higher standards of protection.

142. It is hardly necessary to make clear that this outcome is based on rather narrow procedural grounds. This judgment does not concern the merits of the two cases. The issues were raised in a timely way in these proceedings and are not retrospective to other cases.

The Interests of the State

143. But it must be emphasised that the State is entitled to protect the integrity and effectiveness of the immigration and protection system. There are strong policy reasons for this. IPAT is entitled to apply the discretionary criteria set out in the Regulations to future applications to extend time, including in its consideration of what is "just", whether there has been blameworthy delay or failure to engage with procedures, abuse of process, failure to explain delay, or concluding that the appeal would be manifestly ill-founded, unstateable, or vexatious. The balance of justice is achieved by weighing these factors in any individual case. Any vexatious or repeated applications would be an abuse of process. In this or any other case, there would be nothing to preclude IPAT from delivering a decision setting out briefly its reasons on an application to extend time within a short timeframe, in a manner consistent with the law, and the requirements of the Constitution. There is nothing in the Act which would prevent an order by the Minister under s.47(5) being suspended temporarily in effect, while a *bona fide* application to IPAT is pending. There must come a point where the sheer passing of time or lack of engagement by a former applicant would be determinative of any time issue.

144. It is important to stress, however, that the suspensory effect on the Minister's order may not always follow as a matter of course. There may well be cases where, after a reasonable period of time has elapsed, an extension of time would be so unlikely to be granted that the Minister's order should not be regarded as being suspended in effect. This issue is unlikely to cause problems in practice, however. It would not be expected that the Minister would, in fact, exercise her power to deport while an application to extend time¬– which might be viewed as having been made within a reasonable time after the expiration of the time limit in question– is being considered.

145. But it must also be emphasised that, in making a decision as to whether or not to extend the time, IPAT would be operating within an area where discretion would play a significant role. Faced with an application to judicially review such a decision to refuse to extend time, a court might wish to be fully informed of all the circumstances before being asked to issue any order or injunction in such circumstances.

XVII. Summary

146. I now summarise the conclusions in this judgment and address directly the points set out in the issue paper. First, I am not persuaded s.2(2) or s.47(5) of the Act are in breach of EU law. Second, properly construed, s.2 of the Act does not infringe the appellants' rights. No argument was advanced that the provision contravenes the appellants' rights under the ECHR. Third, the appellants are not mounting a collateral attack on decisions made under s.39(3) of the Act. Fourth, the appellants are, however, entitled to an order of judicial review by way of *certiorari*, arising from the first respondent's incorrect and unlawful interpretation and purported application of s.2(2), in conjunction with s.47(5)(b) of the Act. The combined effect of the first respondent's broad interpretation of the two provisions constituted a bar which had the effect of infringing the appellants' right to fair procedures to apply for extensions of time within which to appeal, without either provision, in itself, being a violation of the Constitution.

147. I would grant a declaration that the first named respondent erred in law, and acted *ultra vires*, in precluding these appellants from applying to extend the time within which to file their appeals. The appellants are entitled to orders of judicial review quashing those decisions. I would, therefore, reverse the High Court judgment to that extent, grant an order of *certiorari* of the decisions made, and remit the applications to extend time to the Tribunal to determine in accordance with law. In the case of the first appellant, the decision quashed is that on the 27th August, 2020; in the case of the second appellant, the decision quashed is that made on the 11th December, 2019. This judgment says nothing as to the potential outcome of any such applications, which are a matter for the first respondent to determine, on remittal, in accordance with the Regulations made under the Act.