APPROVED NO REDACTIONS NEEDED

THE COURT OF APPEAL

Neutral Citation Number [2023] IECA 183
Appeal Number: 2022/193

High Court Record Number: 2021 563 JR

Ní Raifeartaigh J.

Allen J.

Butler J.

BETWEEN/

T. F.

APPLICANT/APPELLANT

-AND-

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Butler delivered on the 20th day of July, 2023

Introduction

1. This appeal raises a number of issues concerning the revocation of refugee status granted to the appellant nearly twenty years ago. These issues arise in circumstances where a request was made on foot of a European Arrest Warrant *("EAW")* to surrender the appellant to his country of origin in respect of serious criminal charges. As will be seen such a request has, in fact, been made twice and on each occasion, surrender was legally

impossible because the appellant was a recognised refugee. The appellant complains, *inter alia*, that the decision made by the respondent on 18 May 2021 revoking his refugee status under s. 52 of the International Protection Act 2015 *("the 2015 Act")* was made for an improper purpose, i.e. to facilitate his surrender to Romania on foot of an EAW. The appellant is now a naturalised Irish citizen so the revocation of his refugee status would not affect his entitlement to remain resident in the State. However, for reasons explained below, it would have the effect of making him amenable to surrender to Romania under the EAW regime.

2. The appellant challenges the validity of the respondent's decision on a number of grounds both procedural and substantive. The former include complaints of a breach of fair procedures arising from the manner in which the process under s. 52 was conducted in light of correspondence sent to the respondent by the appellant's solicitors, complaints regarding the identity of the decision maker and a complaint that the decision to withdraw refugee status was tainted by knowledge of the allegations of the criminal conduct underlying the EAW. The latter focusses on an alleged failure on the part of the respondent to conduct an individualised assessment of the appellant's circumstances before deciding to revoke his refugee status and is linked to a complaint that the reasons given for the decision do not demonstrate that such an individualised assessment was carried out. There are also complaints of delay in moving to revoke the applicant's refugee status.

3. These grounds were all disputed by the respondent (also *"the Minister"*) who in addition contends that relief should not be granted to the appellant by way of judicial review because he has an alternative remedy available to him by way of a statutory right of appeal to the Circuit Court. The appellant has in fact lodged such an appeal, but it has not yet proceeded to hearing, presumably pending the outcome of this judicial review.

4. I note that the appellant's Notice of Appeal includes two grounds of appeal contending that s. 52 of the 2015 Act is unconstitutional and/or in breach of European Convention on Human Rights. This is also flagged as an issue in the appellant's written legal submissions but was not actually addressed in either the written or oral argument made on his behalf. The Minister has contended throughout that this plea is improperly made in circumstances where neither the Attorney General nor the Irish Human Rights and Equality Commission were parties to the proceedings and, in any event, that insufficient details have been pleaded to support such a plea. As the challenge to the validity of s. 52 was not argued before the High Court and as the grounds concerning the validity of s. 52 were not actively pursued on behalf of the appellant, I do not propose to deal with them in this judgment.

5. The High Court (Heslin J.) refused the appellant's application in a very comprehensive judgment [2022] IEHC 486. Both the factual and legal background are set out in that judgment with commendable clarity thus obviating the need for this Court to repeat that exercise in any detail. Apart from finding against the applicant on all the legal grounds raised, it is probably fair to observe that the trial judge was very critical of the approach taken by the applicant to the process under s. 52 of the 2015 Act which led to the revocation decision. As noted by the judge, the only submission made by the appellant to the Minister purported to address, in very general terms, the legality of the process and did not make any substantial or evidenced-based arguments as to why his grant of refugee status should not be revoked.

6. I propose to examine the issues raised under five broad headings, namely, issues arising due to the relationship between this s. 52 process and the EAWs which had been issued by the Romanian authorities; issues concerning fair procedures in the s. 52 process; whether the Minister complied with the obligation to conduct an individualised assessment of the appellant's position under s. 52 and whether the reasons given for that decision support

the contention that she did; whether the Minister's proposal to revoke the appellant's refugee status was vitiated by delay and, finally, if the appellant succeeds in reversing the decision of the trial judge on any of these grounds, whether this Court should in the exercise of its discretion decline to allow the appeal on the basis that there is an alternative remedy available to him. In order to address these issues, it is necessary firstly to set out the relevant statutory provisions governing the situation and then to examine the factual and legal background within which they arise.

Legislative Framework

7. The termination of refugee status is governed by two separate but interacting statutory provisions. Section 9 of the 2015 Act sets out the circumstances in which a person will cease to be a refugee and s. 52 sets out the procedure to be followed by the Minister before she revokes a refugee declaration (such declarations having been given under s. 47 of the same Act).

8. The relevant parts of s. 9 are as follows:-

> *"9. (1) A person shall cease to be a refugee if he or she - …*
>
> *(c) has acquired a new nationality (other than as an Irish citizen), and enjoys the protection of the country of his or her new nationality,…*
>
> *(e) subject to sub-sections (2) and (3), can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of his or her country of nationality,…*
>
> *(2) In determining whether paragraph (e) or (f) of subsection (1) applies, regard shall be had to whether the change of circumstances is of such a significant*

and non-temporary nature that the person's fear of persecution can no longer be regarded as well founded."

(The other sub-paragraphs of subsection (1) are not relevant to the appellant's circumstances and sub-section (3), which requires to be invoked by the refugee whose status is in issue, was not relied on by the appellant.)

9. The structure of s. 9, which mirrors the provisions of Article 11 of the Recast Qualification Directive 2011/95/EU *("the Qualification Directive")*, is interesting because, on the one hand, it suggests that the cesser provided for under s. 9(1) is automatic when one or more of the conditions set out in sub-paragraphs (a) to (f) are satisfied. On the other hand, s. 9(2) clearly envisages that a *"determination"* will be made as to whether a refugee has ceased to be a refugee. This is analogous to the process whereby someone is recognised as a refugee in the first instance which is legally framed as the recognition of an existing status rather than a decision which confers that status upon the subject. Presumably the effect of this (particularly when s. 9 (1)(e) is read in conjunction with s. 52) is that refugee status, once granted, will not be treated as having ceased unless a determination is made to that effect and the declaration formally revoked, but the determination is a factual one as to whether any of the conditions set out in s. 9(1) are met, rather than being the exercise of a discretion.

10. It may be noted that s. 9(1)(c) refers to the acquisition of a new nationality other than as an Irish citizen. Under s. 47(9) of the 2015 Act a declaration of refugee status (or subsidiary protection status) given or deemed to have been given under the 2015 Act *"ceases to be in force"* when the person to whom it has been given becomes an Irish citizen. Section 47(9) does not envisage any separate determination being required to formally revoke such status. Under s. 69(1) a declaration of refugee status made under s. 17 of the Refugee Act

1996 is deemed to have been made under the 2015 Act and the provisions of the 2015 Act apply to it.

11. Section 52 then sets out the process by which a determination can be made as to whether refugee status has ceased. The section is broader than simply dealing with the circumstances in which refugee status will cease as it also covers cases in which a person is or was excluded from being a refugee under s. 10 but was nonetheless recognised as such and circumstances where a refugee declaration was acquired through misrepresentation, omission of facts or use of false documents. Further, under s. 52(2) the Minister has a discretionary power to revoke refugee status if the person is a danger to the security of the State or has been convicted of a particularly serious crime. These grounds, which relate to the conduct of the refugee, are not relevant to the present appeal. In setting out the relevant provisions of s. 52, I have excluded those parts which refer exclusively to these issues and the parallel provisions which apply to the revocation of a subsidiary protection declaration.

12. The relevant portions of s. 52 are as follows:-

> *"52. (1) The Minister shall, in accordance with this section, revoke a refugee declaration given to a person if satisfied that – …*
>
> *(b) the person has, in accordance with section 9, ceased to be a refugee.*
>
> *…*
>
> *(4) Where the Minister proposes, under subsection (1) … to revoke a declaration, he or she shall send a notice in writing of his or her proposal and of the reasons for it to the person concerned, which notice shall include a statement of the person's entitlement under subsection (6) to make representations in writing to the Minister in relation to the proposal.*
>
> *…*

(6) A person who has been sent a notice of a proposal under subsection (4) may, within 15 working days of the sending of the notice, make representations in writing to the Minister in relation to the proposal.

(7) The Minister shall –

(a) before deciding to revoke a declaration under this section, take into consideration any representations made to him or her in accordance with subsection (6), and

(b) where he or she decides to revoke the declaration under this section, send a notice in writing of his or her decision and the reasons for it to the person concerned, which notice shall include a statement of the person's entitlement under subsection (8) to appeal.

(8) A person to whom a notice under subsection 7(b) is sent may, within 10 working days from the date of the notice, appeal to the Circuit Court against the decision of the Minister to revoke the declaration.

(9) The Circuit Court, on the hearing of the appeal under subsection (8), may, as it thinks proper –

(a) affirm the decision of the Minister, or

(b) direct the Minister not to revoke the declaration.

Under s. 52(10) if an appeal is taken and not withdrawn, the decision to revoke does not take effect unless and until the appeal is determined and the Minister's decision affirmed.

13. There is no provision directly comparable to s. 52 of the 2015 Act in the Qualification Directive but Article 14 of the Directive provides as follows:-

"1. Concerning applications for international protection filed after the entry into force of Directive 2004/83/EC, Member States shall revoke, end or refuse to renew the refugee status of a third-country national or a stateless person granted by a

governmental, administrative, judicial or quasi-judicial body if he or she has ceased to be a refugee in accordance with Article 11.

2. Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his or her disposal, the Member State which has granted refugee status shall, on an individual basis, demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article."

The appellant places significant reliance on the fact – which is accepted by the Minister – that under s. 52 the onus of proving that his refugee status has ceased lies on the Minister.

Factual background

14. There was no disagreement between the parties as to the relevant facts. The appellant is a Romanian national of Roma ethnicity who arrived in Ireland in 2001 and was granted asylum in 2004. The basis for his application for asylum was that he had suffered persecution, including physical maltreatment, at the hands of the Romanian police because of his ethnicity. To say that the appellant is now a well-settled migrant would be an under-statement. He has lived in Ireland for nearly a quarter of a century. He is the father of Irish born children and the grandfather of Irish grandchildren. Apart from his immediate family, all of whom live in Ireland, many of both his and his wife's extended family members are also permanently resident in Ireland. The appellant became a naturalised Irish citizen in 2015. Thus, his entitlement to remain in Ireland is no longer based on his status as a refugee and revocation of his refugee status will not, of itself, alter that position.

15. In February 2010, a European Arrest Warrant was issued by the relevant Romanian authorities seeking the surrender of the appellant and his return to Romania to face serious criminal charges. This EAW was presented for endorsement for execution by the High Court

in February 2011. The appellant was arrested and remanded in custody on 20 March 2011 before being released on bail on 6 April 2011 (see judgment of Edwards J. [2011] IEHC 134). When the matter came back before the High Court on 13 April 2011, the Minister did not seek to stand over the requested surrender and the appellant was released from custody. On the authority of the decision of Peart J. in *Minister for Justice v. Pollak* [2010] IEHC 209, the Minister accepted that the appellant's status as a refugee precluded his surrender to the country from which he had fled fearing persecution.

16. In July 2018 a second EAW was issued by the Romanian authorities. This EAW differed from the earlier one in that the surrender of the appellant was sought to serve a sentence of four years imprisonment which had been imposed on him following a trial *in absentia* on the charges which were the subject of the first EAW. Although trial *in absentia* is not generally a feature of the Irish criminal law system, it is both permitted and regularly occurs in other EU jurisdictions. Under s. 45 of the European Arrest Warrant Act 2003 a person who has been convicted *in absentia* may be the subject of a request for surrender, provided the warrant on foot of which the surrender is sought confirms that the person in question will be advised of their right to seek a re-trial at which the merits of the case can be re-examined and fresh evidence admitted.

17. This second EAW was presented to the High Court for endorsement for execution in June 2019 and the appellant was arrested in September 2019 but immediately granted bail. The matter was adjourned from time to time whilst enquiries were made by the Minister as to the basis on which the appellant had been granted asylum. Eventually a hearing date was fixed for the end of July 2020. At that stage, the Minister sought a further adjournment to consider the steps that might be taken in light of the appellant's status as a refugee. Although there is no evidence before the Court on this point, counsel for the Minister indicated – and the appellant did not contest – that it was stated on the Minister's behalf in the EAW process

before the High Court that the revocation of the appellant's asylum status under s. 52 was being considered by her. A further adjournment was granted to October 2020 but when no steps had been taken by the Minister before the adjourned date the matter was listed for hearing a few days later. As the appellant remained a refugee, the Minister again conceded that the proposed transfer could not be effected in light of the decision in *Minister for Justice v. Pollak*. Consequently, surrender was refused by the High Court.

18. Subsequent to these events, on 5 March 2021 an official in the Minister's department *("the official")* wrote to the appellant informing him of the Minister's proposal to revoke his refugee status under s. 52(1)(b) of the 2015 Act. The letter included a statement of the reasons for the proposal which focussed on the change of conditions in Romania since the date on which asylum had been granted as evidenced by its accession to the European Union in 2007. This is described as *"a change of circumstances which is of such a significant and non-temporary nature that your fear of persecution can no longer be regarded as well-founded"*. The appellant was advised of his right to make representations within fifteen working days of the notice. That deadline was extended on several subsequent occasions to a final deadline of 14 May 2021.

19. During the intervening period there was an exchange of correspondence between the appellant's solicitor and the official. Most of this was relatively routine and comprised requests for the extension of the deadline for making representations. However, on 6 May 2021 the appellant's solicitor sent a letter (by e-mail) to the official in which she took issue with the proposal to revoke the appellant's asylum status, suggesting that it was *"ultra vires, an abuse of process and vitiated by delay"*. She claimed that the proposal was *"fatally undermine[d]"* because it only materialised following what she described as an *"unsuccessful attempt"* by the Minister *"to remove [the appellant] from the State pursuant to an [EAW]"*. The letter concluded by asking the Minister to confirm the withdrawal of the

proposal and threatened legal proceedings if the Minister failed to do so. The following day the official acknowledged receipt of this letter and stated in an e-mail that *"a substantive response will issue to you after these representations receive full consideration of this office"*.

20. The appellant's solicitor replied by letter of 10 May 2021 complaining that the response was ambiguous and asking for confirmation that the reference to *"representations"* in the official's e-mail related to the letter of 6 May and *"not to the substantive submissions due in response to your letter of 5 March 2021"*. Again, legal action was threatened in default of such confirmation. The official replied the following day (11 May) confirming that *"the only representations under consideration by this office in respect of the Minister's proposal to revoke issued to your client dated 5 March 2021, are those received from your office by letter/e-mail on 6 of May 2021"*. The appellant's solicitor replied immediately to the effect that this response did not adequately address her letter of 10 May and threatened litigation if *"an appropriate response"* was not received by close of business. A further response in slightly fuller terms issued from the Minister, also on the 11 May. There is no material difference between the two replies sent by the Minister on 11th May. In any event, the Minister did not provide the confirmation requested by the appellant's solicitor and the appellant did not issue the threatened litigation.

21. On 18 May 2021 a decision revoking the declaration of refugee status which had been granted to the appellant issued on behalf of the Minister by way of letter signed by the official. The decision referred firstly to s. 52(1) and s. 9 of the 2015 Act. Then, under the heading *"The reason for revocation is as follows"*, it set out the basis upon which the appellant had been granted asylum in 2004 identifying *"widespread discrimination against members of the Roma community"*. It then noted Romania's accession to the European Union in 2007 and the view of the European Parliament (as expressed in 2004 and reported

in a newspaper article in February of that year) that this could not occur without significant reforms, including respect for human rights. The language used in identifying this as a significant and non-temporary change of circumstances in Romania is identical to that used in the proposal letter of 5 March. The reasons portion of the letter concludes by stating that the Minister *"[had taken] into account of all of the information on your file and the representations made on your behalf (dated 6th May), by your legal representative …"*. Finally, the appellant was advised of the right to appeal to the Circuit Court under s. 52(8) of the 2015 Act. This is the decision under challenge in the appellant's proceedings.

22. The appellant filed a Notice of Appeal to the Circuit Court under s. 52(8) of the 2015 Act on 28 May 2011. Notwithstanding that the appeal is by way of a *de novo* hearing (see further below), the grounds of appeal are virtually identical to those raised in the judicial review. They focus on the alleged illegality of the process in circumstances where it was prompted by the unsuccessful application for surrender on foot of an EAW to which effect could not be given because of the appellant's refugee status. Whilst it is contended that no reasonable decision maker could have reached the conclusion the Minister did in respect of a change in circumstances in Romania being demonstrated by that country's accession to the European Union, no particular ground of appeal is advanced based on any individual apprehension on the part of the appellant or on the current position of the Roma community in Romania generally. Although the appeal was returnable before the Circuit Court in 2021, I understand that has not been progressed pending the outcome of the judicial review. Under s. 52(10) the lodging of this appeal has suspensive effect and the Minister's decision will not take effect unless it is affirmed on appeal or the appeal is withdrawn.

The Appellant's Proceedings

23. Some ten days after filing his statutory appeal in the Circuit Court, the appellant was granted leave by the High Court to apply for judicial review of the Minister's decision. The relief sought includes not just an order of *certiorari* of the decision of 18 May 2021 but an order of prohibition to preclude any future proposal to revoke the appellant's declaration of refugee status under section 52. Other relief was sought in the form of declarations to the effect that s. 52 is unconstitutional or in contravention of the European Convention on Human Rights. These are no longer relevant to this appeal.

24. The legal grounds upon which the appellant relied have been outlined in the introduction above. In relation to the appellant solicitor's correspondence, it was contended that the decision was made in breach of natural justice because the appellant was led to believe he could have a further opportunity to put in substantive submissions and, in effect, the respondent did not allow him the opportunity to which he is entitled under statute to make representations. Issue was taken with the involvement of a single official in the Minister's department in making the proposal to revoke, dealing with the appellant's solicitor's correspondence, and then in making the impugned decision. This was contended to be a breach of the principle of *nemo judex in causa sua* and a denial of *"a transparent and independent process".* It was contended that the respondent did not conduct an individualised assessment of the risk to the appellant, and it was pointed that that there was no actual consideration in the decision of the current position of the Roma community in Romania and their treatment by the Romanian authorities. The decision was alleged to have been inadequately reasoned. The appellant suggested that there had been a fourteen-year delay on the part of the respondent in seeking to revoke his refugee status. Presumably this dates from Romania's accession to the E.U. in 2007 to the date of the proposal letter in March 2021. It was contended that if there were genuine reasons to revoke the appellant's refugee status based on current conditions in Romania, that step would have occurred sooner.

It was asserted that the circumstances which prompted the proposal to revoke, i.e. the unsuccessful EAW applications, fatally undermined the basis for the proposal and constituted an abuse of process.

25. The affidavit of the appellant grounding the application sets out his personal and family circumstances in some detail and recites the history of the two European Arrest Warrants and of the revocation process. A considerable volume of documentation is exhibited including the decision of the Refugee Appeals Tribunal *("RAT")* granting the appellant asylum and all of the correspondence between the appellant's solicitor and the respondent. The appellant asserts that discrimination against the Roma in Romania continues to be a problem and cites a 2014 UNHCR report in support of this contention.

26. After raising some preliminary objections as regards the appellant's claim for declarations as to the constitutionality/convention compatibility of s. 52, the Minister's Statement of Opposition admits the basic factual narrative on which the appellant relies. However, the Minister disputes the meaning the appellant attributes to the correspondence exchanged between the parties. Thereafter, the various legal grounds advanced by the appellant are engaged with and contested. It is acknowledged that the attempt to surrender the appellant on foot of the EAWs was the factor which prompted the revocation process, but it is denied that this informed the outcome of the process or was impermissibly taken into account. It is acknowledged that the appellant was treated differently to other refugees from Romania because of this factor. The alleged delay is disputed, in particular in circumstances where any decision to revoke refugee status must be made by reference to contemporaneous information and circumstances.

27. In relation to the requirement for an individualised risk assessment and the related allegation of inadequate reasoning, the Minister relies on the fact that the appellant did not engage with the *"explicit and irrefutable reasoning"* proffered for the proposed revocation

– namely the accession of Romania to the EU in 2007 – and its *"wholly obvious consequences"* – that there had been a non-temporary change in circumstances such as to give rise to the conclusion that the appellant's fear of persecution was no longer well founded – when this had been identified as the primary matter under consideration in the proposal to revoke.

28. The Statement of Opposition also expressly pleaded that the fact of Romania's accession to the EU in 2007 allowed the Minister to conclude that the appellant's fear of persecution was no longer well-founded and this *"obviated the necessity to conduct an individualised risk assessment"*. The stance taken by the Minister in her submissions to the High Court was somewhat different. The written submissions accept the CJEU case law relied on by the appellant (primarily the decision in *Abdullah* (Case C-175/08)) and thus implicitly accept the requirement to conduct an individualised risk assessment but argue that the Minister had materials before her capable of meeting those standards. In his submissions on this appeal, counsel for the Minister expressly accepted the requirement to conduct an individualised assessment of risk before taking any decision to revoke refugee status. However, the submission was slightly different again to that made in the written submission in that he contended that such an assessment had actually been carried out by the Minister and was evidenced by the reference in the impugned decision of 18 May 2021 to the RAT decision granting asylum to the appellant. In circumstances where the Minister's formal response to this ground has shifted from an assertion that no individualised risk assessment was required in the circumstances to the position that an individualised risk assessment was actually carried out, it will be necessary to interrogate the underlying material in some detail to see if it supports this latter contention.

29. The respondent's grounding affidavit was sworn by the same official who made the decision on behalf of the Minister and whose involvement in that decision had been

impugned by the appellant because he also signed the letter notifying him of the proposal to revoke and engaged in correspondence with the appellant's solicitor whilst that decision was pending. Paragraphs 4 and 5 of that affidavit are of particular significance. In para. 4 the official expresses the view that many Romanian nationals who were granted refugee status over the years have ceased to be refugees but that, as a matter of practicality, steps have not been taken to formally revoke such status. He acknowledges that *"absent some good reason"* it is not the practice of the Minister to commence the revocation process. He also acknowledges that the appellant's surrender to Romania is currently precluded as a matter of law by reason of his status as a refugee.

30. I have already noted that the judgment under appeal found against the appellant on all issues. For that reason, all of the grounds initially raised by the appellant are ventilated again in his Notice of Appeal and the trial judge is characterised as having erred in law and in fact in having failed to find in the appellant's favour on these issues. Likewise, the respondent disputes each of the grounds and additionally contends that no particular errors of fact have been identified.

Overview of Legal Issues

31. Before looking at the specific issues arising on this appeal, it may be useful to look in a more general way at how and why these issues have arisen in this case.

32. Firstly, as a matter of principle, international protection is granted to non-nationals present in the State who establish a well-founded fear of persecution or risk of serious harm such that they are unable or unwilling to return to and avail of the protection of their country of origin. Whilst the State initially undertook obligations in respect of the recognition and treatment of persons who are refugees in 1962 by signing the Geneva Convention, 1951, these obligations are now largely governed by EU law as part of a Common European

Asylum System. The underlying premise is that the State must provide protection to persons who, for certain defined reasons, are unable or unwilling to avail of the protection of their own country. The actions of the State are governed by the principle of non-refoulement (also called the prohibition of refoulement) which under international law prohibits the State from returning an individual to a country where that individual is at risk of persecution or serious harm. That principle is now enshrined in Article 21 of the Qualification Directive and s. 50 of the 2015 Act.

33. It is recognised that circumstances in the countries from which persons flee seeking international protection can vary over time. Thus, a person who was historically recognised as a *bona fide* refugee may, with the passage of time and by reason of a change in the circumstances in their country of origin, no longer be in need of the protection of the host country. Article 11 of the Qualification Directive recognises this and provides for the cessation of refugee status, *inter alia*, if such a change occurs. This is, however, subject to the requirement that the change of circumstances be *"of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded"* (Article 11(2)).

34. Separate to cessation of refugee status because of a change of circumstances in the refugee's country of origin, such status may cease if the refugee voluntarily re-avails themselves of the protection of their country of origin or re-establishes themselves there or, alternatively, acquires a new nationality and enjoys the protection of the country of that nationality. The logic underlying these provisions is that in the first two, the refugee can no longer claim a *"well-founded fear of persecution"* or of *"serious harm"* in their country of origin if they have voluntarily chosen to return there. In the latter case, two different scenarios may arise. The refugee may have acquired the nationality of a third country or may have acquired the nationality of the host country. In the former, the protection of the

host State is no longer required because the refugee now has the benefit of the protection of the country of their new nationality. In the latter case, the refugee no longer requires the protection of the host State *qua* refugee because they now have the protection of that State as an incident of their citizenship.

35. In many, if not most instances, cessation is largely academic. This is because a recognised refugee must be afforded a right of residence in that capacity and as a result may over time acquire rights of long-term or permanent residence in the host country. Further, as a refugee integrates into the host country, they may acquire the right to remain established there through relationships with nationals of that country, most likely through marriage or parenthood. In addition, in Ireland a recognised refugee who has been resident in the State for a period of three years after the grant of a refugee declaration, is entitled to apply for Irish citizenship under s. 15 of the Irish Nationality and Citizenship Acts, 1956 to 2004. Thus, as time passes the entitlement of a refugee to remain resident in the host country is less likely to be based solely on their status as a refugee. Indeed, the longer the time a refugee spends in the host country the greater the likelihood that they will acquire an entitlement to remain there independent of their refugee status.

36. These various possibilities were reflected in the International Protection Act, 2015. Section 9 of that Act reflects Article 11 of the Recast Qualification Directive and provides, *inter alia*, that a person shall cease to be a refugee if they *"can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of his or her country of nationality"* (Section 9(1)(e)). Section 9(2) contains the same proviso as Article 11(2). Section 9(3) provides, *inter alia*, that sub-para. (e) *"shall not apply to a refugee who is able to invoke compelling reasons arising out of previous prosecution for refusing to avail himself for herself of the protection of his or her country of nationality."* This would, for

example, enable a refugee whose experiences in their host country were so traumatic that they are psychologically unable to return, to retain their refugee status even where the circumstances which gave rise to those experiences no longer exist. Section 9(1)(c) provides that a person will cease to be a refugee where they have acquired a new nationality. However, the text of this provision is somewhat different to the parallel text of Article 11(1)(c) of the Qualification Directive because s. 9(1)(c) does not apply when the new nationality is *"as an Irish citizen"*. This exclusion does not appear in the Qualification Directive. The likely reason for this exclusion is to be found in s. 47(9) of the 2015 Act which provides for the automatic cesser of refugee status when the person concerned becomes an Irish citizen.

37. Section 52 of the 2015 Act provides for the revocation of refugees' subsidiary protection declarations. Whilst I will consider this section in some more detail when considering the appellant's fair procedures grounds, for present purposes it is significant to note that s. 52(1) confers upon the Minister a power to revoke a refugee declaration if satisfied that the person is excluded from being a refugee under s. 10 or has ceased to be a refugee under s. 9, or that the decision to grant a refugee declaration was based on mis-representation, omission of facts or the use of false documents by the person in question. The revocation process set out in s. 52 does not apply to section 47(9). Thus, it would appear that a person who has been granted a declaration of refugee status under the 2015 Act, or is deemed to have been granted such a declaration, automatically ceases to be a refugee on becoming an Irish citizen. If they become a citizen of a third country, if they re-avail themselves of the protection of their original nationality or if circumstances in their country of origin change, while they might in theory be regarded as having lost that status automatically, they will remain legally recognised refugees until the Minister revokes the declaration recognising that status through the process provided for in section 52.

38. The position is complicated somewhat by the fact that in *M.A.M. (Somalia)* [2019] IECA 116, the Court of Appeal granted a declaration to the effect that s. 47(9) of the 2015 Act did not have retrospective effect in respect of a refugee who had been granted Irish citizenship before the 2015 Act came into force. The appellant in this case is in a similar position. He became an Irish citizen on 14 December 2015 and the 2015 Act was not commenced until 11 January 2016 (S.I. No. 26 of 2016). It is for this reason that the respondent did not, or could not, rely on the provisions of s. 47(9) to treat the appellant as having automatically ceased to be a refugee on his acquisition of Irish citizenship and, instead, commenced a process under s. 52(1)(b) of the 2015 Act on the basis that the appellant had ceased to be a refugee in accordance with s. 9 of the Act.

39. Although the status of citizenship is perhaps the most profound expression of the relationship between a State and its nationals, there are instances in which a recognised refugee may have greater rights than citizens of the State in question. One of these, the right to family re-unification, is the subject of the decision in *M.A.M. (Somalia) v. Minister for Justice* [2020] IESC 32 (MacMenamin J.). Another is the possibility of surrender to a person's country of origin on foot of an EAW. In normal course, the nationality of a person who is the subject of an EAW is not a consideration for the High Court in deciding whether the warrant should be endorsed under s. 13 of the European Arrest Warrant Act 2003. However, where the person the subject of the warrant, is a recognised refugee, the prohibition of refoulement applies and operates to prohibit, as a matter of law, the surrender to the country from which the subject previously fled seeking international protection.

40. This is the essence of the decision in *Minister of Justice v. Pollak* [2010] IEHC 209 where Peart J. found that the respondent's surrender was *"prohibited by reason of his having an extant refugee status"* and that when this fact was drawn to the Court's attention it would *"properly permit the Court to refuse to endorse the warrant"*. Technically, Peart J. found

that surrender in these circumstances would be a breach of s. 37 of the 2003 Act. This provides that a person shall not be surrendered if surrender would be incompatible with the State's obligations under the European Convention on Human Rights and, in the particular case, Article 3 of the ECHR which prohibits torture or inhuman or degrading treatment or punishment.

41. Whilst existing status as a refugee will automatically preclude surrender under s. 37(1) of the 2003 Act, the provisions of s. 37(1) require that the High Court when endorsing an EAW be satisfied that the prohibition of refoulement will not be breached even where the subject of the warrant is not the beneficiary of international protection. This means that in any case in which it is a potential issue, the Court must consider the extent to which the person whose surrender is sought is at risk of persecution or serious harm if surrendered to the requesting State. Thus, even if the appellant's refugee status were to be held to have been lawfully revoked, his surrender to Romania on foot of any further EAW that might issue is not a foregone conclusion.

42. So, how do these general principles bear on this appellant's circumstances? Firstly, as a recognised refugee the appellant is availing of the protection of the State in circumstances where his fear of persecution in Romania on the grounds of his Roma ethnicity was held to be well-founded. For as long as the appellant remains a recognised refugee he cannot, in principle, be forcibly returned to Romania without the State being in breach of the principle of non-refoulement and, by extension, of Article 3 of the ECHR and s. 37 of the 2003 Act. Although the 2015 Act now clearly provides that a refugee who is granted Irish citizenship will, for that reason, cease to be a refugee, the appellant was granted citizenship before the relevant provisions of the 2015 Act came into force. As those provisions are not retrospective, the granting of Irish citizenship to him did not have the consequent effect of his ceasing to be a refugee. Thus, even though the appellant's entitlement to reside in the

State on a permanent basis is no longer dependant on his refugee status, as long as that status persists, he cannot be forcibly returned to Romania. In this regard, he is in a more advantageous position than an Irish citizen would be facing similar requests for surrender by the Romanian authorities.

43. Further, the appellant emphasises that if he were not a refugee and were to rely on his fear of persecution in Romania under s. 37(1) of the 2003 Act, then the onus of proof would rest on him to establish that his surrender would constitute a breach of the ECHR. On the other hand, in order for the Minister to revoke his refugee status under s. 52 and s. 9(1)(e) of the 2015 Act, the Minister bears the onus of establishing a material change in circumstances in Romania of a significant and non-temporary nature such that the appellant's fear of prosecution is no longer well-founded. Whilst in both cases a similar test will be applied to the same underlying facts, there is a material difference as to who bears the burden of proof and in the consequences of that burden not being discharged. If the Minister does not discharge the burden on her under s. 52, then the appellant retains his refugee declaration and all of the benefits which flow from that status, including the fact that the State would be precluded from surrendering him to Romania. On the other hand, if the appellant does not discharge the burden under s. 37(1) of the 2003 Act, the likely consequence is that he would be surrendered to Romania unless there is some other reason – possibly arising from whatever EAW the Court might be examining – which precludes such surrender.

44. All of this leads to what is perhaps the central issue in the case, namely whether it is legitimate for the respondent to make a decision to revoke the appellant's refugee status under s. 52 when the commencement of the s. 52 process was prompted by the fact that the respondent had failed to secure the surrender of the appellant to Romania by virtue of his extant refugee status. Although the Minister argued that there was no challenge in the proceedings to the decision to commence the process, it is clear from the way the case has

been framed on behalf of the appellant that the illegality alleged in the decision to revoke is in part premised on the assertion that it was an abuse of process to commence the s. 52 process in the first place in light of the previous unsuccessful EAW applications. Of course, many of the more detailed issues concern the manner in which that process was carried out and fall to be considered if it is legally permissible for the Minister to have instituted the process in these circumstances.

Issues Concerning Relationship Between s. 52 Process and EAW Request

45. The appellant's central argument under this heading is that the revocation of his refugee status was *"a means of circumventing or obviating the difficulties in surrendering"* him and, consequently, that it is an abuse of process. He contends that the institution of what he describes as *"two futile surrender attempts"* by the Minister was also an abuse of process which contaminated the subsequent proposal to revoke. To a large extent the appellant characterises the desire to make him amenable to surrender to Romania as being the purpose of or the ulterior motive for the revocation decision. Some of the appellant's arguments under this heading are contradictory. On the one hand, he claims that he should have been put on notice of the alleged ulterior motive, presumably so that he could make submissions on the issue and thereby secure a more individualised decision specific to his circumstances. On the other hand, he contends, that the ulterior motive is irrelevant to the decision under s. 52 and, presumably, therefore, should not be considered at all. He complains that on the Minister's rationale, all Romanian refugees in this State are liable to have their status revoked. As this clearly has not occurred, he argues that he has been singled out for revocation solely because of the existence of the EAWs seeking his surrender.

46. The Minister carefully characterises the second EAW request as having prompted or triggered the s. 52 process but as not having informed the outcome of that process in any

way. She argues that the power to revoke refugee status under s. 52 is clearly not going to be exercised on every occasion on which it potentially arises so that there will necessarily be some factor which prompts reliance on that power on each occasion on which it is exercised. There was no concealment of this prompting factor as the Minister openly identified the possible revocation of the appellant's refugee status in the EAW process but had not commenced the procedure under s. 52 before the EAW process was concluded. It is argued that there is nothing improper in a proposal to revoke refugee status being triggered by the prior EAW process in which it became apparent to the Minister that that status *"may unjustifiably have been impeding an otherwise lawful application for surrender"*.

47. In analysing this issue, it is useful to start by expressing by agreement with the views of the High Court judge that there was nothing improper either in the fact that the Minister previously sought endorsement of the two EAWs or in the manner in which this was done. The existence of two separate EAW processes is readily explained by the fact that one EAW sought the surrender of the appellant to face criminal charges and the other sought his surrender to serve a term of imprisonment that had been imposed on him in respect of those charges following a trial *in absentia*.

48. It is not accurate for the appellant to characterise the Minister as having subjected him twice to the EAW process. Regard must be had to the fact that as a matter of international and European law the Minister is under a legal duty to act on foot of a request for surrender properly made by the authorities of participating States under the EAW Framework Decision. The action required of the Minister is to bring the matter before the High Court and it is then a matter for the High Court – and not for the Minister – to decide whether surrender should be ordered. Once the Minister became aware of the appellant's status and had an opportunity to consider the implications of that status on the request for surrender, she did not purport to stand over the requested surrender before the High Court. Whilst

extant refugee status may have the effect of precluding surrender under s. 37(1)(a) of the 2003 Act, it does not make somebody immune from the EAW process nor does it prevent a request being made for their surrender by another State thus triggering the Minister's obligation to bring the person before the High Court.

49. There may be merit in the appellant's criticism of the Minister for failing to respond to the judgment in *Pollak* by putting in place a system to ascertain whether a person arrested on foot of an EAW is a holder of a grant of international protection. Of course, this Court has no way of knowing whether such a system is practicable or even desirable and difficulties might arise because of the confidentiality attaching to the grant of international protection, particularly when the State is engaging with the authorities of the State from which a requested person has fled. In any event, it does not follow from the absence of a system under which a person's asylum status is automatically ascertained, that the Minister acted improperly in receiving and acting on foot of the EAWs received in respect of the appellant just because he was, in fact, a refugee at the material time.

50. Accepting, as I do, that the EAW processes were not themselves unlawful or improper, does the fact that the Minister's proposal to revoke was prompted by the unsuccessful EAW processes render that proposal and the resulting decision unlawful? It is well established as a matter of administrative law that a statutory power may only be exercised for the purpose for which it is conferred and reliance by the decision maker on an *"improper purpose"* may render a decision made under statute invalid. There is, however, an important distinction to be drawn between the factors which may cause a decision maker to commence a particular statutory process and the factors which may be properly considered within that process once it has commenced. Generally, the jurisprudence under this heading involves cases where the reasons given for decisions or the material on which they are based are manifestly outside the scope of the statutory scheme under which the decision is to be made.

51. The appellant does not contend for either of these things in this case, although he makes two criticisms which touch on the latter. The first is to argue that the same official who initiated the proposal should not also have been the person to make the final decision, not least because that meant that the final decision maker was aware of the underlying EAWs which were not relevant to the decision under section 52. The second is to complain that the appellant's full file was not disclosed to him nor exhibited in the judicial review proceedings. In my view, this second element of the complaint is unmeritorious in circumstances where the appellant did not seek access to his file at any stage. He had the option of making a data access request or of seeking discovery in the context of these proceedings but did neither. Indeed, he might have simply written a letter asking for a copy of his file but did not take even this simple step. Consequently, he cannot speculate as to whether that file might have included reference to the underlying EAWs in an improper manner. The onus is on the appellant to prove that the EAWs were improperly considered in the s. 52 process and in the absence of such proof I must assume that no improper or irrelevant material was considered.

52. The contention that a decision to revoke should be made by a different official to the one who made the initial proposal raises more substantive concerns. It rests on two propositions, namely that the motivation for the decision – which the appellant characterises as being to facilitate his surrender to Romania – was inherently an improper one and once that motivation was known to the person who proposed revocation and handled the file, thereafter it could not be *"unknown"* by him in making the final decision. The appellant relies on the decision of the Supreme Court (Dunne J.) in *Damache v. Minister for Justice* [2020] IESC 63 in support of this argument.

53. *Damache* involved a proposal to revoke citizenship under s. 19(1) of the Irish Nationality and Citizenship Acts 1956 to 2004. The statutory process entailed the making of a reasoned proposal on behalf of the Minister, followed by the setting up of a Committee

of Enquiry by the Minister which Committee would hold an oral hearing at which submissions could be made and evidence presented and queried. Representatives of the Minister would present the reasons for the proposed revocation to the Committee and, in effect, act as *legitimus contradictor* against the person facing the loss of citizenship. The Committee would then make a recommendation to the Minister but, in making a final decision, the Minister was not bound by the findings of the Committee.

54. Dunne J. held (at para. 129) that this process did *"not provide the procedural safeguards required to meet the high standards of natural justice applicable to a person facing such severe consequences"*. At an earlier point in her judgment (para. 27) Dunne J. emphasised the importance of citizenship and the grave significance to the individual of the loss of citizenship and consequent loss of the protection of the full range of constitutional rights conferred on citizens. For this reason, she held that the process by which citizenship can be revoked must be *"a robust process which properly balances the rights of the State to make such a decision with the rights of the individual concerned"* (para. 28). Finally, she concluded that the existence of the remedy of judicial review did *"not provide an effective remedy where the problem is not with the manner in which the process is carried out but with the process itself."* (para. 130).

55. The Minister seeks to distinguish *Damache* in part on the basis that refugee status does not have the same unique constitutional status as citizenship and in part because the procedures under s. 52, taken as whole, provide a high level of natural justice and procedural fairness. Given the undoubted importance of international protection, distinguishing *Damache* on the basis that there is a material difference between refugee status and citizenship is, at first glance, unattractive. However, I think the distinction is fundamentally correct. The particular and unique importance of citizenship was recognised and expanded upon by Dunne J. in *Damache*. The grant of Irish citizenship to someone not otherwise

entitled to it by birth or descent is a privilege conferred upon the new citizen through the exercise of an Executive discretion which is inherent in the sovereignty of the State (albeit now regulated by statute under Irish Nationality Citizenship Acts 1956 to 2004). Once conferred, citizenship is intended to be permanent. Indeed, the citizenship of a non-naturalised Irish citizen cannot be revoked. In the case of a naturalised Irish citizen, such as the appellant, citizenship can only be revoked on the limited grounds set out in s. 19(1) of the 1956 to 2004 Acts, most of which entail either adverse conduct on the part of the naturalised citizen vis-à-vis their citizenship or what might loosely be regarded as the abandonment of Irish citizenship by leaving the State on a long-term basis or acquiring citizenship of another country.

56. In contrast, refugee status arises because the State is legally obliged to recognise a third country national's need for international protection. Subject to certain limited exclusions, the grant of refugee status is not discretionary once an applicant has established that the requisite criteria have been met. The State has certain obligations toward persons who have been granted international protection (and indeed towards applicants for such protection) including the obligation to permit them to reside in the State in order to avail of the State's protection. However, these obligations and the consequent entitlements of persons granted international protection, although themselves very significant, are not as extensive or as fundamental as those pertaining to citizenship.

57. Both the Geneva Convention and the Qualification Directive explicitly recognise that a person may cease to be a refugee if there is a material change in the circumstances in the country from which they have fled such that their fear of persecution is no longer well founded. This may occur independently of any act or conduct, much less any adverse conduct, on the part of the refugee. Thus, it is evident that refugee status is not of itself intended to be permanent – although as I have previously noted, residence in a host country

as a refugee may, over time, give rise to a right of residence independent of the person's original refugee status.

58. Further, the revocation of citizenship under s. 19 of the 1956 Act remains a discretionary decision. Section 19(1) outlines the circumstances in which that decision may be made by the Minister and presumably it is open to the naturalised citizen to seek to persuade the Minister that such a decision should not be made even if those circumstances are established. In contrast, cessation of refugee status is virtually automatic under s. 9 if any of the circumstances set out in sub-s. (1) are shown exist. I acknowledge that in practical terms the difference may be subtle in circumstances where legal effect is only given to the cessation of refugee status under s. 9 following the conduct of a process under s. 52, and that process will only arise when the Minister proposes to revoke an extant declaration of refugee status. Nonetheless, I think the distinction is of some significance. It is often pointed out that when somebody is granted a declaration of refugee status, this is the recognition of a status which exists independently of and indeed prior to the declaration itself. By analogy, the revocation of refugee status, particularly on the grounds proposed in this case – under s. 9(1)(e) – is a recognition of the fact that a person has ceased to be a refugee independently of any decision to revoke that status under section 52.

59. For all of these reasons, although it is undoubtedly the case that a high standard of fair procedures must apply to decisions revoking refugee status, the standard is not necessarily commensurate with that applicable to the revocation of citizenship. On the facts of this case, the revocation of the appellant's refugee status would not of itself have any impact on his or his family's right to live and work in or on their right be supported by the State as citizens.

60. I also accept the other ground upon which the Minister seeks to distinguish *Damache*. The procedure under s. 52 is not one in respect of which the Minister remains the ultimate decision maker throughout. Under s. 52(8) where the Minister has made his decision to

revoke refugee status, the person concerned has a statutory right to appeal to the Circuit Court. Further, under s. 52(9) on the hearing of such an appeal the Circuit Court may either affirm the decision or direct the respondent not to revoke the declaration. As noted by Clarke J. in *Nz.N. v. Minister for Justice* [2014] IEHC 31 at para. 31 this constitutes a *de novo* appeal in which the Circuit Court *"can consider all of the evidence which was before the Minister and hear oral evidence from the appellant and any witnesses called by either party in determining the appeal. The Court can come to its own view as to whether the decision to revoke is appropriate or should be withdrawn."* This means that there is independent judicial oversight of the revocation process which was absent from the procedure under s. 19 of the Irish Nationality and Citizenship Acts 1956 to 2004.

61. The existence of that right of appeal stands in stark contrast to the two matters which were of most concern to Dunne J. in relation to the statutory process in *Damache*. The first of these was that the findings of the Committee of Enquiry were not binding on the Minister so that even though she was satisfied as to the independence of such a committee, it did not resolve the concerns she had about the independence of the process. Secondly, the remedy of judicial review was not regarded by Dunne J. as an effective remedy since factual issues going to the substance or the merits of the decision would not be reviewed by the High Court in a judicial review. In contrast, the Circuit Court can revisit all or any factual issues and decide them on the same or different evidence to that which was before the Minister. The decision of the Circuit Court will be determinative of any appeal since the Minister will be obliged to comply with any direction of that court not to revoke a declaration of citizenship.

62. In general, it might be perceived as preferable to have a different official make the decision to revoke a declaration under s. 52(7) to the individual who has made the proposal to revoke under section 52(4). That said, it is difficult to see why in a process which seeks to determine the existence of a particular state of affairs for the purposes of making a decision

which is not discretionary once that state of affairs is established, the involvement of the same individual throughout necessarily amounts to a breach of fair procedures. This is particularly so when the person who is the subject of the decision has not engaged with the process nor made any substantive submissions on the proposed revocation. Unlike the initial decision to grant or refuse refugee status, a decision to revoke that status is unlikely to turn on matters such as the credibility of the applicant. The person in question is a recognised refugee and thus the credibility of their initial claim has already been accepted. What is in issue on a proposed revocation, certainly under s. 9(1)(e), is the more objective question of whether conditions in the country of origin have materially changed such as to make the initially well-founded fear of persecution no longer relevant.

63. The making of a proposal under s. 52(4) is designed to ensure that a person who might be adversely affected by the revocation of a declaration of refugee status is given notice of the potential revocation and the reason for it and given a full opportunity to make submissions before any decision is made. It would be unwarranted to introduce additional procedural requirements around the proposal stage or to treat it as a step, such that the official who issues the proposal is automatically precluded from any further involvement in the decision-making process. There may conceivably be circumstances in which the level of engagement and the nature of the submissions made are such that it would be inappropriate to have the official who had formulated the reasons for the original proposal decide whether those reasons had withstood the process, but manifestly this is not such a case.

64. The appellant complains that as the official knew of the existence of the EAW, he could not *"unknow"* that information when making the decision to revoke on behalf of the Minister. There is nothing in the decision itself which suggests that the existence of the prior EAW was a factor to which any consideration was given. It is not the reason given for the proposal and it is not mentioned in the *"reasons"* part of the decision, or indeed in any part

of it. The appellant did not put any material before the Court to suggest that the official in question was improperly motivated by a desire on the Minister's part to secure the surrender of the appellant to Romania. The Minister openly acknowledges in the papers filed in this case that she was prepared to pursue the avenues lawfully available to her to revoke the appellant's asylum status in circumstances where that status appeared to be unjustifiably impeding an otherwise lawful application for his surrender to serve a sentence of imprisonment for criminal offences of which he has been convicted. I accept the argument made on her behalf that there is a difference between the factor which prompts the initiation of a process and the matters which can be properly considered during that process and there is no evidence before the Court that the Minister – or the official on her behalf – crossed that line.

65. It seems in fact that the existence of the EAW was introduced into the process by the appellant solicitor's letter of 6 May 2021. I will deal with the arguments made by the appellant arising from this correspondence in the next section of this judgment. At this stage it is sufficient to observe that it is very difficult to see how the appellant can be critical of the official having knowledge of the EAW when that knowledge was provided by the appellant himself.

66. There is an air of unreality to some of the appellant's other submissions under this heading. I accept that it would be both impractical and unnecessary for the Minister to routinely take steps to revoke the refugee status of persons resident in Ireland based on changes in their countries of origin. For the most part, such persons will have become legally settled in Ireland through the passage of time and the revocation of their refugee status would not have a material bearing on their presence here one way or the other. When a proposal of this nature is made it will necessarily be prompted by a factor on which the continued

existence of refugee status has some bearing and, in the general run of things, most likely by a factor which does not reflect well on the person concerned.

67. It also cannot be the case that the fact that the appellant was previously the subject of requests for surrender on foot of EAWs, which could not be given effect to because of his refugee status, necessarily precludes any decision being made to revoke that status. Just as refugee status will not be granted to a person who fears prosecution in their country of origin (absent the existence of persecution), an extant declaration of refugee status cannot operate to render a person indefinitely immune from prosecution in their country of origin if they no longer have a well-founded fear of persecution which precludes their return to that country or which requires the State to continue to afford them protection. This is particularly so if they have in fact been engaged in criminal activity in the country in question.

68. Further, knowledge of alleged criminal behaviour cannot be regarded as being *per se* prejudicial in the context of the revocation of refugee status. I have noted above that, in general, a proposal to revoke will only be made in circumstances where the continued existence of an individual's refugee status comes to the Minister's attention in some other context and that those contexts will generally not be favourable to the person concerned. On the facts of this case, although the appellant did not make any substantive submissions on the Minister's proposal, it would be very difficult to see how he could do so in a manner which would enable the Minister to make an individualised decision pertaining to him without acknowledging that he has recently been convicted of a criminal offence and would, if returned to Romania, inevitably became engaged with the criminal justice system in that country. The basis on which he was originally granted refugee status included discriminatory involvement in the criminal justice system in Romania and mistreatment at the hands of the Romanian police. Presumably any representation contending that he would

still be subject to unfair police attention or prosecution because of his ethnicity would have to reference the criminal charges the subject of the EAWs.

69. Finally, the appellant also argued that in any future EAW process the High Court would take account of the fact that his refugee status had been revoked (assuming that the decision to revoke were to be affirmed on appeal by the Circuit Court). There was some debate as to the extent to which the High Court, in taking cognisance of a decision to revoke would regard itself as free to take a different view, or even the extent to which the appellant could urge the High Court to do so without being accused of making a collateral attack on the revocation decision. As these issues are hypothetical in the absence of a further EAW and as the High Court has a duty under s. 37(1) of the 2003 Act to ensure that surrender is not effected in breach of the ECHR, I think it more appropriate to leave the resolution of these issues to a case in which they actually arise.

Breach of Fair Procedures

70. The appellant's case under this heading is relatively straightforward. He contends that the response to his solicitor's letter of 6 May 2021 led him to believe that the Minister would make a preliminary decision on the validity of the proposal to revoke, would advise him of that decision, and (assuming that the Minister did not agree to withdraw the proposal) would then afford him a further period within which to make submissions *"on the merits"* of the proposal before proceeding to make any decision on the proposal to revoke. As the Minister did not do this, he contends that he was denied fair procedures in that he was denied the opportunity to make substantive submissions in response to the Minister's proposal.

71. In my view there is nothing in the correspondence received from the Minister which could reasonably have led the appellant or those advising him to reach this conclusion. The Minister facilitated the appellant on a number of occasions by extending the deadline for

making submissions to 14 May 2021. At no stage did the Minister's correspondence suggest the deadline would be extended beyond that date. Whilst the appellant solicitor's letter of 10 May 2021 sought to make a distinction between the *"representations"* made in her earlier letter and the *"substantive submissions due in response"* to the proposal letter, nothing in the Minister's further correspondence could reasonably be read as either agreeing to make and communicate a decision on the representations or as extending the deadline for substantive submissions. Equally, the statement in the Minister's letter of 11 May 2021 that *"the only representations under consideration by this office in respect of the Minister's proposal to revoke"* were those of 6 May cannot reasonably be construed as having this effect. If anything, the distinction which the appellant's solicitor attempted to draw between the *"representations"* already made and the *"substantive submissions"* which it seems it was intended to make at a later stage is confusing as s. 52, sub-ss. (4), (6) and (7)(a) all refer to the making and consideration of representations and do not make any reference to submissions. In my view these terms are synonymous but if the solicitor intended to draw a distinction between them, it would have made more sense to use the statutory term for the representations which she intended to make on behalf of her client within the statutory scheme. In any event, the only representations which had been received on behalf of the appellant were those in the letter of 6 May 2021 so it is unsurprising that the respondent would have confirmed that these were the only representations under consideration.

72. The Minister's letter of 5 March 2001 commenced a statutory process under s. 52 by notifying the appellant of the proposal and inviting representations. The process set out in s. 52 is not an iterative one, nor is it a process the structure of which can be dictated by the recipient of such a proposal. The appellant was invited to make representations and the Minister was obliged to consider any representations which were made by the appellant. The appellant's solicitor sought the withdrawal of the proposal in default of which litigation was

threatened. Manifestly, the Minister did not withdraw the proposal and never gave any indication that this was likely, or even under consideration by her. The fact that the threatened litigation was not issued on the appellant's behalf did not create any obligation on the Minister to address the contents of the appellant's letter in the manner requested by the appellant. In short, there was no obligation on the Minister to engage with the appellant's solicitor's complaints about the validity of the process before proceeding to make a decision on the substantive proposal. The appellant was afforded a lengthy extension of time within which to make representations and did not do so. There was nothing to prevent the appellant from making substantive representations on the proposal to the Minister whilst also issuing correspondence challenging the validity of the process. The choice to hold back on making substantive representations whilst awaiting a formal response to the procedural objection was exclusively that of the appellant and the making of that choice did not impose an obligation on the respondent to engage with it in the manner required by the appellant.

73. I am in full agreement with the conclusion of the trial judge (at para. 60 of his judgment) that where an applicant takes a wholly unreasonable and inappropriate interpretation of what the respondent has stated or is mistaken as to what the respondent's position is, they cannot rely on that misinterpretation or mistake to assert a breach of fair procedures on the part of the respondent where the mistake was not caused by any lack of clarity on the respondent's part.

Individualised Assessment of Risk

74. By the time the appeal was heard, the Minister expressly accepted that she was obliged to conduct an individualised assessment of the risk to the appellant before making the decision to revoke his refugee status but contended that she had done so in the decision of 18 May 2021. As previously noted, her initial approach was somewhat different and relied

on the appellant's failure to make substantive representations as obviating the necessity for an individualised risk assessment. Clearly there is a material difference between asserting that something is not legally required and contending that the legal requirement was complied with which, of itself, tends to undermine the Minister's approach to this issue.

75. The requirement for an individualised assessment is identified in the decision of the CJEU in *Abdulla & Ors.* Case C-175/08 which concerned Iraqi nationals granted asylum in Germany between 1999 and 2002 because of a fear of persecution in Iraq by Saddam Hussein's regime. The relevant German authorities revoked their asylum status in 2005 on the basis of a change of circumstances in Iraq, namely the overthrow of Saddam Hussein. There followed a series of applications to and appeals from the administrative courts in Germany and the matter ended up before the Federal Administrative Court, which referred a series of questions to the CJEU. The questions sought to ascertain the conditions of which authorities in a host country should be satisfied before determining that an individual's refugee status had ceased under Article 11(1)(e) of the Qualification Directive (equivalent to s. 9(1)(e) of the 2015 Act). In answering the questions posed, the CJEU stated as follows:-

> *"69. Consequently, refugee status ceases to exist where the national concerned no longer appears to be exposed, in his country of origin, to circumstances which demonstrate that that country is unable to guarantee him protection against acts of persecution against his person for one of the five reasons listed in Article 2(c) of the Directive. Such a cessation thus implies that the change in circumstances has remedied the reasons which led to the recognition of refugee status.*
>
> *70. In order to arrive at the conclusion that the refugee's fear of being persecuted is no longer well founded, the competent authorities, by reference to Article 7(2) of the Directive, must verify, having regard to the refugee's individual situation, that the actor or actors of protection of the third country in question have taken reasonable*

steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status."

76. The emphasis on the refugee's individual situation is repeated at para. 89 where the Court addresses the equivalence of the standard to be applied in assessing whether a person should be recognised as a refugee at the outset and whether that status should be maintained when circumstances in the country of origin have changed:

"89. At both of those stages of the examination, the assessment relates to the same question of whether or not the established circumstances constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subjected to acts of persecution."

77. A similar point is made by the Court of Appeal in England (Arden L.J.) in *Secretary of State for the Home Department v. MA (Somalia)* [2018] EWCA Civ. 944 which held that *"There should simply be a requirement for symmetry between the grant and cessation of refugee status"* (para. 47). At para. 49 of the same judgment Arden L.J. stated:-

"Another way of putting the point is that the Refugee Convention and the [Qualification Directive] are not measures for ensuring political and judicial reform in the countries of origin or refugees. The risks which entitle individuals to protection are risks which affect them personally and individually. It is an individualised approach."

78. This much is undisputed. What is disputed is whether the assessment carried out by the Minister meets this standard and particularly whether it does so in circumstances where the appellant failed to make any representations on the proposal to revoke. The appellant says that it does not as the reasons given in the letter of 18 May 2021 – i.e. that Romania's

accession to the EU demonstrates a significant and non-temporary change of circumstances such that his fear of persecution is no longer well-founded – is capable of applying to all Romanians and does not take account of his personal circumstances including his Roma ethnicity. The Minister argues that it is clear from the immediately preceding paragraph in the letter that the Minister had regard not just to the fact that the appellant's well-founded fear of persecution had been accepted by the RAT but that country of origin information at the time confirmed widespread discrimination against members of the Roma community.

79. Two general observations can be made. The first is that a reason which applies to a large group of people – even a group as large as all Romanians granted asylum twenty years ago – is capable of justifying a decision to revoke on the grounds of s. 9(1)(e) if it is also shown that this reason applies specifically to the subject of the decision. A change in circumstances in a country may well mean that all persons who previously fled that country can no longer maintain a well-founded fear of persecution on their return. However, the decision maker cannot assume this to be the case. Some express regard must be had to the circumstances of the individual whose status is in issue, and particularly those circumstances which justified the grant of recognition as a refugee in the first place, before the decision maker can properly be satisfied that general improvements in the conditions in a country of origin allay the original fear of persecution.

80. The second is that the extent to which the decision maker must engage with the individual's personal circumstances will undoubtedly be affected by the extent to which the individual engages with the decision maker and addresses both the reason for the proposed revocation and their individual circumstances. In a case such as this, where the appellant did not avail of the opportunity to make representations, the decision maker's knowledge of his individual circumstances will necessarily be limited. However, that does not absolve the decision maker from the obligation to consider how the changes in conditions in the country

of origin will impact on the individual circumstances of the appellant insofar as those circumstances are known to the decision maker. That consideration may well be fairly basic if all that is known about the appellant is that he is a man in his 50s of Roma ethnicity with a history of persecution by the police in Romania. Nonetheless, it is an exercise which must be carried out in order to ensure that adequate regard is had to the appellant's individual situation.

81. Equally, an individual cannot complain after the event that a particular document or a particular piece of information was not considered (here the 2014 UNHCR Report referred to in the appellant's affidavit) when that document was never provided to the decision maker. This is, of course, subject to the proviso that the information actually relied on by the decision maker fairly reflects conditions in the individual's country of origin.

82. Bearing these observations in mind, I do not think that the letter of 18 May 2021 evidences that the Minister carried out an individual assessment of the risk to the appellant of revoking his refugee status. No other documentation or analysis has been put before the Court in which such assessment can be found. Conditions in Romania may indeed now be such that the appellant's fear of persecution is no longer well founded. However, before the Minister could be satisfied that this is the case, she would be required to expressly consider the current position of the Roma community in Romania and, in particular, whether, and if so the extent to which, members of that community continue to suffer from mistreatment and harassment at the hands of the Romanian police. Even without the appellant having made submissions, the Minister was aware that his Roma ethnicity and his mistreatment by the police on account of that ethnicity were the factors which justified his recognition as a refugee in 2004. At a minimum those factors require to be addressed in any decision revoking that status in order to maintain the symmetry described by Arden L.J. in *Secretary of State for the Home Department v MA (Somalia)* (above).

83. In my view, the fact that the appellant's Roma ethnicity is flagged in that part of the decision which addresses the initial grant of refugee status does not suffice to demonstrate that the decision maker has assessed current conditions in Romania with regard to persons of the appellant's ethnic background. In the context of s. 52, setting out the basis upon which a refugee was granted asylum merely identifies the matters with which the risk assessment must be concerned but does not of itself amount to an assessment of those matters.

84. Further, it is a feature of cessation under Article 11(1)(e) and s. 9(1)(e) that it is based on current conditions in the refugee's country of origin. The decision in this case was made in 2021. The only piece of documentary information relied on by the Minister was a statement by the EU Parliament in 2004 (which coincidentally was the same year the appellant was recognised as a refugee) and Romania's subsequent accession to the EU in 2007. Whilst I fully accept that accession to the EU is a significant step for a country and does, of itself, evidence a commitment to adhere to certain democratic standards, I would nonetheless expect the decision maker to have considered some more up-to-date analysis confirming Romania's adherence to those standards during the intervening fourteen years. Even in circumstances where the appellant did not engage with the reason for the proposed revocation of his refugee status, it is, in my view, necessary for that reason to be fully interrogated before a final decision can be made on that ground.

85. I have previously held that the Minister cannot be criticised for not having considered and addressed specific material which was not brought to her attention by the appellant. This is however subject to the proviso that a reasonably thorough analysis of the current position based on reputable up-to-date information has been carried out. Although the 2014 report cited by the appellant in his affidavit could also be regarded as out-of-date and may not necessarily support the contention that his fear of persecution continues to be well founded,

at a minimum it suggests that reliance on the accession of Romania to the EU in 2007 *simpliciter* is not sufficient to discharge the burden of proof that lies on the respondent under Article 14(2) of the Qualification Directive.

86. In these circumstances, I do not share the view expressed by the trial judge (at para. 75 of his judgment) that the appellant has not made out his allegation that the Minister failed to carry out an individualised assessment of the appellant as a member of the Roma community with a focus on his individual circumstances in the context of conditions in Romania. I do not think that compliance with the obligation to carry out an individualised assessment is satisfied merely by establishing that the materials necessary to do so were before the Minister. In any event, the evidence before the Court does not in my view establish that that Minister had before her materials capable of grounding an assessment of current conditions in Romania for a person of Roma ethnicity. There is no evidence that she considered any information post-dating Romania's accession to the EU in 2007 and no evidence that she considered any information specific to the position of the Roma community in Romania. For all of these reasons I would allow the appellant's appeal on this ground.

Adequacy of Reasons

87. The appellant's arguments concerning the adequacy of the reasons for the Minister's decision to revoke his refugee status and the contention that the Minister did not carry out an individualised assessment of the risk to him are very much intertwined. I have already expressed the view that a reason based generally on the reform of the judiciary and improvements in respect of human rights in Romania is not inadequate simply because it is capable of applying to a large number of people. However, given the individualised nature of international protection decisions, including decisions to revoke asylum status, in my view

it is necessary to establish not just the existence of a reason which applies in general to a group of people but also that that reason applies specifically to the individual in question. In this instance, the appellant is not just Romanian, he is a member of the Roma community. The Roma community constitute a minority that historically has been subjected to discrimination, social exclusion, economic deprivation and persecution in a number of countries including Romania. Establishing a general improvement in conditions in Romania goes part of the way towards establishing that the appellant's fear of persecution may no longer be well-founded. However, in order for the reasons to be adequate, they must also specifically address the factors relied upon by the appellant at the time asylum was granted to him, i.e., his Roma ethnicity and his treatment by the Romanian police in the context of the criminal justice system. Mentioning that ethnicity in connection with the original grant of asylum does not address nor provide a reason as to why his well-founded fear of persecution on that ground in 2004 could be said to have ceased by 2021.

88. I do not wish to overstate the reasoning obligation on the Minister in these circumstances. The appellant's failure to make substantive representations on the proposal to revoke necessarily means that the reasoning obligation on the Minister will be commensurately lighter than if the appellant had meaningfully engaged with the process. Much of the recent case law on the standard of reasoning required of administrative decision makers focusses on occasions where there has been active and meaningful engagement with the decision maker and the consequent entitlement of people to know the view the decision maker took on the issues raised in the submissions which they had made (see for example *Connolly v. An Bord Pleanála* [2018] IESC 31). Less consideration has been given to the standard of reasons required where a process has not been engaged with and submissions have not been made. This may be something which the courts will have to consider in detail in a future case.

89. However, in circumstances where I am satisfied that the Minister failed to conduct an individualised assessment it may be fallacious to also criticise reasoning in the decision for failing to address the criteria that should have been addressed were an individualised assessment to have been carried out. The error is largely antecedent to the reasoning. Where a decision is legally inadequate it might seem logical to hold that the reasons for the decision cannot be adequate. However, it is also arguable that where reasons transparently explain the decision maker's rationale, they meet the legal criteria for adequacy and should not be held inadequate because some other legal error has been made. Fortunately, it is not necessary to resolve this conundrum as the appeal must succeed in light of my finding that the Minister has failed to conduct the necessary individualised assessment and if such an assessment is properly carried out then the reasons for any resulting decision will inevitably be different to those at issue here.

Delay

90. In light of the conclusions, I have reached on the lack of an individualised assessment addressing what should have been the key issue in relation to the appellant, my observations in relation to delay necessarily *obiter*. Consequently, I will keep them brief. I will also briefly address the argument made by the Minister as to the adequacy of the alternative remedy available to the appellant.

91. The case made by the appellant on delay is a little difficult to understand. It is pleaded on the basis that there has been a delay which constitutes *"inordinate and inexcusable delay"* – concepts which have particular relevance in the jurisprudence concerning the striking out of proceedings for failure to prosecute. It is less clear that those concepts have any meaning or relevance to the revocation of refugee status. Firstly, cessation of refugee status is dependent on the conditions in the country of origin at a particular point in time. Therefore,

any decision under s. 52 must necessarily be made by reference to those conditions at the time the decision maker is considering revocation. Those conditions may or may not have persisted for some time at that stage but there is nothing in the legislation or the instruments from which it is derived (i.e. the Qualification Directive and the Geneva Convention) to suggest that a change in circumstances in a refugee's country of origin commences a time limit, the expiration of which precludes the revocation of refugee status at any point thereafter.

92. Implicit in the appellant's case is an argument to the effect that because the Minister did not move to revoke his refugee status either when Romania joined the EU in 2007 or when the first EAW could not be executed in 2011, she was estopped from seeking to do so thereafter. In my view, this argument is fundamentally misconceived. Refugee status does not become permanent through the passage of time – although, as previously noted, a refugee who is present in a host country for an extended period of time may acquire a permanent right to continue to reside there for reasons independent of their refugee status. Indeed, if anything, the instruments on which s. 9(1)(e) is based recognise that refugee status may cease with the passage of time or when certain conditions change, which may or may not be based on the refugee's own actions. Consequently, in my view both the notion of a time limit from which delay could be measured or an estoppel arising from such delay are misconceived and do not apply either to the cessation of refugee status under s. 9 nor the formal revocation of refugee status under section 52.

93. The trial judge analysed this issue in some considerable detail between paras. 97-105 of his judgment. Nothing that has been advanced by the appellant in his appeal persuades me that he was incorrect in his analysis and, consequently, I would not allow the appeal on this ground.

Adequacy of Alternate Remedy

94. Logically, it might have been appropriate to address the adequacy of the alternative remedy, i.e. the statutory right of a full appeal to the Circuit Court, before considering the merits of the substantive points raised on the appeal. This is all the more so because the point on which the appellant has succeeded, namely the failure of the respondent to carry out an individualised assessment of the risk to him, is one which could be in principle have been addressed by the Circuit Court in the course of a full appeal. However, this was not clear from the outset as the Minister's Statement of Grounds expressly pleaded that an individualised assessment was not required under section 52(1)(b). Therefore, there was a real possibility that if the appellant were required to proceed with the appeal, the Minister would have contended that the scope of the statutory appeal did not require the Circuit Court to conduct such an assessment. That requirement has now been established in this judgment.

95. Further, the other issue raised by the appellant, namely the allegation of improper motive and abuse of process because the s. 52 process was prompted by the unsuccessful attempts to return him to Romania on foot of two EAWs also gives rise to some difficulties. The jurisdiction an appellate court exercises when hearing a *de novo* appeal is quite distinct from the supervisory jurisdiction exercised by High Court over the actions of lower courts and administrative decision makers. The Circuit Court can fully examine the merits of the proposal made by the Minister and the reasons advanced by the appellant as to why the declaration of refugee status should not be revoked, and consider any evidence adduced by either side in coming to its conclusion. A court exercising that type of jurisdiction would not normally have – or indeed require – jurisdiction to decide upon the *vires* of the actions of the original decision-maker. Consequently, it was unclear, to say the least, that this issue could ever be resolved by way of an appeal to the Circuit Court, although if such an appeal

were to find in the appellant's favour, then the need to determine whether the original process was *intra vires* would become moot.

96. In response to the Minister's contention that relief should be refused on a discretionary basis because of the existence of an alternative remedy, the appellant contended that as the process was fundamentally flawed an appeal to the Circuit Court was not an appropriate remedy. The trial judge rejected this argument on the basis that the appellant had not established that the process was inherently flawed. Consequently, he concluded that it would be an appropriate exercise of the Court's discretion to refuse the appellant's application because he had not exhausted his right of appeal to the Circuit Court before bringing his proceedings. Clearly, that rationale is no longer applicable in circumstances where I have held that the decision under challenge is flawed by reason of the failure to conduct an individualised assessment. Consequently, this Court is in the more invidious position of having to determine whether, notwithstanding that finding, relief should be refused because of the existence of an alternative remedy. The situation is perhaps made more complex because the Notice of Appeal to the Circuit Court which has been exhibited in these proceedings is largely based on the same type of procedural arguments which the appellant has made in this judicial review and does not, in fact, engage substantively with the issue intended to be addressed on such an appeal: which is whether the conditions in the appellant's country of origin have changed in a significant and non-temporary way such that his fear of prosecution can no longer be regarded as well founded. It may be that the appellant's Notice of Appeal has been framed in this matter because of what the appellant perceives as the deficiencies in the decision under appeal, some of which have been upheld by this Court.

97. In any event and notwithstanding my view that in principle a statutory appeal of this nature constitutes an adequate alternative remedy which should be exhausted before an

appellant proceeds to seek relief by way of judicial review, it seems that in the circumstances of this case requiring the appellant to prosecute the currently extant appeal would not really bring the substantive issues properly before the Circuit Court. In all the circumstances, and acknowledging that in principle an appeal of this nature can constitute an adequate alternative remedy, I am not minded to exercise my discretion so as to refuse the appellant the relief sought and to which he would otherwise be entitled on the basis of this judgment.

98. In conclusion, having found for the appellant on the individualised assessment issue, it follows that he has succeeded on this appeal to the extent that the Minister's decision of 18th May 2021 should be quashed which is the relief sought at paragraph D(i) of his Statement of Grounds. I propose making an order to that effect.

99. In circumstances where the appellant has succeeded on his appeal my provisional view is that the appellant should be entitled to an order for his costs of the appeal. However, it appears that this case took two days at hearing in the High Court. The appellant did not succeed in all the issues raised by him on the appeal nor in obtaining most of the relief sought by him. Indeed, there are significant issues of principle on which the Minister successfully defended the appellant's application both in the High Court and in this Court. These included resisting an application for prohibition which, if granted, would have precluded the Minister from making any further proposal to revoke the appellant's refugee status. Therefore, the order I propose in respect of the High Court costs is that order made by Heslin J. should be reversed and the appellant should recover the costs of the proceedings in the High Court but to include only one day's hearing. If the either party wishes to contend for an alternative order, they has liberty to file a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the other party will have a similar period to respond likewise. In default of such submissions being filed, the proposed order will be made in the terms suggested above.

100. As this judgment is being delivered electronically, Ní Raifeartaigh and Allen JJ. have indicated their agreement with it and the orders I have proposed.