

THE HIGH COURT

[2021] IEHC 82
[2020 No. 13 JR]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT
2000 (AS AMENDED)

BETWEEN

Y

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 8th February 2021.

A.

Notice of Motion

1. By notice of motion of 14th January 2020, Mr Y seeks, *inter alia*, the following reliefs:

"(1) *an order of certiorari quashing the review decision of the Minister made under s.49(7) of the International Protection Act 2015 on 29th November 2019 and issued on 10th December 2019;*

(2) *an order of certiorari quashing the decision of the Minister made under s.50 of the Act of 2015 on 27th November 2019 and issued on 9th December 2019.*

...

(5) *such further or other order as the court may deem meet, including an extension of time; and*

(6) *costs."*

2. Orders (3) and (4), as mentioned in the notice of motion, were not the subject of the submissions and the court understands them not to be sought any longer. The parties can correct the court if it is mistaken in this regard.

B.

Statement of Grounds

3. The Statement of Relevant Facts in the Statement of Grounds states, *inter alia*, as follows:

"(i) *The Appellant is a...national of the Democratic Republic of Congo ('DRC'). He made a claim for international protection to the International Protection Office ('IPO') on the 3rd April 2018, on the basis that if he returned to the DRC he would face persecution or serious harm....*

(ii) *The Applicant filed an International Protection Questionnaire on the 31st May 2018. He was interviewed by the IPO under s.35 of the International Protection Act 2015 (the 'Act') on the 6th December 2018. His application for international protection was denied for the reasons set out in the Report pursuant to Section 39 of the*

International Protection Act 2015 dated 7th May 2019. He duly appealed to the IPAT on the 31st May 2019....

- (iii) On the 7th May 2019, the IPO issued an 'Examination of File under Section 49(3) of the International Protection Act 2015' by which it made a decision under s.49(4)(b) of the Act that the Applicant be refused permission to remain in the State (the 'PTR Decision').*
- (iv) On the 1st August 2019, the IPAT denied his appeal from the refusal of international protection under s.46 of the Act.*
- (v) On or around the 7th August 2019, the Applicant made further representations in support of his application for permission to remain and non-refoulement and furnished, inter alia, a s.49 Review Form dated 7/8/19; letters in relation to studies which he had undertaken in the State; copies of payslips; volunteer certificate; letter from [STATED NAME] dated 16/9/19; evidence of CALCC membership.*
- (vi) On the 10th December 2019, the IPO issued its 'Review under Section 49(9) of the International Protection Act 2015' dated 29th November 2019 (the 'PTR Review Decision').*
- (vii) The IPO noted, inter alia, the submissions made on behalf of the Applicant under s.49(3)(a) of connection to the State, including labour market access permission, and s.49(3)(b) Humanitarian Considerations. In relation to the latter, the IPO found that '[t]he humanitarian considerations of these submissions is noted here and this issue is also considered later in this report in respect of the prohibition of refoulement'.*
- (viii) Under the Article 8 ECHR – Private Life heading the IPO noted the Applicant's submissions in relation to his integration in the State, involvement in a church choir, education and employment, including labour market access permission. The IPO determined that 'Having considered and weighed all the facts and circumstances in this case, a decision to refuse the applicant permission to remain does not constitute a breach of the right to respect for private life under Art. 8(1) ECHR'.*
- (ix) The IPO further found under the heading of s.49(3) findings that 'While noting and carefully considering the submissions received regarding the applicant's private and family life and the degree of interference that may occur should the applicant be refused permission to remain, it is found that a decision to refuse permission to remain does not constitute a breach of the applicant's rights. All of the applicant's family and personal circumstances, including those related to the applicant's right to respect for family and private life, have been considered in this review, and it is not considered that the applicant should be granted permission to remain in the State.'*

- (x) *In its consideration of non-refoulement under s.50 of the Act, the IPO noted representations in relation to the Applicant's membership of CALCC and representations from [STATED NAME] that the DRC remains a high-risk region. The IPO had regard to the US Department of State's 2018 Country Reports on Human Rights Practices – Democratic Republic of Congo, 13 March 2019, on freedom of movement; noted that his immediate family members still reside there; and that he had been denied international protection. The IPO found that 'having considered all the facts in this case and relevant country of origin information, I am of the opinion that repatriating the applicant to DRC is not contrary to s.50 of the International Protection Act 2015, in this instance, for the reasons set out above.'*"

C.

Grounding Affidavit of Mr Y

4. In his grounding affidavit of 9th January 2020, Mr Y avers, *inter alia*, as follows:

- "3. *I have reviewed the decision made under sections 49(7) of the International Protection Act 2015 (the 'Act') (the 'Section 49(7) Decision') as well as the decision under s.50 of the Act (the 's.50 Decision') contained in the document entitled 'Review under Section 49(7) of the International Protection Act 2016' dated 29th November 2019 and which issued to me on the 10th December 2019...*
4. *The s.49(7) Decision was a review of an earlier decision finding that I should not be given permission to remain in the State made under s.49(4)(b) of the Act, and the s.50 Decision was a review of an earlier decision as set out in the 'Examination of File under Section 49(3) of the International Protection Act 2015' dated the 7th May 2019 (the 'PTR Decision')...*

Submissions made on my behalf

5. *On the 7th August 2018, by and through my solicitors, I made further representations in support of my application for permission to remain and non-refoulement and furnished, inter alia, a Section 49 Review Form dated 7/8/19; letters in relation to studies which I had undertaken in the State; copies of payslips; volunteer certificate; letter from [STATED NAME] dated 16/9/19; evidence of CALCC membership...*

Text of the decision

6. As appears from the s.49(7) Decision, the IPO's determination with regard to my right to private life was as follows:

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

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

7. The IPO's final determination with regard to my application to remain under s.49(3) of the Act was as follows:

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

8. The IPO's final determination with regard to my application to remain based on non-refoulement under s.50 of the Act was as follows:

'Accordingly having considered all of the facts in this case and relevant country of origin information, I am of the opinion that repatriating the applicant to DR Congo is not contrary to s.50 of the International Protection Act 2015, in this instance, for the reasons set out above.'

9. As appears from the 'Review under Section 49(7) of the International Protection Act 2015, the IPO's Decision under section 49(4) of the Act was as follows:

'The applicant's case was considered under Section 49 and Section 50 of the International Protection Act 2015 on review. Refoulement was not found to be an issue in this case. Consideration was also given to private and family rights under Article 8 ECHR.

Having considered the applicant and the particular circumstances of this case and the applicant's right to respect for his private and family life, I affirm the decision dated 07/05/2019 that the applicant, Mr Y, should not be given permission to remain in the State under s.49 of the 2015 Act.'

Notice of the Impugned Decisions

10. *I was notified of the s.49(7) and Decisions by way of a letter, sent by registered post, from the Ministerial Decisions Unit of the Department...dated the 10th December 2019, which I received on or around the 11th December 2019....*

Issues Arising from the Impugned Decision

11. *I wish to challenge the decision to refuse me permission to remain for the reasons set out in the Statement of Grounds.*
12. *In particular, I say that the Minister has not given proper consideration to my volunteer work and integration into the State and has not given proper regard to the Country of Origin Information and representations submitted on my behalf in relation to my fears of return to the DRC."*

D.

The Impugned Decision

5. The impugned review decision of 29th November 2019 reads, *inter alia*, as follows:

"1. Background

The applicant made an application for international protection in the State. This application was refused. The applicant lodged an appeal with the International Protection Appeals Tribunal and the applicant was informed that the recommendation to refuse international protection by the International Protection Office has been affirmed by the Tribunal. A section 49 consideration was completed on 7/5/2019 and the applicant was informed that he had been refused permission to remain in the State. The applicant is now being assessed as a failed asylum seeker as the IPO has found that he is not in need of international protection for the reasons claimed or any other reason.

2. Section 49(7) and Section 49(9) of the International Protection Act 2015

In accordance with section 49(7), where the IPAT affirms a recommendation referred to in Section 39(3)(c), a review of the decision made under Section 49(4)(b) is required where new information has been submitted to the Minister or the Minister has become aware of a change of circumstances that would be relevant to the making of a decision under subsection 4(b). The following documentation was submitted by or on behalf of the applicant in support of his application for review: [Various Items Listed]...All representations and correspondence received from or on behalf of the applicant relating to permission to remain and permission to remain (review) have been considered in the context of drafting this report.

3. Section 49(3) of the International Protection 2015

In deciding whether to give the applicant a permission, regard has been given 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) Consideration of national security and public order, and e) Any other considerations of the common good.

4. Section 49(3)(a) – Nature of the Applicant's connection with the State

The applicant made the following submissions. The applicant submits that he came to Ireland in March 2018 and applied for international protection. The applicant submits that he doesn't have any family in Ireland but has many friends and he outlined details of how he has integrated into the State and his local community. The applicant illegally entered the State on 30/03/2018 and applied for international protection in the State on 03/04/2018. On that basis, the applicant has been in the State for approximately 1 year and 8 months at the time of writing this submission. The applicant presented as single and with no family connections to the State. The applicant is currently residing in RIA provided accommodation within the State. The applicant was granted permission to access the labour market by the LMAU until 18/01/2020 or until such time as the applicant receives a final, negative decision on their international protection application, whichever occurs first.

5. Humanitarian Considerations

The applicant submits that he has a fear of returning to the DRC which is real. The applicant submitted a membership card and form for CALCC (the Council of the Apostolate of the Catholic Laics of Congo). Representations received on behalf of the applicant from [STATED NAME] submits that the DRC is still a high-risk region and that it would not be safe for the applicant to go back.

The humanitarian considerations of these submissions is noted here and this issue is also considered later in this report in respect of the prohibition of refoulement.

[Court Note: The meaning and implications of the last-quoted sentence were the subject of some consideration at hearing. In fact when one has regard to the decision as a whole the meaning seems clear. By this point in the impugned decision the author of same has already stated as follows:

"All representations and correspondence received from or on behalf of the applicant relating to permission to remain and permission to remain review have been considered in the context of drafting this report."

Once one recalls this text it becomes clear what the author of the impugned decision means when he writes that *"The humanitarian considerations of these submissions is noted here and this issue is also considered later in this report in respect of the prohibition of refoulement."* He means, in effect, 'I mentioned above that I had considered everything. I'm just noting that fact again here for completeness and I also move on to consider those considerations in the context of *refoulement*'.

Section 49(3) of the Act, as applied by s.49(8) of the Act to a s.49(7) review, requires 'merely' that the Minister have due regard to, *inter alia*, humanitarian considerations. The author indicates at the outset of the report that everything has been considered, here he notes that that consideration has occurred.

It will be clear to the parties from the foregoing that the court respectfully does not accept that anything untoward is done or occurs at this point of the impugned decision, including any improper deferment of the humanitarian considerations point to point at which the s.50 (*refoulement*) issue is considered. The author by this point has done what he says himself to have done and later proceeds to do what he here states that he will do. There is nothing wrong in his doing or proceeding so.]

6. Section 49(3)(c) – Character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions)

The character and conduct of the applicant both within and outside the State has been considered in this case. The applicant has submitted several references attesting to his good character as set out in Section 2 (above). These submissions

have been considered in the context of this review. The applicant further submits that he is of good character and has no criminal record.

- 7. Section 49(3)(d) – Considerations of National Security and Public Order**
Considerations of national security and public order do not have a bearing on this case.

8. Section 49(3)(e) – The Common Good
The applicant has not submitted any information under this heading in accordance with section 49(9); therefore, the consideration previously undertaken under this heading remains valid and requires no additional consideration.

9. Article 8 ECHR – Private Life
The previous consideration under Art. 8 private life, contained in the s.49(3) decision, found that the applicant’s private life rights had not been engaged and that a refusal of permission to remain did not constitute a breach of Article 8(1).

The applicant made the following submissions regarding his private life.

The applicant submits that he has many friends in Ireland and outlined his integration in the State and involvement in his church choir, education and employment. The applicant is currently employed on a full-time basis and is also studying for the Leaving Certificate on a VTOS programme.

The applicant illegally entered the State on 30/03/2018 and applied for international protection in the State on 03/04/2018. On that basis, the applicant has been in the State for approximately 1 year and 8 months at the time of writing this submission. The applicant presented as single with no family connections to the State.

The applicant is currently residing in RIA provided accommodation within the State.

The applicant was granted permission to access the labour market by the LMAU until 18/01/2020 or until such time as the applicant receives a final, negative decision on their international protection application, whichever occurs first.

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

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

10. Article 8 ECHR – Private Life
The previous consideration under Article 8 private life, contained in the s.49(3) decision, found that the applicant’s private life rights had not been engaged and that a refusal of permission to remain did not constitute a breach of Article 8(1).

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

11. Section 49(3) findings

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

12. Section 50 of the International Protection Act 2015 (prohibition of refoulement)

In accordance with section 50(1) of the International Protection Act 2015, a person shall not be expelled or returned 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. Section 50(3) states that 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.

The applicant has made representations regarding the prohibition of refoulement. The applicant submits that he has a fear of returning to the DRC which is real. The applicant submitted a membership card for CALCC. Representations received on behalf of the applicant from [STATED NAME] submits that the DRC is still a high-risk region and that it would not be safe for the applicant to go back.

The applicant's international protection claim was refused by the IPO and affirmed by the IPAT as he was determined to be a person not in need of international protection.

The following country of origin information from United States Department of State 2018 Country Reports on Human Rights Practices – (Democratic Republic of Congo), 13 March 2019 states:

'd. Freedom of Movement

The law provides for freedom of internal movement, foreign travel, emigration, and repatriation. The government sometimes restricted those rights. The government occasionally cooperated with the Office of the UN High Commissioner for Refugees (UNHCR) and other humanitarian

organizations in providing protection and assistance to IDPs, refugees, asylum seekers, stateless persons, or other persons of concern...

[Court Note: It is not entirely clear why the person who authored the review decision sees fit to highlight the free movement aspect of the COI. Perhaps what is meant is that the DRC is a big country and hence that Mr Y could perhaps move to a part of the DRC where he would be safer. However, the court is but guessing at what is meant in this regard; it is not at all clear what the author of the review decision means to state. (By way of *obiter* comment, the court would note that there can be a difference between the practical reality of free movement and the theoretical availability of same. Men do not exist as islands unto themselves and social, societal, and other considerations, even the purely financial, may reduce the legally available to the practically unrealisable. Again however, the court does not know why the person who authored the review decision saw fit to highlight the free movement aspect of the COI).]

It is noted that the applicant's immediate family members are still living in the DRC.

[Court Note: In fact, it seems that only some of them are. One sibling has, it is claimed, inexplicably disappeared.]

I have considered all the facts of this case together with relevant country of origin information in respect of DRC. The prohibition of refoulement was also considered in the context of the international protection determination. The prohibition of refoulement has also been considered in the context of this report. The country of origin information does not indicate that the prohibition of refoulement applies if the applicant is returned to DRC.

Accordingly, having considered all of the facts in this case and relevant country of origin information, I am of the opinion that repatriating the DRC is not contrary to section 50 of the International Protection Act 2015, in this instance for the reasons set out above.

13. Decision under Section 49(4) of the Act

The applicant's case was considered under Section 49 and Section 50 of the International Protection Act 2015 on review. Refoulement was not found to be an issue in this case. Consideration was also given to private and family rights under Article 8 of the ECHR.

Having considered the applicant and the particular circumstances of this case and the applicant's right to respect for his private and family life, I affirm the decision dated 7/5/2019 that the applicant, Mr Y, should not be given permission to remain in the State under section 49 of the 2015 Act."

E.

Affidavit of IPO Official

6. An IPO official has furnished an affidavit in which she avers, *inter alia*, as follows:

3. *I say that the Applicant made an application to the Minister for international protection on 3 April 2018. The Applicant completed a French language Application for International Protection Questionnaire on dated 25 May 2018....*
4. *I say that the Applicant was interviewed pursuant to Section 35 of the International Protection Act 2015 (the 2015 Act) on 6 December 2018.*
5. *I say that by letter dated 14 May 2019 the Applicant was informed that the International Protection Office was recommending that he should not be given either a declaration of refugee status or subsidiary protection. A report dated 07 May 2019 pursuant to Section 39 of the 2015 Act was enclosed together with a copy of the Application for International Protection Questionnaire and a copy of the signed report of the Section 35 interview.*
6. *I say that an Examination of File under Section 49(3) of the International Protection Act 2015 was also completed on 7 May 2019, in which a decision was made not to give the Applicant permission to remain in the State under section 49 of the 2015 Act.*
7. *I say and believe that the letter dated 14 May 2019, in addition to advising the Applicant that the International Protection Office was recommending that he should not be given either a declaration of refugee status or subsidiary protection, also informed the Applicant that he had been refused permission to remain in the State. A copy of the Examination of File under section 49(3) of the International Protection Act 2015 was attached to the said letter....*
8. *I say that by letter dated 31 May 2019, a Notice of Appeal was submitted on behalf of the Applicant by his Solicitor...*
9. *The Applicant attended for his appeal hearing at the International Protection Appeals Tribunal on 30 July 2019. I say that by letter dated 1 August 2019 the Applicant was informed that the Tribunal had affirmed the recommendation of the International Protection Officer that he should be refused a declaration as a refugee and subsidiary protection status. A copy of the Tribunal's decision was enclosed...*
10. *I say that the Applicant submitted a Section 49 Review Form dated 7 August 2019 together with supporting documentation, which was received by the IPO on 8 August 2019...*
11. *I say that further supporting documentation was submitted by email by the Applicant's solicitor on 30 August 2019, 20 September 2019, and 10 October 2019 and by letters dated 14 October 2019 and 6 November 2019...*
12. *I say that the said representations and additional documentation were considered pursuant to section 49(7) of the 2015 Act which requires a review of the decision*

made under section 49(4)(b) of the 2015 Act where new information has been submitted to the Minister pursuant to Section 49(9) and the Tribunal has affirmed a recommendation under section 50 of the Act, refoulement was not found to be an issue in this case. I say that consideration was also given to private and family rights under Article 8 of the European Convention on Human Rights. I say that by letter dated 10 December 2019, the Applicant was informed that by decision dated 29 November 2019, the Minister had decided that he should not be given permission to remain in the State pursuant to section 49 of the 2015 Act. The Applicant was further informed that he had now ceased to be an applicant under the 2015 Act and, as such, the permission to enter and remain in the State which had been granted to him for that purpose had expired.”

F.

Summary Chronology

7. There is a lot to the foregoing. A summary chronology may assist to facilitate a clear understanding of key events:

03.04.2018	Mr Y makes a claim for international protection.
25.05.2018	Mr Y completes an International Protection Questionnaire (in French).
31.05.2018	Mr Y's Questionnaire filed.
06.12.2018	Section 35 interview takes place.
07.05.2019	International protection application denied for reasons set out in s.39 report.
	Examination of File under Section 49(3) takes place. Permission to remain refused.
14.05.2019	Mr Y advised of recommendation to refuse international protection and of refusal of permission to remain.
31.05.2019	Mr Y appeals to IPAT.
30.07.2019	IPAT hearing takes place.
01.08.2019	Appeal refused and recommendation to refuse international protection affirmed.
07.08.2019	Mr Y submits a s.49 review form, making further representations and enclosing additional documentation. Further additional documentation provided on various dates thereafter.
29.11.2019	Section 49(7) review carried out.
10.12.2019	Letter issues advising Mr Y of decision to affirm the decision of 07.05.2019.
13.01.2010	Leave to bring the within proceedings granted.
02.02.2021	Hearing of judicial review application.

G.

Some Legislation of Relevance

8. Sections 49 and 50 of the Act of 2015 provide as follows:

"Permission to remain

49. (1) *Where a recommendation referred to in section 39(3)(c) [i.e. a declaration 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) [i.e. an IPO recommendation that an applicant should be given neither a refugee declaration nor a subsidiary protection declaration] 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.*

Prohibition of refoulement

- 50. (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."*

9. In summary, the following process applies:

Section 49 (Permission to remain)

Following a s.39(3)(c) declaration Minister to consider, in accordance with s.49, whether to give a s.49 permission to remain (s.49(1)).

In consideration under s.49, Minister to have regard to (a) any (if any) information submitted by applicant under s.49(6), and (b) any relevant information presented by the applicant in his/her application for international protection (including any interview statements) (s.49(2)).

In deciding whether to give permission to remain, Minister to have regard to applicant's family/personal circumstances and right to respect for private/family life, having due regard to (a) nature of applicant's connection with Ireland, if any, (b) humanitarian considerations, (c) character/conduct of the applicant both within and (where relevant/ascertainable) outside Ireland, (d) national security and public order considerations, and (e) any other considerations of the common good (s.49(3)).

Minister must then decide to give/refuse a s.49 permission to remain (s.49(4)). Minister to give applicant and legal representative (if known) written notification of the Minister's decision under s.49(4), along with statement of the reasons for the decision (s.49(5)).

Applicant (a) may, at any stage prior to preparation of s.39(1) report submit information that would, in the event that s.49(1) applies be relevant to the Minister's decision under s.49, and (b) shall, where s/he becomes aware, during the period between making 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 same (s.49(6)).

Where IPAT affirms a s.39(3)(c) recommendation, the Minister shall, upon receiving information from an applicant in accordance with subsection (9), review a decision made by him/her under s. 49(4)(b) in respect of that applicant (s.49(7)). Subsections (2) to (5) apply, *mutatis mutandis*, to a review under subsection (7) (s.49(8)).

An applicant, for the purposes of a review under subsection (7), and within such period following receipt under s.46(6) of the IPAT decision as may be prescribed (a) may submit information that would have been relevant to the making of a decision

under s.49(4)(b) had it been in the Minister's possession when making such decision, and (b) shall, where s/he becomes aware of a change of circumstances that would have been relevant to the making of a decision under s.49(4)(b) had it been in the Minister's possession when making such decision, inform the Minister, forthwith, of that change (s.49(9)).

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 (s.49(10)).

A permission under s.49 is deemed a permission under s.4 of the Immigration Act 2004 (which Act applies accordingly). A reference in any enactment to a permission under section 4 of the 2004 Act includes a reference to a s.49 permission (s.49(11)).

Prohibition of refoulement

A person shall not be expelled or returned to the frontier of a territory where, in the opinion of the Minister (a) the life/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 (s.50(1)).

In forming his/her opinion of the matters referred to in s.50(1), the Minister must have regard to (a) the information (if any) submitted by the person under s.50(3), and (b) any relevant information presented by the person in her/his application for international protection (including any interview statements) (s.50(2)).

A person must, where s/he becomes aware of a change of circumstances that would be relevant to the formation of an opinion by the Minister under s.50, inform the Minister forthwith of that change (s.50(3)).

A person who, but for the operation of s.50(1), would be the subject of a s.51 deportation order must be given permission to remain in Ireland (s.50(4)).

A s.50 permission is deemed to be a permission under s.4 of the Immigration Act 2004 (which Act applies accordingly) (s.50(5)).

A reference in any enactment to a permission under s.4 of the 2004 Act includes a reference to a s.50 permission (s.50(6)).

The term 'person' in s.50 means a person who is/was an applicant (s.50(7)).

H.

"All representations and correspondence...considered"

10. Close to the outset of the impugned decision, the author of same observes as follows:

"All representations and correspondence received from or on behalf of the applicant relating to permission to remain and permission to remain (review) have been considered in the context of drafting of this report."

11. So, all representations and everything received has been considered. There is nothing that has not been considered. And there is no reason not to believe what the author of the impugned decision asserts in this regard. The author of the impugned decision thus gets off to a good start, proceeding on the most solid of bases. *However*, and it is important to remember this, just because a decisionmaker has considered everything of relevance does not, when it comes to the substance of the decision that such decisionmaker issues, relieve him of, for example, the obligations arising for him, *qua* decisionmaker, pursuant, *inter alia*, to the decision of the Supreme Court in *Mallak v. Minister for Justice* [2012] 3 IR 297 (considered later below).

I.

Legal Questions Arising

12. The court accepts that four legal questions arise for it to consider, *viz*:
- (i) Is the s.49(7) decision unlawful for failure of the Minister to take into account or properly evaluate material facts/considerations including the "*humanitarian considerations*" under s.49(3)(b) of the Act of 2015?
 - (ii) Did the Minister err in his assessment of prohibition of *refoulement* under s.50(2) of the Act of 2015?
 - (iii) Did the Minister err in failing to give cogent reasons for his decision under s.49(3) and/or 50 of the Act of 2015 and/or Art.8(1) ECHR and/or in failing to properly evaluate certain material facts or considerations?
 - (iv) Has Mr Y discharged the burden of proof in establishing that the Minister failed to take account of or to properly evaluate material facts/considerations, notwithstanding express statements to the contrary on the part of the Minister in this regard?

J.

Question 1

13. Is the s.49(7) decision unlawful for failure of the Minister to take into account or properly evaluate material facts/considerations including the "*humanitarian considerations*" under s.49(3)(b) of the Act of 2015?

- (i) Answer 1
14. For the reasons identified hereafter, and solely to the extent identified hereafter, the court's answer to this question is a qualified 'yes'. There has been no failure to take material facts/considerations into account. That this is so is clear from the observation by the author of the impugned decision, almost at the outset of the decision that "*All representations and correspondence received from or on behalf of the applicant relating to permission to remain and permission to remain (review) have been considered in the*

context of drafting this report". However, there has, for the reasons identified hereafter, been a failure to properly evaluate certain material facts/considerations.

(ii) Reasoning

15. Section 49(7) of the Act of 2015, it will be recalled, provides that:

"Where the [IPAT]...affirms a recommendation referred to in section 39(3)(c) [i.e. an IPO recommendation that an applicant should be given neither a refugee declaration not a subsidiary protection declaration] 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."

16. Here, such an affirmation issued on 1st August 2019, the requisite information issued on 7th August 2019, and a s.49(4)(b) decision having issued in May 2019, and a s.49(7) review therefore ensued.

17. Consistent with s.49(8), *inter alia*, s.49(2) and (3) apply to such a review. Thus in the context of such a review, the Minister had to have regard to:

- (i) the information (if any) submitted by Mr Y under s.49(6) (per s.49(2)(a));
- (ii) any relevant information presented by Mr Y in his application for international protection (including any interview statements) (per s.49(2)(b));
- (iii) Mr Y's family and personal circumstances and his right to respect for his private and family life, having regard to (a) the nature of his connection with Ireland (if any), (b) humanitarian considerations, (c) the character and conduct of Mr Y within and (where relevant and ascertainable) outside Ireland (including any criminal convictions), (d) considerations of national security and public order, and (e) any other considerations of the common good (per s.49(3)).

18. The court turns to consider each of items (i)-(iii) below:

- (i) *the information (if any) submitted by Mr Y under s.49(6)*

19. The review decision expressly states that:

"All representations and correspondence received from or on behalf of the applicant relating to [1] permission to remain and [2] permission to remain (review) have been considered in the context of drafting this report".

20. There is no reason to disbelieve the just-quoted statement. It must therefore be that any information submitted by Mr Y under s.49(6) was considered.

- (ii) *Any relevant information presented by Mr Y in his international protection application (including any interview statements)*

21. It is notable that s.49(2)(b) (as applied by s.49(8)), in requiring that in his considerations under s.49(7) the Minister shall have regard to “*any relevant information*” presented by the applicant expressly references “*any statement made by him or her at his or her preliminary interview and personal interview*”.

22. Again, the review decision expressly states that:

“All representations and correspondence received from or on behalf of the applicant relating to [1] permission to remain and [2] permission to remain (review) have been considered in the context of drafting this report”.

23. Additionally the (earlier) permission to remain decision states that:

“All representations and correspondence received from or on behalf of the applicant have been considered in this report, including the report prepared under section 35(12), noting the information that has been highlighted under section 35(13)(b)”.

24. There is no reason to disbelieve either of the just-quoted statements. Moreover, if the later statement is true (and again there is no reason to disbelieve it), then the fate of Mr Y’s brother, an issue raised in the s.35(12) report was considered.

(iii) Mr Y’s family and personal circumstances and his right to respect for his private and family life, having regard to

(a) the nature of his connection with Ireland (if any)

25. It was contended by Mr Y, in his written submissions that:

“Apart from noting the Applicant’s submissions in relation to his integration into the State, and permission to access the labour market, the Respondent made no express determination under the s.49(3)(a) criterion in relation to his connections with the State”.

26. The court respectfully does not accept this contention for two reasons.

27. First, if one looks to s.49(3) (as applied by s.49(8) to a s.49(7) review), it does not require that the Minister arrive at an express determination as to “*the nature of the applicant’s connection with the State, if any*”. It ‘merely’ requires that the Minister “*shall have regard to*” (i) “*the applicant’s family and personal circumstances*” and (ii) “[the applicant’s] *right to respect for his or her private and family life*” to have “*due regard to*”, *inter alia*, “*the nature of the applicant’s connection with the State, if any*”. In other words what falls for determination is whether or not to give a permission; in arriving at that determination, the Minister has regard to two stated factors and in considering those two stated factors he must have due regard to certain other factors. But no separate determination is required in respect of the factors to which he must have regard.

28. Second, when one has regard to what the Minister is required by statute to do, Mr Y’s submissions in this regard are summarised by the author of the impugned decision at some length. The court respectfully does not see how, having recited those submissions

at length in the body of the review decision it can correctly be contended that the Minister has not had due regard to same. There is, the court notes, no suggestion that the Minister 'slipped up' in this regard and failed to have due regard to some aspect of Mr Y's connection with Ireland that would have altered the Minister's ultimate decision.

(b) *humanitarian considerations*

29. The court respectfully considers that the Minister fell into error in when it came to humanitarian considerations by virtue of what might be referred to as the *Comité Laic* point, to which the court now turns.
 30. One of the concerns expressed by Mr Y is that because of his claimed membership of a Catholic lay organisation known as *Comité Laic* he would be exposed to some level of State persecution were he now to return to the DRC. The IPAT in its decision accepts that "*The COI...supports the proposition that if the Appellant [Mr Y] was an active member of CLC there would be a risk of persecution and/or serious harm from state forces*". As part of the documentation submitted for the s.49(7) review decision, *but not previously seen* by the IPO or the IPAT, Mr Y submitted to the Minister a membership card and a *fiche d'adhésion* concerning his purported membership of the *Conseil de l'Apostolat des Laics*.
 31. The impugned decision mentions several times that the membership card and *fiche* have been received. However, it engages in no analysis of this aspect of matters. Again it is worth remembering in this regard that the author of the impugned decision states near the outset of that decision that "*All representations and correspondence received from or on behalf of the applicant relating to permission to remain and permission to remain (review) have been considered in the context of drafting this report*". So there can be no doubt, given the just-quoted text, that the author of the impugned decision has taken everything into account in drafting, and arriving at, the impugned decision. But has he engaged in a proper evaluation of same? Most particularly, given the arrival *en scène* of the never previously seen *Conseil de l'Apostolat des Laics* membership card, and the related *fiche d'adhésion*, has there (ever) been a proper evaluation of those novel factors, in the sense that they have been treated with in a form that conforms with the obligations arising pursuant to Supreme Court jurisprudence such as the decision in *Mallak*?
 32. Before proceeding to answer the just-posed questions, the court turns to consider the judgments of the Supreme Court in *GK v. Minister for Justice* [2002] 2 IR 418 and *Mallak v. Minister for Justice* [2012] 3 IR 297 and the more recent judgment of the High Court in *FMO (Nigeria) & Ors v. Minister for Justice and Equality (No.2)* [2019] IEHC 538.
- a. *GK*
33. In *GK*, the applicants were Polish nationals seeking refugee status in Ireland. Their applications were refused at first instance by letter of February 2000, having been determined to be manifestly unfounded, which finding was upheld by the Refugee Appeals Authority on appeal. By letter of July 2000, the applicants were given notice of the issue of deportation orders in respect of them and they were invited to make representations pursuant to s. 3(3)(b) of the Immigration Act 1999. By letter of January 2000, the applicants were notified that the Minister, having had regard to, *inter alia*, the

representations received on behalf of the applicants, had decided to make the said deportation orders.

34. In the High Court, the applicants sought and were granted an order extending the time to apply for judicial review in respect of both the decision to refuse refugee status and the decision to make the said deportation orders on the ground, *inter alia*, that the Minister had not considered the representations made on their behalf in his decision to issue deportation orders. A successful appeal against the extension of time followed. In the course of a brief but informative judgment for the Supreme Court, Hardiman J. observed, *inter alia*, at pp. 426-27, that:

"A person claiming that a decision-making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case."

35. Notably, Hardiman J.'s observation is limited to a claim that representations were ignored. It does *not* extend to the very different submission that a particular representation, though acknowledged, was not properly evaluated.
36. A good example of the difference between the two just-mentioned scenarios is offered by the *Comité Laïc* point. This is because the point urged by Mr Y on this Court is not that the provision of the membership card and *fiche* was ignored (*à la GK*) – that they were received was repeatedly noted by the author of the review decision, and that they were considered is clear from the observation by the author of the impugned decision near the outset of same that "*All representations and correspondence received from or on behalf of the applicant...have been considered in the context of drafting this report*". What is at issue is whether the significance or otherwise of the membership card and the *fiche d'adhésion* have been properly evaluated in the manner contemplated by the decision of the Supreme Court in *Mallak*, to which the court now turns.

b. Mallak

37. *Mallak* is a case that is often referred to in judicial review proceedings but, at least in this Court's experience, rarely opened at length. However, the judgment of Fennelly J., in that case repays careful consideration. There, the applicant applied, in December 2005, for a certificate of naturalisation, with an ultimate view to obtaining citizenship. In November 2008 the Minister informed the applicant that he was refusing his application but did not provide any reasons for his decision, insisting that he was not obliged to explain his decision. The applicant was granted leave by the High Court to obtain judicial review of the Minister's decision on the grounds, *inter alia*, that the decision was invalid because of the respondent's failure to give reasons for it. The High Court rejected the applicant's contention that the respondent was required to accompany his decision with a statement of reasons. This decision was successfully appealed to the Supreme Court.

38. Giving judgment for the Supreme Court, Fennelly J. made, *inter alia*, the following points:

- (1) That a person has an absolute discretion does not necessarily imply, or imply at all, that he is not obliged to have a reason for exercising his discretion in a particular way; that would be the very definition of an arbitrary power (para. 45).
- (2) The rule of law requires all decision makers to act fairly and rationally, meaning that they must not make decisions without reasons (para.45).
- (3) The necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, *inter alia*, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision (para.45, citing Henchy J. in *State (Keegan) v. Stardust Compensation Tribunal* [1986] IR 642, at p. 658).
- (4) Statutorily endowed discretionary ministerial powers may be exercised only within the boundaries of the stated objects of the relevant statute; they are powers which cast upon the relevant minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse at his will (para. 46, citing Walsh J. in *East Donegal Co-Op Livestock Mart Ltd v. Attorney General* [1970] IR 317, at pp. 343-44).
- (5) That a power is to be exercised in the "*absolute discretion*" of the decision maker may be relevant to the extent of the power of the court to review it, being potentially relevant principally to questions of the reasonableness of decisions. It could scarcely ever justify a decision maker in exceeding the limits of his powers under the legislation, in particular, by taking account of a legally irrelevant consideration (para. 47).
- (6) The characterisation of a ministerial discretion as absolute provides no justification for the suggestion that he is dispensed from observance of such requirements of the rules of natural and constitutional justice as would otherwise apply (para. 47, quoting with approval certain observations of Hogan J. in *Hussain v. Minister for Justice* [2011] IEHC 171, at para. 17).
- (7) Over several decades our courts have recognised a significant range of circumstances in which a failure or refusal by a decision maker to explain or give reasons for a decision may amount to a ground for quashing it (para. 65).
- (8) Absent the provision of reasons, it is impossible for the recipient/subject of a ministerial decision to ascertain whether he has a ground for applying for judicial review and, by extension, it is not possible for the courts effectively to exercise their power of judicial review (para. 67).
- (9) In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving

fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open, and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded (para. 68)

- (10) Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them (para. 69). In this regard it has to be regarded as significant that the Freedom of Information Act 1997, though principally concerned with the provision of information to the public, envisages that public bodies will give reasons for their decisions at the request of an affected person (para. 70).
 - (11) Article 296 TFEU provides that “[l]egal acts shall state the reasons on which they are based...”. Article 41 CFEU provides that every person benefits from what is called in the heading the “*Right to Good Administration*”, which includes “*the obligation of the administration to give reasons for its decisions*” (para. 71).
 - (12) “*The purpose of the obligation to state the reasons on which an act adversely affecting an individual is based, which is a corollary of the principle of respect for the rights of the defence, is, first, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the European Union judicature and, second, to enable that judicature to review the legality of that act*” (para. 71, quoting from the judgment of the European Court of Justice in *Bamba (Case C-417/11)* (Unreported, European Court of Justice, 15th November 2012)).
 - (13) The developing jurisprudence of our courts provides compelling evidence that, at this point, it must be unusual for a decision maker to be permitted to refuse to give reasons. The reason is obvious. In the absence of any reasons, it is simply not possible for the applicant to make a judgment as to whether he has a ground for applying for a judicial review of the substance of the decision and, for the same reason, for the court to exercise its power. At the very least, the decision maker must be able to justify the refusal (para. 76).
39. The problem that presents for the author of the impugned decision is that when it comes to the membership card and the *fiche d’adhésion* concerning Mr Y’s purported membership of the *Conseil de l’Apostolat des Laïcs* (receipt of which is acknowledged several times) there is no analysis (none at all) of the significance (or insignificance) of this. Mr Y is left completely in the dark as to why this information has been deemed not good enough to establish his claimed membership of *Comité Laïc*. That is just not good enough when one has regard to the above-underlined aspects of the judgment of Fennelly J. in *Mallak*.

c. FMO (No.2)

40. This was a failed application to the High Court for leave to bring appeal against a refusal to grant relief by way of *certiorari*. In the course of its refusal, the court observed, *inter alia*, as follows, at paras. 5-6:
- "5. *The point that seems to have eluded the applicants is that lack of narrative discussion of an issue does not amount to failure to consider that issue and that where a decision-maker states that something has been considered, the onus is on the applicant to put forward some proof either direct or inferential to displace that before he or she can obtain relief by way of judicial review. That has already been clarified by the Supreme Court in G.K. v. Minister for Justice, Equality and Law Reform [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401 so there is no particular benefit in having further reiteration of the point by the appellate courts.*
6. *I suggested in the No. 1 judgment that the next time anyone confused the question of consideration on the one hand with narrative discussion on the other, counsel might beneficially list the cases in which this point has already been dealt with. Very helpfully indeed, [counsel for the State]...has now provided what I am sure will be an invaluable resource to applicants' counsel in the future by listing in submissions the various cases in which this point has been repeatedly emphasised by the courts."*
41. In doing their very best for their clients, part of the challenging role of counsel involves advancing points that they may consider to be weak or strong, and which they may privately consider to have poor or good chances of succeeding. So just because counsel fails in any one case on any one point does not mean that the truth of matters has escaped such counsel; it simply means that a particular argument advanced on behalf of a client (perhaps in the belief that the point was strong, perhaps despite the belief that the point was weak) has failed before a particular court – and when it fails before a court of first instance there is every possibility that it may yet win favour on appeal or even on further appeal. The legal process involves a constant approach to the truth, but no one judgment is possessed of absolute truth, and even repeated statements of a perceived truth across multiple judgments (such as the multiple judgments referred to in *FMO (No. 2)*) do not preclude a contrary evolution in the understanding of a particular truth or even the abandonment at some future time of a once-acknowledged truth. *Mallak* is a good example of this: doubtless there was a time when the truth of matters when it came to absolute discretion was generally perceived to be that an unreasoned exercise of such a discretion was legally permissible, indeed this perception was essentially the view that was advanced for the Minister in *Mallak*, yet the decision of the Supreme Court in that case indicated that in fact the law, through its constant approach to an ultimately unattainable absolute truth, had, even if it once stood as the Minister contended, latterly evolved in a contrary direction.
42. Here, the point made by counsel for Mr Y is *not* that the observation of Hardiman J. in *GK* was wrong – that is a conclusion that this Court bound by the rules of precedent could not in any event reach, nor would this Court be so presumptuous as even to offer a view in

this regard: it accepts as correct the decision by which it is bound. Rather, what counsel here contends for is, the, in truth, basic and correct proposition, that the decision of the Supreme Court in *GK* must itself be viewed in the context of the later decision of the Supreme Court in *Mallak* and hence that there may and will be instances in which the absence of narrative discussion, while it may not amount to a failure to consider an issue, nonetheless offends against the legal position identified in *Mallak*, most notably through a failure to provide sufficient information to an affected person on which to later construct a judicial review application. This is one such case. When it comes to the membership card and the *fiche d'adhésion* concerning Mr Y's purported membership of the *Conseil de l'Apostolat des Laïcs* (receipt of which is acknowledged several times) there is no analysis (none at all) of the significance (or insignificance) of this. Mr Y is left completely in the dark as to why this information has been deemed not good enough to establish his claimed membership of *Comité Laïc*. No reasons are offered in this regard. And that is just not good enough when one has regard to the above-underlined aspects of the judgment of Fennelly J. in *Mallak*.

(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.*

(e) *any other considerations of the common good.*

43. No specific criticism was raised concerning the Minister's consideration of items (c), (d) or (e).

K.

Question 2

44. Did the Minister err in his assessment of prohibition of *refoulement* under s.50(2) of the Act of 2015?

(i) Answer 2

45. For the reasons identified hereafter, and solely to the extent identified hereafter, the court's answer to this question is that the Minister erred in the *process* of assessment by failing to provide any reasoning on the newly received information (the membership card and *fiche d'adhésion*), thus making it entirely impossible, in contravention, *inter alia*, of the decision of the Supreme Court in *Mallak*, for this Court properly to assess whether the Minister erred in his assessment of prohibition of *refoulement* under s.50(2) because the court knows nothing as to the substantive reasoning of the author of the impugned decision (and hence the Minister) regarding the *Comité Laïc* point. Nor is one, in this regard, within the territory contemplated by Fennelly J. in *Mallak*, op. cit., para. 68, whereby "*the reasons for the decision are obvious*".

(ii) Reasoning

46. In considering Question 2, the court recalls its consideration above of the judgments of the Supreme Court in *GK v. Minister for Justice* [2002] 2 IR 418 and *Mallak v. Minister for Justice* [2012] 3 IR 297 and the more recent judgment of the High Court in *FMO (Nigeria) & Ors v. Minister for Justice and Equality (No.2)* [2019] IEHC 538.

47. As mentioned above, one of the concerns expressed by Mr Y is that because of his claimed membership of a Catholic lay organisation known as *Comité Laïc* he would be exposed to some level of State persecution were he now to return to the DRC. The IPAT in its decision accepts that “*The COI...supports the proposition that if the Appellant [Mr Y] was an active member of CLC there would be a risk of persecution and/or serious harm from state forces*”. As part of the documentation submitted for the s.49(7) review decision, but not previously seen by the IPO or the IPAT, Mr Y submitted to the Minister a membership card and a *fiche d’adhésion* concerning his purported membership of the *Conseil de l’Apostolat des Laïcs*.
48. The impugned review decision mentions several times that the membership card and *fiche* have been received. However, it engages in no analysis (none at all) of the significance or otherwise of this. Mr Y is left completely in the dark as to why this information has been deemed not good enough to establish his claimed membership of *Comité Laïc* (a point which clearly impacts upon the issue of *refoulement*). By failing to provide any reasoning in this regard, the author of the impugned decision has made it entirely impossible, in contravention, *inter alia*, of the decision of the Supreme Court in *Mallak*, for this Court to assess whether the Minister erred in his assessment of prohibition of *refoulement* under s.50(2) for the simple reason that the court knows nothing as to the substantive reasoning of the author of the impugned decision (and hence the Minister) regarding why the provision of the never-previously-seen membership card and *fiche d’adhésion*, was considered not good enough to establish Mr Y’s claimed membership of *Comité Laïc* (a point which clearly impacts upon the issue of *refoulement*). Nor is one, in this regard, within the territory contemplated by Fennelly J. in *Mallak*, *op. cit.*, para. 68, whereby “*the reasons for the decision are obvious*”. One can guess at a reason but one has no idea whether that guess is correct or not.
49. Again, the court notes in this regard that the point made by counsel for Mr Y is *not* that the observation of Hardiman J. in *GK* was wrong. Rather, what counsel for Mr Y contends is, the, in truth, basic and correct proposition, that the decision of the Supreme Court in *GK* must itself be viewed in the context of the later decision of the Supreme Court in *Mallak* and hence that there may and will be instances in which the absence of narrative discussion, while it may not amount to a failure to consider an issue, nonetheless offends against the legal position identified in *Mallak*, most notably through a failure to provide sufficient information to an affected person on which to later construct a judicial review application. This is one such case. Mr Y is left completely in the dark as to why this information has been deemed not good enough to establish his claimed membership of *Comité Laïc* (a point which clearly impacts upon the issue of *refoulement*). No reasons at all are offered in this regard. As a consequence the author of the impugned decision has made it entirely impossible, in contravention, *inter alia*, of the decision of the Supreme Court in *Mallak*, for this Court to assess whether the Minister erred in his assessment of prohibition of *refoulement* under s.50(2) for the simple reason that the court knows nothing as to the substantive reasoning of the author of the impugned decision (and hence the Minister) regarding why the provision of the never-previously-seen membership card and *fiche d’adhésion*, is considered not good enough to establish Mr Y’s claimed

membership of *Comité Laïc* (a point which clearly impacts upon the issue of *refoulement*). Nor is one, in this regard, within the territory contemplated by Fennelly J. in *Mallak, op. cit.*, para. 68, whereby "*the reasons for the decision are obvious*". One can guess at a reason but one has no idea whether that guess is correct or not.

(iii) The Country of Origin Information

a. The Consideration of the COI

50. It will be recalled that the review decision in its treatment of the COI states as follows:

"The following country of origin information from United States Department of State 2018 Country Reports on Human Rights Practices – (Democratic Republic of Congo), 13 March 2019 states:

d. Freedom of Movement

The law provides for freedom of internal movement, foreign travel, emigration, and repatriation. The government sometimes -restricted those rights. The government occasionally cooperated with the Office of the UN High Commissioner for Refugees (UNHCR) and other humanitarian organizations in providing protection and assistance to IDPs, refugees, asylum seekers, stateless persons, or other persons of concern..."

b. *JDS v. Minister for Justice & Anor.*

[2012] IEHC 291

51. It is useful before proceeding further to pause to consider the decision in the above-entitled proceedings.

52. The adult applicant in *JDS* was a Nigerian national who claimed to have married her husband in Nigeria in 2006. He was said to have arrived in Ireland shortly afterwards staying for two weeks. The wife claimed to have arrived in Ireland at the end of October 2008. Both claimed asylum. The wife gave birth to her husband's child, on 2nd January 2009. Her claim for asylum was based on an alleged fear of persecution for religious reasons if returned to Nigeria. She claimed that her father was a Muslim and that she had been brought up in that religion. In 1998, she met her husband who was a Christian and in spite of the disapproval of her father, she left her father's home in 2006, moved to live with her husband, and married him without her father's consent. She claimed that when she became pregnant in January 2008, she decided to tell her father in the hope that he had changed his mind, but he forced her to drink a potion causing her to have a miscarriage. She said that she and her husband were threatened by her father. When she moved away to her sister-in-law's home she said her father sent a man after her who threatened to kill her if she did not move back to her father's house. She returned to her husband's home where she remained for several months while arranging her flight from Nigeria. In June 2008, she travelled to Italy where she remained for some four months before coming to Ireland.

53. The claim for asylum was rejected in a report of 14th November 2008, and its negative recommendation was upheld on appeal by a decision of the RAT on 31st March 2009. An application for subsidiary protection was then made on 22nd May 2009 in which the claimed risk of serious harm was once again the threat posed by her father. It was determined on 14th January 2010 that subsidiary protection would not be granted. Following that refusal the mother was informed by a letter of 9th February 2010 from INIS's Repatriation Unit that the Minister had decided to make a deportation order. The letter said: "*In reaching this decision the Minister has satisfied himself that the provisions of s 5 (prohibition of refoulement) of the Refugee Act 1996 (as amended) are complied with in your case.*" The letter indicated that "*a copy of the Minister's considerations pursuant to s 3 of the Immigration Act 1999 (as amended) and s 5 of the Refugee Act 1996 (as amended) [were] enclosed with the letter.*" This was the memorandum entitled "*Examination of file under s 3 of the Immigration Act 1999, as amended*" in which were set out are the matters considered by the Minister by reference to the various subheadings of s. 3(6) of the Immigration Act 1999, s. 5 of the Act of 1996, s. 4 of the Criminal Justice (UN Convention Against Torture) Act 2000, and Art.8 ECHR.
54. The analysis under the heading "*Section 5 of the Refugee Act 1996, as amended (prohibition of refoulement)*" began with an accurate summary of the applicant's claim, followed by a series of quotations extending over five pages introduced by the statement: "*The following country of origin information is relevant to the Applicant's claim.*" There was then a series of extracts from COI derived from a diversity of sources and collated under the following headings: Geography, Constitution, Security Forces-Overview, Police, Avenues of Complaint, Freedom of Religion-Overview, Religious Demography, Freedom of Movement, Exit-Entry Procedures, and Treatment of Failed Asylum Seekers. This assembly of COI was then completed by the conclusion: "*Having considered all the facts of this case, I am of the opinion that repatriating [the mother] to Nigeria is not contrary to s 5 of the Refugee Act 1996, as amended, in this instance.*" At the end of the memorandum the overall conclusion under the heading "*Recommendation*" is expressed as follows:
- "[The mother's] case was considered under Section 3(6) of the Immigration Act 1999, as amended and under Section 5 of the Refugee Act 1996, as amended. Refoulement was not found to be an issue in this case. In addition, no issue arises under Section 4 of the Criminal Justice (UN Convention against Torture) Act 2000. Consideration was also given to private and family rights under Article 8 of the European Convention on Human Rights (ECHR). Therefore on the basis of the foregoing, I recommend that the Minister makes a deportation order in respect of [the mother]."*
55. The essential case made on behalf of the applicant in *JDS* was that it was impossible to tell from the Minister's s. 5 consideration and concluding recommendation what the rationale of his decision was and what particular reasons he had for concluding that repatriation would not be contrary to the prohibition. The applicant had explicitly claimed that she had converted to Christianity, which resulted in her life having been threatened

by her father, a Muslim cleric who had also forced/tricked her into an abortion. This, it was argued, called for a clear, rational and intelligible decision on the part of the Minister. Instead, the respondents' response was characterised by counsel for the applicants as an attempt to 'construct a hypothesis' as to why the Minister must have reached the conclusion that he did. (There were shades of this approach in the submissions by counsel for the Minister in the within proceedings when it came to the *Comité Laïc* point).

56. In the course of a judgment that saw him quash the deportation order made against the mother, Cooke J. observed, *inter alia*, as follows, at paras. 19-20:

"[19] ...[H]aving summarised the claim based upon the threats to her life from her Muslim father at the beginning of the s. 5 analysis, the memorandum immediately proceeds to recite the country of origin information given above. This includes extracts relating to the existence of security forces and police; the availability of "avenues of complaint;" and the freedoms of religion and of movement. This part of the memorandum draws no explicit conclusions from these extracts, but the implication is that a Christian woman threatened by a Muslim father for having converted to Christianity would have avenues of complaint available to her in Nigeria which would secure her domestic protection from the police or security forces or, alternatively or additionally, by relocating elsewhere within Nigeria. Because this assemblage of country of origin information covering different possible topics is followed directly by the opinion of the author as already quoted above without any linking explanation or particularisation of reasoning, it is not possible, in the view of the court, to understand precisely why the Minister formed the opinion that the Applicant could be repatriated without risk that the prohibition would be violated. The implication clearly arises that, in the absence of any reiteration of, or reliance upon, credibility doubts expressed in the asylum process, the Minister is accepting that this is a woman who has converted to Christianity and has been or might have been, the subject of threats to her life by her Muslim father but that, if so, she would not now be at risk on repatriation because (a) she can complain to the police or security forces who will intervene to protect her from such threats; (b) she can relocate away from her father and it is unlikely he will pursue her there; and (c) such fundamentalist religious threats are only a problem in certain northern states of Nigeria where she has never lived.

[20] In these circumstances the court accepts that the fundamental proposition advanced in support of the leave ground is correct. While it is possible and even highly probable that the hypothesis advanced on behalf of the Minister as to the rationale and reasons for the s. 5 conclusion is that suggested, the addressee of a deportation order cannot be expected to wait for the forensic analysis of the memorandum in the course of judicial review in order to understand why the crucial opinion has been reached. Although, understandably, it has not been referred to by either side in the course of the present hearing, this is an issue which was addressed by this court in its recent judgment in *Ahuka v. Minister for Justice* (Unreported, Cooke J. High Court, 20th June, 2012). In that judgment, the court

pointed to the dangers inherent in systematic processing of large numbers of decisions taken under s 3 of the Act of 1999, where the tendency to reply mechanically by reference to country of origin information to the headings of s 3(6) of the Act of 1999 or s. 5 of the Act of 1996 can deflect the decision maker from the need to stand back and ensure that a coherent and intelligible explanation is apparent from the memorandum when read as a whole. It is necessary in the view of the court that the decision should explain why the deportation order is being made and why, in particular, it is concluded that the deportee faces no risk to life or to person on repatriation contrary to the prohibition in s. 5."

57. In short, Cooke J. noted in the context of the COI information at issue in that case that:
- (i) there was a failure to draw explicit conclusions;
 - (ii) there was no linking explanation or particularisation of reasoning;
 - (iii) it was not possible to understand why the Minister formed the opinion that the applicant would not be repatriated without risk that the *refoulement* prohibition would be violated;
 - (iv) while a hypothesis could be constructed that possibly, even probably reflected the rationale for the Minister's action, the subject of a decision "*cannot be expected to wait for the forensic analysis of the memorandum in the course of judicial review in order to understand why the crucial opinion has been reached*";
 - (v) there was a failure on the part of the decisionmaker "*to stand back and ensure that [there was] a coherent and intelligible explanation...apparent from the memorandum when read as a whole...[as to] why the deportation order...[was] being made and why, in particular, it...concluded that the deportee [faced]...no risk to life or to person on repatriation contrary to the [refoulement] prohibition*".

c. The Within Application

58. When it comes to the decision impugned in the within application it seems to the court that precisely the same criticisms fall to be made of it when it comes to the treatment of COI as were made by Cooke J. of the decision before him in *JDS*. Thus:
- (i) there is a failure to draw explicit conclusions;
 - (ii) there is no linking explanation or particularisation of reasoning;
 - (iii) it is not possible to understand why the Minister formed the opinion that the applicant would not be repatriated without risk that the *refoulement* prohibition would be violated;
 - (iv) while a hypothesis can be constructed that possibly, even probably reflects the rationale for the Minister's decision, Mr Y "*cannot be expected to wait for the forensic analysis of the memorandum in the course of judicial review in order to understand why the crucial opinion has been reached*";

(v) there was a failure on the part of the author of the review decision “to stand back and ensure that [there was] a coherent and intelligible explanation...apparent from the memorandum when read as a whole...[as to] why...the deportee faces...no risk to life or to person on repatriation contrary to the [refoulement] prohibition”.

59. Additionally, given the somewhat unusual choice of which element of the COI to focus upon (freedom of movement) when what is at issue is the risk of harm if returned to the DRC, one is not within the territory contemplated by Fennelly J. in *Mallak*, op. cit., para. 68, whereby “the reasons for the decision are obvious”.

L.

Question 3

60. Did the Minister err in failing to give cogent reasons for his decision under s.49(3) and/or 50 of the Act of 2015 and/or Art.8(1) ECHR and/or in failing to properly evaluate certain material facts or considerations?

(i) Answer 3

61. For the reasons identified hereafter, and solely to the extent identified hereafter, the court’s answer to this question is ‘yes’.

(ii) Overview

62. Before proceeding to consider this question, it is helpful to consider some case-law of relevance, viz. *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701, *Mallak v. Minister for Justice* [2012] 3 IR 297, *PO v. Minister for Justice* [2015] 3 IR 164, *Luximon v. Minister for Justice and Equality* [2018] 2 IR 542, and *AWK (Pakistan) v. Minister for Justice and Equality (No. 2)* [2018] IEHC 631.

(iii) Some Case-Law of Relevance

63. The court considers the just-mentioned case-law hereafter.

a. *Meadows*

64. In *Meadows*, the applicant, a Nigerian national, applied for asylum in the State, this was refused at first instance and unsuccessfully appealed. The applicant then applied to the Minister pursuant to s. 3(3)(b) of the Immigration Act 1999 for humanitarian leave to remain in the State on the grounds, *inter alia*, that she would be subjected to female genital mutilation if returned to Nigeria and that her deportation would be a violation of her human rights and a breach of the principle of non-*refoulement*, governed by s. 5 of the Refugee Act 1996. The High Court refused the applicant leave to apply, by way of judicial review, to quash the decision of the first respondent to make a deportation order in respect of her. However, it certified that its decision involved a point of law of exceptional public importance, the point of law being whether in determining the reasonableness of an administrative decision which affects/concerns constitutional/fundamental rights, it was correct to apply the standard set out in *O’Keeffe v. An Bord Pleanála* [1993] 1 IR 39. The appeal to the Supreme Court was successful, Murray CJ observing, *inter alia*, as follows, in the course of his judgment, at paras. 93-94:

“[93] An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That

rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.

[94] *Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective."*

b. Mallak

65. The facts of *Mallak* have been considered above. Of interest, in light of Murray CJ's above-quoted observation in *Meadows*, is the following observation of Fennelly J., at para. 68:

"In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."

66. Notwithstanding the foregoing, Fennelly J. does go on to observe as follows, at para. 69:

"Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them."

c. PO

67. In *PO*, the appellants were a Nigerian national and her Irish-born son. Neither was entitled to Irish citizenship. Following the failure of their asylum applications, the first respondent made deportation orders against the appellants. The appellants made an application under s.3(11) of the Immigration Act 1999 to the Minister to revoke the deportation orders. That application was refused. The appellants sought to quash that decision by way of judicial review. The High Court refused the application. The appellants then appealed to the Supreme Court and also applied for an injunction restraining their deportation pending the determination of the appeal. The appellants submitted that they had an arguable case for the grant of an interlocutory injunction. They claimed a breach of fair procedures and contended that their rights to private life and family rights, as guaranteed under Article 8 of the ECHR, were either ignored or not properly analysed by the first respondent. In the course of his judgment in the Supreme Court, McMenamin J. observed, *inter alia*, as follows, at para. 85:

"...[E]very state is entitled to control entry with its territory. It has been affirmed on many occasions by the European Court of Human Rights that the control of immigration policy through legislation can be necessary in a democratic society under article 8(2). Under the ECHR, and under national law, there is no general entitlement of non-nationals to choose to come to and live in any contracting state

without the permission of the appropriate authorities. In Nunez v. Norway (App. No. 55597/09) (2014) 58 EHRR 17, a judgment of the 28th September 2011, that principle was again affirmed. At p 535 the court stated:-

'70 The Court further reiterates that Art 8 does not entail a general obligation for a state to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a state's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest...Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion....Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precariousWhere this is the case the removal of the non-national family member would be incompatible with Art 8 only in exceptional circumstances...''

d. Luximon

68. Ms Luximon and Mr Balchand ('the respondents') were citizens of Mauritius. They arrived in Ireland in 2006 to avail of an administrative educational scheme set up by Ireland in 2001. Under that scheme, students were permitted to engage in part-time work, as well as to undertake post-secondary level educational courses. The respondents originally received Stamp 2 student permissions which allowed them to study and work, and which were renewed up to 2011. In July 2011, the government established a new scheme which set time limits on how long such students might remain in Ireland. In order for the respondents to remain, the new scheme required them to apply for, and obtain, Stamp 4 permissions which would permit long-term residence. They submitted applications to the Minister seeking to vary their immigration permissions from Stamp 2 to Stamp 4. The applications were refused and the respondents were informed that they must leave Ireland unless they secured another form of immigration permission. The decision letters made no reference to the respondents' asserted private or family life rights under Art.8 ECHR.
69. The High Court in *Luximon* held that, in arriving at a decision under s.4(7) of the Immigration Act 2004, the Minister erred in failing to consider the respondents' Art.8 ECHR privacy and family rights in deciding whether to vary or renew their permission to be in Ireland. The Court of Appeal upheld this judgment. The High Court in *Luximon* declined to grant judicial review of the Minister's decision holding that, in making such a decision, the Minister did not have an ECHR duty because the respondents' status in the

State was precarious and therefore their private and family life rights were minimal to non-existent. The Court of Appeal allowed the respondents' appeal against that decision, holding that the Minister, in making the decisions under s.4(7) of the 2004 Act, erred by failing to give consideration to the respondents' Art.8 ECHR privacy/family rights. The Minister appealed both Court of Appeal decisions to the Supreme Court submitting that an Art.8 ECHR assessment was only required at the deportation, stage of the procedure. Those appeals failed.

70. In the course of his judgment in the Supreme Court, McMenamin J. observed, *inter alia*, as follows, at para.10:

"In Balchand, the High Court judge, in comparing the respondents' status to failed asylum seekers, made reference to the judgments of this court...in PO v. Minister for Justice [2015] I.R. 164. These judgments must be read in their entirety. To take one illustration, an observation at para.26 of my judgment in PO, quoted in the High Court judgment in Balchand, should not be misunderstood as holding that an unsuccessful asylum seeker's rights were 'minimal to non-existent' when it came to a decision to revoke a deportation order. The judgments of this court in PO hold that the Minister has significant duties under s.3(11) of the Immigration Act 1999, and these duties arise under legal parameters. PO concerned the Minister's discretion on application to revoke a deportation order made concerning an unsuccessful asylum seeker. Section 3(11) of the 1999 Act allows the Minister to amend or revoke a deportation order made under s.3(1) and (2) of the same Act. In PO, having referred to the relevant provisions of the Act of 1999, I pointed out at para. 15:

"...15. It would be entirely wrong to conclude that, by reference to these provisions alone, and in operating under this regime, the Minister is at large in exercising her discretion. Firstly, it is necessary that the Minister have regard to the materials which have been furnished previously. She must then consider here only new facts, materials or circumstances. If there are truly new facts, materials or circumstances which could be material to an overall assessment of the position, the officials should take an overall view as to the circumstances, including those new matters addressed....Furthermore, in making such decisions, the Minister is obliged to operate within the boundaries of natural and constitutional justice, and also to decide in accordance with the international obligations which have been incorporated into domestic law by the Oireachtas. The Minister is not entitled to act unconstitutionally. She must determine every application on its merits. This includes operating within the boundaries of the 1999 Act itself, and, more broadly, the Constitution, the European Convention on Human Rights, 1950...as explained by the European Court of Human Rights, ... and the principle of proportionality, all of which must be applied to the circumstances of the case."

71. As indicated in the above-quoted text, the rights of an unsuccessful asylum-seeker are not “*minimal to non-existent*” and the Minister was not at large in the exercise of the discretion therein (as herein) but rather had to consider new material facts in accordance with natural and constitutional justice and obligations arising under international law.

e. AWK

72. In AWK, the facts of the case and reliefs sought were described in the following terms by the High Court, at paras. 1 and 3 of its judgment:

“1. *The applicant claims he was born in Pakistan in 1991. He says that he went to Lahore in March 2010 and to the United Kingdom on 28th January 2011, where he studied accountancy and then subsequently apparently changed studies to the security industry. He applied for leave to remain. That application was rejected. He appealed in April 2015 and, with his student permission about to expire as of December 2015, he came to Ireland, arriving on 25th August 2015. He then applied for asylum on 26th August 2015, apparently never having sought protection during his years in the U.K. That application was rejected by the Refugee Applications Commissioner on 29th August 2016. He appealed to the Refugee Appeals Tribunal against that rejection. Following the commencement of the International Protection Act 2015 on 31st December 2016, he applied for subsidiary protection on 13th February 2017, an application that was then remitted to the International Protection Office and refused on 10th July 2017. An appeal to the International Protection Appeals Tribunal was dismissed on 13th October 2017. On 26th July 2017, he was informed that the Minister had refused permission to remain in the State under s. 49(4)(b) of the 2015 Act. On 15th and 24th November 2017 he made representations out of time to review that decision under s. 49(7) and (9). On 15th March 2018 the IPO rejected the review under s. 49(9) and the applicant was so notified on 23rd April 2018. On 3rd May 2018 he sought a further review. On 8th May 2018 a deportation order was made. On 10th May 2018 the IPO informed the applicant that the review had been completed and no further review arose. The present proceedings were filed on 31st May 2018 and moved ex parte on 12th June 2018.*

...

3. *The primary relief sought falls essentially into two categories: (i) certiorari of the s. 49(9) decision of 15th March 2018 and consequential certiorari of the deportation order and (ii) mandamus to compel the Minister to consider the further purported application under s. 49(9), made on 3rd May 2018.”*

73. What is perhaps notable for the purposes of the within judgment is that in the course of dismissing the application before it the court observed, at para.14 that while, in *Luximon*, “*the Supreme Court took the view that it was going too far to say that the Art. 8 rights of unsettled migrants were minimal to non-existent...that certainly does not change the fundamental point that deportation of such an unsettled migrant only breaches art. 8 in exceptional circumstances.*”

(iii) Application of Case-Law

74. Bearing the above case-law in mind it seems to the court that three observations may be made concerning the review decision.
75. First, under the heading "9. Article 8 (ECHR) – Private Life", the review decision states as follows:

"9. Article 8 ECHR – Private Life

The previous consideration under Art. 8 private life, contained in the s.49(3) decision, found that the applicant's private life rights had not been engaged and that a refusal of permission to remain did not constitute a breach of Article 8(1).

The applicant made the following submissions regarding his private life.

The applicant submits that he has many friends in Ireland and outlined his integration in the State and involvement in his church choir, education and employment. The applicant is currently employed on a full-time basis and is also studying for the Leaving Certificate on a VTOS programme.

The applicant illegally entered the State on 30/03/2018 and applied for international protection in the State on 03/04/2018. On that basis, the applicant has been in the State for approximately 1 year and 8 months at the time of writing this submission. The applicant presented as single with no family connections to the State.

The applicant is currently residing in RIA provided accommodation within the State.

The applicant was granted permission to access the labour market by the LMAU until 18/01/2020 or until such time as the applicant receives a final, negative decision on their international protection application, whichever occurs first.

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

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

76. The court sees nothing wrong with this reasoning. There are only so many ways that one can say, 'Having regard to the just-described litany of facts I don't think there's an issue under Art. 8(1)'. There is nothing wrong with the way in which this is expressed. To borrow from the wording of Fennelly J.'s judgment in *Mallak*, Mr Y cannot be at a loss to understand what the Minister is stating in this regard, viz. that having regard to the just-recited facts he does not consider that Art.8(1) is engaged or that any breach of same will present.

77. Second, where an issue does present, it seems to the court, is when it comes to *refoulement*. It will be recalled that in this regard the review decision states as follows:

"12. Section 50 of the International Protection Act 2015 (prohibition of refoulement)

In accordance with section 50(1) of the International Protection Act 2015, a person shall not be expelled or returned 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. Section 50(3) states that 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.

The applicant has made representations regarding the prohibition of refoulement. The applicant submits that he has a fear of returning to the DRC which is real. The applicant submitted a membership card for CALCC. Representations received on behalf of the applicant from [STATED NAME] submits that the DRC is still a high-risk region and that it would not be safe for the applicant to go back.

The applicant's international protection claim was refused by the IPO and affirmed by the IPAT as he was determined to be a person not in need of international protection.

The following country of origin information from United States Department of State 2018 Country Reports on Human Rights Practices – (Democratic Republic of Congo), 13 March 2019 states:

d. Freedom of Movement

The law provides for freedom of internal movement, foreign travel, emigration, and repatriation. The government sometimes restricted those rights. The government occasionally cooperated with the Office of the UN High Commissioner for Refugees (UNHCR) and other humanitarian organizations in providing protection and assistance to IDPs, refugees, asylum seekers, stateless persons, or other persons of concern..."

It is noted that the applicant's immediate family members are still living in the DRC.

I have considered all the facts of this case together with relevant country of origin information in respect of DRC. The prohibition of refoulement was also considered in the context of the international protection determination. The prohibition of refoulement has also been considered in the context of this report. The country of origin information does not indicate that the prohibition of refoulement applies if the applicant is returned to DRC.

Accordingly, having considered all of the facts in this case and relevant country of origin information, I am of the opinion that repatriating the DRC is not contrary to section 50 of the International Protection Act 2015, in this instance for the reasons set out above."

78. There are two difficulties with the above.
79. First, one of the concerns expressed by Mr Y is that because of his claimed membership of a Catholic lay organisation known as *Comité Laic* he would be exposed to some level of State persecution were he now to return to the DRC. As part of the documentation submitted for the s.49(7) review decision, *but not previously seen* by the IPO or the IPAT, Mr Y submitted to the Minister a membership card and a *fiche d'adhésion* concerning his purported membership of the *Conseil de l'Apostolat des Laïcs*. The review decision mentions several times that the membership card has been received. However, it engages in no analysis (none at all) of the significance of this and thus fails to offer even a single cogent reason to Mr Y as to why this information has been deemed not good enough to establish his claimed membership of *Comité Laic* (a point which clearly impacts upon the issue of *refoulement*). As a consequence the author of the impugned decision has made it entirely impossible, in contravention, *inter alia*, of the decision of the Supreme Court in *Mallak*, for this Court to assess whether the Minister erred in his assessment of prohibition of *refoulement* under s.50 for the simple reason that the court knows nothing as to the substantive reasoning of the author of the impugned decision (and hence the Minister) regarding why the provision of the never-previously-seen membership card and *fiche d'adhésion*, is considered not good enough to establish Mr Y's claimed membership of *Comité Laic* (a point which clearly impacts upon the issue of *refoulement*). Nor is one, in this regard, within the territory contemplated by Fennelly J. in *Mallak*, *op. cit.*, para. 68, whereby "*the reasons for the decision are obvious*".
80. Again, the court notes in this regard that the point made by counsel for Mr Y is *not* that the observation of Hardiman J. in *GK* was wrong. Rather, what counsel for Mr Y contends is, the, in truth very basic and correct proposition, that the decision of the Supreme Court in *GK* must itself be viewed in the context of the later decision of the Supreme Court in *Mallak* and hence that there may and will be instances in which the absence of narrative discussion, while it may not amount to a failure to consider an issue, nonetheless offends against the legal position identified in *Mallak*, most notably through a failure to provide sufficient information to an affected person on which to later construct a judicial review application. This is one such case. Mr Y is left completely in the dark as to why the provision of the membership card and *fiche d'adhésion* has been deemed not good enough to establish his claimed membership of *Comité Laic* (a point which clearly impacts upon the issue of *refoulement*). No reasons at all are offered in this regard, let alone a cogent reason. As a consequence the author of the impugned decision has made it entirely impossible, in contravention, *inter alia*, of the decision of the Supreme Court in *Mallak*, for this Court to assess whether the Minister erred in his assessment of prohibition of *refoulement* under s.50 for the simple reason that the court knows nothing as to the substantive reasoning of the author of the impugned decision (and hence the Minister)

regarding why the provision of the never-previously-seen membership card and *fiche d'adhésion*, is considered not good enough to establish Mr Y's claimed membership of *Comité Laïc* (a point which clearly impacts upon the issue of *refoulement*). Nor is one, in this regard, within the territory contemplated by Fennelly J. in *Mallak, op. cit.*, para. 68, whereby "*the reasons for the decision are obvious*". One can guess at a reason but one has no idea whether that guess is correct or not.

81. Second, it will be recalled that the review decision in its treatment of the COI states as follows:

"The following country of origin information from United States Department of State 2018 Country Reports on Human Rights Practices – (Democratic Republic of Congo), 13 March 2019 states:

'd. Freedom of Movement

The law provides for freedom of internal movement, foreign travel, emigration, and repatriation. The government sometimes restricted those rights. The government occasionally cooperated with the Office of the UN High Commissioner for Refugees (UNHCR) and other humanitarian organizations in providing protection and assistance to IDPs, refugees, asylum seekers, stateless persons, or other persons of concern..."

82. Returning again to the language of Cooke J. in *JDS v. Minister for Justice and Equality & Anor.*, considered previously above, it seems to the court that precisely the same criticisms fall to be made of the impugned review decision at issue in the within proceedings as were made by Cooke J. of the decision before him in *JDS*. Thus:
- (i) there is a failure to draw explicit conclusions;
 - (ii) there is no linking explanation or particularisation of reasoning;
 - (iii) it is not possible to understand why the Minister formed the opinion that the applicant would not be repatriated without risk that the *refoulement* prohibition would be violated; while a hypothesis can be constructed that possibly, even probably reflects the rationale for the Minister's decision, Mr Y "*cannot be expected to wait for the forensic analysis of the memorandum in the course of judicial review in order to understand why the crucial opinion has been reached*";
 - (iv) there was a failure on the part of the author of the review decision "*to stand back and ensure that [there was] a coherent and intelligible explanation...apparent from the memorandum when read as a whole...[as to] why...the deportee faces...no risk to life or to person on repatriation contrary to the [refoulement] prohibition*".
83. Additionally, given the unusual (or, at least, unexplained) choice as to which element of the COI to focus upon (freedom of movement) when the critical risk at issue is the risk of harm if returned to the DRC, one is not within the territory contemplated by Fennelly J. in *Mallak, op. cit.*, para. 68, whereby "*the reasons for the decision are obvious*".

M.

Question 4

84. Has Mr Y discharged the burden of proof in establishing that the Minister failed to take account of or to properly evaluate material facts/considerations, notwithstanding express statements to the contrary on the part of the Minister in this regard?

85. This question, posed by counsel for the respondent, is part of an effort by the Minister to suggest that the entirety of the within proceedings confuses a failure to engage in narrative discussion with a failure to consider relevant matters, a point which has been touched upon above and relevant case-law considered. That is, with respect, fundamentally to misunderstand the nature and substance of the arguments treated with in the within judgment. To the very limited extent that what presents is not a failure to consider but rather a lawful absence of narrative, a finding is made in favour of the Minister at the relevant point.

N.

Extension of Time

(i) Application and Applicable Law

86. Under s.5 of the Illegal Immigrants (Trafficking) Act 2000, as amended by s.34 of the Employment Permits (Amendment) Act 2014 and s.79 of the International Protection Act 2015, Mr Y had 28 days from about 11th December 2019 to commence the within proceedings. In fact, the proceedings were commenced out-of-time on 13th January. Application has been made by Mr Y for an extension of time for the bringing of the within proceedings.

87. In its recent judgment in *X v. Minister for Justice and Equality* [2021] IEHC 32, this Court, in Sections XV and XVI of that judgment, addressed, in the following terms, the issue of whether and when such extensions may be granted:

“XV

DELAY

19. *Section 5 of the Illegal Immigrants (Trafficking) Act 2000 as amended by s.34 of the Employment Permits (Amendment) Act 2014 and s.79 of the International Protection Act 2015 provides, inter alia, as follows:*

‘(1) A person shall not question the validity of...(og) a recommendation of an international protection officer under paragraph (b) or (c) of section 39(3) of the International Protection Act 2015...otherwise than by way of an application for judicial review under Order 84 of Rules of the Superior Courts...hereafter in this section referred to as ‘the Order’...

[Court Note: In the within proceedings the relevant provision is s.5(1)(oi) of the Illegal Immigrants (Trafficking) Act 2000, as inserted by s.79(a) of the Act of 2015 (“(oi) a decision of the Minister under section 49(4)(b) of the International Protection Act 2015”). This is because s.49(8) provides that “Subsections (2) to (5) shall apply to a review under subsection (7), subject to...any other necessary modifications”. Thus, although a s.49(7) review is required (obviously) by s.49(7),

the ultimate decision to refuse the applicant a permission to remain, consequent upon a s.49(7) review, is made under s.49(4)(b), and hence the limitation period created by s.5(1)(oi) of the Act of 2000 applies.]

(2) *An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in subsection (1) (hereafter in this section referred to as an 'application') shall be made within the period of 28 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed.'*

20. *As can be seen, there are two questions that arise for the court to answer under s.5(2) before it may grant the leave sought:*

(1) *Is the High Court satisfied that there are substantial grounds for contending that the impugned action is invalid or ought to be quashed?*

(2) *Is there good and sufficient reason for extending the period within which the application shall be made?*

21. *The answer to both questions must be 'yes' before the court decides to grant the leave sought. If the answer to both questions is 'yes' it does not seem to the court that it is precluded in all the circumstances presenting in any one case from exercising its discretion so as to refuse the leave sought – though there would need to be good reason for so doing in the face of two 'yes' answers.*

XVI

AN ASIDE ON THE 'NEED FOR SPEED'

22. *There is nothing in s.5 of the Act of 2000 to suggest that the usual 'need for speed' that applies in judicial review proceedings does not apply with equal vigour in the context of proceedings to which s.5 applies. It is useful to consider some of the applicable case-law in this regard. The court turns briefly to consider: *De Róiste v. Minister for Defence* [2001] 1 IR 190, *O'Brien v. Moriarty* [2006] 2 IR 221, and *Shell E&P Ireland v. McGrath* [2013] 1 IR 247.*

(i) *De Róiste*

23. *De Róiste makes clear that time is more of the essence, more urgent in judicial review proceedings.*

24. *In De Róiste, the applicant had been 'retired' from the defence forces in 1969 on the suspicion that he had associated with subversives. In 1997, he sought to challenge the decision to retire him. He claimed that the trauma suffered by him as a result of the original decision that had prevented him from proceedings as they*

ought. The respondents claimed that the applicant was barred from bringing the proceedings by reason of the delay presenting. The applicant's action was dismissed in the High Court and an appeal to the Supreme Court failed, that court holding that there had been inordinate and inexcusable delay and that the court would not exercise the (still-presenting) jurisdiction to allow the matter to proceed to trial. In her judgment, Denham J. observed, inter alia, as follows, at p. 210:

'The time element in judicial review proceedings requires early application to court by an applicant. This is indicated by the requirement that the application be made promptly, and in any event within three or six months from when the grounds for application arose, unless there is good reason to extend the period within which the application shall be made. This is a shorter time span than the time required in other proceedings, for example a plenary summons. Time is more of the essence, more urgent, in judicial review proceedings.'

(ii) O'Brien

25. *O'Brien points to the fact that from sometime around the turn of the century, the courts have applied a greater level of scrutiny when it comes to belated applications for judicial review.*

26. *In September 2004, the applicant applied to the High Court for leave to apply for judicial review of, inter alia, a decision of the tribunal of the respondent, which was established by order on the 26th September 1997, to proceed to public hearings in respect of a purchase in August 1998. It was contended by the applicant that the respondent did not have sufficient evidence to proceed to public hearings and that the transaction occurred after the establishment of the tribunal. The High Court refused the application for leave and refused to grant interlocutory relief restraining the respondent from proceeding to hold public hearings in respect of the transaction until the determination of the application for judicial review. The applicant appealed successfully to the Supreme Court. In the course of his judgment, Fennelly J. referred, at p. 237, to it being 'undoubtedly the case that the courts have in recent years applied much more severe scrutiny to delayed applications for judicial review than formerly'.*

(iii) Shell

27. *The judgment in Shell points to the public interest in the finality of decisions.*

28. *In 2002, on the application of the plaintiff and in the context of the proposed development by the plaintiff of the Corrib gas field, the predecessor of the first defendant to the counterclaim made a pipeline consent order pursuant to s. 40 of the Gas Act 1976, and certain compulsory acquisition orders pursuant to s. 32 of that Act of 1976. In 2004, planning permission was granted for an onshore gas terminal. In March 2005, the plaintiff instituted proceedings against the defendants, alleging, inter alia, that the defendants had obstructed or interfered with the plaintiff's right to carry out work in respect of the construction of the pipeline. As part of the defence to the claim, the defendants joined the State parties as*

defendants to a counterclaim in which the validity of the relevant statutory decisions concerned were challenged. The plaintiff subsequently advised the defendants that it intended to discontinue its claims against them, and in April 2007 the High Court. The counterclaim of the defendants against the plaintiff and the defendants to the counterclaim remained extant. The court ordered that the contention that the defendants were out of time to raise public law issues should be tried as a preliminary issue. The defendants to the counterclaim, supported by the plaintiff, contended, inter alia, that the defendants' pleas came within O.84 RSC, in that they could have been pursued by way of judicial review. Further, they contended that in the context of a plenary action, the time limitations prescribed by O.84 RSC were applicable by analogy to the defendants' pleas, and that the defendants had not complied with these time limitations. The High Court held that the defendants were not barred on grounds of time. A successful appeal to the Supreme Court ensued. In the course of his judgment in the Supreme Court, Clarke J., as he then was, observed, inter alia, as follows, at p. 264:

'The underlying reason why the rules of court impose a relatively short timeframe in which challenges to public law measures should be brought is because of the desirability of bringing finality to questions concerning the validity of such measures within a relatively short timeframe. At least at the level of broad generality there is a significant public interest advantage in early certainty as to the validity or otherwise of such public law measures. People are entitled to order their affairs on the basis that a measure, apparently valid on its face, can be relied on. That entitlement applies just as much to public authorities. The underlying rationale for short timeframes within which judicial review proceedings can be brought is, therefore, clear and of significant weight. By permitting time to be extended the rules do, of course, recognise that there may be circumstances where, on the facts of an individual case, a departure from the strict application on whatever timescale might be provided is warranted. The rules do not purport to impose an absolute time period.'

29. *What principles can be derived from the foregoing cases? It seems to the court that the following five principles may safely be stated:*
1. *Time is more of the essence, more urgent, in judicial review proceedings (De Róiste).*
 2. *From sometime around the turn of the century, the courts have applied a greater level of scrutiny when it comes to belated applications for judicial review (O'Brien).*
 3. *The underlying reason why the rules of court impose a relatively short timeframe in which challenges to public law measures should be brought is because of the desirability of bringing finality to questions concerning the validity of such measures within a relatively short timeframe (Shell).*

4. *At the level of broad generality there is a significant public interest advantage in early certainty as to the validity or otherwise of such public law measures. That entitlement applies just as much to public authorities (Shell).*
5. *By permitting time to be extended the rules recognise that there may be circumstances where, on the facts of an individual case, a departure from the strict application on whatever timescale might be provided is warranted. The rules do not purport to impose an absolute time period (Shell)."*

(ii) Application of Section 5(2)

88. The court turns now to consider the two questions that arise under s.5(2) of the Act of 2000.

89. Question A. Is the High Court satisfied that there are substantial grounds for contending that the impugned act/ion is invalid or ought to be quashed?

90. It will be clear from the various observations made by the court in the preceding pages (and by virtue of those observations) that the court's answer to this question is 'yes'.

91. Question B. Is there good and sufficient reason for extending the period within which the application shall be made?

92. The reason for the delay in commencing the proceedings appears to be attributable solely to the fact that the decision issued in early-December and the end-of-year vacation period (including two Bank Holidays) intervened. Whether that would be reason enough in itself to allow for extension may arise in another case. Here what the court has to decide is whether separate good and sufficient reason for extending the period within which the within application shall be made in the fact that:

- (i) the delay presenting, though best avoided, was not of an especially long duration;
- (ii) no prejudice has been claimed by the respondent (although the fact of having to respond to the proceedings could be considered to be a form of prejudice, albeit one to some extent superseded by the fact that the proceedings have now proceeded to hearing and been heard in full, with the extension application only now falling to be adjudicated upon);
- (iii) the impugned decision directly impinges upon whether an asylum-seeker should be returned to a jurisdiction where he claims that he would be afraid for his personal safety, so a matter in which the State has a moral imperative to proceed with all due caution; and
- (iv) the court, for all the reasons stated in the preceding pages, considers that ought now to grant relief to the applicant should the extension be granted.

93. Having regard to all of the foregoing the court considers that there is good and sufficient reason for extending the period within which the within application should be made and will therefore extend the said period to the end of the day on which the application was in fact made.

O.

Conclusion

94. For the reasons stated above, the court will grant an order of *certiorari* quashing the impugned decision.