THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 486
RECORD NO: 2021/563 JR

BETWEEN

T.F

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Mark Heslin delivered electronically on the 16th day of June, 2022

Introduction

1. In these proceedings the Applicant challenges the fairness and legality of the decision-making process, found in s.52 of the International Protection Act 2015 ("the 2015 Act"), which led to the Respondent's decision of 18 May 2021 to revoke the Applicant's refugee status. The challenge is brought on a number of bases. These include: inadequacy of the opportunity to make substantive submissions in advance of the decision; abuse of process; that irrelevant and unlawful considerations featured in and motivated the decision; breach of the memo *iudex in causa sua* principle; inordinate and inexcusable delay; deficiency in terms of reasons; and that the 2015 Act, in particular s.52 thereof, is unconstitutional.

S.52 of the 2015 Act

2. Given its significance for the present proceedings, it is useful to set out, *verbatim*, s.52 of the 2015 Act, which, under the heading of "Revocation of refugee declaration or subsidiary protection declaration" provides, as follows:

"*52. (1) The Minister shall, in accordance with this section, revoke a refugee declaration given to a person if satisfied that—*

(a) the person should have been or is excluded from being a refugee under section 10,

(b) the person has, in accordance with section 9, ceased to be a refugee, or

(c) misrepresentation or omission of facts, whether or not including the use of false documents, by the person was decisive in the decision to give the person a refugee declaration.

(2) The Minister may, in accordance with this section, revoke a refugee declaration given to a person if satisfied that—

(a) there are reasonable grounds for regarding him or her as a danger to the security of the State, or

(b) the person, having been by a final judgement convicted, whether in the State or not, of a particularly serious crime, constitutes a danger to the community of the State.

(3) The Minister shall, in accordance with this section, revoke a subsidiary protection declaration given to a person if satisfied that—

(a) the person should have been or is excluded from being eligible for subsidiary protection under section 12,

(b) the person has, in accordance with section 11, ceased to be eligible for subsidiary protection, or

(c) misrepresentation or omission of facts, whether or not including the use of false documents, by the person was decisive in the decision to give the person a subsidiary protection declaration.

(4) Where the Minister proposes, under subsection (1), (2) or (3), to revoke a declaration, he or she shall send a notice in writing of his or her proposal and of the reasons for it to the person concerned, which notice shall include a statement of the person's entitlement under subsection (6) to make representations in writing to the Minister in relation to the proposal.

(5) Where the Minister sends a notice under subsection (4) to a person, he or she shall at the same time send a copy thereof to the person's legal representative (if known) and to the High Commissioner.

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

(7) The Minister shall—

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

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

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

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

(a) affirm the decision of the Minister, or

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

(10) A decision to revoke a declaration shall take effect—

(a) where no appeal to the Circuit Court is brought against the decision of the Minister, on the date on which the period specified in subsection (8) for making such an appeal expires, or

(b) where an appeal to the Circuit Court is brought against the decision of the Minister—

(i) from the date on which the Circuit Court, under subsection (9)(a), affirms the decision, or

(ii) from the date on which the appeal is withdrawn.

(11) In this section "declaration" means a refugee declaration or a subsidiary protection declaration."

S.9 of the 2015 Act

3. Whereas s.52(1)(b) of the 2015 Act refers to s.9, it provides the following under the heading of "Cessation of refugee status":

"9. (1) A person shall cease to be a refugee if he or she—

(a) has voluntarily re-availed himself or herself of the protection of the country of nationality,

(b) having lost his or her nationality, has voluntarily re-acquired it,

(c) has acquired a new nationality (other than as an Irish citizen), and enjoys the protection of the country of his or her new nationality,

(d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution,

(e) subject to subsections (2) and (3), can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of his or her country of nationality, or

(f) subject to subsections (2) and (3), being a stateless person, is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to his or her country of former habitual residence.

(2) In determining whether paragraph (e) or (f) of subsection (1) applies, regard shall be had to whether the change of circumstances is of such a significant and non-temporary nature that the person's fear of persecution can no longer be regarded as well-founded.

(3) Paragraphs (e) and (f) of subsection (1) shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of his or her country of nationality or, being a stateless person, of the country of former habitual residence."

Background

4. The Applicant is a gentleman, born in 1973, who is of Roma ethnic origin. He has resided in Ireland since September 2001, having come to this State with his partner and young son, fleeing persecution in Romania. The Applicant was granted refugee status on 13 October 2004. Exhibit "TF1" comprises the relevant decision by the Refugee Appeals Tribunal ("the RAT") dated 26 April 2004, in which the RAT was satisfied that the Applicant and his wife could well suffer further persecution if returned to Romania.

5. The RAT decided that they and their young son should be declared to be refugees in accordance with the provisions of section 2 of the Refugee Act 1996 (as amended) ("the 1996 Act") and it is clear from the said decision that the grant of refugee status was on the basis, *inter alia*, that the Applicant suffered

persecution in Romania because of his ethnicity and that he had suffered persecution and beatings from the police in Romania.

6. Exhibit "TF2" comprises the 13 October 2004 grant of refugee status. Under the heading *"Your rights in this State"*, it is confirmed that the Applicant's rights, which are set out in S.3 of the 1996 Act, include *inter alia*, an entitlement to work; receive social welfare benefits; reside; travel; practice religion; access the courts; and to form and be a member of associations and trade unions to the same extent "*as an Irish citizen*".

7. The refugee status declaration goes on to make clear that travel rights are subject to section 4 of the 1996 act, which refers*, inter alia* to the issuing of a travel document; the Minister's right, in the interest of national security or public policy, to refuse to issue a travel document; the form of a travel document; and the obligation on an Applicant applying for a travel document to provide information reasonably required by the Minister.

8. Subsequent to receiving the decision to grant refugee status, the Applicant underwent the appropriate registration process; and exhibit "TF3" comprises his Certificate of Registration with the Garda National Immigration Bureau ("GNIB").

9. The Applicant has, by now, significant and long-standing ties to this State and to his county of residence where he has lived since 2001. He currently resides with his partner of 27 years and their 2 youngest children. They have 4 children in total, ranging from 16 to 25 years of age, all of whom reside in Ireland and are Irish citizens. The Applicant and his partner also have 4 grandchildren, all of whom were born in Ireland. The Applicant's mother stays with him and his family for a few months each year. His father is deceased. The parents of the Applicant's partner, as well as her 4 sisters, one brother, 4 nieces and 4 nephews also reside in the same town as the Applicant.

10. The Applicant is now an Irish citizen. On 14 December 2015, the Applicant was granted a Certificate of Naturalisation, a copy of which comprises exhibit "TF4". Thus, he enjoys a right to reside in this State wholly independent of his status as a refugee.

11. The Applicant was the subject of a European arrest warrant ("EAW") which was issued by the State of Romania on 5 Feb 2010 ("the 2010 EAW"). The said warrant was endorsed for execution by this Court on 16 Feb 2011 and was in relation to a pending trial in respect of (i) the offence of trafficking in minors, carrying a maximum penalty of 7 to 18 years imprisonment; and (ii) the offence of trafficking in human beings, carrying a maximum penalty of 5 to 15 years imprisonment.

12. Exhibit "TF7" comprises a copy of the 2010 EAW, accompanied by a translation into English. It is clear from the contents of same that the relevant offences are alleged to have occurred "*During 2007-2008"* (i.e. after the Applicant was granted refugee status in 2004).

13. When the matter was due for hearing on 13 April 2011, the court was informed that the Minister was "*not in a position to stand over the surrender"* due to the Applicant's refugee status and, in the circumstances, the court made an order refusing the surrender.

14. By EAW dated 10 July 2018 ("the 2018 EAW"), the surrender of the Applicant was sought by a judicial authority in Romania, so that he could serve a sentence of 4 years imprisonment imposed upon him *in absentia* by a court in Timis County, Romania, on 29 June 2018, in respect of the offences which were the subject of the 2010 EAW.

15. Section 13(1) of the European Arrest Warrant Act 2003 ("the EAW Act 2003" or "the 2003 Act") requires the Respondent Minister (being the "*Central Authority*" referred to in that legislation), as soon as

may be after she receives an EAW to *"…apply, or cause an application to be made, to the High Court for the endorsement by it…"* of the EAW *"…for execution of the European arrest warrant concerned".* Sub-section (2) specifies what this Court must be satisfied of, as regards compliance with the provisions of the 2003 Act, before it may endorse the EAW for execution.

16. On 24 June 2019, the 2018 EAW was endorsed for execution. On 5 September 2019 the Applicant was duly arrested and brought before this Court on the same day, in accordance with the requirements of s.13 of the 2003 Act. Bail was granted to the Applicant on the day of his arrest, on the basis of strict signing-on conditions. The matter was adjourned on occasions during a period of 12 months, initially for the purposes of sourcing the Applicant's file from the International Protection Appeals Tribunal ("IPAT"). This file was provided in June 2020 and a hearing date was assigned for 29 July 2020.

17. On 15 July 2020, the Respondent applied to vacate the 29 July hearing date, to consider the issue of the Applicant's refugee status and whether an application should be brought to revoke. This adjournment application was opposed by the Applicant, however, the Court "*reluctantly"* acceded to the adjournment application and set a new hearing date for 15 October 2020.

18. On 15 October 2020, the Respondent made a further application to adjourn the hearing, on the grounds that the Minister wished to give further consideration as to whether she would seek to revoke the Applicant's status as a refugee. The matter was further adjourned to 20 October 2020, at which point the Respondent's request for a further adjournment was refused, and the matter was listed for hearing on 23 October 2020.

19. On 23 October 2020, the application was formally opened and the surrender of the Applicant was refused on the basis of the Respondent's concessions that refugee status always presented a formal bar to surrender in light of the decision of *Minister for Justice and Equality v. Pollack* [2010] IEHC 209 and the fact that s.47(9) of the 2015 Act had been deemed to be not retrospective.

EAW proceedings – 'doomed to fail'

20. A principal submission made on behalf of the Applicant was that the proceedings in respect of both the 2010 EAW and the 2018 EAW were essentially 'doomed to fail', having regard to the decision of Peart J. in *Pollack*. That case concerned the surrender of a Respondent which was sought by a judicial authority in Czechia so that he could serve a two-year sentence imposed upon him, *in abstentia,* by a court in that State, in respect of the offences of causing bodily harm and causing a breach of the peace. The Respondent had been granted a declaration of refugee status on the basis of a well-founded fear of persecution in Czechia. In the penultimate paragraph, Peart J. summarised the Court's decision as follows: "*Insofar as it might be argued that the obligation to surrender a person under a European arrest warrant is in conflict with the non-refoulement principle, I would have no hesitation in concluding that the former must yield."*

21. Section 47(9) of the 2015 Act provides that: "*A refugee declaration or a subsidiary protection declaration given, or deemed to have been given, under this Act shall cease to be in force where the person to whom it has been given becomes an Irish citizen."* It will be recalled that, as of 14 December 2015, the Applicant became an Irish citizen, having been granted a certificate of naturalisation. In submissions, Counsel for the Applicant drew this Court's attention to the Supreme Court's 19 June 2020 decision in *M.A.M v. Minister for Justice* [2020] 3 IR 50. There, the court considered s.47(9) of the 2015 Act and held, *inter alia,* that a declaration of refugee status granted under s.17 of the 1996 Act did not automatically cease to have effect when a person became an Irish citizen. On p.61 of the judgement Mr Justice

McMenamin referred to the Court of Appeal's judgment of 29 March 2019 [2019] IECA 116, stating as follows:

> *"Both applicants appealed the decision in their cases to the Court of Appeal. On one issue, that court, at para. 144, reversed the High Court decision. Ms. M. was granted a declaration to the effect that s. 47(9) of the 2015 Act did not have retrospective effect. That provision had been the sole basis of the refusal of Ms. M.'s application for family reunification dated 20 October 2017. The Minister did not cross-appeal that decision on non-retrospectivity to this court."*

22. Regardless of the skill with which submissions are made on behalf of the Applicant, the foregoing does not constitute proof of any abuse of process on the part of the Respondent Minister, with regard to the dealing with either the 2010 or 2018 EAWs. The Applicant's counsel submitted that the Applicant was "needlessly" subjected to proceedings concerning the 2010 and 2018 EAWs, which involved, *inter alia,* his arrest and detention and that this amounted to prejudice suffered by him and an abuse of process in circumstances where it was contended that the EAW proceedings were 'doomed to fail'. I regard myself as obliged to reject these submissions which seem to me to have insufficient regard to the following:-

- (i) The decisions to *issue* EAWs in respect of the Applicant in 2010 and in 2018 were not made by the Respondent, but by relevant authorities in Romania;
- (ii) Nor did the Respondent decide *what* the EAWs related to;
- (iii) Similarly, the Respondent had no role in deciding *when* the EAWs would be issued;
- (iv) Furthermore, the EAW Act 2003 *requires* the Respondent to ensure that an application is made to this Court for the endorsement, by it, of the EAW;
- (v) In addition, the decision-maker in respect of a *surrender* is this Court, not the Respondent Minister; and
- (vi) Thus, the Respondent Minister has no control whatsoever over the *outcome* of the proceedings but is obliged to make the relevant application on receipt of an EAW.

23. Particular emphasis was laid by the Applicant's counsel on the following paragraph from Mr. Justice Peart's decision in *Pollack*:

> *"I suppose one could say that if on the application for endorsement of the warrant the applicant was already aware that the proposed respondent was a refugee here and from the issuing state, that matter if brought to the court's attention would properly permit the court to refuse to endorse the warrant, just as where the warrant discloses an offence which it is accepted has no corresponding offence in this State, the court will refuse to endorse the warrant; firstly on the grounds of futility, but secondly and more importantly because no person should be arrested and deprived of his liberty, no matter how short the period thereof, where there can be no possibility of the application for surrender succeeding."*

24. No evidence or legal authority has been put before this Court to the effect (i) that the grant of refugee status prohibits the *issuing* of an EAW with respect to an individual having such status; or (ii) that having refugee status constitutes a 'bar' to *arrest* on foot of an EAW; or (iii) operates as a 'bar' to a *hearing* with respect to the endorsement of the warrant or the surrender of the individual concerned. Nor is there any evidence or legal authority before the court to the effect that (iv) the refugee status is *self-evident* or immediately obvious to the Respondent Minister in respect of every individual in respect of whom an EAW may be issued; or (v) that the Respondent has any means to, or is under any obligation to, immediately ascertain the refugee status of an individual in respect of whom an EAW has been issued; or (vi) that the

Respondent failed in such a 'duty'. Furthermore, (vii) there is no evidence of any concealment by the Respondent of relevant information from the court which was dealing with both EAWs. In addition, (viii) no evidence or authority has been put before this Court to suggest that it is impermissible, or that it constitutes an abuse of process, for more than one EAW to be issued in respect of the same individual. By contrast, the Respondent undoubtedly has legal obligations placed upon her, by virtue of the EAW Act 2003, to bring applications.

25. It also seems to me that to better understand the context in which Peart J. made the statements which the Applicant relies upon, it is useful to set out, *verbatim,* the immediately preceding paragraph, in which Mr Justice Peart stated the following:

> *"I must say I think it is undesirable to conclude in the present case that the application for surrender in the circumstances of this case would amount to an abuse of process. That concept usually imports some element of mala fides. Neither should this court impute such mala fides or abuse of process to the issuing judicial authority in circumstances where there is no evidence of the kind which would justify such a conclusion against an issuing judicial authority in a member state of the European Union. It is safe to conclude that nobody having any role in this application was aware of the fact that this respondent was a refugee from the Czech Republic until such time as he brought that fact to attention. I appreciate that the applicant will have been the corporation sole which declared him to be a refugee, but it is going too far to conclude that as a result there has been an abuse of process in bringing this application for surrender before the High Court. In fact under the Act of 2003 he is required to do so whenever a European arrest warrant is transmitted to the central authority by an issuing state. The applicant is not invested with any discretion to refuse to make the application in such circumstances."*

26. There is no evidence before this Court of any *mala fides* on the Respondent's part and, as Peart J. observed, the Respondent was then (and remains) obliged to bring an application for surrender on receipt of an EAW. There is no evidence before this Court which would allow me to take the view that the proceedings with regard to the 2010 EAW and/or the 2018 EAW constituted an abuse of process by the Respondent. It also seems uncontroversial to say that, insofar as refugee status is asserted following the arrest of an individual on foot of an EAW, the foregoing is an issue to be ascertained in the context of a determination by the court of the relevant issues.

27. Support for the foregoing observation can be found in the Applicant's exhibit "TF8", which comprises the 6 April 2011 judgment delivered by Mr Justice Edwards in respect of the bail application concerning the 2010 EAW. The said application arose from the Applicant's arrest on 20 March 2011; his remand in custody to Cloverhill prison; and the granting of leave to serve short notice on the Minister of the Applicant's intention to apply for bail on 23 March 2011 (which was granted).

28. As is clear from the learned judge's decision comprising the reasons for the court's decision to grant bail, subject to conditions, Edwards J. referred to the evidence which was before the court and which included an affidavit sworn by the Applicant's solicitor who made averments, *inter alia*, concerning the Applicant's Roma ethnic origin and his grant of refugee status on 13 October 2004. It is clear that the foregoing constituted evidence which had to be put before the court which illustrates, *inter alia,* (i) that refugee status is not self-evident, but something to be established, and (ii) that the relevant decision-maker is the court, not the Respondent. It was in the foregoing context that, whilst the Applicant was arrested in connection with the 2018 EAW, he was admitted to bail on strict conditions on the same day.

For the foregoing reasons, I take the view that the Applicant has not established that the proceedings concerning the 2010 and/or 2018 EAWs were unlawful or an abuse of process.

Certain facts in chronological order

29. It is appropriate, at this juncture, to look in some detail at certain facts which emerge from an examination of the evidence before the court insofar as the period commencing on 5 March 2021 is concerned. For ease of reference, this is done in chronological order, with particular reference to correspondence exchanged.

5 March 2021

30. On 5 March 2021, the ministerial decisions unit of the Respondent's department wrote by registered post to the Applicant in a letter which was entitled "*Proposal to revoke refugee status*". The letter made clear that the proposal to revoke the Applicants refugee status was pursuant to s.52(1)(b) of the International Protection Act 2015 ("the 2015 Act") which, *per* the terms set out, *verbatim*, earlier in this judgment, requires the Minister, in accordance with that section, to revoke a refugee declaration if satisfied that the person in question has, in accordance with section 9 of the 2015 Act, ceased to be a refugee. Section 9(1)-(3) was also set out in the letter which gave the following reasons for the proposal:

> *"You were granted refugee status by the Refugee Appeals Tribunal (RAT) under section 13 of the Refugee Act 1996 (as amended) on the 13 October 2004. The tribunal found that you had a well-founded fear of persecution within the meaning of section 2 of the Refugee Act 1996 (as amended). Country of Origin at the time confirmed there was widespread discrimination against members of the Roma Community. Further information on file notes [that] an article in the Irish Times (21 Feb 2004) stated that*
>
> > *'The European Parliament, using the toughest language an EU body has used against the Balkan countries so far, told Romania on Thursday that it stood no chance of joining the EU into thousand 7 unless it fought corruption, reform the judiciary, guaranteed media freedom and respect of human rights.'*
>
> *Romania ascended into the European Union in January 2007. Accordingly, Romania's accession into the European Union demonstrates a change of circumstances which is of such a significant and non-temporary nature that your fear of persecution can no longer be regarded as well-founded."*

This 5 March 2021 letter went on to notify the Applicant of his right (explicitly provided for in s.52(6), which was referenced in the letter) to make representations in writing, within 15 working days, in relation to the proposal. The Applicant's attention was also specifically drawn to s.52(7) which requires the Minister, before deciding to revoke a refugee declaration, to take into consideration any representations made in accordance with subsection (6).

Suspicions

31. A key submission made on behalf of the Applicant was to the effect that, prior to receiving the Respondent's statement of opposition and verifying affidavit the Applicant "*suspected*", but did not know, that the revocation process in respect of his refugee status stemmed from the EAWs. This was said to be unlawful and abusive and it was submitted that the process in respect of the revocation of the Applicant's refugee status was tainted by an inappropriate motivation, of which the Applicant only became fully aware

as a result of what was confirmed by Mr Cronin of the Respondent's Ministerial Decisions Unit at paragraph 3 of his affidavit (to which I will presently refer).

32. Regardless of the skill with which this submission was made, it is one which does not have support in the evidence before this Court and the facts which emerge from an analysis of the evidence fatally undermine the submission. I say this in circumstances where the Applicant makes averments, at para. 19 of his 14 June 2021 affidavit, with respect to the 2020 hearing arising from the 2018 EAW including that:

> "*On 15 July 2020 the Respondent applied to vacate that hearing date to consider the issue of your deponent's refugee status and whether an application should be brought to revoke. This application was opposed by my legal representatives, however, the court acceded to the adjournment application and set a new hearing date for 15 October 2020."*

33. Thus, it was in the context of what were then ongoing EAW proceedings, that the Respondent gave consideration to an application to revoke his refugee status, as the Applicant was well aware of at the time. The Applicant proceeded to make the following averments at para 20 of his affidavit:

> *"On 15 October 2020 the Respondent made a further application to adjourn the hearing date on the grounds that the Minister wished to give further consideration as to whether she would seek to revoke your deponent's status as a refugee. The matter was further adjourned to 20 October 2020…"*

Again, this is clear evidence from the Applicant that it was in the context of the EAW proceedings that the Respondent gave consideration to whether she would seek to revoke his status as a refugee. This is not something he *suspected*. It is something he *knew*. That is put beyond doubt at para 24 of the same affidavit, where the Applicant makes the following averment with regard to the Respondent's revocation of his refugee status:

> *"It is clear that* ***the only circumstances prompting such a proposal at the present time*** *is the fact of the unsuccessful attempt by the Respondent to remove your deponent from the State pursuant to a* ***European Arrest Warrant****…"* (emphasis added)

34. In view of the foregoing, the evidence is not that the Respondent ever acted in any covert manner, or that the Respondent was ever unclear as to her position. Nor does the evidence support the proposition that the Applicant was in some way 'in the dark', with only *suspicions* about the Respondent Minister's position or motivation, but not truly *knowing* same until facts were 'revealed' during the course of these proceedings. The evidence paints an entirely different picture.

35. At all material times, the Applicant well knew what the Respondent's position was; and he has averred this in very clear terms. In short, the evidence demonstrates that, prior to the institution of the present proceedings, the Applicant was very well aware of what gave rise to the decision to commence an application to revoke the Respondent's refugee status. There is simply no evidence whatsoever that there was ever any concealment of what motivated the commencement of the revocation process.

36. On the same issue, but from the Respondent's perspective, Mr Cronin makes, *inter-alia,* the following averments at paras. 2 and 3 of his 16 August 2021 affidavit in which he verified the contents of the Respondent's statement of opposition:

> *"At paragraph 24 of his affidavit sworn on 14 June 2021 the Applicant asserts that the revocation process would not have been instituted but for the receipt and endorsement of the European arrest warrant in the state.*
>
> *The Applicant is correct in this assertion…"*

What the Applicant has failed to do, however, is to demonstrate, with reference to any legal authority or principle, that a decision motivated by the EAW proceedings, to *commence* a revocation process concerning the Applicant's refugee status amounted to something unlawful or abusive or that such a *motivation* was improper. Nor has the Applicant demonstrated that this motivation 'infected' or rendered unlawful the decision which is challenged in these proceedings.

37. Furthermore, there is no challenge made in the present proceedings to the decision to *commence* the revocation process which, as we have seen, began with the Respondent's 5 March 2021 letter to the Applicant.

<u>Transparency</u>

38. Among the submissions made on behalf of the Applicant is to suggest that the process was flawed because the 5 March 2021 letter did not inform the Applicant that the reason for the initiation of the proposal to revoke his refugee status was the EAW proceedings. This was also described by the Applicant's counsel as being a "*transparency problem"* affecting the decision which is challenged. Two comments seem appropriate, as follows. Firstly, as a matter of fact, the Applicant already knew full well, indeed has averred what lay behind the initiation of the proposal to revoke his refugee status, namely, the EAW proceedings. He knew this because, during the EAW proceedings, the Minister sought and was granted adjournments in order to consider an application to revoke his refugee status. Thus, according to the Applicant's own averments (see, in particular paras. 19, 20 and 24 of his 14 June 2021 affidavit) there was nothing opaque and no transparency problem. Secondly, there is a fundamental distinction between (i) why, at a particular point in time, the s.52 process was *initiated* and (ii) the reasons proffered by the Respondent Minister to justify a proposed *revocation* of refugee status. There was no failure on the part of the Respondent to identify (ii) in her 5 March 2021 letter. The Applicant has not demonstrated, with reference to any statutory provision, legal principle, or relevant authority, that the Respondent was required to identify why the process was initiated at that juncture; and, on the particular facts of this case already *knew* (i). By way of a concluding comment as regards the 5 March 2021 letter, it is appropriate to note that the 15-day deadline which was referred to, as regards the making of representations, is one laid down by statute (see s.52(6)) as well as being one to which the Applicant's attention was specifically drawn.

<u>12 March 2021,</u>

39. On 12 March 2021, the Applicant's solicitor emailed the Respondent's department stating *inter-alia*:

> *"I am conscious that your letter states a 15-day timeframe for lodging of representations to the Minister and for this reason I need to urgently speak with you to determine and seek an extension on this timeframe as there will be a lot of work to prepare representations to the Minister and I just want to discuss this issue with you."*

<u>15 March 2021</u>

40. Further email communication took place and, by email sent on 15 March 2021 (9:25), the Respondent's department stated, *inter alia*:

"I am directed by the Minister for Justice to refer to your email received in this office on 12/03 2021. ***An additional period of 15 days (16 April 2021) will be permitted*** *on this occasion in order for your client to take legal advice on this matter."* (emphasis added)

12 April 2021

41. There was an additional request for an extension of time and, following an exchange of emails on 12 April 2021, the Minister's Department stated the following:

"I am directed by the Minister for Justice to refer to your email received in this office on 12/04/2021. I refer to your request for a further extension of time to make submissions on behalf of your client. The Minister previously granted an extension of time until the 16 April 2021 on 15 March 2021 in order for your client to make representations. Please note, as an exceptional measure the Minister will accommodate a final extension of time to make representations before considering whether to revoke your client's refugee status. ***The final date for representations to this office is now 14 May 2021****…"* (emphasis added)

6 May 2021

42. By letter dated 6 May 2021, the Applicant's solicitor wrote to the Respondent's department in the following terms:

"*Having considered the issues which arise from the proposal by the Minister for Justice to revoke our client's refugee status and, having taken advice from counsel, we are surprised at this juncture that the Minister is attempting to impugn our client's lawful residence in the state on the basis of his refugee status, declared in 2004. We note Romania acceded to the European Union in January 2007.*

You have set a deadline of Friday, 14 May 2021 for us to make representations in writing *to the Minister in respect of the proposal.*

The proposal to revoke our client's refugee status is inter alia ultra vires, an abuse of process and vitiated by delay*. The proposal materialised only following an unsuccessful attempt by the Minister to remove our client from the State pursuant to a European arrest warrant. This fatally undermines the basis for the proposal. We reserve the right to raise other issues, as appropriate.*

We therefore call upon the Minister, by close of business on Wednesday, 12 May 2021, to confirm in writing that she will withdraw and not further pursue the proposal. Failure to so confirmed will result in our immediate application to the High Court seeking prohibition and declaratory relief at the next available date." (emphasis added)

Representations

43. The first observation to make in respect of this letter is that nowhere did it state that it did *not* comprise representations on behalf of the Applicant within the meaning of s.52(6) of the 2015 Act. I am satisfied that, as a matter of fact, this is precisely what it comprised. It will be recalled that the Respondent's 5 March 2021 letter set out clearly the reasons for the Minister's proposal, at the heart of which was Romania's accession to the EU. It is fair to say that the Applicant's representations of 6 May 2021 did not engage in any meaningful way with the Respondent's reasons for the proposed revocation of his refugee

status. The furthest these 6 May 2021 representations went on that core issue of the Respondent's reasons was to say: "*We note Romania acceded to the European Union in January 2007.*" There was no assertion that the circumstances which had given rise to the 2004 recognition of refugee status continued to exist. Nor was there any attempt to underpin such an assertion by reference to any material whatsoever, whether concerning Romania, generally, or relating to the Applicant or his ethnic origin, in particular. There was no engagement, in these 6 May 2021 representations, with the fact of Romania's accession to the EU, what that entailed, and the consequences for the Applicant's situation, despite the fact that the Respondent's 5 March 2021 letter set out her reasons in a manner that was clear and intelligible.

44. In the manner I will presently refer to, it was not until after the Respondent made the (18 May 2021) decision, which is challenged in the present proceedings, that the Applicant submitted for the first time (by means of his 28 May 2021 affidavit) evidence addressing the Respondent's reasons, but this was done in the context of the Applicant's appeal to the Circuit Court against the Respondent's decision, the significance of which appeal I will presently discuss.

Residence / surrender

45. Returning to the 6 May 2021 letter, it is difficult to understand the assertion that "*the Minister is attempting to impugn our client's lawful residence in the State"*, given that no such issue was raised by the Respondent. It is also common case that the Applicant, as a citizen, enjoys an independent right of residence which is not derived from refugee status. Furthermore, as the Respondent indicated in written submissions, even if the Applicant's refugee status were to be revoked, it is not axiomatic that the Applicant would cease to reside in this state. As regards any potential return to Romania, this Court would have to be satisfied that, in meeting a request for surrender, the Applicant would enjoy recourse to the protections of the Framework Decision 2002/584/JHA (embodied within the EAW Act 2003) and with it, the basic human rights set out in the European Convention on Human rights. As counsel for the Respondent points out, those minimum standards are imported into the EAW Act, 2003 in that, under the heading "Prohibition on Surrender" s.37 provides, *inter alia*, as follows:

> *"37.—(1) A person shall not be surrendered under this Act if—*
>
> *(a) his or her surrender would be incompatible with the State's obligations under—*
>
> *(i) the Convention, or*
>
> *(ii) the Protocols to the Convention,*
>
> *…*
>
> *(c) there are reasonable grounds for believing that—*
>
> *(i) the [relevant arrest warrant] was issued in respect of the person for the purposes of facilitating his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or*
>
> *(ii) in the prosecution or punishment of the person in the issuing state, he or she will be treated less favourably than a person who—*
>
> *(I) is not his or her sex, race, religion, nationality or ethnic origin,*
>
> *(II) does not hold the same political opinions as him or her,*
>
> *(III) speaks a different language than he or she does, or*
>
> *(IV) does not have the same sexual orientation as he or she does,*

or

(iii) were the person to be surrendered to the issuing state—

(I) he or she would be sentenced to death, or a death sentence imposed on him or her would be carried out, or

(II) he or she would be tortured or subjected to other inhuman or degrading treatment.

(2) In this section—

"Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994; and

"Protocols to the Convention" means the following protocols to the Convention, construed in accordance with Articles 16 to 18 of the Convention:

(a) the Protocol to the Convention done at Paris on the 20th day of March, 1952;

(b) Protocol No. 4 to the Convention securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto done at Strasbourg on the 16th day of September, 1963;

(c) Protocol No. 6 to the Convention concerning the abolition of the death penalty done at Strasbourg on the 28th day of April, 1983;

(d) Protocol No. 7 to the Convention done at Strasbourg on the 22nd day of November, 1984."

When the "*proposal materialised*"

46. Returning once more to the Applicant's 6 May 2021 letter, it stated, *inter alia*: "*The proposal materialised only following an unsuccessful attempt by the Minister to remove our client from the state pursuant to a European arrest warrant. This fatally undermines the basis for the proposal."* As regards the foregoing, certain comments seem appropriate to make, as follows. The Applicant's solicitors appear to criticise the way in which, and the point at which, the "*proposal materialised*" (i.e. when and why it was decided to commence the revocation process).

47. Even though the Applicant's counsel argued forcefully during the hearing before this Court, that the Applicant only had suspicions about the true motivation of the Respondent in commencing the revocation process and contended that these suspicions were only confirmed by the swearing of the Respondent's 16 August 2021 affidavit, the foregoing statements in the letter wholly undermined those submissions. Rather, the contents of the 6 May 2021 letter underline the fact that the Applicant was, at all material times, well aware that the decision to commence the revocation process (i.e. the "*proposal")* was made following the EAW proceedings and motivated by same.

48. As observed elsewhere in this judgment, the decision to *commence* the process has never been challenged. That is not a criticism, but it is a fact, and one which underlines that the function of this Court is to look at the lawfulness of the decision which *is* challenged, being the decision of 18 May 2021 (rather than a decision of March 2021 to commence the revocation process).

49. Furthermore, there is no setting-out in the 6 May 2021 letter as to *why* a proposal to revoke the Applicant's refugee status, which was made following EAW proceedings, *fatally undermined* that proposal. This assertion was made in 'bald' terms only and went no further. There was no reference to any allegedly relevant facts, legislative provisions, or legal principle, merely the representation that the "*proposal"* was fatally undermined. The same comments apply to the same argument which was made at the hearing. In

essence, the evidence demonstrates that, at all material times, the Applicant was well aware that the commencement of a process in which it was proposed to revoke his refugee status was precipitated by prior EAW proceedings, the most recent of which involved the refusal of his surrender on 23 October 2020. However, the Applicant has not proved that this motivation was impermissible or that it rendered unlawful the process which was initiated.

'Bald' assertions

50. The 6 May 2021 letter submitted that the proposal to revoke the Applicants refugee status was (i) "*ultra vires"*; (ii) "*an abuse of process*"; and (iii) "*vitiated by delay".* It is fair to say that these assertions were not elaborated upon. These can accurately be described as 'bald' assertions, made in very general terms. In truth, the Applicant went no further than to make reference to what the Respondent's counsel fairly described as a number of 'categories' of complaint. These categories were not elaborated-upon in any material way. No evidence was referred to; no material was enclosed; no statutory provision or legal authority was referenced; and no legal principle was addressed in any meaningful way. It is also fair to say that the explicit focus of the representations was on persuading the Respondent to "*withdraw and not further pursue the proposal"* i.e. to halt the entire process.

Vires

51. As regards the Respondent's *vires*, it is uncontroversial to say that all parties knew, at all material times, what the 2015 Act provides for, in particular, what is set out in ss.9 and 52. All parties knew then, just as they know now, that s.52 sets out the relevant process where a *"proposal*" is made by the Respondent Minister in relation to revoking a person's refugee status and empowers the Respondent to make a decision, subject to the obligations on the Minister, in particular, as regards the duty to considering representations and subject, also, to a right of appeal against the Respondent's decision.

Abuse of process

52. Although *abuse of process* was asserted, there was no engagement with *why* there was alleged to be an abuse of process. Indeed, it is entirely fair to say that, although it was asserted that there was an abuse of process, the Applicant, *via* his solicitors, did not even identify the process which was alleged to be abused by the Respondent Minister. By that I mean, the representations did not even go as far as indicating whether there was an alleged abuse of process (i) as regards the provisions of the 2015 Act and their operation; or (ii) whether the alleged abuse of process related to the legal proceedings concerning the EAWs. The foregoing is not at all clear from the contents of the 5 March 2021 representations.

Delay

53. With regard to *delay*, the representations did not even identify the *period* of delay complained of; when it commenced; or when it ended. Nor was there any elaboration on the allegation of delay and/or its alleged consequences for the Applicant. It is also fair to say that, on the one hand, the letter made explicit that (i) the Applicant was aware that the proposal to revoke his refugee status *"materialised only following an unsuccessful attempt"* to remove him from the State pursuant to a European arrest warrant but, on the other hand, (ii) complained of inordinate and inexcusable delay. The date of the "*unsuccessful attempt"* which preceded the commencement of the s.52 process was 23 October 2020. If, as the Applicant's

representations made explicit, the proposal materialised only afterwards, the relevant period insofar as alleged delay, would be 'book-ended' by (i) the 23 October 2020 refusal of surrender and (ii) the 5 March 2021 notice to the Applicant of the Respondent's proposal to revoke his refugee status. This was a period of somewhat over 4 months which, in objective terms, could hardly be considered to amount to delay, still less inordinate delay. More importantly, there was no development whatsoever, in the representations of 6 May 2021, of any argument made with reference to delay. Nor was it claimed that any alleged delay had resulted in any prejudice to the Applicant and no details of alleged prejudice were provided.

54. The representations in the 6 May 2021 letter were made *within* the relevant statutory deadline (which, having been extended twice, expired on 14 May 2021). It is fair to say, however, that no other representations were made. If it was the case that the Applicant intended to furnish any additional representations prior to the expiry of the statutory deadline, no explanation has been given by or on behalf of the Applicant for his failure to do so. There is certainly no evidence that the Respondent refused to accept submissions to 14 May 2021 and I am entitled to hold that, had any further representations been furnished up to 14 May 2021, the Respondent would have considered same.

7 May 2021

55. In an email sent on 7 May 2021, the Respondent's department acknowledged receipt of the letter from the Applicant's solicitor dated 6 May 2021 and stated:

> "*I am directed by the Minister for Justice to acknowledge receipt of your email received in this office on 06/05/2021 the contents of which are noted. A* ***substantive*** *response will issue to you* ***after these representations receive the full consideration*** *of this office".* (emphasis added)

10 May 2021

56. Although it does not seem to me that there was anything unclear arising from the exchange of communication which took place on 6 and 7 May, the Applicant's solicitors wrote to the Respondent's department again, on 10 May 2021, and stated *inter alia* the following:

> *"We acknowledge receipt of your email response of the 7 May 2021.*
>
> *Your response is, to a degree, ambiguous. Please confirm by immediate return that the representations you referred to in your email of 7 May 2021 specifically refer and relate to our email/letter of 6 May 2021 and not to the substantive submissions due in response to your letter of 5 March 2021…"*

11 May 2021

57. The clarification sought by the Applicant's solicitors was provided in the form of a letter sent by email, on 11 May 2021, in which the Respondent's department stated *inter-alia:*

> *"I am instructed by the Minister for Justice to acknowledge your letter, by email, of the 10 May 2021, received by this office on the 11 May 2021. I can confirm that* ***the only representations under consideration by this office, in respect of the Minister's proposal to revoke*** *issued to your client dated 5 March 2021, are those received from your office by letter/email on* ***6 May 2021****."* (emphasis added)

Counsel for the Applicant submits that "*The Minister ought to have been clearer in her correspondence."* It seems to me that the Minister's 11 May 2021 letter makes the following perfectly clear:

(i) that representations had been *received* by the Respondent's department;
(ii) these representations were received *from* the office of the Applicant's solicitor;
(iii) they comprised the representations set out in a letter sent, by email, on *6 May 2021*;
(iv) these were the *only* representations received;
(v) these were the only representations which would be *considered*;
(vi) they would be considered in respect of the Respondent's "*proposal to revoke*";
(vii) that proposal comprised the Respondent's *5 May 2021* proposal to revoke the Applicant's refugee status.

The foregoing is what the 11 May 2021 emailed letter said. The email did *not* say (and, in my view, it could not reasonably be suggested that the email meant) that the Respondent was *not* going to consider the proposal to revoke (i.e. what might be called the '*substantive'* issue, being a term also used in the Respondent's 7 May 2021 email). On the contrary, the email made explicit that this is precisely what the Respondent *would* be considering.

58. The email made equally clear that it was *only* the Applicant's 6 May 2021 representations which would be considered in that regard. Furthermore, the email did *not* say (and for similar reasons could not reasonably be taken to mean) that the Respondent's department had agreed to contact the Applicant's solicitors *prior* to any consideration of the substantive question, being the proposal to revoke. The Respondent agreed no such thing. I make the foregoing comments in circumstances where, later on 11 May 2021, the Applicant's solicitor's stated *inter-alia,* the following in a letter sent by email to the Respondent's department: "*We refer to your reply from which we take it that you are considering our submissions as to the lawfulness of your proposal and will revert on that issue in advance of any consideration of the substantive question. On that basis, we will not institute High Court proceedings impugning the proposal pending receipt of your reply to ours of 7 May 2021.*"

59. There was, in fact, no communication from the Applicant or his solicitors dated 7 May 2021; and it will be recalled that the only representations made by the Applicant's solicitors were comprised in their 6 May 2021 letter. Leaving that aside, and for the reasons already explained, what the Applicant's solicitors unilaterally purported to take from the Respondent's 11 May 2021 emailed letter was not, by any means, a reasonable or rational interpretation of what had been explicitly stated.

60. As a matter of first principles, I reject the proposition that, where an Applicant or their solicitors take a wholly unreasonable and inappropriate interpretation of what the Respondent has stated or are mistaken as to what the Respondent's position is, they can rely on that misinterpretation or mistake, to assert a breach of fair procedures on the part of the Respondent, in circumstances where any mistake was not caused by any lack of clarity on the Minister's part. Yet, that is precisely the position in the present case.

61. In essence, the Applicant relies on the exchange of correspondence to which I have referred, and contends that properly considered, the correspondence evidences that the Respondent deprived the Applicant of his right to make submissions on the substantive question of the proposed revocation of his refugee status, which proposal resulted in the first-instance decision by the Respondent which is challenged in these proceedings. In my view, and for the reasons set out above, the evidence does not at all support this contention. There was no lack of clarity in relation to the Respondent's position as articulated in the correspondence from her office dated 7 and 11 May 2021 and the wholly unreasonable and/or mistaken

interpretation adopted by the Applicant in respect of the Respondent's position does not constitute evidence of a breach of fair procedures.

62. Given the fact that the Minister had already made her position clear, not once, but twice (in the form of letters from her department dated 7 May and 11 May) I reject the proposition that she was under an obligation to restate her position for a *third* time, by way of a response to the letter from the Applicant's solicitors which constituted a completely and in my view unreasonable misinterpretation of what was a clearly stated position. If it were otherwise, it seems to me that it would be to licence potential chaos as regards the orderly carrying-out by the Minister of the functions she has been tasked by the Oireachtas to perform. It would be to say that, regardless of how clearly, and how many times the Respondent expressed her position, and regardless of the fact that there was no fault on the Respondent's part, a 'spoke' could be inserted in the 'wheels' of a decision-making process which is perfectly clear as to the steps to be followed (resulting in delay, additional burdens on limited resources, and potential frustration of the process itself) by means of unilateral misinterpretations adopted by other parties.

63. It also seems to me that, subject to the Minister having made herself clear and the Applicant's mistake not being one caused by her, the foregoing comments are equally applicable, regardless of whether the misinterpretation amounted to a *genuine mistake* or was what might be described as a '*tactical' misinterpretation*. In saying the foregoing, I am not suggesting that the Applicant's solicitors ever acted in anything other than an appropriate and professional manner. The point I wish to emphasise is simply that, even if a very genuine mistake was made, it does not, on the evidence before this court, create fair procedures obligations for the Respondent which she fell short of. This point seems particularly important to stress, given the clarity with which s.52 sets out the process to be followed, which process, by means of correspondence from his solicitors (terminating with their 11 May 2021 letter) the Applicant, unilaterally, sought to depart from and to place himself outside of.

<u>14 May 2021 deadline</u>

64. I am satisfied, in light of the evidence, of the fact that the Applicant had every reasonable opportunity to furnish such representations as he wished to make in respect of the Respondent's proposal to revoke his refugee status. The final deadline for the making of representations was 14 May 2021. That deadline was (i) made perfectly clear in the 12 April 2021 email from the Respondent's department to the Applicant's solicitor; and (ii) was specifically acknowledged by the Applicant's solicitor in their letter dated 6 May 2021, in which they stated: *"You have set a deadline of Friday, 14 May 2021 for us to make representations in writing to the Minister in respect of the Proposal."* It is perfectly clear that the Applicant knew what "*the Proposal"* was, in circumstances where, in the very first paragraph of the 6 May 2021 letter, it had been defined by his solicitors in the following terms:

> *"We refer to previous correspondence from your office regarding our client, T.F., and to your letter dated 5 March 2021 entitled "Proposal to Revoke Refugee Status" (hereinafter "the Proposal")."*

Thus, the Applicant, *via* his solicitors, was squarely on notice that a decision would be made on the *substantive* issue of the proposal to revoke his refugee status, with the Minister considering only such submissions as had been furnished by the 14 May 2021 deadline. The only submissions furnished were those dated 6 May 2021, to which I have referred.

65. The author of the correspondence from the Respondent's department, Mr Gerard Cronin, swore an affidavit in these proceedings, on 16 August 2021, in which, having referred to the letter from the Applicant's solicitor of 6 May 2021, he made the following averments at para.11: -

> *"11. Insofar as it is suggested that there was any ambiguity thereafter as to what the Respondent was considering,* ***the position was made abundantly clear by my email letter of 11 May 2021 in which I explicitly stated that the only submissions which the Minister was considering was the content of the letter of 6 May 2021.*** *My letter by email also made it clear that this consideration was in relation to the proposal to revoke."* (emphasis added)

The foregoing averments are borne out by the evidence. I take the view that the Respondent's position was made abundantly clear in the manner averred. It will also be recalled that (per s.52(7)) what the Minister *"shall"* take into consideration, are any representations made to her "*in accordance with subsection (6)",* whereas subsection 6 specifies "*15 working days"* for the making of such representations in writing to the Minister. That period was twice extended in this case, to a final date of 14 May 2021. In light of the foregoing, it was not open to the Applicant to ignore the deadline of 14 May 2021, and, in light of the position which then pertained, it seems to me that the Minister was mandated to take into consideration such representations as the Applicant had decided to provide as of 14 May 2021, being, of course, the 6 May 2021 letter.

Agreement to depart from the s.52 process

66. Among the submissions made on behalf of the Applicant is that, in circumstances where the Respondent had "*agreed"* to extend the deadline for the making of representations (and this represented a departure from the imposition of the 15-working day deadline provided for in the 2015 Act) it was open to the parties to agree other variations. That may well be so, but the fundamentally important points seems to me to be that, on the facts of the present case, the Respondent did *not* agree (i) that she would not decide the substantive issue with reference to such submissions as had been furnished by 14 May 2021; (ii) nor did the Respondent agree that she would revert to the Applicant's solicitors prior to deciding that issue; and (iii) furthermore, there was no agreement by the Respondent to some sort of 'bifurcated' hearing whereby questions such as *vires*, abuse of process and delay would be decided first, and the proposal to revoke would be left over for later consideration. The evidence before this Court simply does not allow for a finding that there was any agreement of the foregoing sorts.

67. It is fair to say that a principal reason why the Applicant contends that the process leading to the Respondent's decision was unfair is because, to quote a submission by his counsel: "*He was led to believe that the legal issues raised in his 6 May 2021 letter would first be considered and that, thereafter, he would have an opportunity to make submissions on the substantive issue."* The Applicant was not led to believe this. The Respondent said nothing of the sort. The facts which emerge from an analysis of the evidence do not support that submission and I am obliged to reject it.

68. Given the facts in the present case, it seems fair to say of the Applicant, what Ms Justice Faherty said of the relevant Applicant in *Kumar v. Minister for Justice, Equality & Law Reform* [2016] IEHC 677 (at para. 25), namely, that: "*The nature of the response he chose to make was at the Applicant's election."* In short, the Applicant had the opportunity to make representations regarding the proposal to revoke, and the only representations he chose to make were those comprised in the 6 May 2021 letter which the Respondent Minister considered, having made perfectly clear that this would be done.

69. In a similar vein to the approach taken by Faherty J. in *Kumar,* there was no facility or entitlement on the part of the Applicant, to seek to depart from the s.52 process in the manner which the 11 May 2021 letter - unilaterally and based on a fundamental misinterpretation of the Respondent's stated position - sought to do. Thus, it does not follow that the Applicant was treated in any way unfairly by reason of the fact that the Respondent (i) did not repeat her position a third time and/or (ii) did not depart from the s.52 process, wherein, at all material times, the Applicant's rights and obligations were clearly set out and known to him.

70. There can be no dispute about the fundamental importance of fair procedures to lawful decision-making. A range of authorities emphasise this and the Applicant draws this Court's attention to some of them (including in *Mallak v. Minister for Justice, Equality and Law Reform* ("MJELR") [2012] IESC 59; *Javed v. MJELR* [2014] IEHC 508; *International Fishing Vessels Ltd v. Minister for the Marine* (No.2) [1991] 2 I.R. 93; and *Habte v. Minister for Justice and Equality* [2020] IECA 22). The difficulty for the Applicant is not that any doubt exists in relation to the importance of fair procedures, the insurmountable problem facing the Applicant is that there was no breach of fair procedures on the facts of this case. He had a right, consistent with natural and constitutional justice, to be heard. That right was given statutory expression in the form of s.52(6) whereby he had a right to make representations; and s.52(7) whereby the Minister was required to consider them. At all material times the Applicant was aware of his rights and free to exercise them; and there was no failure on the part of the Respondent as regards her obligations.

<u>18 May 2021</u>

71. The decision which is challenged in the present proceedings was made on 18 May 2021, pursuant to s.52(1)(b) of the 2015 Act. It is comprised in a letter issued to the Applicant by Mr Cronin of the Ministerial Decisions Unit of the Respondent's department. Section 52(1)(b) is set out in that letter as is s.9(1)(e); s.9(2) and (3), as well as the reasons for the proposal. The balance of the letter appears in the following terms:

> *"Romania ascended into the European Union in January 2007. Accordingly, Romania's accession into the European Union demonstrates a change of circumstances which is of such a significant and non-temporary nature that your fear of persecution can no longer be regarded as well-founded.*
>
> *Before making this decision, the Minister took into account all information on your file and the representations made on your behalf (dated 6th May) by your legal representative Niamh Moriarty & Co. solicitor… in accordance with section 52 (7) (a) of the International Protection Act 2015.*
>
> *You may appeal against the decision of the Minister under section 52 (8) of the international protection act 2015 to the Circuit Court within 10 working days from the date of this notice.*
>
> *The decision to revoke your refugee status will take effect as per section 52 (10)*
>
> *(a) where no appeal is brought against the decision of the Minister, on the date on which the period specified in subsection 84 making such an appeal expires, or*
>
> *(b) where an appeal to the circuit court is brought against the decision of the Minister-*
>
> *(i) from the date on which the circuit court, under subsection 9 a affirms the decision, or*
>
> *(ii) from the date on which the appeal is withdrawn.*
>
> *The United Nations High Commissioner for Refugees (UNHCR) and the Garda National immigration bureau (GNIB) have been informed of the Minister's decision and reasons for it."*

Reasons

72. There is no dispute between the parties in relation to the appropriate legal principles concerning the duty to give reasons for administrative decisions (see, for example, *EMI records Ireland Ltd v. Data Protection Commissioner* [2013] 2 I.R. 669; *YY v. Minister for Justice and Equality* [2017] IESC 61). For present purposes it is sufficient to refer to the decision of Keane J. in *Bortha (A Minor) v. The Minister For Justice and Equality* [2018] IEHC 152, which concerned a decision whether to grant 'naturalisation', wherein the court stated the following at para. 15:

> *"The obligation on the Minister is to disclose, at least, the essential rationale on foot of which the decision is taken; Meadows v. Minister for Justice [2010] 2 I.R. 701. As Hardiman J. observed in F.P. v. The Minister for Justice [2002] 1 IR 164 (at 175), where an administrative decision must address only a single issue, its formulation will often be succinct."*

73. In the present case, although succinctly put, reasons were certainly given for the decision which is challenged. The reasons are clear and intelligible and convey the basis for the decision made. In the manner examined earlier, the Applicant, *via* his solicitors, made no meaningful representations prior to the making of the first-instance decision. Apart from listing categories of complaint (which were not elaborated upon or explained with reference to facts or legal principles, such as would enable engagement with them), the Applicant said absolutely nothing with regard to the core reason for the 5 March 2021 proposal, being the reason relied upon in the Minister's decision.

74. It will be recalled that the extent of the Applicant's representations, as regards the reasons for the proposal to revoke, was: "*We note Romania acceded to the European Union in January 2007."* In light of the factual position which pertained, it seems to me to be entirely unsurprising that the reasons were put as succinctly as they appeared in the 18 May decision. In essence, nothing of substance had been put forward by the Applicant and nothing at all had been said with regard to the reasons for the proposed revocation. Nothing whatsoever was put by the Applicant to the Respondent to support any contention that the circumstances which gave rise to the 2004 declaration of refugee status remained unchanged insofar as the Applicant was concerned. It does not seem unfair to say that in circumstances where nothing had been put to the Respondent, the reasons in the decision did not engage with what was not put to her.

75. To say the foregoing is not to suggest that the Applicant has proved that there was any failure on the part of the Respondent to carry out an individualised assessment of the Applicant (*qua* member of the Roma community or *qua* Romanian) with a focus on the circumstances of the individual in the context of conditions in Romania. Such an assertion is made, but it is not underpinned by any evidence which was put before this Court. It is uncontroversial to say that accession to the European Union carries with it the presumption that the State in question will uphold the basic and fundamental human rights standards, which are monitored thereafter. Leaving entirely to one side the fact that the Applicant chose to make no representation whatsoever on the substantive issue, it seems to me that the Respondent had before her materials which were, at least, capable of meeting her obligations consistent with EU case law, including Joined Cases C-175/08 *Abdulla & Ors* [EU:C:2010:105] wherein (at 73) the CJEU (commenting on the examination of an application for refugee status and on the examination, at a later point, of whether refugee status should be maintained) observed that:

> *"89. At both of those stages of the examination, the assessment relates to the same question of whether or not the established circumstances constitute such a threat that the person concerned*

may reasonably fear, in the light of his individual situation, that he will in fact be subjected to acts of persecution."

Merits

76. In circumstances where the Respondent, without doubt, provided reasons for her decision, the Applicant's complaint as to the adequacy of reasons seems to me to be, in reality, a contention that the Minister was *wrong* in the view she came to, for the reasons she gave. It need hardly be said that this Court, in judicial review, is not conducting a merits-based analysis. Rather, the focus of this Court must exclusively be on whether the decision impugned was reached in a lawful manner. However, on the subject of merits-based decision-making, and in the manner I will presently come to, the Applicant enjoys a right, yet to be exercised, to have an entirely fresh merits-based consideration of matters in the form of an appeal to the Circuit Court, which appeal is without doubt part of the self-same process, in respect of which the decision challenged in this Court, was a first-instance decision in a process yet to conclude.

Deprived of a fair hearing

77. Reliance by the Applicant on the Supreme Court's decision in *Stefan v. The Minister for Justice, Equality & Law Reform & Ors* [2001] 4 IR 203 (wherein reference was made to the judgment of Lynch J. in *Gill v. Connellan* [1987] I.R. 541) cannot assist the Applicant, given the fundamentally different facts in those authorities compared to those in the present case. In *Gill v. Connellan,* the hearing conducted by the District Court fell below requisite standards, having regard to certain interventions by the court as described in the High Court's judgement. In *Stefan,* the Supreme Court dealt with the Respondents' appeal against this Court's grant of *certiorari* in respect of a decision of the Respondent Minister refusing the Applicant refugee status and remitting the matter. The Court found that part of the Applicant's completed questionnaire had been omitted from the translation before the officer to whom the application was made and that, following on from this, the recommendation to refuse refugee status was made in the absence of all material submitted by the Applicant. The Supreme Court dismissed the appeal in question. The facts in the present case are starkly different. There is no question of the Respondent not having received all representations which the Applicant chose to make.

78. Particular reliance was placed by the Applicant's counsel on the extract from the judgement in *Stefan* where Denham J. (as she then was) stated that:

> *"In Gill v. Connellan [1987] IR 541, the applicant had not received a satisfactory hearing before the District Court and the question was whether an appeal to the Circuit Court was an adequate alternative remedy. Lynch J held at p.548 that it was not, stating:*
>
> > *'In the present case however, both facts and law are in issue. Neither the facts nor the law have been adequately heard in the District court. On an appeal to the Circuit Court, therefore, the appeal could hardly be said to be by way of rehearing-the case would more truly be heard for the first time. The applicant and his solicitor would be deprived of the possible advantage of having gone over the whole facts and law and of having heard the submissions and cross-examination by the prosecuting superintendent in the District court.'*
>
> *It is clear that whilst the presence of an alternative remedy, an appeal process, is a factor, the court retains jurisdiction to exercise its discretion to achieve a just solution."*

Wholly unlike the position which pertained in *Gill*, the Applicant in the present case was not, as his Counsel submits, "*deprived of a fair hearing*" at first-instance. On the facts, there was no impediment to the Applicant putting such representations to the Respondent and directing her attention to such material, be they facts or law, as the Applicant felt was relevant.

79. The Applicant has not established that the first-instance process was in any way unfair. Nor does the present case involve a situation where material was not before the decision-maker by virtue of any error or omission on the Respondent's part. In short, the proposition that the Applicant did not have a fair first-instance hearing is simply unsupported by evidence. Thus, whilst no issue can be taken with the principles which are outlined in these authorities, they cannot avail the Applicant, given the particular facts in the present case and how starkly they differ from the authorities relied upon.

Nemo iudex in causa sua

80. It is acknowledged on behalf of the Applicant that Mr Cronin was a "*Carltona* delegate" of the Respondent Minister (see *Carltona Ltd v Commissioners of Works* [1943] 2 All E.R. 560 wherein it was stated that: *"the duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case."*) A principal argument canvassed on behalf of the Applicant, however, revolves around the principle of *nemo iudex in causa sua*. In essence, it is contended that, because it was Mr Cronin who (i) notified the Applicant of the proposal to revoke his refugee status; (ii) managed the file; and (iii) confirmed the decision of 18 May 2021, the said decision "*all emanated from the Respondent through the same individual"* (*per* para. 49 of the Applicant's written submissions). Thus, contends the Applicant, there was a breach of natural and constitutional justice. It was also submitted on behalf of the Applicant that such knowledge as Mr Cronin had, in particular, as regards the prior EAW proceedings, permitted what was described by the Applicant's counsel as "*cross-contamination of knowledge*" as regards the 18 May 2021 decision. The thrust of the submission was that it was impossible for Mr Cronin to 'un-know' that the EAW proceedings gave rise to the commencement of the revocation process. Building on the foregoing assertion, it was submitted that the revocation process was "*ordained to achieve*" a particular outcome, which he could not have been unaware of. A similar submission was made with regard to knowledge on the part of Mr Cronin that the Applicant is a citizen. In essence, it was submitted that this is also something Mr Cronin could not 'un-know', the thrust of the argument being that it must have played a part in the decision challenged, given that the same individual gave notice of the proposal to revoke (5 March 2021) and also confirmed the Respondent's decision (18 May 2021). Counsel for the Applicant also submitted that, in circumstances where this "*cross-contamination of knowledge*" was permitted by the "*system*" established pursuant to s.52 of the 2015 Act, "*the system should be different*" and s.52 was, as a consequence unconstitutional.

81. With regard to the foregoing submissions, and as explained elsewhere in this judgement, the fact that the decision to commence the s.52 process was prompted by the EAW proceedings, does not constitute proof of unlawfulness. Thus, fairness did not require Mr Cronin to 'un-know' such knowledge of the EAW proceedings as he possessed. It is also appropriate to note that the Statement of Opposition, the contents of which have been verified by means of Mr Cronin's affidavit makes the following explicit at para. 19: "*… although the execution of the European arrest warrants prompted the Minister to invoke the revocation*

process, it did not inform the outcome of that process." The Applicant has not adduced evidence which undermines the veracity of the foregoing.

To say what was *not* considered

82. Insofar as it was submitted that, in the 18 May 2021 decision, Mr Cronin should have made clear that the EAW proceedings and the Applicant's citizenship played no part in the decision, the thrust of that submission was to suggest that a decision-maker is under an obligation to list in their decision, all those things which they did *not* consider in reaching it. Perhaps unsurprisingly, the Applicant has not put forward any legislative provision, legal principle, or authority which would underpin such a proposition. I am satisfied that the Respondent was not obliged to state in the 18 May 2021 decision that (i) it was *not* based on the EAW proceedings; and (ii) was not based on the Applicant's citizenship status and these were not factors taken into account; nor was the decision-maker obliged (iii) to refer to any other factor which was *not* taken into account.

Stretching credulity

83. Counsel for the Applicant also submitted that "*It is to stretch credulity beyond any allowable degree*" to suggest that the EAWs which motivated the commencement of the s.52 process would not have informed the decision on revocation, given that the same person was involved. Despite the skill with which the submission is made, it is not grounded in evidence to the effect that the EAWs (or any other issue) comprised the *reasons*, in whole or in part, for the 18 May 2021 decision. I am satisfied that the Applicant has not established an evidential basis which would permit this Court to find that any irrelevant considerations were taken into account in reaching the 18 May 2021 decision which is challenged (be that the EAW proceedings or, for that matter, the Applicant's citizenship). This is in circumstances where the decision itself makes very clear, albeit succinctly, the reasons it *was* based on. It is fair to say that, in making the foregoing submissions, the Applicant placed very considerable reliance on the decision in *Damache v. the Minister for Justice & Ors* [2020] IESC 63 and it is appropriate at this point to turn to that authority.

***Damache v, the Minister for Justice & Ors* [2020] IESC 63**

84. The Applicant submits that, in *Damache,* the process provided for as regards a revocation of naturalisation, involved the same person who initiated the revocation process (and in that context whose representatives made the case for revocation before the Committee of Inquiry) ultimately making the decision to revoke. The Supreme Court found that the process failed to provide the procedural safeguards required to meet the high standards of natural justice, by reason of the absence of an impartial and independent decision maker. The Applicant submits that the facts in the present case are similar, with regard to the involvement of a single named official within the Respondent's department. The Applicant further submitted that, insofar as s.52 of the 2015 Act mandates the involvement of just one individual, the same is unconstitutional.

Citizenship / Refugee status

85. Although *Damache* concerned the revocation of citizenship as opposed to refugee status, nothing appears to me to turn on that distinction. I say this in circumstances where, as both parties acknowledged

at the hearing, the consequences of a revocation of refugee status are very significant, and there was no dispute between the parties that a very high standard of fair procedures must apply to a revocation of refugee status. In other words, the dispute between the parties in the present case did not revolve around the 'height' of the standard of fair procedures enjoyed by someone holding a declaration of refugee status, as opposed to citizenship, in the context of a revocation application. On the contrary, counsel for the Respondent acknowledged that, for the purposes of these proceedings, there was no material difference between the fair procedures standards applicable in both scenarios. Thus, it was unnecessary for this Court to engage in what would have been, in the present case, a sterile debate as regards the extent to which, if at all, a higher standard of fair procedures is enjoyed by a citizen faced with an application to revoke citizenship, as opposed to facing an application to revoke refugee status.

86. Despite the emphasis in *Damache* on the need for the application of high standards of natural justice given the serious consequences for the individual concerned, reliance on *Damache* cannot avail the Applicant. I say this in circumstances where the salient features of the revocation process, as identified by the Supreme Court in *Damache,* were in essence, (i) that the recommendation of the relevant Committee of Inquiry were not binding on the Minister; and (ii) there was no right of appeal from the Minister's decision (see para. 126 of the judgement).

87. By contrast, the process set out in s.52 of the 2015 Act, not only provides (i) a right of appeal against the Respondent's decision; (ii) that appeal is not 'merely' to a different individual within the Minister's Department; (iii) nor is it an appeal confined to questions of reasonableness or rationality in the judicial review sense; (iv) the outcome of the appeal is certainly binding. The foregoing is in circumstances where s.52(8) gives the Applicant a right of appeal to the Circuit Court. Thus, not only is there an appeal to a wholly independent party, the outcome is self-executing as well as binding. This is wholly different to the process in *Damache,* reliance on which offers no support for the Applicant's claim.

88. What the Supreme Court regarded as meeting the requisite high standards of natural justice and procedural fairness, can be seen from para. 125 of *Damache,* wherein the court made reference to the Canadian Federal case of *Hassouna v. Minister for Citizenship* [2017] FC 473 (in which the Canadian court found that legislation which removed in "non-complex" cases the power of the courts to conduct a hearing on appeal from the decision of the Minister was unconstitutional) stating:-

> *"125. The next point to make concerns an observation in Hassouna previously cited but to my mind, it bears repetition:*
>
> > *'In order for the revocation process to be procedurally fair, the Applicants ought to be entitled to: (1) an oral hearing before a Court, or before an independent administrative tribunal, where there is a serious issue of credibility; (2) a fair opportunity to state the case and know the case to be met; and (3) the right to an impartial and independent decision-maker'."*

All the foregoing is provided for in s.52 (8) and (9). Moreover, the Applicant's right to a full oral hearing is not confined to circumstances where there is an issue of credibility.

The process as a whole

89. A further point seems important to stress at this juncture. It is perhaps the obvious point that when considering fair procedures and natural justice in the context of a process, it is necessary to examine the process as a whole. I say this in circumstances where it seems to me that the Applicant is inviting this Court to look at the fundamentally important issues of fair procedures, natural justice, and the

constitutionality of s.52 of the 2015 Act, with an exclusive focus on s.52 (1) – (7) *only*, while simultaneously inviting the Court to be 'blind' to subsections (8) and (9) which, without doubt, form an integral part of the very process contended to be unfair.

Appeal to the Circuit Court

90. It seems to me that there can be no greater guarantee of fairness than the right of appeal which the Oireachtas decided to include as an intrinsic element of the process pursuant to which any final decision would be made in relation to the revocation of a refugee declaration. Thus, it seems to me that it is inappropriate to look at only certain subsections of s.52, and to consider questions of fairness and constitutionality divorced from the reality that a full, autonomous, independent, remedy for any alleged deficiency in the Respondent's first-instance decision, exists in the form of a judicial determination, which is built into the architecture of the 2015 Act, later in the very same section. To ignore s.52(8) and (9) is not to look at the 's.52 process'. It is to consider only *part* of that process, ignoring a fundamentally important element of same. As to what is provided, s.52(8) and (9) state that:

> *"(8) a person to whom a notice under subsection (7)(b) is sent may, within 10 working days from the date of the notice, appeal to the Circuit Court against the decision of the Minister to revoke the declaration.*
>
> *(9) the Circuit Court, on the hearing of an appeal under subsection (8) may, as it thinks proper-*
>
> > *(a) affirm the decision of the Minister, or*
> >
> > *(b) direct the Minister not to revoke the declaration."*

In her judgment in *Nz.N. v. The Minister for Justice and Equality* [2014] IEHC 31 Clark J. considered the provisions of s.21 of the 1996 Act, which reflect those in the 2015 Act, in that they provided the following:

> *"21 (5) A person concerned may appeal to the High Court against a decision of the Minister under this section and that Court may, as it thinks proper, on the hearing of the appeal, confirm the decision of the Minister or direct the Minister to withdraw the revocation of the declaration."*

91. Thus, the only distinction between s.21(5) of the 1996 Act and s.52(8) and (9) of the 2015 Act is that the latter provides that the appeal lies to the Circuit Court, rather than to this Court. With regard to the nature of the appeal, Clark J. stated the following (from para. 31 of her decision) in *Nz.N*:-

> *"31. The powers of the Court on an appeal against a revocation of a refugee status is to determine whether the decision to revoke the declaration was correctly made and should be confirmed, or whether the decision was wrong and should be withdrawn. The Court can consider all the evidence which was before the Minister and hear oral evidence from the appellant and any witnesses called by either party in determining the appeal. The Court can come to its own view as to whether the decision to revoke is appropriate or should be withdrawn.*
>
> *32. While in Lukoki v. Minister for Justice (Unreported, ex tempore, High Court, 6th March 2008) and in Morris Ali v. Minister [2012] IEHC 149, De Valera J. considered that the test was the reasonableness of the Minister's decision to revoke, the later decisions of Minister for Justice v. Gashi [2010] IEHC 436, Abramov v. Minister [2010] IEHC 458 and Adegbuyi v. Minister [2012] IEHC 484 the decision of the Court on the appeal was distinguished from its powers in judicial review. The Court is not empowered to ask the Minister to re-consider the decision and the Court must come to its own decision confirming the Minister's original decision to revoke the appellant's refugee status or restoring the appellants status by directing the Minister to withdraw the*

> *revocation of the declaration. This Court does this* ***on the evidence which was before the Minister and any additional evidence presented on the appeal****."* (emphasis added)

It is clear from the foregoing that the appeal constitutes a *de novo* hearing, where matters are looked at entirely fresh on the basis of all evidence presented, irrespective of whether or not it had been put to the Minister in the context of the first-instance decision appealed against.

92. Thus, the elements in the process under consideration in *Damache* which resulted in a finding of unconstitutionality are not deficiencies present in the s.52 process. Rather than offering any support for the case made by the Applicant, it seems to me that the Supreme Court's analysis in *Damache* highlights that the process set out in s.52 of the 2015 Act is one entirely consistent with the Applicant's fair procedure rights and natural and constitutional justice. In short, I take the view that the s.52 process provides the procedural safeguards required to meet the high standards of natural justice applicable to someone in the Applicant's position and, accepting without reservation, that the consequences of an adverse decision are potentially very significant, there is no deficiency in the s.52 process.

93. *Damache* is not authority for the proposition that, at a particular stage along the continuum of the s.52 process, it is impermissible for a single individual to both give notice of the Respondent's proposal to revoke and, having considered such representations as may or may not have been made, to confirm the Respondent's first instance decision. Nor is there any support in the evidence before this Court for the proposition that the Applicant's refugee status will in fact be decided by a single person. The role played by Mr Cronin (delegatee of the Respondent Minister) is an element, only, of a s.52 process yet to run its full course, material aspects of which process (in particular, s.52(8) and (9)) ensure, *inter alia*, that the *nemo iudex in causa sua* principle is not breached. In my view, reliance on *Damache* takes the Applicant no further than the principle (which the Respondent fully acknowledges) that high standards of fair procedures are applicable to his case. The evidence does not establish, however, that, with reference to the analysis in *Damache*, there has been any breach of the high, fair procedures standard, to which the Applicant was and (insofar as his yet to be heard appeal) is entitled.

Oral evidence

94. Insofar as the Applicant submits that he had no opportunity to present oral evidence in respect of the decision challenged, three comments seem appropriate. Firstly, neither the Applicant nor his solicitors made any request to present oral evidence to the Minister. Indeed, the Applicant did not even present written evidence in support of such representations as were made on his behalf, which went no further than 'bald' assertions. Secondly, that fact does not evidence unfairness or unconstitutionality, particularly when the entirety of the s.52 process is considered. Thirdly, the existence of a right to a *de novo* hearing to the Circuit Court at which that Court (having considered the entirety of the evidence, *oral* and written, as well as all submissions) comes to a merits-based decision, seems to me to speak to the highest of fair procedures safeguards and, in my view, fatally undermines the Applicant's submissions on this issue.

Burden of proof

95. On the facts of the present case, the Applicant has invoked his right to appeal to the Circuit Court and that appeal has not yet been determined. This Court was informed at the hearing that the Circuit Court appeal is next listed, "For Mention" only, on 12 September 2022. The submission is made on behalf of the Applicant that in the context of the appeal, the Applicant would be facing the burden of proof. Whatever

force that argument might have, if the relevant appeal was limited to an assessment of, say, reasonableness or rationality insofar as those terms are understood in judicial review, it seems to me that its force is lost where the appeal to which the Applicant has a statutory entitlement will proceed as a hearing *de novo.*

The proposition that "*it won't be an appeal*"

96. In addition, it is submitted on behalf of the Applicant that "*the state of the first instance decision and the process leading up to it are so poor that, in reality, it won't be an appeal.*" For the reasons set out in this decision, I must disagree. The Applicant has not demonstrated that the *process* leading up to the decision challenged in the present proceedings was in any way unlawful. On the contrary, it was a process which ensured that the Applicant had every reasonable opportunity to furnish such submissions as he wished the Minister to consider. The fact that the Applicant (i) chose to limit his submissions to the making of 'bald' assertions; and (ii) chose not to accompany those submissions with any evidence, be that in relation to the current treatment of members of the Roma community in Romania, or any other evidence he wished the Minister to consider, certainly does not constitute proof of an unlawful process. For the reasons explained in this decision I reject the proposition that, in the teeth of communication from the Respondent which has a plain meaning, an Applicant can adopt a wholly irrational interpretation of what the Respondent has said and can use same, unilaterally, to impose on the Respondent obligations which she does not have, be they of the 'negative' or 'positive' type contended for in the present proceedings (i.e. not to determine the substantive issue; and to revert to the Applicant before considering the substantive issue). In short, wholly unreasonable and/or mistaken interpretations cannot be relied on as a basis for the assertion of 'rights' enjoyed by an Applicant and/or 'duties' binding the Respondent, particularly when the misinterpretation involves a purported unilateral departure from a statutory process which is clear as regards all relevant steps, rights and obligations.

Inordinate and inexcusable delay

97. Returning to the issue of what the Applicant asserts to be inordinate and inexcusable delay on the part of the Respondent, the following observations seem to me to be appropriate to make. The meaning of the terms *inordinate* and *inexcusable* delay is well understood, in light of the jurisprudence concerning the approach which this Court should take to an application to dismiss legal proceedings for 'want of prosecution'. Those terms are discussed in what might be considered to be overlapping streams of jurisprudence which emerge from the very well-known decisions of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 and *O'Domhnaill v. Merrick* [1984] IR 151. In such applications, delay is measured relative to the date at which legal proceedings were commenced. This is in circumstances where it is entirely safe to say that a plaintiff who decides to issue proceedings against the defendant is under an obligation to progress those proceedings with adequate expedition. Furthermore O.122, r.11 of the Rules of the Superior Courts provides that where there has been no proceeding for 2 years, a defendant may apply to dismiss the claim for want of prosecution. That time limit is measured with reference to when the proceedings are commenced.

98. I mention the foregoing to contrast it with the situation in the present case. This Court is not dealing with a situation where a proposal to revoke the Applicants refugee status was made, but the Respondent did not progress matters for years. This seems to me to be a very significant, if entirely obvious, point to

make. As a matter of first principles, it does not seem to me that the 'clock starts' for the purposes of assessing the Respondent's delay, until a proposal to revoke refugee status is actually made. I take this view because, until the Respondent gives notice of such a proposal, the recipient is in no different a position than they were on the very day when refugee status was granted and every day since (terminating with the receipt of a proposal to revoke). Unlike the position of a defendant in the example I have just referred to, the individual in question who has received a declaration of refugee status but has not received any notice of a proposal to revoke same, does not have something 'hanging over them'. This is for the simple reason that, in stark contrast to a defendant in legal proceedings which a plaintiff has failed to progress with diligence, they are *not* subject to any process which the Minister has commenced (but, in that theoretical example, has not progressed with expedition).

99. Furthermore, nothing in the 2015 Act requires the Minister either to (i) bring an application to revoke refugee status in respect of *every* situation where it is perceived that the circumstances in which that status was originally conferred may have changed; or (ii) to bring such an application within a specific *period*. Why this is so seems to me to be entirely obvious. Firstly, the drafters of the legislation must have appreciated that it would be a time 'gap' between the date upon which refugee status was conferred and the date by which the circumstances giving rise to the grant of refugee status might have ceased to exist. I deliberately use the word "*might"* because the drafters doubtless appreciated that there may be instances where those circumstances would *never* cease to exist, regardless of how much time elapsed. No doubt, the drafters also appreciated that situations in any country of origin can be fluid, in that circumstances can improve or dis-improve, with no guarantee of the former (or that it will not be followed by the latter). Thus, the imposition of (i) a *deadline* by which the Respondent was required to commence an application to revoke refugee status was entirely illogical, as was (ii) an *obligation* to commence same. No legislative provision or legal authority has been put before this Court which would suggest otherwise.

100. What can be said with confidence, however, is that a proposal to revoke refugee status falls to be considered at a point in time. This, it seems to me, is another fundamentally important distinction which is not appreciated by the contention that the Respondent has been guilty of inordinate and/or inexcusable delay. In the example given of legal proceedings, the issue in dispute will fall to be determined with reference to evidence as to the factual and legal position at the point at which those proceedings were issued and will often turn on evidence (such as witness recollection) of events prior to the commencement of the proceedings in question. Delay post-commencement of legal proceedings is examined in that context. The situation is entirely different here, where evidence of the circumstances which pertained in the country-of-origin years before, and the consequences for the relevant individual of a position which no longer pertains, are not relevant to the question. Rather (and wholly unlike the position in respect of legal proceedings) it is the current situation which is key to the determination of a proposal to revoke refugee status. Thus, I fail to see how justice might be in any way imperilled by reason of the passage of time, irrespective of how much, from the grant of refugee status to the determination of a proposal to revoke same.

101. Earlier in this judgment I observed that it is a matter of fact, indeed, one emphasised by the Applicant, that it was only *following* the EAW proceedings that the proposal to revoke his refugee status *materialised*. Thus, the proposal to revoke came less than 5 months after the most recent EAW proceedings. Even if (which I do not accept) the Minister was under some obligation to commence a revocation application on the conclusion of those EAW proceedings (23 October 2020), the notice given to the Applicant

in this case (5 March 2021) did not amount to delay on the Respondent's part with regard to commencing the process, on the facts of this case.

102. It also seems to me that, on a first principles analysis, it could hardly be said that the Applicant would have been in a *better* position, had the Respondent commenced an application to revoke his refugee status *sooner* than she did. Furthermore, as the s.52 process makes clear, there will be a 'binary' outcome to the process, in that either the Applicant will retain, or he will lose, refugee status. I cannot accept that the Applicant has suffered any prejudice as a result of such an outcome arising in 2022 as opposed to, say, 2007. I refer to 2007 in circumstances where the reasons relied on by the Respondent in respect of the proposal were squarely based on Romania joining the EU in 2007.

103. Whilst not suggesting for a moment that the s.52 process concerns or determines residency, it seems appropriate to make the following comments on the issue of delay, given certain facts in this case. It is a fact that the Applicant received his Certificate of Naturalisation on 14 December 2015. Until then, it seems fair to say that his rights of residence derived exclusively from his refugee status. If, in a purely theoretical scenario, involving the initiation and determination of a s.52 process in, say, 2014, the outcome had been the loss of the Applicant's refugee status, there was the potential for the Applicant to be in a *weaker* position, *vis-à-vis* residency rights, had the Respondent moved much *sooner* than she did as regards the s.52 proposal to revoke. The foregoing does not suggest delay on the Respondent's part, still less, prejudice resulting from delay. Furthermore, if the outcome of that purely theoretical application in 2014 was that the Applicant's refugee status remained unchanged, such an outcome does not 'bar' the Respondent from bringing a similar application thereafter. Thus, he would not have been in any stronger a position, *vis-à-vis* the s.52 process commenced in 2021, even if a similar application had been made years earlier. In this manner, I cannot see the basis for the delay argument or where any prejudice arises, irrespective of the timing of the commencement of a s.52 process.

104. Given that the Applicant, as he was fully entitled to do, has lodged an appeal to the Circuit Court against the Respondent's decision, it remains to be seen whether the Respondent's reasons will or will not 'pass muster' in the context of a full hearing before the Circuit Court judge entitled to consider all evidence written and oral, including evidence which was not considered when the first-instance decision was made. At the risk of, again, stating the obvious, it is not as if the Applicant will be confined to tendering historic information relating, say, to the situation in Romania, as of 2007 and the relevance for his personal circumstances of the position in Romania *then*. Were that the case, there would of course be merit in an argument based on delay. That is not the case, however. It was not the case in relation to representations to the Respondent in the context of the first-instance decision which she was required to make, nor is it the case in relation to an appeal. On the contrary, and in the manner examined, the question of revocation of refugee status falls to be determined with reference to the *current* situation, not the situation which pertained years *earlier* (although the Applicant is not constrained in any way regarding what evidence he submits and is at liberty to furnish information which speaks to the situation in prior years, should he wish; and, in the manner I will presently refer to, he has done just this in the context of his appeal).

105. As to the state of the decision, it seems to me that, although put succinctly, the reasons are clear and intelligible. It also seems to me that the reasons given need to be seen in the context of the process laid down by s.52, in respect of which the Respondent Minister's 'first-instance' decision is most certainly not the final outcome. Importantly, any person who is unhappy with the Minister's first instance decision has, as part of the explicit provisions in s.52. of the 2015 Act, the right to have an entirely separate body,

in the form of the Circuit Court, make an entirely fresh assessment of everything the Applicant considers to be relevant and to reach a decision on the merits.

Alternative remedy

106. The Applicant's counsel asserts that there has been "*a fundamentally flawed process to date, such that there hasn't really been a process to date*" and, relying on that proposition, it is asserted that an appeal to the Circuit Court "*is not an appropriate alternative remedy*". The Applicant has not established that the process to date was flawed. Moreover, the alternative remedy issue was certainly a 'live' one according to the pleadings. Thus, I feel obliged to reject the suggestion made on behalf of the Applicant that the Respondent did not plead a failure on the Applicant's part to avail of an alternative remedy. I say this given that, at para. 23 of the Statement of Opposition, it is pleaded, *inter-alia,* that: *"It is incumbent on the Applicant to prosecute such alternative remedies as may be available to him."* Furthermore, Mr Cronin made the following averment at para. 14 of his 16 August 2021 affidavit:

> *"I say and am so advised that this appeal which is currently pending before Wexford circuit court's appropriate remedy and should be ventilated to a conclusion, rather than proceeding by way of the application herein."*

107. The Applicant, who bears the burden of proof in the present proceedings, has failed to establish that the process to date has been "fundamentally flawed". In my view the evidence demonstrates the opposite. Thus, in circumstances where (i) the process to date has not been flawed and (ii) the Minister's 'first-instance' decision arises mid-way in what is an ongoing process, which explicitly provides for a completely fresh hearing, I am satisfied that the Circuit Court appeal (to which the Applicant has a statutory right by virtue of s.52(8) of the 2015 Act) constitutes an appropriate alternative remedy available to the Applicant, which he has chosen not to exhaust.

108. In the manner previously explained, such an appeal can be considered to be a crucial element of the fair procedures right afforded to the Applicant and one which is integral to the relevant statutory *process* set out at s.52(1)-(10). In circumstances where he has chosen not to exhaust that right, I am satisfied that an appropriate exercise of this Court's discretion is to refuse the present application. This seems to me to be determinative of the Applicant's entire claim, quite apart from the failure on the part of the Applicant to establish the various claims advanced in the present proceedings and discussed elsewhere.

Notice of appeal

109. A copy of the Notice of Appeal comprises part of exhibit "GC1" to the affidavit sworn by Mr Cronin on 16 August 2021. It was served on 28 May 2021 and was initially returnable to Wexford Circuit Court on 8 June 2021. Thus, the appeal was issued *before* the present proceedings were issued (the present proceedings having been commenced by means of an *ex parte* docket, Statement of Grounds and affidavit sworn by the Applicant, all dated 14 June 2021).

Discovery

110. Insofar as the Applicant's counsel submitted that, were a Circuit Court appeal to proceed by way of a *de novo* hearing, the Applicant would not necessarily know what material the Minister might rely upon, the foregoing seems to be a submission which ignores the obligations of procedural fairness applying to every Circuit Court appeal. Although the 2015 Act is silent in relation to procedures concerning the seeking

of, say, discovery (and even if there are no specific Circuit Court Rules which refer to appeals pursuant to the 2015 Act) it seems to me that it must be open to each party to such an appeal to request discovery on a voluntary basis and, if met with a refusal to provide discovery of relevant and necessary documentation, to bring an application to the Circuit Court seeking an appropriate order. The foregoing would seem to flow from the *de novo* nature of the appeal; the Circuit Court's jurisdiction in that regard; and the overriding objective of all courts being to ensure fairness and a just result. There was certainly no evidence, legal provision, or authority put before this Court which would suggest otherwise.

111. The contents of the Applicant's Notice of Appeal fortifies me in the views already expressed to the effect that it provides an appropriate alternative remedy. Although this Court does not know whether the person who drafted the appeal understood that the appeal would proceed as a *de novo* hearing, as opposed to a limited hearing confined to judicial review principles, nothing turns on this for the purposes of determining the questions before this Court. Of far more relevance is the substance of the appeal in which *inter alia,* the following pleas are made and, thus, constitute the issues which the Applicant invites a trial judge at a future Circuit Court hearing to determine:

- that the Respondent erred in law and in fact;
- that there was inordinate and/or inexcusable delay on the part of the Respondent;
- that the proposal to revoke only materialised following an unsuccessful attempt by the Respondent to remove the Applicant from the state pursuant to an EAW;
- that the Respondent is estopped from now revoking the Applicant's refugee status on the basis that this court relied on that status in 2011 and in 2020 in refusing to surrender the Applicant to Romania, pursuant to an EAW, which applications by the Respondent were 'doomed to fail';
- that the Respondent had an ulterior and unlawful motive, insofar as what prompted the decision was the unsuccessful attempt to surrender the Applicant pursuant to an EAW;
- that this fatally undermines the basis for the Respondent's decision, and is *ultra vires*, and constitutes an abuse of process;
- that the Respondent acted precipitously in making the decision in circumstances where the Applicant had in correspondence contested the *vires* of the Respondent to make this decision and had indicated that she would consider same;
- that the Respondent failed to allow the Applicant to make representations in writing in accordance with section 52(6) of the 2015 Act in respect of the Respondent's proposal to revoke the Applicants refugee status;
- that the Respondent applied an incorrect standard of proof;
- that no reasonable decision-maker could have arrived at the conclusion that the sole reason for the revocation was Romania's accession to the European Union in January 2007 which demonstrated a change of circumstances of such a significant and non-temporary nature that the Applicant's fear of persecution would no longer be regarded as well-founded;
- that no adequate basis of reasons has been set out for the decision that Romania is safe for this Applicant;
- that no individualised assessment of risk to this Applicant was conducted;
- that the decision is such as to lack clarity;
- that the decision was vitiated by disproportionality;

- that the Respondent erred in fact and in law and acted *ultra vires* in arriving at the decision, in circumstances where she failed to have regard to matters prescribed by the enactment governing the exercise which she was engaged in;
- that the Respondent in fact had regard to matters not referred to within relevant parts of the enactment which she was obliged to consider, and the decision is invalid and should not be upheld on appeal;

112. It is entirely uncontroversial to say that the Circuit Court is the body mandated by the Oireachtas to deal with the Applicant's appeal, which remains to be determined and involves, for the reasons explained earlier in this decision, a *de novo* hearing. Prior to commencing the present proceedings, the Applicant appears to have regarded the Circuit Court as the appropriate forum before which to argue the substantive issues of concern to him and, in this, he was undoubtedly correct. A consideration of the affidavit sworn by the Applicant on 28 May 2021 for the explicit purpose of grounding his appeal to the Circuit Court, demonstrates that, insofar as the facts deposed to and the assertions made, this affidavit is similar in all material respects to the affidavit the Applicant subsequently swore on 14 June 2021, in the context of the proceedings before this Court.

County of origin information

113. Although the Applicant did not submit any country-of-origin information to the Respondent for her to consider in the context of the proposal to revoke his refugee status, he does so in the following terms in his affidavit grounding the Circuit Court appeal:

> *"26. All of the fears and concerns which I expressed at the time of the hearing before the Refugee Appeals Tribunal and on which its decision was based remain today and I am aware that discrimination against Roma continues to be a major problem at present. Romani groups complained that police harassment and brutality, including beatings, are routine. I have been advised that, in his June 2014 report on Romania, CommDH(2014)14, the Commissioner for Human Rights stated as follows:*
>
>> *'196. The Commissioner wishes to underline the views expressed by NGOs that Roma are confronted at present mainly with institutionalised racism combined with excessive use of force by law-enforcement authorities. Although such incidents are not frequently reported, they seem to be a current problem in Romania, with several of them resulting in deaths or serious injury. In 2013, NGOs reported two cases of excessive use of force by the police during searches carried out in Roma homes in Reghin, Mureș county. In the previous year, on 31 May, 10 June and 28 July 2012, members of the police and gendarmerie in different parts of the country killed three Roma men during pursuits'."*

Several comments can be made with regard to the foregoing. Firstly, the foregoing averments by the Applicant and the documentary evidence referred to by him, speak to the reasons which were clearly set out in the Respondent's letter of 5 March 2021. However, this is the first time the Applicant chose to refer to country of origin information and his individual concerns. I say this in circumstances where it will be recalled that the entirety of the representation made on behalf of the Applicant, in his solicitor's letter to the Respondent dated 6 May 2021, was as follows; "*We note Romania acceded to the European Union in January 2007."* Secondly, it is also fair to say that the documentary evidence proffered by the Applicant in May 2021 goes back up to a decade earlier. That being so, there appears to have been nothing which prevented the Applicant, had he so wished, from putting this material before the Respondent by means of

representations in the letter from his solicitors, dated 6 May 2021 (or at some other point prior to the deadline which had ultimately been extended to 14 May 2021). Thirdly, the Applicant's failure to put this evidence before the Respondent in the context of the first-instance decision which she was obliged to make pursuant to s.52 cannot be attributed to any wrong done by the Respondent.

114. In submissions, counsel for the Applicant drew the Court's attention to the contents of a 5 October 2021 affidavit sworn by Mr Cronin by way of a response to the appeal lodged by the Applicant. At para. 2 (II) of same, Mr Cronin averred *inter-alia* that *"The appellant has already instigated separate proceedings by way of judicial review, and those matters should be addressed in that forum, if they need to be considered at all."* It does not seem to me that, by reason of the foregoing averment, a *de novo* appeal to the Circuit Court ceases to be any less an appropriate remedy for the Applicant. Rather, it seems to me that the foregoing is an averment which reflects the reality that, among the many points raised in the Applicant's appeal to the Circuit Court, are issues which might well be considered to be 'judicial review' in nature. It was also to draw the attention of the Circuit Court to the present proceedings and that could hardly have been inappropriate. It also seems to me to be of some significance that Mr Cronin specifically employed the phrase "*if they need to be considered at all*", plainly suggesting that administrative law issues were without merit. Nor does anything averred by Mr Cronin 'rob' the Circuit Court of the jurisdiction which the Oireachtas has conferred upon it to provide an appeal to persons in the Applicant's position.

115. For the reasons set out in this decision, the Applicant has failed to establish any entitlement to judicial review, whereas a *de novo* appeal to the Circuit Court is an appropriate alternative remedy, the availability of which, quite apart from the Applicant's failure to succeed on the various arguments raised is, in my view, determinative of the present proceedings in favour of the Respondent.

116. I am satisfied that the Applicant has failed to 'bring home' his case on any of the grounds advanced. In the manner explained in this decision, I am satisfied that the Applicant has failed to establish that the s.52 process is, what his counsel described as "*institutionally unfair*". Nor has the Applicant established that "*An Act allowing for that unfair process is unconstitutional.*" By contrast, it seems to me that s.52 has a very high standard of fair procedures and natural justice 'baked in' to the process which is set out therein, which, for present purposes, comprises: -

- The right (enshrined in s.52(4)) to be given written notice of a proposal by the Minister to revoke his refugee status declaration and the reasons for it (which notice was, in fact, given to the Applicant);
- the obligation on the Minister (again laid down in s.52(4)) to inform the Applicant of his right to make representations in writing to the Minister in relation to the proposal (which obligation the Minister, in fact, discharged);
- The right of the Applicant (enshrined in s.52(6)) to make representations in writing to the Minister in relation to the proposal (the only representations, in fact, made being by means of the 6 May 2021 letter from the Applicant's solicitors);
- The fact that the Minister extended the relevant (i.e. 15-day) deadline for the making of representations on two occasions (ensuring that the Applicant had every reasonable opportunity to make such written representations as he wished to make in respect of the proposal);
- The obligation on the Minister (per s.52(7)(a)) to take into consideration any representations made to her before deciding to revoke a declaration (an obligation the Minister, in fact, discharged in the present case);

- The obligation on the Minister (per s.52(7)(b)) to notify the Applicant, in writing, of her decision and the reasons for it and to point out the Applicant's right of appeal (being a duty the Minister also discharged, on the facts of the present case);
- The Applicant's right (enshrined in s.52(8)) to a full appeal, by an entirely independent party in the form of a Judge of the Circuit Court, against what can fairly be called a 'first-instance' decision by the Minister (being a right of appeal which has been 'triggered' by the Applicant, but one which he has chosen not to follow through to a conclusion);
- The fact that a decision by the Circuit Court, which will involve a *de novo* hearing, is binding on the Minister (per s. 52 (9)).

In short, the Applicant has failed to prove that the decision challenged was reached in an unlawful manner and he has failed to demonstrate that s.15 of the 2015 Act (or any other section of same) is unconstitutional.

117. In conclusion, this case is not one where there was (i) *no* process; or (ii) no *fair* process, or (iii) where he was *denied* access to a fair process. Rather, the Applicant (by means of the 11 May 2021 letter from his solicitors) unilaterally and impermissibly purported to set himself apart from, and outside of, the very process, carefully laid down by the Oireachtas in s.52, which guarantees fairness. It was exclusively due to the foregoing action by the Applicant that, in coming to the decision challenged in these proceedings, the only representations considered by the Respondent were those the Applicant chose to submit (by means of the letter from his solicitors dated 6 May 2021). The decision challenged is by no means the final one in respect of the Applicant's refugee status. The decision challenged was a first-instance decision only, and it remains open to the Applicant to pursue the statutory appeal to which he is entitled.

118. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically:

> *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*

Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order, including as to costs, which should be made. My preliminary view is that, in circumstances where the Respondent has been wholly successful in opposition to the Applicant's claim, the 'normal rule' to the effect that 'costs' should 'follow the event' is appropriate. In default of agreement between the parties on that or any issue, short written submissions should be filed in the Central Office within 14 days.