

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 275

Record No. 2020/382 JR

BETWEEN:

ASA

APPLICANT

-V-

THE MINISTER FOR JUSTICE

RESPONDENT

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

General

1. These proceedings raise a challenge to the manner in which s. 49 of the International Protection Act 2015 (hereinafter referred to as "the 2015 Act") is operated on a general basis by the Respondent.
2. A significant number of other cases have raised a similar legal issue and have been placed in a holding list awaiting the outcome of this decision.
3. Section 49 of the 2015 Act places an onus on the Respondent, exercising the executive power of the State, to consider whether a failed asylum seeker should be given a permission to remain in this jurisdiction having regard to an applicant's personal circumstances and matters of State policy. In the first instance, this onus arises when a recommendation has been made by an International Protection Officer (hereinafter referred to as "an IPO") that an asylum seeker be given neither a refugee or a subsidiary protection declaration. The onus again arises if an appeal to the International Protection Appeals Tribunal affirms the negative recommendation of the IPO and the applicant thereupon submits further information to the Respondent regarding permission to remain in the State.
4. The 2015 Act saw the introduction of a unitary process in respect of an application for international protection and permission to remain whereby an application for a declaration of refugee status results in that application together with a subsidiary protection application being considered at the same time by an IPO. In the event of such an application being unsuccessful, an onus then devolves onto the Respondent to consider whether permission to remain should be granted without the necessity for a further application to be made in this regard. This unified approach has reduced in a very significant manner, the extremely long delays which had become endemic in the previous system.
5. The 2015 Act is clear regarding the designation of responsibility with respect to the two separate decisions at issue in the 2015 Act: an IPO has responsibility for the international protection decision whereas the Respondent has responsibility for the permission to remain decision.

6. In practise, the s. 49 decision is taken on behalf of the Respondent by an officer of the Respondent who works within the International Protection Office. Such person will also have been appointed as an IPO.
7. The exercise by an officer of the Respondent, who is also appointed as an IPO, of the Respondent's s. 49 decision making power was commented upon, without negativity, by the Supreme Court in *IX v. IPAT* [2020] IESC 44 as follows:-

"Leave to remain is a matter of domestic law and a matter for the discretion of the Executive, exercised in this case by the Minister, and the Act therefore constitutes the IPO as, also an officer of the Minister for the purposes of such an application."

8. In summary, the issue which the Applicant raises regarding the operation of the system, is that the decision pursuant to s. 49 is unlawfully made on behalf of the Respondent by persons who also are appointed as IPOs. The Applicant accepts, having regard to the Carltona principle, that the s. 49 decision can be made by an officer on behalf of the Respondent and does not have to be taken by the Respondent herself. However, it is asserted that it is inappropriate that the decision be taken by an IPO as this fails to respect the separate and distinct roles of an IPO determining an international protection claim and the Respondent, exercising the executive function of the State, permitting a person to remain in the State on humanitarian grounds. It is also asserted that the manner in which the 2015 Act is operated by the Respondent has incorrectly blurred the distinction between international protection and permission to remain decisions. Finally, it is asserted that there is an error on the face of the s. 49 decision.

The Applicant's Claim

9. The Applicant is a national of Nigeria. He left Nigeria in December 2016 and travelled to Germany on a visa. Having resided in Germany for a two year period, he then entered this jurisdiction in December 2018 and claimed international protection.
10. On 2 March 2020, he was notified by letter from the International Protection Office that an IPO [Ms Mairead Lenaghan] had recommended that he should not be given a refugee or a subsidiary protection declaration. The letter also contained a Notice pursuant to s. 49(5) of the 2015 Act which set out the following:-

"Permission to Remain (PTR)

Having considered your case under section 49 of the 2015 Act, the Minister has decided pursuant to section 49(4)(b) of the 2015 Act to refuse you..... permission to remain in the State.

.....

A statement of reasons for this decision prepared under section 49(5) of the 2015 Act is enclosed."

11. The statement of reasons in relation to the s. 49 decision, which was enclosed in the letter from the International Protection Office, was signed by "Sarah Nugent, Case Worker, International Protection Office" and concluded with a paragraph headed "Decision" which stated, *inter alia*:-

"Therefore having considered the applicant's family and the particular circumstances of this case and the applicant's right to respect for his private and family life, I decide that the Applicant ASA should not be given permission to remain in the State under section 49 of the 2015 Act." (emphasis added)

12. Leave to apply by way of Judicial Review for an Order of Certiorari quashing the decision refusing permission to remain pursuant to s. 49 of the 2015 Act was granted by the High Court on 8 July 2020.

Relevant sections of the 2015 Act

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

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

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

Section 2 provides *inter alia* that:-

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

Section 35 provides *inter alia*:-

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

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

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

Section 39 provides *inter alia*:-

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

Section 49 provides:-

- “(1) Where a recommendation referred to in section 39(3)(c) [that the applicant should be given neither a refugee declaration nor a subsidiary protection declaration] is made in respect of an application, the Minister shall consider, in accordance with this section, whether to give the applicant concerned a permission under this section to remain in the State (in this section referred to as a “permission”).
- (2) For the purposes of his or her consideration under this section, the Minister shall have regard to—
- (a) the information (if any) submitted by the applicant under subsection (6), and
 - (b) any relevant information presented by the applicant in his or her application for international protection, including any statement made by him or her at his or her preliminary interview and personal interview.
- (3) In deciding whether to give an applicant a permission, the Minister shall have regard to the applicant’s family and personal circumstances and his or her right to respect for his or her private and family life, having due regard to—
- (a) the nature of the applicant’s connection with the State, if any,
 - (b) humanitarian considerations,
 - (c) the character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions),
 - (d) considerations of national security and public order, and
 - (e) any other considerations of the common good.
- (4) The Minister, having considered the matters referred to in subsections (2) and (3), shall decide to—
- (a) give the applicant a permission, or
 - (b) refuse to give the applicant a permission.
- (5) The Minister shall notify, in writing, the applicant concerned and his or her legal representative (if known) of the Minister’s decision under subsection (4), which notification shall be accompanied by a statement of the reasons for the decision.
- (6) An applicant—
- (a) may, at any stage prior to the preparation of the report under section 39(1) in relation to his or her application, submit information that would, in the event that subsection (1) applies to the applicant, be relevant to the Minister’s decision under this section, and
 - (b) shall, where he or she becomes aware, during the period between the making of his or her application and the preparation of such report, of a change of circumstances that would be relevant to the Minister’s decision under this section inform the Minister, forthwith, of that change.

- (7) Where the Tribunal affirms a recommendation referred to in section 39(3)(c) made in respect of an application, the Minister shall, upon receiving information from an applicant in accordance with subsection (9), review a decision made by him or her under subsection (4)(b) in respect of the applicant concerned.
- (8) Subsections (2) to (5) shall apply to a review under subsection (7), subject to the modification that the reference in subsection (2)(a) to information submitted by the applicant under subsection (6) shall be deemed to include information submitted under subsection (9) and any other necessary modifications.
- (9) An applicant, for the purposes of a review under subsection (7), and within such period following receipt by him or her under section 46(6) of the decision of the Tribunal as may be prescribed under subsection (10)—
 - (a) may submit information that would have been relevant to the making of a decision under paragraph (b) of subsection (4) had it been in the possession of the Minister when making such decision, and
 - (b) shall, where he or she becomes aware of a change of circumstances that would have been relevant to the making of a decision under subsection (4)(b) had it been in the possession of the Minister when making such decision, inform the Minister, forthwith, of that change.
- (10) The Minister may prescribe a period for the purposes of subsection (9) and, in doing so, shall have regard to the need for fairness and efficiency in the conduct of a review under this section.
- (11) (a) A permission given under this section shall be deemed to be a permission given under section 4 of the Act of 2004 and that Act shall apply accordingly.
 - (b) A reference in any enactment to a permission under section 4 of the Act of 2004 shall be deemed to include a reference to a permission given under this section."

Section 50 provides:-

- "(1) A person shall not be expelled or returned in any manner whatsoever to the frontier of a territory where, in the opinion of the Minister—
 - (a) the life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or
 - (b) there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.
- (2) In forming his or her opinion of the matters referred to in subsection (1), the Minister shall have regard to—
 - (a) the information (if any) submitted by the person under subsection (3), and

- (b) any relevant information presented by the person in his or her application for international protection, including any statement made by him or her at his or her preliminary interview and personal interview.
- (3) A person shall, where he or she becomes aware of a change of circumstances that would be relevant to the formation of an opinion by the Minister under this section, inform the Minister forthwith of that change.
- (4) A person who, but for the operation of subsection (1), would be the subject of a deportation order under section 51 shall be given permission to remain in the State.
- (5) A permission given under this section shall be deemed to be a permission given under section 4 of the Act of 2004 and that Act shall apply accordingly.
- (6) A reference in any enactment to a permission under section 4 of the Act of 2004 shall be construed as including a reference to a permission given under this section.
- (7) In this section "person" means a person who is, or was, an applicant."

Section 51(1) provides:-

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

Section 74 provides:-

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

Section 75 provides:-

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

Section 76 provides:-

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

Other Relevant Legislation

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

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

The Operation of the International Protection Office

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

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

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

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

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

"A Case Processing Unit, solely responsible for examining an applicant's application for International Protection was established. This unit is staffed by Civil Servants/caseworkers who examine applications for international protection and make recommendations in their capacity as International Protection Officers. These caseworkers in their capacity as International Protection Officers act independently of the Minister. The overall management of this Unit is the responsibility of the Chief International Protection Officer. Where an International Protections Officer makes a recommendation referred to in section 39(3)(c) (i.e., that the applicant should be given neither a refugee declaration nor a subsidiary protection declaration), the applicant's file is then passed to a different unit being the Permission to Remain Unit. The is a separate and distinct unit from the Case Processing unit and is staffed by different civil servants. The overall management of this Unit is the responsibility of the Head of Operations.

15. The Permission to Remain unit is a dedicated unit responsible for making decisions on whether or not an applicant should be given permission to remain in the State under section 49 of the 2015 Act. The caseworkers/Civil Servants in this unit make decisions in

respect of permission to remain in their capacity as Officers of the Minister under the authority of the Minister. Where an officer of the Minister makes a decision under section 49, he or she is not exercising the functions of an IPO but is acting solely in his/her role as an officer of the Minister, although all caseworkers have also been formally appointed as IPOs.

16. Where the International Protection Appeals Tribunal affirms a recommendation of an International Protection Officer that an applicant should be given neither a refugee declaration nor a subsidiary protection declaration, the Minister reviews the permission to remain decision provided that the applicant has submitted new information that would have been relevant to the making of the original decision or has informed the Minister of a change of circumstances that would have been relevant to the making of the original decision. A review of a permission to remain decision is made by a different caseworker acting as officer of the Minister within the Permission to Remain Unit, and not by the officer who made the original Permission to Remain decision.”

The Carltona Principle

20. The Carltona principle recognises that suitably experienced officers of a Government Minister can exercise that Minister’s functions on his or her behalf within the realm of their expertise.
21. The principle was considered by the Supreme Court in *W.T. v. Minister for Justice & Equality and Ors.* [2015] 2 ILRM 225. In that case, the issue to be determined was whether the decision of the Respondent to make a deportation order pursuant to section 3(1) of the Immigration Act 1999 had to be taken personally by the Respondent. The Supreme Court held it did not have to be taken by the Respondent personally and could be taken by an official of the Respondent in accordance with the Carltona principle. MacMenamin J stated:

“1. It is now well recognised in the law that each minister must both bear political responsibility to the Dáil, and legal responsibility in the courts, for actions taken by their own departments. In law, ministers are regarded as being one and the same as the government departments of which they are the political heads. Conversely, departmental officials act in the name of the minister. In making administrative decisions, therefore, discretion is conferred on a minister, not simply as an individual, but rather as the person who holds office as head of a government department, which collectively holds a high degree of collective corporate knowledge and experience, all of which is imputed to the political head of the department. Frequently a minister's officials will prepare documents for consideration, consider objections, summarise memoranda, and outline a policy approach to be taken by the Minister as an integral part of the decision-making process. Part of this arrangement, identified as the eponymous Carltona principle, is that the functions entrusted to departmental officials are performed at an appropriate level of seniority, and within the scope of responsibility of their government department. No express act of delegation is necessary. When the principle became a recognised part of Irish law, it was characterised as being a

"common law constitutional power" (see *Carltona Ltd v Commissioners of Public Works* [1943] 2 All E.R. 560; *Bushell v Secretary for State for the Environment* [1981] A.C. 75; *R. v Home Secretary, ex p. Oladehinde* [1991] 1 A.C. 254 at 282 approved by Hamilton C.J. in *Tang v Minister for Justice* [1996] 2 I.L.R.M. 46 and in *Devaney v Minister for Justice* [1998] 1 I.R. 230; [1998] 1 I.L.R.M. 81). The constitutional origins of the power derived from the executive power of the State, identified, *inter alia*, in Art.28 of the Constitution.

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

The Test for Excluding Carltona

3. In law, the principal, thus expressed, is capable of being negative or confined by express statutory provision to the contrary, or by necessary implication (see generally, Chapter 11 Administrative Law in Ireland 4th Edition, Hogan & Morgan, Roundhall Press). In such cases, then, the test is whether it can be established that a statute clearly conveys that the Carltona principle is not to be recognised, or clearly implies such a conclusion. Although the doctrine was devised under the exigencies of administration in the United Kingdom in World War II, it is now seen as a judicial recognition of the complexity of the administration of modern states, where it would be impractical that a minister, as a political head of a department, could personally take every decision.
4. In identifying the scope of this principles, a distinction is made when a decision maker is a statutory office holder: then different considerations arise. For present purposes, I distinguish between devolved Carltona powers and what I characterise as delegated statutory powers. The Carltona principles does not apply to statutory office holders exercising decision-making functions delegated by Statute. If, on the other hand, the decision-maker is a civil servant assigned specific duties under Statute, but who operates a devolved power vested in the Minister then the Carltona principles will apply.
5. The Oireachtas can, by legislation, restrict or prohibit a Minister's power to devolve a decision, and may require the Minister to exercise such decision making power in person. This will require very clear statutory terminology; for example, words to the effect that a direction, or decision, should be made or performed by a Minister "and not by a person acting under his authority". It follows that a Court will be very slow to read into a statute any such implicit limitation; providing that the devolved power does not conflict with the duties of an official in the discharge of their specific functions, and that the decision in question is suitable to their grading and experience."

22. In summary, to ensure the effective administration of a Minister's power, a suitably experienced official of a Minister can make decisions within the power of such Minister without the necessity of the power being expressly delegated to the official. The application of the Carltona principle is assumed to apply unless there is an express statutory derogation from the principle or derogation arises by way of necessary implication from the terms of the statute provided that the devolved power does not conflict with the other duties imposed on the official in the discharge of his or her specific functions.

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

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

and permission to remain being considered (if the applicant is unsuccessful in his international protection claim), the Court would have expected the Oireachtas to have been explicit in restricting a consideration of the s. 49 permission to remain decision to officers of the Respondent who were not IPOs, if that had been their intention. The Oireachtas did not legislate in this manner which raises a serious issue against the argument that the 2015 Act, by necessary implication, prohibits IPOs from making s. 49 decisions.

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

permission to remain setting out two separate processes with separate criteria made by separate decision makers, namely IPOs in the former instance and the Respondent in the latter. B and D is not supportive of the argument which the Applicant seeks to make that an IPO, in his separate role as an officer of the Minister, cannot take s. 49 decisions.

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

36. The real concern of the Applicant perhaps is that of refoulment and the determination of this issue within the s. 49 decision making process. The question is raised by the Applicant as to how the IPO determining the s. 49 issue can decide that refoulment arises when another IPO has determined that international protection is not warranted in the matter. The difficulty with this argument is that the Respondent is entitled in any event to have regard to the determination of the IPO with respect to the issue of refoulement. In *Kouaype v. Minister for Justice Equality and Law Reform* [2011] 2 I.R. 1, Clarke J expressed the view:-

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

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

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

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

38. Accordingly, as a point of principle, this fact alone is not sufficient to establish that an IPO should not be permitted to make a s. 49 decision. The principle of *nemo iudex in causa sua* does not arise as the s. 49 decision is not an appeal decision from a refusal of international protection and whilst the question of refolement arises in each separate decision, the decision maker in the s. 49 decision making process is entitled to have regard to the earlier decision with respect to refolement in the international protection decision. There is no evidence to suggest or infer that should an additional consideration arise in relation to refolement that the decision maker in the s. 49 process would not properly and appropriately consider that issue afresh. Judicial review, would in any event, be available should a consideration in this regard raise issues of unreasonableness or irrationality.
39. The Applicant further argues that IPOs are effectively exercising deportation powers when making a negative s. 49 decision which is a conflict with and embarrassment to their statutory IPO functions and duties. Whilst the automatic effect of a negative s. 49 decision is that a deportation order must ensue, this is by operation of law pursuant to s. 51(1) of the 2015 Act rather than being a decision determined by an IPO. Accordingly, the decision at issue remains that of permission to remain.
40. Therefore, it seems to me that by exercising the Respondent's devolved power pursuant to s. 49 of the 2015 Act, an IPO is not conflicted with the duties and functions he is mandated to execute in his role as an independent IPO pursuant of the 2015 Act. His independence pursuant to s. 74(4) of the 2015 Act relates to his role as an IPO who is determining a completely different issue (international protection) to the decision at issue pursuant to s.49 (permission to remain). Hence the cases of *Oladehinde* and *Bourgass* are not apposite to the instant decision as they both considered situations where the devolved decision maker also was assigned a specific decision making role relating to, in essence the same issue: in *Oladehinde* immigration officers were devolved deportation powers (although this was found to be lawful); in *Bourgass* prison officers with a power to order solitary confinement for a specific period of time were devolved a power to determine an extended period of time (this was found to be unlawful).
41. I am supported in my view by the judgment of McDermott J. in *MI v Minister for Justice* [2017] IEHC 570 where he rejected the contention that the deportation decision maker must be a different individual from the international protection decision maker. He stated:-
- [96] It is alleged that the decision-makers lacked independence because they were simultaneously looking at questions of deportation and subsidiary protection. I am not satisfied that this was so. Furthermore, I am not satisfied that the evidence establishes that the consideration of the application for subsidiary protection by the first respondent and his officials or the involvement of the same officials in making recommendations in both would lead inevitably to bias. The decisions concern significantly different issues determined at clearly defined and different stages which render them completely separate.

[99] The court is not satisfied that a decision maker in respect of subsidiary protection lacks independence because they are at the same time vested with the decision in respect of deportation. The decision to deport is the final decision made in the immigration process. There is no requirement on a member state to establish a decision-making process which is independent of the first respondent. Different procedures apply amongst the European Union Member States. In some states provision is made for the Minister for Justice or his/her equivalent to act through their officials and I do not consider that of itself to be legally objectionable under domestic or European Union law."

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

Error on the Face of the Record

44. The Applicant also challenges the s. 49 decision as being unlawful as it is claimed that it contains an error on the face of the record. It is asserted that it is stated to be signed by an IPO rather than a person acting for and on behalf of the Respondent.
45. The factual position, which has been earlier recited, is that the statement of reasons regarding the s. 49 decision is signed by "Sarah Nugent, Case Worker, International Protection Office". Contrary to what is asserted by the Applicant, she is not stated to be an International Protection Officer and does not sign the statement of reasons as such. The statement of reasons concludes with a paragraph headed "Decision" which states, inter alia "I decide that the Applicant...should not be given permission to remain in the State under section 49 of the 2015 Act". In a letter to the Applicant dated 2 March 2020 emanating from the International Protection Office, a Notice pursuant to s. 49(5) of the 2015 Act was included which states the following:-

"Permission to Remain (PTR)

Having considered your case under section 49 of the 2015 Act, the Minister has decided pursuant to section 49(4)(b) of the 2015 Act to refuse you..... permission to remain in the State.

.....

A statement of reasons for this decision prepared under section 49(5) of the 2015 Act is enclosed.”

46. Accordingly, the Applicant has been notified that the Respondent has refused him permission to remain pursuant to s. 49 of the 2015.
47. The assertion that the Applicant would be unaware that the Respondent made this determination is not well founded having regard to the letter of 2 March. Further, Part 9 of the questionnaire form which is required to be completed by an applicant for international protection, and which was completed by this Applicant on 7th January 2019, relates to permission to remain. It sets out the procedure regarding this part of the application, should it arise. It states:-

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

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

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

48. Having regard to this factual scenario, no error appears on the face of the record. As an aside, no confusion could have arisen for the Applicant as to who was determining this issue as it is clearly set out in Part 9 of the questionnaire form which was completed by him.
49. Accordingly, the grounds of challenge to the s. 49 decision relating to the Applicant have not been made out. I will therefore refuse the relief sought and make an order for the Respondent’s costs as against the Applicant.