**THE HIGH COURT**

**[2024] IEHC 183**

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

**RECORD NO. 2023/640JR**

**A**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**RECORD NO. 2023/104JR**

**B**

**APPLICANT**

**AND**

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

**RESPONDENTS**

**JUDGMENT OF Ms. Justice Siobhán Phelan, delivered on the 22nd day of March, 2024.**

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## INTRODUCTION

**1.** In December, 2020, contemporaneous with the withdrawal of the United Kingdom from the EU, the Minister for Justice and Equality (hereinafter "the Minister") signed the

International Protection (Safe Third Country) Order 2020 (S.I. No. 725 of 2020) into law in exercise of the power vested under s. 72A of International Protection Act 2015 (hereinafter "the 2015 Act") (as inserted by section 117 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020) thereby designating the United Kingdom of Great Britain and Northern Ireland as a safe third country for the purpose of the 2015 Act in December, 2020 (hereinafter "the 2020 Designation Order").

**2.** The concept of safe third country refers to a country transited by an applicant for international protection which is considered safe for the provision of international protection. The concept is different from and should not be confused with the separate and distinct safe country of origin concept which applies to a country whose own citizens are not persecuted (provided for under s. 72 of the 2015 Act).

**3.** These proceedings concern the lawfulness of this designation of the United Kingdom and Great Britain as a safe third country in the light of a contentious immigration policy known as "*the Rwanda Policy*" currently being pursued by the UK Government. Under the Rwanda Policy the UK Government seeks to transfer asylum seekers to Rwanda for the further processing in Rwanda of their claims.

**4.** In the light of the Rwanda Policy, the Applicants challenge the lawfulness of decisions made under the 2015 Act to: (i) refuse to admit each of two applicants of differing nationalities to the protection process in this jurisdiction; and (ii) return them to the UK for further processing of their protection claims in reliance on its safe country designation.

**5.** Even more fundamentally these proceedings call into question the very legal basis for giving effect in the State to a safe third country concept in circumstances where Ireland's asylum policy is subject to a common EU policy on asylum and operates within the framework of a Common European Asylum System ("CEAS").

**6.** These two cases have been identified as lead cases and raise issues of principle which are common to a significant number of other cases. Both cases come before me as applications for relief in judicial review proceedings in a telescoped hearing and without applications for leave being first determined. While there is considerable overlap between the issues raised, the cases are not identical. Proceedings have been commenced in each at different stages of

the admissibility and returns process provided for in cases where the safe third country concept is applied. In view of the leading nature of the proceedings and slight differences in evidence as between the cases, I have decided to deal with both cases together, distinguishing between them only to the extent necessary to address issues unique to one only of the cases.

## GENERAL BACKGROUND AND RWANDA POLICY

**7.** The so-called "*Rwanda policy*" refers to a UK Government Policy stated to have been developed in response to an increase in the number of people crossing the English Channel in small boats and seeking asylum on arrival in the UK. Under the Policy the UK Government intends to send some people arriving in the UK in small boats and via other 'inadmissible' routes, to Rwanda for further processing of their international protection claims.

**8.** To give effect to the Rwanda Policy, an agreement between the UK and Rwandan governments was reached in April 2022 as part of a 'Migration and economic development partnership' (MEDP) which included an asylum partnership agreement, signed as a non-binding memorandum of understanding (MoU) by the two countries.

**9.** Under the terms agreed, those arriving in the UK without permission, with certain exceptions, could be relocated to Rwanda during a trial period. Those making asylum claims would have these determined in Rwanda by the Rwandan authorities and those granted refugee status would stay in Rwanda, ineligible to return to the UK. As part of the agreement, the UK government was to provide development funding to Rwanda. The MEDP further provided for the UK to pay additional processing and integration costs for each relocated person.

**10.** The Nationality and Borders Act 2022 and the Illegal Migration Act 2023 together provide for rules on 'inadmissible' asylum claims and represent the statutory framework within which the Rwanda Policy was intended to operate. Section 16 of the Nationality and Borders Act 2022 allows for asylum claims from individuals with a connection to a 'safe third state' to be declared inadmissible to the UK's asylum system allowing for the removal of such individuals to a safe third state that agrees to receive them, without first having to consider any asylum claim. The Illegal Migration Act 2023 makes further provision for removal of persons arriving in the UK without permission on or after 20 July 2023, where they did not come

directly from a country in which their life and liberty were threatened regardless of whether an individual had made a claim for asylum.

**11.** The provisions outlining the removal duty and associated requirement to disregard asylum claims from persons meeting the criteria for removal were not yet in force on the date of hearing before me.

**12.** In consequence of a series of legal challenges to removals and court rulings in the UK (*AAA & Ors. v Secretary of State for the Home Department*), the Rwanda Policy has not yet been implemented. The first planned flight to Rwanda was cancelled following interim measures issued by the European Court of Human Rights (ECtHR) in Strasbourg under its 'rule 39' in June, 2022 in the matter of *N.S.K. v. the United Kingdom* (no. 28774/22). The Strasbourg Court ruled that an applicant should not be removed to Rwanda until ongoing judicial review had been determined. The Strasbourg Court only intervened by granting interim measures, however, when applications for injunctive relief in the said judicial review proceedings were unsuccessful before the UK High Court, Court of Appeal and Supreme Court in June, 2022. The ECHR determined that were *N.S.K.* removed to Rwanda before the policy's legality was determined, he may face "*treatment contrary to [his] Convention rights*" and a "*real risk of irreversible harm*" due to the "*lack of any legally enforceable mechanism for [his] return*." Interim orders were also granted in several other cases in June, 2022.

**13.** The challenge to the policy proceeded by way of judicial review to the UK High Court. In December 2022, that court ruled that it was lawful for the government to make arrangements for relocating asylum seekers to Rwanda and for their asylum claims to be determined in Rwanda rather than in the United Kingdom (*AAA & Ors. v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin)(19th December, 2022). Several of the claimants were granted permission to appeal against the judgment of the High Court. The interim measures which had been granted by the European Court of Human Rights were discharged following the decision of the High Court in the light of orders quashing removal orders in individual cases for inadequate reasoning and failure to consider the evidence put forward, it having been confirmed that the UK Government were not appealing against the quashing of the removal orders in individual cases notwithstanding the appeal against the finding that the policy itself was lawful.

**14.** On the 29th of June 2023, the Court of Appeal ruled, by a majority of two to one, that the Rwanda policy was unlawful (*AAA & Ors. v Secretary of State for the Home Department* [2023] 1 WLR 3202; [2023] EWCA Civ. 745). The decision of the majority was that the deficiencies in the asylum system in Rwanda were such that there were substantial grounds for believing that there was a real risk that persons sent to Rwanda will be returned to their home countries where they faced persecution or other inhumane treatment, when, in fact, they had a good claim for asylum with the result that Rwanda could not be considered a "*safe third country*". This conclusion was founded on the evidence before the High Court that Rwanda's system for deciding asylum claims was, in the period up to the conclusion of the Rwanda agreement, inadequate.

**15.** The Court of Appeal in turn gave permission for the case to go to the Supreme Court. On the 15th of November, 2023 the Supreme Court unanimously upheld the Court of Appeal's decision that the Rwanda policy was unlawful (*AAA & Ors. v Secretary of State for the Home Department* [2023] 1 WLR 4433; [2023] UKSC 42). The Supreme Court concluded that the Court of Appeal was correct to reverse the decision of the Divisional Court and was entitled to find that there were substantial grounds for believing that the removal of the claimants to Rwanda would expose them to a real risk of ill-treatment by reason of refoulement, making the policy unlawful.

**16.** In its judgment in *AAA & Ors. v Secretary of State for the Home Department,* the Supreme Court noted Rwanda's human rights record, evidence from the UNHCR, the UN Refugee Agency, of "*serious and systematic defects in the Republic of Rwanda's procedures and institutions for processing asylum claims*", and that Rwanda had previously "*failed to comply with an explicit undertaking to the government of Israel to comply with the principle of non-refoulement*". The Supreme Court dismissed a cross-appeal from one of the applicants alleging that the Rwanda policy was unlawful and incompatible with retained EU law because Articles 25 and 27 of the Procedures Directive only permit removal to a third country (such as Rwanda) if asylum seekers have a connection to that country. The cross-appeal was dismissed on the basis that these provisions no longer have any effect in the U.K. as those articles are not "*retained*" EU law.

**17.** Following the Supreme Court judgment, the UK Government decided to pursue measures aimed at making the Rwanda policy lawful by addressing risks identified by that

Court in *AAA & Ors. v Secretary of State for the Home Department* [2023] 1 WLR 4433; [2023] UKSC 42 by seeking to ensure consistency with international law. Specific measures adopted included upgrading the agreement reflected in the MoU to a treaty signed in early December, 2023. The new treaty features an independent monitoring committee (already established under the earlier MoU) to ensure compliance with the obligations in the treaty, such as reception conditions, processing of asylum claims, and treatment and support for individuals and a new appeal body. Notably, on the 22nd of January 2024 the House of Lords resolved that the treaty should not be ratified.

**18.** In tandem with the new treaty, the UK Government also published its Safety of Rwanda (Asylum and Immigration) Bill in draft form on the 6th of December 2023, the same date that it laid the new UK-Rwanda treaty before Parliament. Through its terms the Safety of Rwanda (Asylum and Immigration) Bill sought to insulate future removals from further challenges in the domestic courts. As at the date of hearing before me a the Safety of Rwanda (Asylum and Immigration) Bill had not been enacted.

**19.** A range of bodies have expressed views on the legality of the government's plans. UNHCR has previously said the UK-Rwanda asylum partnership will "*shift responsibility for making asylum decisions and protecting refugees*" (see UNHCR, Analysis of the Legality and Appropriateness of the Transfer of Asylum- Seekers under the UK-Rwanda arrangement, 8th of June, 2022). Furthermore, UNHCR argues that "*externalising asylum obligations poses serious risks for the safety of refugees*". It contends that the UK-Rwanda asylum partnership arrangement "*proposes an asylum model that undermines global solidarity and the established international refugee protection system*", and therefore "*is not compatible with international refugee law*".

**20.** In an updated analysis report published on the 15th of January 2024, the agency said that it maintained its position that the "*arrangement, as now articulated in the UK-Rwanda partnership treaty and accompanying legislative scheme, does not meet the required standards relating to the legality and appropriateness of the transfer of asylum seekers and is not compatible with international refugee law*" (UNHCR/UN Refugee Agency, 'UNHCR analysis of the legality and appropriateness of the transfer of asylum seekers under the UK-Rwanda arrangement: An update', 15 January 2024).

**21.** Other bodies have also expressed a view that the proposed legislation in the form of Safety of Rwanda (Asylum and Immigration) Bill is incompatible with international law. The Bar Council of England and Wales has expressed serious doubts as to whether it is appropriate to deem Rwanda to be safe for the purposes of meeting the UK's international obligations under the European Convention on Human Rights and the Refugee Convention. The Bar Council of England and Wales concluded that the bill required "*very careful consideration by Parliament before it progresses*". It said the bill, "*on any view, sails very close to the wind in terms of what is acceptable from a rule of law and European Convention [on] Human Rights perspective. Legal challenges are therefore almost inevitable*" (see Bar Council statement of 15th November 2023). Some have gone further and have posited that the Bill, if passed, would be unlawful as contrary to the rule of law because it would amount to a legislative usurpation of the judicial function, contrary to the UK's constitutional understanding of the separation of powers, which requires the legislature to respect the essence of the judicial function.

**22.** It is against this evolving background, repeatedly described as a "*state of flux*" during the hearing before me, that the issues in these proceedings arise for determination. For reasons which will become apparent, however, it is not necessary for me to decide in these proceedings whether the UK can be considered a safe third country for international protection seekers at this time.

## LEGAL FRAMEWORK APPLICABLE TO INADMISSIBILITY AND RETURN DECISIONS

**23.** The Applicants are both the subject of determinations under s. 21 of the 2015 Act (as amended) that their applications for international protection status are inadmissible. In each case, the inadmissibility determination was made in reliance on the applicant's connection with the United Kingdom and its designation as a safe third country under the 2015 Act.

**24.** To properly understand and contextualise the issues arising in these proceedings it is necessary to consider the inadmissibility procedure provided for under the 2015 Act, the legislative amendments providing for safe third country designation and consequential implications for the prohibition on refoulement and the return of persons whose applications have been determined as inadmissible. It will subsequently be necessary to examine these domestic provisions (pre-existing and new) with a view to assessing compliance of Irish

provisions in relation to the designation of safe third countries with the relevant EU legal framework.

**25.** The power at the heart of these proceedings, namely the power to designate a safe third country for the purposes of examination of claims for international protection, was prescribed for the first time in 2020 in conjunction with the withdrawal of the United Kingdom from the EU. The Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (hereinafter "the 2020 Act") deals with a wide range of matters consequent on the withdrawal of the United Kingdom from membership of the European Union. It makes provision for, *inter alia*, the protection and maintenance of the Common Travel Area (hereinafter "the CTA") between the State and the United Kingdom and the rights and privileges associated therewith, giving further effect to Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter "the Procedures Directive") and an admissibility process for persons whose applications for international protection are determined to be inadmissible.

**26.** The 2015 Act was amended in a number of material ways by the 2020 Act (Part 18: International Protection). For these proceedings, it is necessary to focus on four particular amendments, namely:

a) the insertion of a new power to designate a country as a safe third country (under s. 122 of the 2020 Act by insertion of s. 72A into the 2015 Act);
b) the addition of a new basis for treating a protection application as inadmissible arising from a connection with a designated safe third country (under s. 119 of the 2020 Act by insertion of s. 21(2)(c), s.21(17) and (18) into the 2015 Act);
c) the insertion of a further prohibition against refoulement in applications determined inadmissible (under s. 120 of the 2020 Act by insertion of s. 50A into the 2015 Act); and, finally,
d) the insertion of a new power to make a return order in respect of a person whose application for international protection has been determined under section 21(11) to be inadmissible (under s. 121 of the 2020 Act by insertion of s. 51A into the 2015 Act).

**27.** In terms of the new power to designate a country as a safe third country under the 2015 Act, s. 72A as inserted by s. 122 of the 2020 Act, provides:

> *"(1) The Minister may by order designate a country as a safe third country.*
>
> *(2) The Minister may make an order under subsection (1) only if he or she is satisfied that a person seeking to be recognised in the country concerned as a refugee will be treated in accordance with the following principles in that country—*
>
> > *(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion,*
> >
> > *(b) the principle of non-refoulement in accordance with the Geneva Convention is respected,*
> >
> > *(c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment, as required by international law, is respected, and*
> >
> > *(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*
>
> *(3) The Minister shall base his or her assessment referred to in subsection (2) on a range of sources of information, including in particular information from—*
>
> > *(a) other Member States of the European Union,*
> >
> > *(b) the European Asylum Support Office,*
> >
> > *(c) the High Commissioner,*
> >
> > *(d) the Council of Europe, and*
> >
> > *(e) such other international organisations as the Minister considers appropriate.*
>
> *(4) The Minister shall, in accordance with subsections (2) and (3) and on a regular basis, review the situation in a country designated under subsection (1).*

*(5) The Minister shall notify the European Commission of the making, amendment or revocation of an order under subsection (1).*

*(6) In this section—*

*"country" means a country other than an EU Member State;*

*"refugee status" means the recognition by the country concerned of a third country national or stateless person as a refugee."*

**28.** The power to designate a safe third country was exercised immediately upon the commencement of s. 72A by the promulgation of the International Protection Act 2015 (Safe Third Country) Order 2020 (S.I. No. 725 of 2020) (identified above as "the 2020 Designation Order" and referred to as such in these proceedings) under the terms of which the Minister ordered that the United Kingdom of Great Britain and Northern Ireland be designated a safe third country effective from 11.00 p.m. on the 31st of December 2020.

**29.** On its face the 2020 Designation Order recites that it is made in exercise of the powers conferred on the Minister by s. 72A(1) of the 2015 Act, she being satisfied, in accordance with that section and in relation to the country specified, namely the United Kingdom of Great Britain and Northern Ireland, as to the matters specified in 72A(2).

**30.** As originally enacted, s. 21(2) of the 2015 Act prescribed the circumstances in which an application for international protection could be treated as inadmissible as limited to where: (a) another Member State has granted refugee status or subsidiary protection status to the person; (b) a country other than a Member State is, in accordance with subsection (15), a first country of asylum for the person.

**31.** By the amendment introduced by s. 119(a) of the 2020 Act, a new section 21(2)(c) provides for the treatment of a claim as inadmissible if made by a person who arrived in the State from a safe third country. This is a material provision for the purpose of these proceedings and both Applicants' cases have been found inadmissible under s. 21(2)(c) of the 2015 Act.

**32.** Section 21(17) of the 2015 Act (as inserted by s. 119(d) of the 2020 Act) provides that for the purposes of an inadmissibility decision, a safe third country is a safe country for a person

if he or she— (a) has "a sufficient connection" with the country concerned on the basis of which it is reasonable for him or her to return there, (b) will not be subjected in the country concerned to the death penalty, torture or other inhuman or degrading treatment or punishment, and (c) will be re-admitted to the country concerned.

**33.** Whether a protection seeker has "a sufficient connection" is assessed, *inter alia*, with regard to the matters specified in s. 21(18) (also inserted by s.119(d) of the 2020 Act). These are: (a) the period the person concerned has spent, whether lawfully or unlawfully, in the country concerned; (b) any relationship between the person concerned and persons in the country concerned, including nationals and residents of that country and family members seeking to be recognised in that country as refugees; (c) the presence in the country concerned of any family members, relatives or other family relations of the person concerned; (d) the nature and extent of any cultural connections between the person concerned and the country concerned.

**34.** Section 21 of the 2015 Act (as amended) further provides in detail for a decision making and appeals process in accordance with which a first instance inadmissibility decision is made by the International Protection Office (IPO), with a right of appeal on the papers only to the IPAT. Where it is recommended following this process that the application is inadmissible, the Minister is required to ("*shall*") determine the application to be inadmissible. The effect of such a determination is that the protection claim is not further considered in this jurisdiction unless subsequently the Minister determines that the prohibition on non-refoulement provided for in s. 50A(i) applies.

**35.** Following upon the making of an inadmissibility determination, the Minister shall make a return order under s. 51A of the 2015 Act (as amended) requiring the person whose application has been determined to be inadmissible to leave the State provided there is compliance with non-refoulement requirements prescribed under s. 50A of the 2015 Act. Like s. 21(2)(c), s. 51A was inserted by the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (s. 121).

**36.** Under s. 50A a person shall not be expelled or returned in any manner whatsoever to the frontier of a territory where, in the opinion of the Minister—(a) the life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular

social group or political opinion, or (b) there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

**37.** In forming his or her opinion of the matters referred to in s. 50A(1) the Minister is mandated ("*shall*") have regard to (a) the information (if any) submitted by the person under s.50A(3), and (b) any relevant information presented by the person, including any statement made by him or her at his or her preliminary interview and any information presented for the purpose of an appeal by the person under *section 21(6).* Section 50A(3) provides for a change in circumstances that would be relevant to the formation of an opinion by the Minister under s. 50A to be notified to the Minister.

**38.** Finally, s. 51A provides in mandatory terms ("*shall*"), subject only to section 50A, for a return order requiring a person whose application for international protection has been determined under s. 21(11) to be inadmissible in reliance on the safe third country concept under s. 21(2)(c) to leave.

**PROCEEDINGS**

*Applicant A*

**39.** Applicant A is a 23-year-old man from Iraq, of Kurdish origin, who applied for protection in the State on the 18th of May, 2021. On the occasion of a preliminary interview on the 18th of May, 2021 Applicant A stated that he had applied for international protection in the UK in 2018 but that his application was refused. He could not confirm the exact date of refusal but stated that it was in 2019.

**40.** On the 30th of August, 2021, the IPO initiated an information request to the UK under a 2014 Memorandum of Understanding between the UK and Ireland on the Exchange of Information for the purposes of protecting the Common Travel Area and Associated Annex on Asylum Data (hereinafter "the 2014 UK/Ireland MoU").

**41.** On the 31st of August, 2021, the UK confirmed that the Applicant made an asylum application on the 7th of March, 2018 which was refused on the 9th of December, 2019.

**42.** On the 26th of September, 2021, the Applicant completed an application for international protection questionnaire in which he claimed protection on religious and political grounds. He confirmed that he was convicted of a border-crossing offence in Iraq but had not served any custodial sentence. He said that there was an extant arrest warrant for him in Iraq. He claimed that he had travelled from the UK to Iraq in December, 2020 to seek out family, believed lost during ISIS incidents occurring in September, 2017. He claimed to have left Iraq on the 29th of March, 2021 and travelled through several countries before arriving in Ireland on the 18th of May, 2021.

**43.** On the 28th of September, 2021, the IPO sent a further biometric data request to the UK under the 2014 UK/Ireland MoU.

**44.** On the 4th of October, 2021, the UK informed the IPO that the Applicant was accepted to be readmitted to their immigration procedures.

**45.** On the 3rd of December, 2021, a translation of Applicant A's application was generated.

**46.** An inadmissibility interview was conducted by the IPO under s. 13(2)(h) of the 2015 Act on the 7th of February, 2022.

**47.** On the 3rd of March, 2022 the IPO issued a recommendation under s. 21(4) of the 2015 Act confirming that the application had been determined to be inadmissible under s. 21(2)(c) and 21(17) of the 2015 Act as the UK was considered to be a safe third country.

**48.** In its decision the IPO found, on the evidence before it, that there was insufficient evidence submitted by the Applicant to show that he left the UK for Iraq before he travelled to Ireland. The IPO found that as Ireland and the UK operate a return system under the 2020 Designation Order in line with Directive 2005/85/EU (hereinafter referred to in this judgment as the "Procedures Directive") that it was satisfied that the UK authorities would re-admit Applicant A back in their territory. The IPO concluded, from the evidence provided, that it was therefore satisfied Applicant A came within the terms of Section 21(17) of the 2015 Act, that the UK was a safe third country for the Applicant and therefore the terms of Section 21(2)(c) of the 2015 Act were applicable in his case.

**49.** On the 16th of March, 2022 an appeal was submitted to the International Protection Appeals Tribunal (hereinafter "the Tribunal"). On appeal to the Tribunal, it was submitted on Applicant A's behalf by his solicitors, *inter alia*, that the IPO made errors of fact and law in the assessment of the admissibility of the Appellant's application for International Protection under s.21 of the 2015 Act in finding that the Applicant came within the terms of s.21(17) of the 2015 Act and that the UK is a safe third country for him. It was contended that the return system which the State operated under the 2020 Designation Order was unlawful having regard to Article 27 of the Procedures Directive. It was contended that the UK should not be designated as a safe third country for the purposes of s.72(A)(1) of the 2015 Act and/or that it was not a safe third country in the Applicant's particular circumstances.

**50.** It was submitted in appealing on the Applicant's behalf that the IPO erred under the 2015 Act in finding that the Applicant arrived in the State from a "*safe third country*" in circumstances where the Applicant stated that he lived in the UK from March 2018 to December 2020 and had applied for international protection there but his application was refused in or around 2019 and he then left the UK by illegal means. It was pointed out that Applicant A had claimed to have been smuggled back to Iraq where he sought information on his family's whereabouts. It was his case that he had left Iraq in March, 2021 and travelled to Ireland via Iran, Turkey, Greece, Italy, and France. It was stated that he feared being returned to the UK as he believed he would be deported to Iraq. It was contended that the IPO erred in finding that Applicant A had a "*connection with the UK*" on the basis of which it was reasonable for him to return there. As the submissions pre-dated the MoU between the UK and Rwanda, no reference was made to the Rwanda Policy and the risk of removal to Rwanda in these submissions.

**51.** On the 3rd of August, 2022, the Tribunal issued a decision under s. 21(7)(a) confirming the IPO inadmissibility decision. In its decision the Tribunal referred to inconsistencies and contradictions which negatively affected the Applicant's claim to have left the UK and upheld the IPO's findings that there was insufficient evidence to show he had left the UK. The Tribunal was satisfied that the Applicant had a "*sufficient connection*" to the UK and it would be reasonable to return him there. The Tribunal found "*no evidence*" to indicate that the Applicant would be deprived of rights recognised under the Geneva Convention and the European Convention on Human Rights (ECHR) if transferred to the UK and that he always

had the option to make an Article 3 ECHR claim in the UK which was considered "*an effective means of protection*." The Tribunal was satisfied that the UK would respect and adhere to the principle of non-refoulement in accordance with its international obligations under Article 3 ECHR.

**52.** As appears from the Impugned Decision, the Tribunal's conclusion on refoulement was as follows:

> *"I have considered the prohibition of refoulement in light of all the facts of this case, including the Applicant's personal circumstances, together with relevant current country of origin information in respect of the United Kingdom. Having done so, I am of the opinion that returning the Applicant to the United Kingdom is not contrary to section 50A of the International Protection Act 2015, in this instance, for the reasons set out above. All of the additional information of relevance considered in this decision, as set out in the Appendix and throughout this consideration, and which was not submitted by the Applicant/his legal representatives, is freely available on the Internet and is entirely free-to- access."*

**53.** No reference was made to the Rwanda Policy in the Tribunal Decision, albeit by then the agreement between Rwanda and the UK was a matter of public knowledge and debate having already resulted in interim measures being granted against the UK by the European Court of Human Rights in Strasbourg. In noting that no reference was made to the Rwanda Policy in the Tribunal decision, it is only fair to also record that no attempt was made on behalf of Applicant A to make a supplemental submission on foot of developments in the UK between the filing of the appeal and its determination.

**54.** On the 5th of August, 2022, the Minister issued a s. 21(11) notice confirming the application to be inadmissible and stating that the Minister would proceed to make a return order under s. 51A, subject to s.50A of the 2015 Act.

**55.** On the 30th of August, 2022, Applicant A's solicitors made submissions under s. 50A(3) of the 2015 Act which relied, *inter alia*, on a change in circumstances. It was submitted that the safe third country system was not in compliance with Article 27(1) of the Procedures Directive and that there should be no return of international protection applicants to the UK

where they face a strong likelihood of being removed to Rwanda which has not been designated as a "*safe third country*". It was pointed out that Rwanda had not been designated as a "*safe third country*" for the purposes of s.72A(1) of the 2015 Act.

**56.** It was further submitted that the IPO had breached the Applicant's data protection rights. It was asserted that there were no provisions within the safe third country system for the protection of the Applicant's data. It was stated that the Tribunal had found that a biometric data request was sent by the IPO to the UK on the 28th of September, 2021 "*under the 2014 UK/Ireland MoU, purportedly pursuant to an 'Associated Annex on Asylum Data'*". They asserted that this "*2014 UK/Ireland MoU has now been replaced by the Memorandum of Understanding dated 8 May 2019*", and that the 2019 Memorandum of Understanding did not include provision for data exchange. It was stated that this was in contrast with the Dublin III Regulation, which contains several recitals and articles on data protection and data exchange. It was claimed that it would be "*incongruous if a Member State could avoid the data protection provisions contained in the Dublin III Regulation by way of a separate Memorandum of Understanding with a third country*", and that the safe third country return system with the UK must be considered to be unsafe as a result.

**57.** Submissions were made under s. 50A that the Applicant was at risk of harm on return and/or his rights under Articles 3 and 8 ECHR, or Articles 4 and 7 of the Charter on Fundamental Rights of the European Union (hereinafter "the Charter") would be breached. The Minister was requested to suspend the operation of the Safe Country Transfer System as it applies to the UK and to cancel the return decision or grant non-refoulement relief under s. 50A(4) of the 2015 Act.

**58.** On the 26th of January, 2023, the Minister issued a "*Report of the Consideration of s.50A of the International Protection Act 2015 (Prohibition of Refoulement)*" dated the 25th of January, 2023 together with a Return Order under s. 51A(1) of the 2015 Act directing Applicant A to return to the UK. He was further directed to present to the Garda National Immigration Bureau ("GNIB") on the 15th of February, 2023 to make arrangements for his return to the UK. In the report it was observed:

> *"The Applicant's legal representatives have made a number of claims. Not all of these claims are relevant to refoulement in the Applicant's case, and many relate*

*to the legalities of the return order mechanism in respect of the UK more generally and transposition issues. The Minister's sole obligation in this case is to consider whether the prohibition of refoulement, as that prohibition is defined by section 50A(1) of the Act of 2015, would be violated were the Applicant returned to the UK. It is not accepted that the Minister can be obliged to analyse every point raised by an applicant, including academic legal arguments not directly relevant to the decision at hand (here, the prohibition of refoulement). A refoulement consideration is not the appropriate vehicle in which to make or to consider arguments on the State's alleged failure to transpose Article 27(1) of the Procedures Directive (paras 2.2 to 2.8) where these are not directly relevant to the prohibition of refoulement in the Applicant's specific case. These arguments are therefore not considered here."*

**59.** Consideration was given in the Report to the arguments made concerning the application of the Rwanda Policy to the Applicant. It was concluded that the Applicant was a failed asylum seeker (his claim having been previously refused in the UK) and therefore the MoU between the UK and Rwanda could not apply to him. Furthermore, reliance was placed on the policy underpinning the manner in which the MoU will be implemented as set out in the Home Office's *Inadmissibility Guidance: Safe Third Country Cases*, appended to the Report. The *Inadmissibility Guidance* states that the MoU applies, *inter alia*, where the applicant's journey to the UK can be described as having been dangerous and that journey was made on or after the 1st of January 2022.

**60.** It was concluded in reliance on the *Inadmissibility Guidance* that even if the Applicant were considered an asylum seeker, it was not accepted that either his original journey to the UK from his country of origin nor any proposed return from the State to the UK via the return order mechanism would bring him within the criteria such that he would be transferred to Rwanda, were such transfers in fact occurring.

**61.** It was found that as there was little-to-no risk, much less a "*likelihood"*, that the Republic of Rwanda would be the Applicant's "*final destination*" if he were to be returned to the UK via the return order mechanism. There was therefore no requirement to conduct a refoulement consideration for the Applicant in respect of the Republic of Rwanda.

**62.** It was further noted that, in response to the interim relief granted by the European Court of Human Rights in *NSK v United Kingdom* (application no. 28774/22), the UK authorities had suspended planned transfers to the Republic of Rwanda. It was noted that the England and Wales High Court in *R (AAA) v Secretary of State for the Home Department* [2022] EWHC 3230 upheld the lawfulness of the MoU/Migration and Economic Development Partnership, but that this is being appealed to the England and Wales Court of Appeal. It was concluded that the suspension on proposed transfers from the UK to the Republic of Rwanda therefore appeared likely to continue into "*at least*" the short-term future, if not longer.

**63.** Of note, the Report records:

> *"Having considered the country of origin information on the UK, I am satisfied that the UK has been correctly and properly designated as a safe third country, pursuant to section 72(A)(1) of the Act of 2015, meaning that the Minister considers the UK to meet and to continue to meet the criteria established in section 72(A)(2) of the Act of 2015."*

**64.** Regarding the rights arguments presented on behalf of the Applicant, it was not accepted that the Charter was applicable to the return order mechanism under s. 50A of the Act of 2015 as the position adopted on behalf of the Minister was that return orders to the UK were a matter of national law, not European law, and Charter rights were therefore considered to be of no application. It was pointed out that while the UK was no longer subject to the Charter, it remained subject to the Convention and to the jurisdiction of the European Court of Human Rights. It was added that even were it the case that European law applied, the Applicant had not succeeded in establishing a breach of his rights. This was because the mere fact that the Applicant may be at risk of detention, or other treatment, if returned to the UK was not, in and of itself, considered to constitute a violation of Article 3 ECHR/Article 4 Charter. It was considered that no evidence had been submitted that would indicate that the conditions in immigration detention in the UK or otherwise were of such poor quality that they reach the threshold of a violation of Article 3 ECHR either generally, or that they reach the threshold of a violation of Article 3 ECHR in the Applicant's own specific circumstances.

**65.** Whereas it was stated that "*it is not accepted that Article 8 ECHR has any application within a refoulement consideration of this type*," consideration was given on a without

prejudice basis to Article 8 rights in the Report. It was noted that the Applicant's Article 8 rights had not been elaborated upon or quantified in any way in the Applicant's refoulement submissions. It was pointed out that in his interview on the 18th of May 2021, the Applicant had stated that he had no family in Ireland or Europe. It was concluded that whereas a decision to return the Applicant to the UK would constitute an interference with the right to respect for private life under Article 8(1) ECHR, this interference was justified by reference to Article 8(2) ECHR, as it is in accordance with law pursuant to s. 50A of the 2015 Act, pursues a pressing need and legitimate aim namely, the legitimate aim of the State to control immigration and to maintain the integrity of its system for providing asylum in the State and is necessary in a democratic society, in pursuit of a pressing social need and proportionate to the legitimate aim being pursued within the meaning of Article 8(2) ECHR.

**66.** The Report further addressed, on a without prejudice basis, the data rights breaches which had been alleged albeit expressly not accepting that alleged data protection breaches on the part of the IPO or the UK authorities could constitute a refoulement issue under s. 50A(l) of the 2015 Act. It was stated that the 2019 Memorandum of Understanding referred to by the Applicant's legal representatives in their submissions did not replace the 2014 Memorandum of Understanding and the Associated Annex on Asylum Data. Even if it did, however, reliance was placed on two adequacy decisions adopted by the United Kingdom in respect of the UK on the 28th of June 2021, one under GDPR and the other for the Law Enforcement Directive.

**67.** An article published on the Commission's website was quoted as saying: "*Personal data can now flow freely from the European Union to the United Kingdom where it benefits from an essentially equivalent level of protection to that guaranteed under EU law*." In consequence it was not accepted that the exchange of information between countries in the Applicant's case raises data protection issues nor that it renders the entire system for returns to the UK unsafe.

**68.** Where data concerns arise, it was found that the appropriate avenue to resolve such issues was through the Data Protection Commission in Ireland and the Information Commissioner's Office in the UK and/or the courts, rather than through the submission of refoulement considerations for the return order mechanism.

**69.** An application for leave to proceed by way of judicial review was moved before the High Court on the 9th of February, 2023 on foot of papers filed the previous day. By Order *ex*

*parte* (Meenan J.), Applicant A was directed to bring his application in the within proceedings by way of Judicial Review "*on notice*" to the Respondents. An Order was also made restraining the removal of Applicant A from the State pending the determination of the proceedings.

**70.** In his proceedings Applicant A challenges the safe country return system as operated in Ireland as being *ultra vires* by reason of non-compliance with EU law. It is further contended that the designation of the UK as a safe third country is unlawful by reason of a failure to conduct a meaningful review and/or irrationality. In addition, Applicant A challenges lawfulness of the Minister's decision that his return would not be in breach of the prohibition against non-refoulement and the lawfulness of the Return Order made without consideration, *inter alia*, of his private rights and his right to protection of his data. He seeks relief for breach of his data rights arising from the exchange of his personal data outside the territories of the EU.

**71.** The Applicant duly served notice returnable for 27th February 2023. The matter was listed on a number of occasions, and on 20th June 2023, the Respondents confirmed that they opposed the application. On the 4th of July, 2023 the High Court (Hyland J.) directed that the proceedings be heard and determined on a telescoped basis and fixed dates for hearing in December, 2023.

**72.** Opposition papers were filed on the 31st of July, 2023. In opposing the proceedings, it is asserted that as the Applicant has not challenged the findings of the IPO or the Tribunal, that it was impermissible to mount a collateral attack on those decisions through a challenge to the decision of the Minister. It is denied, *inter alia*, that the designation by the Minister of the UK as a safe third was ultra vires the Procedures Directive and/or was improperly made contrary to Ireland's obligations under the Common European Asylum System ("CEAS") or that the failure to enact a transposing measure prior to the 1st of December, 2007 precludes the State from introducing legislation to provide for safe third country designation. It is asserted that the Recast Procedures Directive had no application to Ireland but that the State remained bound by the Procedures Directive. It is contended that there has been no breach of the obligation to review designation.

**73.** It is further denied that the implementation of the Safe Third Country failed to afford the Applicant any data rights protections or that the Minister is in breach of the Applicant's

data protection rights. Reliance is placed on Article 2(2)(a) Regulation (EU) 2016/679 ("GDPR") to contend that the requirements of the GDPR do not apply to the processing of personal data in the course of an activity falling outside the scope of Union law. Article 49(1)(d) GDPR is also invoked as providing a lawful basis for data transfers necessary for important reasons of public interest, such as in this instance, the maintenance of fair and effective immigration control, in particular across the historic CTA", the preservation and strengthening of the CTA and the maintenance of a fair and effective system for granting persons international protection in the State and the administration of justice generally and the exercise of executive functions related to the prevention and detection of immigration abuses. In the alternative, it is contended that if any breach of the Applicant's data protection rights were occasioned by the making of and/or implementation of the Return Order and/or the Safe Third Country system in the Applicant's case, such breach would not have the effect of rendering the Safe Third Country Order thereby *ultra vires* the Procedures Directive and/or contrary to the State's obligations under the CEAS. Furthermore, it is contended that the Applicant had adequate and effective remedies available to him pursuant to the GDPR and the Data Protection Act, 2018 in respect of any such breach, which remedies were sufficient to vindicate in full the Applicant's data protection rights.

**74.** The Applicant's standing to challenge the safe designation of the UK or any orders made regarding him with reference to the Rwanda Policy is disputed on the basis that he has not established that he was a person liable to be removed to Rwanda under that Policy and the Respondents stand over the rationality of the Minister's decision to make the Return Order.

**75.** On the 3rd of November 2023, the Respondents sought to vacate the hearing date at least partly in anticipation of the judgment of the U.K. Supreme Court in *R (AAA and ors) v. Secretary of State for the Home Department*, which it was expected would be delivered by the second week of December 2023. In consequence, hearing dates in February, 2024 were fixed. Following delivery of the Supreme Court judgment, further Affidavit evidence and written submissions were filed addressed to the judgment of the Supreme Court and the reaction to same including policy and legal responses and widespread criticism of the Rwanda Policy, not least from the UNHCR.

**76.** During the course of the hearing before me it was indicated that information had come to light bearing on the candour of Applicant A and his entitlement to obtain relief in these

proceedings. On application on behalf of the Respondents I gave liberty to adduce fresh affidavit evidence and two affidavits were sworn by officials on behalf of the Respondents on the 21st of February, 2024, without determining what weight, if any, I would give to them.

**77.** From these affidavits it is clear that in October, 2021, in responding to the biometric data request which had been made on the 28th of September, 2021, the UK authorities advised that the Applicant had been convicted on an offence in June, 2018 in the UK and was in consequence registered as a sex offender. It appears that this information had been redacted by reason of data protection concerns before being placed on Applicant A's immigration file. This notwithstanding it appears that an "*alert*" was subsequently created on the 14th of January, 2022 on Applicant A's file as contained on the Minister's database. It seems that it was only on the 14th of December, 2023, that an official in the Repatriation Unit of the Minister's Department noticed the "*alert*" and enquiries were directed concerning the nature of Applicant A's criminal offence in the UK. A response to these enquiries was only forthcoming on the 19th of February, 2024, the day before the hearing before me was due to commence.

**78.** In circumstances where it was contended that the failure to disclose the fact of a previous criminal conviction in the UK in the course of his protection application evidenced a lack of candour and the failure to refer to it in moving his application before the High Court by way of judicial review constituted a breach of Practice Direction HC 81 of a nature that should disentitle Applicant A to relief, I allowed Applicant A an opportunity to file a replying affidavit and the Respondents to file an amended Statement of Opposition in which a plea of lack of candour could be advanced. It was conceded on behalf of the Respondents in response to a question from me, however, that the new information was not otherwise relevant to the issues arising for determination in the proceedings.

**79.** An Amended Statement of Opposition was filed on the 22nd of February, 2024 in which a preliminary objection to relief having regard to lack of candour and non-compliance with High Court Practice Direction 81 was introduced.

**80.** In a replying affidavit also sworn on the 22nd of February, 2024, while the cases were at hearing, Applicant A confirmed that he was unaware of the requirements to register as a sex offender in this jurisdiction on foot of his conviction in the UK and had not been advised of any such requirement on any of his attendances with the GNIB. He explained that on his

reading of the international protection application questionnaire he was required to disclose convictions in his country of origin, not any third country as this question appears in that part of the form dealing with State Protection. He had disclosed a previous conviction in Iraq in consequence but did not understand disclosure of criminal convictions anywhere else to be required.

**81.** In his replying affidavit Applicant A pointed out that while information relating to his criminal conviction was available to the Respondents from the 4th of October, 2021, he had never been questioned about it and it had not been mentioned. He pointed to the fact that the Respondents did not explain how they had been prejudiced by reason of the failure on his part to disclose information which had been in the Respondents' possession for several years.

**82.** Following submissions from both parties, I confirmed that I would address the issue of candour in my final judgment, declining to make any preliminary findings pending a full hearing of the case.

*Applicant B*

**83.** Applicant B is a Nigerian national who applied for international protection on the 24th of May, 2022. He was interviewed that same day under s. 13(2) of the 2015 Act and confirmed that he had been living in the UK pursuant to a visa.

**84.** The IPO sent a biographical data request to the UK in June, 2022 in accordance with the 2014 Memorandum of Understanding between the UK and Ireland on the Exchange of Information for the purpose of protecting the Common Travel Area and Associated Annex on Asylum Data (the "UK/Ireland MoU").

**85.** In its response on the 8th of July, 2022, the UK confirmed that Applicant B had been granted a student visa from the 26th of December, 2020 to 31st of May, 2022. He entered the U.K. on 2nd January 2021 and remained there for approximately five months before travelling to the State to apply for protection.

**86.** In July, 2022, the Applicant submitted an application for international protection questionnaire to the IPO. He claimed that he and his family were prominent members of the Indigenous People of Biafra, and had been targeted by both Fulani herdsman and the Nigerian

security forces. He claimed that his brother was shot dead by Fulani herdsmen. He claimed to fear further reprisals by the security forces if returned to Nigeria.

**87.** It appears that a further request for biometric data was sent by the IPO to the UK authorities on the 29th of July, 2022. On the 28th of November, 2022, the UK authorities informed the IPO that that Applicant B had made an application for asylum in the UK which had been refused on 5th of November, 2019 with an appeal received on the 6th of January, 2020. It was indicated that he had been given permission to work in the UK on the 16th of June, 2022 (coinciding with dates that he was in Ireland).

**88.** Applicant B was issued with permission to access the labour market valid from the 20th of December 2022 to the 20th of December 2023.

**89.** In November, 2022, the IPO sent a second biographical data request to the UK. In responding to this request in January, 2023, the UK accepted Applicant B's readmission. It was confirmed that he had no known relatives in the UK. It was advised that his appeal rights with regard to his asylum claim were exhausted on 13th of October, 2022.

**90.** In February, 2023, the IPO conducted an inadmissibility consideration interview during which Applicant B confirmed that he had lived in the UK for a year and five months on a student visa, had no family there and had worked in a warehouse. He claimed that he was unsafe in the UK. He reported that he owed money in the UK and his life was in danger. He claimed to have reported his fears to the UK authorities but nothing was done for him. There is no record of him being asked about the asylum application and appeal referred to in the biometric data received from the UK.

**91.** In its report dated the 23rd of February, 2023, under s. 21(4) of the 2015 Act, the IPO recommended that the application be deemed inadmissible because the UK is "*a safe third country*" and the Applicant had "*a connection with the UK on the basis of which it is reasonable to return him there*". Despite focussing in the body of the report on s. 21(2)(c) and the safe third country designation status of the UK, the report in its recommendation section in fact recommended that the application be deemed inadmissible on the basis that Applicant B had a refugee application ongoing in the UK.

**92.** By letter dated the 23rd of February, 2023, the Minister wrote to Applicant B advising him that his application was inadmissible relying on s. 21(2)(b) of the 2015 Act, namely that a country other than a Member State is a first country of asylum for the Applicant. Reliance was not, in this letter, placed on s. 21(2)(c) and the 2020 Designation Order. This was not an accurate reflection of the report where reliance had been placed on the 2020 Designation Order and s. 21(2)(c), albeit some confusion may have arisen from the fact that the report in its recommendation recommended that the application be deemed inadmissible on the basis that Applicant B had a refugee application ongoing in the UK.

**93.** On the 8th of March, 2023, Applicant B appealed to the Tribunal. In detailed grounds of appeal, he claimed that:

a) the safe third country system was not in compliance with Article 27(1) of the Procedures Directive;
b) he did not feel safe in the UK as he was contacted by unknown people who threatened to kill him;
c) he feared being detained or sent back to Nigeria or Rwanda noting that Rwanda had not been designated as a safe third country;
d) he feared he would be tortured on return;
e) the IPO was in breach of his data protection rights;
f) the IPO erred in finding he had a connection to the UK;
g) return to the UK risked breach of his Article 3 and 5 rights under the European Convention on Human Rights; and
h) he had gained private and family rights in Ireland and was in a loving relationship with his partner and was fully integrated into the State.

**94.** Curiously, the extensive grounds of appeal advanced did not address the fact that while the IPO had relied in its considerations on the safe third country designation of the UK, it had made a recommendation under s. 21(2)(b). Nor was the fact that the Minister's Notification related to a finding under s. 21(2)(b) addressed. It was not disputed that Applicant B had made an asylum claim in the UK or that he had an extant application there, as the Minister suggested in the notification letter, and neither Applicant B nor the Respondents have engaged with this feature of the decision in these proceedings and it is of tangential relevance only given that the decision of the Tribunal on appeal was squarely based on s. 21(2)(c) of the 2015 Act.

**95.** On the 27th of April, 2023 (decision received by Applicant B on 2nd of May, 2023), the Tribunal determined that Applicant B's protection application was inadmissible under s. 21(7)(a) of the 2015 Act. The Tribunal addressed each of the grounds of appeal advanced. It was satisfied, for example, that the IPO was the determining authority. It further found that the Tribunal had no role in determining the validity of legislative provisions.

**96.** The Tribunal considered the Country-of-Origin Information submitted in light of the test set out in C-297-17 *Ibrahim*. The Tribunal found that, while the UK "*will often detain people after their claim for international Protection has been refused*" this is not a breach of fundamental rights as the U.K. does not "*routinely detain people during the decision-making process or if the claim is successful*" and most functioning democratic states have power to detain persons who have no permission to remain. The Tribunal accepted that there was a "*significant pressure on the U.K. authorities/or housing migrants, and many inadequate facilities used*" but that so long as there is a system for provision of housing and other services to asylum applicants, there was no basis to consider that the Applicant was at risk of torture or inhuman or degrading treatment. It further found that there was "*nothing about his particular circumstances which gives rise to such concerns*" and the Applicant had "*demonstrated his ability to live and work in the UK*." The Tribunal found that the Applicant had "*lived and worked there for over a year*" and his claim of threats from unknown person and reporting same to the authorities was "*vague*", but that the U.K. has a functioning police and courts system, which the Applicant could access. Having considered all the documents and the Applicant's statements, the Tribunal determined that the Applicant "*does have a connection with the U.K. - he lived and worked there for over a year.*"

**97.** The Tribunal further determined that Applicant B's claim that he would be sent on to Rwanda was "*speculative*" as there was "*no proposal in being to transfer him to Rwanda*" but that he in any event has access to the U.K. courts. The Tribunal noted that a case has been lodged in the European Court of Human Rights in relation to this issue, but that the UK had a system of laws and courts and any concerns in relation to same could be addressed to the UK authorities, which were said to be bound by the provisions in relation to non-refoulement.

**98.** The Tribunal did not deal with Applicant B's claim that he had private and family rights in the State as this was said to be "*a matter for the Minister*." The Tribunal was (only)

considering "*by reason of the legal mechanisms*" whether a claim could be deemed inadmissible. The fact that Applicant B had a partner in the State "*does not render an otherwise inadmissible application admissible*". The Tribunal similarly found that any claim of breach of his GDPR rights was "*a matter for the Data Protection Commissioner and not for the Tribunal*" but "*does not impact the admissibility/inadmissibility of his claim either way*."

**99.** On the 10th of May, 2023, the Minister issued an inadmissibility decision under s. 21(11) of the 2015 Act.

**100.** Proceedings by way of judicial review were commenced before the Minister proceeded to consider making a Return Order under s.51A of the 2015 Act. Papers were lodged on the 7th of June, 2023 and by application *ex parte* on the 16th of June, 2023, the proceedings were opened, the Applicant was given leave to amend his Statement of Grounds and the proceedings were adjourned to the 23rd of October, 2023 at which point the Court (Hyland J.) directed that the application be made on notice to the Respondents and adjourned the proceedings to the 3rd of November, 2023.

**101.** It appears that on the next return date, on 3rd November 2023, the Court was advised that this case raised additional points to other U.K. return cases. The matter was adjourned for three weeks for the Respondents to consider, and then adjourned further to 1st December 2023. At that listing, the Applicant sought to join with Applicant A's case which was already listed for hearing. On the I5th of December 2023, the Respondents consented to Applicant A and B's cases travelling together for telescoped hearing in February 2024.

**102.** In his proceedings, Applicant B challenges the inadmissibility decision and the original and continuing designation of the UK and Northern Ireland as a safe third country as well as the Tribunal decision finding his application inadmissible. In addition, he complains that neither the Tribunal nor the Minister have had regard to the development of his private life in Ireland, particularly in contrast to the absence of any such private life in the UK or to conditions for asylum seekers in the UK. He seeks declaratory relief to the effect that the Safe Third Country Order and/or implementation of the safe third country system is unlawful for failure to afford applicants any data rights protection.

**103.** In Opposition papers filed, the application is opposed, *inter alia*, on the basis that the Applicant has failed to demonstrate substantial grounds for challenging the admissibility decision and has not complied with time limits fixed under s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 in proceeding by way of judicial review. Further, it is contended that s. 72A of the 2015 Act gives effect to Ireland's obligations under EU law and meets the requirements laid down in Articles 25 and 27 of the Procedures Directive which continues to apply by virtue of Article 53 of the Recast Directive.

**104.** Several supplemental affidavits have been filed on behalf of Applicant B (including affidavits on the 18th of January, 2024, 14th of February, 2024 and the 19th of February, 2024) for the purpose of adducing up to date evidence in relation to developments regarding the Rwanda Policy in the UK, not least the passage of the UK Illegal Migration Bill through the first stage in the House of Commons to the House of Lords and further concerns of the UNHCR with respect thereto.

**DESIGNATION OF UK AS A SAFE THIRD COUNTRY**

**105.** In an affidavit sworn on behalf of the Respondents, a Principal Officer in the Migration Policy Division of the Department of Justice and Equality confirmed that relevant country information was sourced and analysed "*in or around the time of designation of the UK as a safe third country*" pursuant to the Safe Third Country Order with a view to assessing whether the UK should be so designated having regard to the requirements of section 72A of the 2015 Act (as inserted by s. 117 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act, 2020. A booklet of the said relevant country information as sourced and analysed by the Minister and the assessment made by the Minister prior to the making of the 2020 Designation Order is exhibited, as is the analysis of the material and recommendation to the Minister relied upon in signing the 2020 Designation Order.

**106.** The analysis of the country information prepared for the benefit of the Minister as exhibited reflects consideration of the factors identified at s. 72A(2)(a)-(d) having regard to sources of information identified in s. 72A(3), where available. Country of origin information considered included: the US State Department 2019 Country Report on Human Rights, 2019; "*Freedom in the World 2020 UK Report*", Freedom House; Amnesty International Report 2019

"*The State of the World's Human Rights - United Kingdom*"; Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 12 April 2016, 19 April 2017; the 2017 Report of the Office of the United Nations High Commissioner for Human Rights in the context of the Universal periodic review, to which UNHCR submitted observations and concerns; Council of Europe Contribution for the 27th UPR Session regarding the United Kingdom; Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 to 24 October 2012; Report of the Office of the United Nations High Commissioner for Human Rights, Summary of other stakeholders submissions United Kingdom of Great Britain and Northern Ireland, 27 February, 2017.

**107.** It is apparent from the exhibited documentation that the factors which required to be considered as identified under s. 72A(2)(a)-(d) were addressed sequentially and in turn with reference to the UK's adherence to applicable international human rights standards and its record in this regard as reported by a range of sources of information.

**108.** It is clear from the exhibited documentation that consideration was also given to the UNCHR position on the concept of Safe Third Country (*UNHCR Guidance on responding to Irregular Onward Movement of Refugees and Asylum Seekers*, September 2019). The UNHCR position as reflected in documentation considered by the Minister is that while international law establishes the right to "*seek and to enjoy... asylum,*" the 1951 Convention and other international legal instruments do not confer a right upon refugees to decide in which State they will receive international protection. The UNHCR state that there is no obligation under international law for a person to seek international protection at the first effective opportunity, but asylum seekers and refugees do not have an unfettered right to choose the country that will determine their asylum claim in substance and provide asylum. According to the UNHCR the primary responsibility for providing international protection rests with the State in which an asylum-seeker arrives and seeks that protection. It is the UNHCR's position that claims for international protection from asylum-seekers should ordinarily be processed in the State in which they are present, or which otherwise has jurisdiction over them in line with general State practice and international law.

**109.** It is acknowledged by the UNHCR as recorded in the documentation before the Minister, however, that it may be permissible for another State to assume responsibility for determining the need for or providing international protection. Such responsibility may be based on, *inter alia*, the availability of access to a fair and efficient asylum procedure to determine the individual's international protection needs and grant international protection if needed (based on the safe third country concept).

**110.** In the material considered by the Minister the UNCHR posit that as a precondition for transfer of a refugee or asylum-seeker to another State, a number of standards need to be met in practice. These include: a) the State must agree to admit the person; b) protection from persecution and threats to physical safety and freedom in that State; c) the opportunity to re-avail him or herself of protection previously enjoyed in that State; d) if not previously recognized as in need of international protection, access to a fair and efficient asylum procedure is needed; e) a right to remain lawfully in the territory for the duration of the asylum procedure, as well as a right lawfully to stay if found to be in need of international protection; and f) standards of treatment commensurate with the 1951 Convention and international human rights standards including, but not limited to, protection from refoulement.

**111.** Although not referred to in the exhibited documentation which is silent as regards the question of review, it was further confirmed on behalf of the Respondents that the Minister keeps under "*general review*" "*on an ongoing basis significant political, policy and legal developments in countries that have been designated pursuant to law as Safe Third Countries*" (at paragraph 11 of Affidavit of Maeve-Anne Kenny sworn on the 31st of July, 2023 in Applicant A's case).

**112.** Matters are put slightly further in an affidavit sworn on the 29th of January, 2024 by the same deponent in Applicant B's case when she says (at paragraph 10):

> *"Sections 72A(4) of the 2015 Act requires the Minister to review the situation in a designated safe third country "on a regular basis". While no formal review of the designation of the UK was undertaken between the date of the 2020 Order and the decision of the International Protection Appeals Tribunal impugned in these proceedings, the Minister keeps under general review on an ongoing basis significant political, policy and legal developments in countries that have been designated*

*pursuant to law as safe countries, independently of any formal periodic review being carried out under section 72A(4).”*

**113.** No further formal or systematic periodic review is relied on by the Respondents and no additional documentation or analysis after the making of the 2020 Designation Order is relied upon by the Minister in opposing the challenge to the designation of the United Kingdom and Great Britain as safe third countries.

**ISSUES**

**114.** As noted above, these two cases have been selected as lead cases and raise issues of principle which are common to many other cases. Accordingly, although pleaded, issues of time are not pressed on behalf of the Respondents in reliance on s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 (hereinafter “the 2000 Act”) but, if necessary and relevant to the question of the test to be applied in respect of an entitlement to appeal against my decision, I am asked to determine the extent of applicability of s. 5 of the 2000 Act to a refoulement decision under s. 50A of the 2015 Act.

**115.** Substantive issues arising therefore include:

a) Is the designation of the UK as a safe third country under s. 72A of the 2015 Act and SI 725/2020 *ultra vires* the Procedures Directive and/or the Recast Procedures Directive?
b) Is the safe third country designation otherwise in breach of s.72A(4) of the 2015 Act for the Minister’s failure to review the current situation in the UK?
c) Is there an obligation on the Minister to consider risk of rights violations before making a return order under s. 51A?
d) Is designation rendered unlawful by reason of breach of Data Protection Rights in its implementation?
e) Was the Minister’s assessment of prohibition of refoulement unlawful or irrational as contrary to s. 50A of the 2015 Act – the Refoulement Decision and is the challenge to this decision a collateral attack on the Inadmissibility Decision?
f) Was the Tribunal Decision in Applicant B’s case irrational having regard to developments in UK with regard to the Rwanda Policy?
g) Is the Minister’s decision under s. 50A captured by s. 5 of the Illegal Immigrants (Trafficking) Act, 2000?

h) Do the Applicants have standing in respect of all of the grounds advanced?
i) Is Applicant A disentitled to relief by reason of lack of candour?

**116.** As noted above, it is not necessary for me to reach a decision on all of these issues for the purpose of determining these proceedings, but I will address each of them in turn.

**DISCUSSION AND DECISION**

*Safe Third Country Designation - Development of EU and Domestic Legal Framework*

**117.** Although the safe third country concept was provided for in the Procedures Directive, its origin in Irish law predated Ireland's adoption of this Directive. The concept first found statutory expression in s.22 of the Refugee Act, 1996 (as amended) (hereinafter "the 1996 Act") into which the "*safe third country*" concept was substituted by s. 7(1) of the Immigration Act, 2003.

**118.** While the Procedures Directive in turn provided for the application of a safe third country concept when prescribed conditions in Article 27 of that Directive were met, it did not require a Member State to apply the concept. The terms of Article 27 are key. It provided:

> *"1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:*
>
> *a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;*
> *b) the principle of non-refoulement in accordance with the Geneva Convention is respected;*
> *c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and*
> *d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*

*2. The application of the safe third country concept shall be subject to rules laid down in national legislation, including:*

*a) rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country;*

*b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;*

*c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.*

*3. When implementing a decision solely based on this Article, Member States shall:*

*a) inform the applicant accordingly; and*

*b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.*

*4. Where the third country does not permit the applicant for asylum to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.*

*5. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article."*

**119.** It is clear from the language of Article 27 that reliance on the safe third country concept was permitted but not required by EU law and would only be tolerated where conditions precedent to its application was required under Article 27 were provided for in domestic law of the Member State.

**120.** Under Article 43 of the Procedures Directive, Member States were required to ("*shall*") bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 December 2008.

**121.** Although provision had been made in Irish law for the safe third country concept in accordance with the amendment to s. 22 of the 1996 Act by the provisions of the Immigration Act, 2003, Ireland did not adopt measures which reflected the requirements of Article 27 of the Procedures Directive prior to its transposition deadline in 2008. It was only in 2011 that the European Communities (Asylum Procedures) Regulations 2011, SI 51/2011 ("the 2011 Regulations") were adopted in this jurisdiction for the express purpose of transposing the Procedures Directive. Regulation 9 of the 2011 Regulations provided:

> "*9. Section 22 (as amended by section 7(l) of the* Immigration Act 2003 *) of the Act of 1996 is amended by substituting the following for subsection (5):*
>
> > *"(5)(a) The Minister may, by order made after consultation with the Minister for Foreign Affairs, designate a country as a safe third country where the Minister is satisfied that an applicant for asylum will be treated in that country in accordance with the principles specified in paragraph (b).*
> >
> > *(b) The principles referred to in paragraph (a) are the following:*
> >
> > i. *life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;*
> > ii. *the principle of non-refoulement in accordance with the Geneva Convention is respected;*
> > iii. *the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and*
> > iv. *the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*

*(c) The Minister shall not make an order under paragraph (a) in respect of a country unless that country and the State are parties to an agreement which provides for—*

*i. the prompt transfer to that country of an application for asylum made in the State by a person who has arrived from that country, and*

*ii. the prompt transfer to the State of an application for asylum made in that country by a person who has arrived from the State.*

*(d) An application for asylum shall not be transferred to a safe third country pursuant to an agreement referred to in paragraph (c) unless the removal to that country of the person who made the application for asylum would be reasonable on the basis of a connection he or she has with that country.*

*(e) An order under paragraph (a) may make provision for such consequential, incidental, ancillary and supplementary matters as the Minister considers necessary or expedient.*

*(f) The Minister shall, from time to time, notify the European Commission of the countries that are designated as safe third countries under paragraph (a).".*

**122.** The 2011 Regulations further provided in regulation 10 (in line with the requirements of the Procedures Directive), that where an application for asylum was to be transferred to a safe third country pursuant to an agreement referred to in s. 22(5)(c) of the Act of 1996, the Minister was required to (a) inform the applicant, and his or her legal representative (if known), of the transfer, and (b) provide the applicant, and his or her legal representative (if known), with a document informing the authorities of the safe third country, in the language of that country, that the application for asylum has not been examined in substance.

**123.** Although no country was ever designated as a safe third country under the 2011 Regulations, issues of timing apart, it seems Ireland had provision in law for a safe third country designation system otherwise compliant with the requirements of the Procedures Directive in place under the 1996 Act (as amended) from 2011 until the 1996 Act was repealed by s. 6 of the 2015 Act. Following the commencement of the 2015 Act and the consequential repeal of

the 1996 Act, however, no provision for a third safe country concept existed in Irish law until further legislative amendment referred to in detail above in 2020.

**124.** For its part, the Procedures Directive was repealed on the 20th of July, 2015 in accordance with the terms of Directive 2013/32/EU (the "Recast Procedures Directive") for Member States bound by the Recast Directive with effect from 21 July 2015. Article 53 expressly provided, however, that the repeal was without prejudice to the obligations of the Member States relating to the time limit for transposition into national law of the Directive set out in Annex II, Part B. Preamble 58 recorded that the United Kingdom and Ireland were not taking part in the adoption of the Recast Procedures Directive and were not bound by it or subject to its application. In consequence, Ireland continued to be bound by the provisions of the Procedures Directive albeit it had been repealed and replaced for most other EU states by the Recast Procedures Directive.

**125.** The Recast Procedures Directive continued the "*carve out*" for third safe countries in largely similar terms to Article 27 of the Procedures Directive. Article 38 of the Recast Procedures Directive provides:

> *"1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:*
>
> *(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;*
>
> *(b) there is no risk of serious harm as defined in Directive 2011/95/EU;*
>
> *(c) the principle of non-refoulement in accordance with the Geneva Convention is respected;*
>
> *(d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and*
>
> *(e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*

*2. The application of the safe third country concept shall be subject to rules laid down in national law, including:*

*(a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;*

*(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;*

*(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).*

*3. When implementing a decision solely based on this Article, Member States shall:*

*(a) inform the applicant accordingly; and*

*(b) provide him or her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.*

*4. Where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.*

*5. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article."*

**126.** Although in almost identical terms to Article 27 of the Procedures Directive, Article 38 of the Recast Procedures Directive added an additional requirement (at Article 38(1)(b)) that Member States were permitted to operate the safe third country concept only where there is no

risk of serious harm as defined in Directive 2011/95/EU (hereinafter "the Recast Qualification Directive"). This is the primary material difference between the Procedures Directive and the Recast Procedures Directive relevant to the issues in these proceedings. Serious harm is defined in Article 15 of the Recast Qualification Directive as consisting of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

**127.** The main objective of the Recast Qualification Directive, referred to in Article 38 of the Recast Directive but not Article 27 of the Procedures Directive, is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States. As recorded in Recital 50 to Recast Qualification Directive, just as with the Recast Procedures Directive, the United Kingdom and Ireland did not take part in it adoption and are expressed in its terms to not be bound by it or subject to its application.

**128.** At the time of the adoption of the Recast Procedures Directive and the Recast Qualification Directive, Ireland had already provided in law a safe third country concept under the 1996 Act (as amended). During this period Regulation (EU) No.604/2013 (the so-called "Dublin III Regulations") was adopted in June 2013, and subject to transitional provisions, were implemented from the 1st of January 2014. Crucially, Ireland adhered to the Dublin III Regulations. The Dublin III Regulations establish the criteria and mechanisms for determining which Member State is responsible for examining an asylum claim made in the EU. The Dublin III Regulations seek to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter as well as the rights recognised under Articles 1, 4, 7, 24 and 47 of the Charter (Recital 39). They allow Member States to send requests to other Member States to "*take charge of*" or "*take back*" asylum applications (subject to time limits). The Dublin III Regulations were intended to ensure quick access to asylum procedures and reduce double handling of asylum claims by different States.

**129.** Notably, under Article 3(1) of Dublin III, a right to have an application for international protection made within the territory of a Member State examined by a Member State is established as follows:

*"1. Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible."*

**130.** The right provided for in Article 3(1) is a substantive right which vests upon the making of an application for international protection within the territory of the EU. Thereafter provision is made Article 3(2) of Dublin III for the designation of the responsible Member State.

**131.** Importantly for present purposes, under Article 3(3) of Dublin III, provision is made for the application of the third safe country concept as follows:

*"3. Any Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU."*

**132.** In this way, the Dublin III Regulations provides for the retention of the safe third country concept on condition of compliance with the rules and safeguards laid down in the Recast Procedures Directive even though Ireland had not adhered itself to this Directive. It bears note that at Recital 41 of the Dublin III Regulations reference is made to Article 3 and Article 4A(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on the European Union (TEU) and to the Treaty on the Functioning of the European Union (TFEU). It is recorded that those Member States had notified their wish to take part in the adoption and application of the Dublin III Regulations. Indeed it is not in dispute in these proceedings that the Dublin III Regulations apply in full to Ireland.

**133.** As noted above, following the commencement of the 2015 Act the State did not operate a safe third country system for more than five years. This only changed in December, 2020 following the withdrawal of the UK from the EU when s. 72A was inserted into the 2015 Act by s. 122 of the 2020 Act. Section 72A of the 2015 Act is set out in full above at paragraph 27.

**134.** As is immediately apparent, s. 72A is drafted in terms which mirror the requirements of the Procedures Directive at Article 27(1)(a)-(d) but not the Recast Procedures Directive at Article 38(1)(a)-(e). Specifically, a requirement has not been specified that the Minister only operate a safe third country designation when satisfied there is no risk of serious harm as defined in Directive 2011/95/EU (the Recast Qualifications Directive).

*Is the Designation Ultra Vires?*

**135.** The designation of the United Kingdom of Great Britain and Northern Ireland as a safe third country is challenged as to its lawful basis on several grounds most notably that:

a) there was a failure to transpose the concept within the time provided for implementation of the Procedures Directive *viz.* December, 2008 with the result that the safe third country concept is no longer available by way of exception to the right to have the application determined on the territory of the Member State;
b) the principle of non-regression precludes late provision for designation;
c) there was a failure to provide for safeguards necessitated under EU law, specifically under Article 38 of the Recast Procedures Directive;
d) there was a failure to provide for a broader rights scrutiny;
e) there was a breach of the requirements of GDPR; and
f) the designation was and is irrational.

*Is there a Power to Designate lost by reason of Non-Transposition before December, 2008?*

**136.** It is contended on behalf of the Applicants that as the original Procedures Directive is no longer in force and as Ireland was required to introduce relevant legislation by no later than 1st of December, 2007, the State having failed to introduce legislation prior to December, 2007, may not now do so. Insofar as s. 72A of the 2015 Act (as amended) purported to do so in December, 2020, it is invalid.

**137.** It seems to me that the arguments advanced on behalf of the Applicants are misconceived insofar as it is contended that the power to designate is lost by reason of non-transposition of the Procedures Directive before its implementation date. The safe third country concept is a concept well known in international refugee law and practice. It does not

derive its existence from the Procedures Directive and was not necessitated or mandated by that Directive or any other provision of EU law. Articles 25 and 27 of the Procedures Directive do not operate to impose an obligation on Member States that must be transposed into national law by a certain point in time or be lost forever. Instead, the CEAS permits Member States to have in place a system for designating safe third countries, provided minimum conditions are complied with. The EU has not proceeded to prohibit the application of the concept for countries who did not have an operative safe third country system in place before the transposition date for the Procedures Directive. On the contrary, the EU continues to provide for application of the concept, albeit with the additional condition prescribed under Article 38(1)(b) where applicable.

**138.** The clear effect of Article 27 of the Procedures Directive was to require that in designating safe third countries, if a Member State elected to do so, there would nonetheless be observance of common minimum standards of protection. Article 27 operates to recognise as lawful the exercise of a discretion by member states to apply a safe third country concept provided certain prescribed conditions are met. The obligation created by EU law in this regard is to provide for safeguards if operating a system of safe third country designation. There is no requirement under the Procedures Directive for a Member State to make national provisions deeming certain applications to be inadmissible, rather there are rules setting the scope within which a Member State may do so, operating as conditions precedent to reliance on the concept. Whether the safe third country concept is applied at all in each member state is, however, a matter of national law.

**139.** The transposition deadline of the 1st of December, 2007 fixed under Article 43 of the Procedures Directive applied only in respect of the laws, regulations and administrative provisions "*necessary to comply with this Directive*". Contrary to the case made on behalf of the Applicant, I am satisfied there was no impediment under EU law to the State introducing new legislation in 2020 allowing for the designation of safe third countries, so long as any such legislation complied with the requirements of EU law by providing for the pre-conditions for designation mandated under EU law, thereby upholding EU standards in ensuring proper processing of asylum applications by persons who seek protection within the territory of the EU.

**140.** No authority has been identified to support the case made on behalf of the Applicant that the State does not continue to be free to introduce a safe third country concept or to revise it, if the system adopted in domestic legislation contains the safeguards mandated by EU law. Unless the contrary is clearly indicated, EU law places no time limit on a Member State's exercise of a discretion conferred in a Directive while that Directive remains in force for that Member State.

**141.** The argument on behalf of the Applicants to the contrary in these proceedings does not withstand scrutiny. Not only is it not supported by authority (and flies in the face of decisions in cases such as *Seredych v Minister for Justice* [2020] IESC 62 and *EV v. IPAT & Ors*. [2020] IEHC 617) but if the logic of the Applicants' argument were correct, it would follow that a Member State found to be in breach of the requirements of EU law in infringement proceedings at the suit of the Commission or another Member State would not be permitted to regularize the position in their domestic legal order for the purpose of bringing it into compliance. Indeed, the Applicants' position is irreconcilable with the provision for infringement proceedings in the TFEU (Articles 258, 259 and 260) which are predicated on a Member State who fails to adopt measures within the time allowed being persuaded to bring the domestic legal order into line with EU law requirements.

**142.** It is recalled that by operation of Article 53 of the Recast Directive, Ireland remains bound by the Procedures Directive which stands repealed only insofar as parties have adopted the Recast Procedures Directive. Article 53 of the Recast Procedures Directive makes clear that transposition obligations of the Irish State under the Procedures Directive remain unaffected by the repeal of the Procedures Directive for those Member States bound by the Recast Procedures Directive.

**143.** While the Procedures Directive has been repealed for those countries who adhered to the Recast Procedures Directive, it is established that its provisions continue to bind Ireland. As found by the CJEU in C-616/19 *M.S. v. Minister for Justice and Equality*, as far as the rules of asylum procedure are concerned, Ireland is subject to a combined application of the Procedures Directive and the Dublin III Directive. In reliance on the decision of the Supreme Court in *Seredych v Minister for Justice* [2020] IESC 62, Burns J. found in *EV v. IPAT & Ors*. [2020] IEHC 617, a case in which the vires of ss.33 and 72 2015 Act (relating to the safe country of origin concept) were challenged, that the fact that Ireland did not adopt the Recast

Directives did not absolve Ireland from transposing and continuing to apply the earlier Directives. She held that this was because Ireland had agreed that while it would not adopt the Recast Directives, it remained bound by the earlier Directives.

**144.** Similarly, in *IM v. IPAT & Ors*. [2020] IEHC 615 (Burns J. in a case on all fours with *EV v. IPAT & Ors*. [2020] IEHC 617) the argument that because Ireland had not adopted the Recast Procedures Directive, the State is not entitled to avail of the provisions of that Directive in order to apply the safe country of origin concept was considered unarguable and leave to proceed by way of judicial review was refused. For the same reasons, I also reject any contention that the Minister's power to designate a third safe country in reliance on the Procedures Directive is lost by reason of the fact that the transposition date of the Procedures Directive had long since passed and had been repealed for those member states who have adhered to the Recast Procedures Directive prior to the amendment of the 2015 Act.

**145.** Furthermore, in C-616/19 *M.S. v. Minister for Justice and Equality* it was established that the failure to adhere to a subsequent Directive which makes particular provision in a manner not available under the previous Directive (since repealed for the parties adhering to the later Directive) to which the Member State was a party, does not preclude that Member State from adopting a domestic law which is compatible with EU law as it is applied to parties adhering to the later Directive. Indeed, adopting measures compatible with the later requirements of EU law, although not mandated because the State had not adhered to the later Directive, was considered the correct interpretation of the legal regime as it was consistent with the context and the objectives pursued by the CEAS.

**146.** It seems to me therefore to be clear that there is no impediment to Ireland applying a safe third country designation by reason only of the fact that the transposition date has passed and the Procedures Directive has been repealed for those adhering to the Recast Procedures Directive.

*Does the principle of non-regression preclude late provision for designation?*

**147.** The Applicants rely in argument on the EU law principle of non-regression, namely that the Minister is not entitled to designate the UK as a safe third country where to do so puts international protection applicants in a less advantageous position than they would be in under

the Dublin III Regulations in circumstances where provision did not exist in national law for such designation between 2015 and 2020.

**148.** The principle of non-regression is a relatively new concept in EU law area. The CJEU has recently discussed it in the rule of law context in C-896/19 *Repubblika v. Il-Prim Ministru* (Maltese Judges) and C-791/19 *Commission v Poland* (disciplinary regime applicable to judges), both cases concerning judicial independence. It seems fair to say, therefore, that thus far, the principle of non-regression in relation to the rule of law has been closely linked to that of judicial independence. The possible wider application of the principle has not been developed. The decision of the CJEU in *Repubblika* concerning Maltese judges is relied upon on behalf of the Applicants in arguing that by reason of the principle of non-regression expounded upon in that decision, any designation of a safe third country which operates to reintroduce the concept in Irish law post the transposition deadline for the Procedures Directive and/or its repeal is ultra vires as incompatible with EU law. It is therefore necessary to consider the decision in *Repubblika* in greater detail.

**149.** The principle as enunciated in the decision in *Repubblika* falls to be understood in the context in which it was made. A fundamental constitutional principle of EU law is the rule of law, a value common to the Member States, enshrined in Art. 2 TEU. It is long established that the EU and the EC before it is a community based on the rule of law. The rule of law constitutes part of the very foundations of the EU and its legal order. Mutual trust which is integral to the operation of the EU legal order is anchored on common values contained in Article 2 TEU upon which the EU is founded and which all Member States are bound by. It is therefore a condition of membership that the rule of law will be respected within the domestic legal order of each Member State.

**150.** From my reading of the *ratio* of the judgment in *Repubblika* insofar as the principle of non-regression is concerned, the obligation for Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law precludes Member States from adopting and enacting national legislation and measures on the organization of justice, which are such to constitute a reduction in the protection of the Article 2 TEU value of the rule of law in that Member State.

**151.** At its core *Repubblika* was about judicial independence, the interpretation and the material scope of Articles 2 and 19 (1) TEU and Article 47 of the CFR. While the decision in *Repubblika* is authority for the proposition that there is now a recognised prohibition in EU law against Member States falling below the minimum standard of compliance with Article 2 values upon which accession to Union membership is conditioned, it is unclear what application this principle might have for issues arising in this case in respect of safe country of origin designation.

**152.** While the judgment in *Repubblika* may signify a new and important approach by the CJEU in reading Articles 2, 19 and 49 TEU together as obliging the Member States to ensure national non-regression in the protection of the founding values, it is nonetheless a principle which only finds application in respect of core values which are fundamental to the rule of law upon which mutual trust between Member States of the EU is built. It is therefore difficult to understand the contention that the principle of non-regression is offended by the adoption of a measure by the State which is expressly contemplated by EU law.

**153.** The argument advanced on behalf of the Applicants, if correct, would mean that a Member State is prohibited by Article 2 of TEU from enacting legislation which may have the effect in the Member State concerned of adversely affecting certain applicants' prospects of having their protection applications determined within the territory of the EU where they benefit from a right to asylum protected under Article 18 of the CFR and a closely regulated regime which ensures important minimum standards operate, even though EU law expressly permits the application of a safe third country concept, subject to safeguards the presence of which operate as conditions precedent to reliance on the concept.

**154.** It seems to me that Article 18 cannot be read as preventing the designation of a safe third country when designation is expressly contemplated by the Procedures Directive itself (and for that matter by the subsequent Recast Directive applicable to other Member States). It is important to recall that Article 18 articulates a right to have an application for international protection examined in line with applicable law. Article 18 was described in C-821/19 *Commission v Hungary Commission v Hungary* (at para. 132) as guaranteeing "*the fundamental right to apply for asylum in a Member State*", and in C-673/19 *M and others,* (para. 40) as encompassing "*the principle of non-refoulement*" but the application of a safe

third country concept in accordance with EU mandated preconditions is not incompatible with Article 18 rights.

**155.** Given that EU law expressly permits and continues to permit the operation of a safe third country designation in the organisation of the domestic international protection systems of each Member State, I am satisfied that the emerging principle of non-regression does not assist the Applicants. There is no common, fundamental value of EU law which would preclude a Member State from providing for the application of a safe third country concept, provided the mandatory requirements of EU law in relation to its operation are adhered to. The principle of non-regression which finds expression in cases such as *Repubblika* has not been advanced to a point where it might be relied upon in judicial review proceedings to ground a finding of incompatibility with EU law by reason of the reintroduction of a safe third country designation regime which is not, *per se*, itself incompatible with the EU legal order.

*Is the Power to Designate Unlawful in the Absence of Safeguards Mandated under Article 38 of the Recast Procedures Directive?*

**156.** As set out above, the Dublin III Regulations provide for the retention of the safe third country concept on condition of compliance with the rules and safeguards laid down in the Recast Procedures Directive, which for their part import application of the safe third country concept only when the Member State is satisfied that there is no risk of serious harm as defined in the Recast Qualification Directive. As found in C-616/19 *M.S. v. Minister for Justice and Equality* insofar as asylum procedures are concerned Ireland is subject to the combined application of the Procedures Directive and the Dublin III Regulation (para. 29). As Ireland is bound by the Dublin III Regulations, however, this begs the question as to whether Ireland is bound by the requirements of the Recast Procedures Directive pertaining to the application of the safe third country concept even though it has not adopted the Recast Procedures Directive by operation of the Dublin III Regulations and, if so, whether there is a gap between the safeguards provided in s. 72A of the 2015 Act (as amended) and the requirements of the Recast Procedures Directive such that the designation of the United Kingdom of Great Britain and Northern Ireland is incompatible with the requirements of EU law.

**157.** The Respondents contend that insofar as Article 3(3) of the Dublin III Regulations makes the right to send an applicant to a safe third country subject to the rules and safeguards laid down in the Recast Procedures Directive, this should be read as merely making clear that

Member States retain the right to send an applicant to a safe third country notwithstanding that the provisions of the Dublin III Regulations may apply to a situation. It is further contended, in the alternative, that to the extent that Article 3(3) of the Dublin III Regulations may operate to require Ireland to observe the rules and safeguards in the Recast Procedures Directive, such an obligation only arises where Dublin III applies and does not apply to the determination that an application is inadmissible per se. It is contended that Dublin III Regulations have no relevance to these proceedings where there is no question of the Applicant being transferred to another Member State under the provisions of that measure. It is squarely denied that the provisions of Article 38 of the Recast Procedures Directive apply to Ireland.

**158.** I cannot accept the Respondents' contentions regarding the nature and effect of the provisions of the Dublin III Regulations. While it is indeed true that the Dublin III Regulations are designed to determine where responsibility lies as between Member States for determining an application, fundamental and inherent to the essence of the Dublin III Regulations is the right of a protection applicant to have the application determined within the territory of a single, responsible member state. Article 3(1) clearly, in express terms and using plain English, provides for a right to have an application for international protection made within the territory of a Member State examined by a Member State. Article 3(1) makes it mandatory ("*Member States shall examine any application*") that an application for international protection by a third-country national or a stateless person who applies on the territory of any member state be examined by a single Member State. While the Dublin III Regulations thereafter provide for a system for determining which Member State is responsible, the only exception to the obligation of the responsible Member State as determined in accordance with Dublin III Regulation criteria is that provided for at Article 3(3).

**159.** As I read it, Article 3(3) does not operate to merely signal that the safe third country concept remains available, as the Respondents posit, but rather makes the right of any member state to rely on that concept "*subject to*" the rules and safeguards laid down in the Recast Procedures Directive. The plain meaning of the language of the provision is therefore to permit reliance on the concept provided the conditions specified in the Recast Procedures Directive are complied with. This being so, it follows that the risk of serious harm as defined under the Recast Qualifications Directive must be excluded where reliance is placed on the safe third country concept consequent upon the terms of Article 38(1)(b) of the Recast Procedures

Directive which imports this requirement by way of enhanced protection in addition to that previously provided under Article 27 of the Procedures Directive.

**160.** I am not persuaded that a case for departing from the plain language of Article 3(3) of the Dublin III Regulations is made out. I consider the construction urged on behalf of the Respondents so strained as to be unacceptably artificial. Article 3(3) of Dublin III Regulations permits a departure from an obligation to assess the international protection application only where a safe third country is identified in accordance with the heightened standards prescribed by way of safeguard for protection seekers within the territory of member states of the EU. In this way the Dublin III Regulations sets a common minimum standard for any protection seeker applying within the territory of a Member State that they shall not be removed from in reliance on a safe third country designation unless a prescribed level of protection is available in that third country.

**161.** It is recalled, as set out above, that the Dublin III Regulations have as an express objective to seek to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter as well as the rights recognised under Articles 1, 4, 7, 24 and 47 of the Charter (Recital 39). An interpretation which recognises the obligation on member states to ensure that a protection application is properly determined is not only the one which flows from the words used but is also that which sits most comfortably with the full observance of the right to asylum guaranteed by Article 18 of the Charter as well as the rights recognised under Articles 1, 4, 7, 24 and 47 of the Charter, this being a declared objective of the Dublin III Regulations. A contrary interpretation to that supported by the plain language of Article 3(3) of the Dublin III Regulations falls foul of the objective recognised in C-616/19 *M.S. v. Minister for Justice and Equality* of limiting secondary movements of asylum applicants between Member States, where such movement would be caused by differences in the legal frameworks of those Member States. As pointed out by the CJEU in *M.S.*, the Dublin III Regulation was specifically intended to prevent such movement by establishing uniform mechanisms and criteria for determining the Member State responsible for examining an application for international protection (see para. 51).

**162.** In deciding whether the Dublin III Regulations operate to make any safe third country system subject to the requirements of the Recast Procedures Directive and thereby the Recast Qualifications Directive insofar as application of the concept is concerned, it further bears note

that at Recital 41 of the Dublin III Regulations reference is made to Articles 3 and 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU. It is recorded in Recital 41 that those Member States, namely the United Kingdom and Ireland, had notified their wish to take part in the adoption and application of the Dublin III Regulation. Recital 41 clearly signals a voluntary assumption of additional obligations arising under the Dublin III Regulations, notwithstanding reservations previously reflected in Protocol No. 21 and in accordance with provision to do so recognised under the terms of that Protocol.

**163.** As to whether there is a gap in Irish law and its compliance with EU law created by the non-implementation of the Recast Procedures Directive, it seems to me that while there is a significant overlap between Article 38(1)(a)-(e) of the Recast Procedures Directive and s. 72A(2) of the 2015 Act (as amended), it is nonetheless clear that serious harm as defined in Article 15 of Directive 2011/95/EU as consisting of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict is not provided for in directly equivalent terms in s. 72A of the 2015 Act. In particular, s. 72A(2) of the 2015 Act (as amended) does not specifically preclude designation as a safe country on the basis of risk of the death penalty or execution or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

**164.** It requires to be considered, however, that in the Irish context the safe third country designation provided for in s. 72A of the 2015 Act operates in conjunction with s. 21 of the 2015 Act (as amended) and s. 50A (non-refoulement where an inadmissibility determination has been made). It is therefore necessary to consider whether any lacuna is addressed through the operation of the statutory scheme as a whole.

**165.** By reason of the application of s. 21(2) and (17), no individual applicant will find their case rejected as inadmissible if there is a demonstrated risk that they will be subjected in that country to the death penalty, torture or other inhuman or degrading treatment or punishment. Similarly, under s. 50A a person shall not be expelled or returned in any manner whatsoever to the frontier of a territory where, in the opinion of the Minister— (a) the life or freedom of the

person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or (b) there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

**166.** It seems to me that by operation of s. 21(2) & (17) and s. 50A of the 2015 Act the potential for a gap between the requirements of Irish law and the requirements of the Recast Directive insofar as the application of the safe third country concept is concerned is narrowed to an apparent failure to exclude transfer to a country where there may be serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

**167.** Although many risks of serious harm as envisaged by Article 15(c) of the Recast Qualifications Directive may also be covered by a prohibition on torture and inhuman and degrading treatment and one might struggle to identify an example of a case which falls within protection against serious harm but outside s. 72A(2)(a)-(d) when combined with s. 21(2)(c) and s. 21(17) of the 2015 Act (as amended) together with s. 50A of the Act, in my view the protections provided under the 2015 Act are not so broadly drawn as to capture all incidents of serious harm within the meaning of Article 15(c) of the Recast Qualifications Directive.

**168.** I have concluded therefore that there is a gap between Irish and EU law such that s. 72A(2) and s. 21 combined with s. 50A of the 2015 Act (as amended) fail to provide for the full extent of the safeguards mandated under Article 38(1)(b) of the Recast Procedures Directive as applicable where a Member State is excused from its obligations to ensure that an asylum claim is determined in accordance with common minimum standards in a Member State.

**169.** In my view these safeguards are binding on Ireland by reason of the State's adherence to the Dublin III Regulations and the express terms of Article 3(3) of the said Regulations. The failure to require the Minister to be satisfied that a person would not be subjected to serious harm on transfer to a third country, if designated as safe, means that Ireland is in breach of the requirements of EU law, specifically Article 3(3) of the Dublin III Regulations. The designation of the United Kingdom of Great Britain and Northern Ireland under s. 72A of the 2015 Act (as amended) is therefore unlawful and *ultra vires* the powers of the Minister.

*Is designation unlawful by reason of breach of the review requirement?*

**170.** Breach of a requirement to review was at the heart of the Applicants' cases as pressed during the hearing before me. The review ground was invoked as a separate ground of challenge to that of *vires* arising from an asserted failure to review the designation of the UK as a safe third country pursuant to s. 72A(4) of the 2015 Act.

**171.** In the clear, precise and express language of s. 72A(4), the Minister is required to review, "*on a regular basis*" "*the situation in a country designated under subsection (1*)" in "*accordance with subsections (2) and (3).*" The frequency of the review is not specified under s. 72A or elsewhere in the 2015 Act (as amended). Nor is the word "*review*" used in either the Procedures Directive or the Recast Procedures Directive (with regard to the safe third country concept). Provision is however made in the Recast Procedures Directive for regular review of a safe country of origin designation (Article 37(2)), without specifying frequency.

**172.** While the frequency of the regular review required is not specified in s. 72A(4) of the 2015 Act (as amended), there is no ambiguity as to what a review should entail under domestic law. The statutory requirement pursuant to s. 72A(4) is for a regular review "*in accordance with subsections (2) and (3)*". This is a full systemic consideration of the position in the country designated as to whether a person seeking to be recognised in the country concerned as a refugee will be treated in accordance with principles in that country which ensure that (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion, (b) the principle of non-refoulement in accordance with the Geneva Convention is respected, (c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment, as required by international law, is respected, and (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention. As a matter of domestic law, the Minister's review of these considerations on a regular basis must have regard to up-to-date information from a range of sources including in particular information from (a) other Member States of the European Union, (b) the European Asylum Support Office, (c) the High Commissioner, (d) the Council of Europe, and (e) such other international organisations as the Minister considers appropriate.

**173.** Where a review within the meaning of s.72A(4) is carried out, one would expect to see it documented in much the same way as the assessment leading to the original designation order was documented. No such documentation has been adduced to evidence a statutory review under s. 72A(4). Indeed, it appears to be accepted on the Affidavit evidence adduced that the Minister has not engaged in a formal review of the s. 72A designation of the United Kingdom of Great Britain and Northern Ireland in accordance with s. 72A(4) of the 2015 Act (as amended) since June, 2020 when the 2020 Designation Order was made.

**174.** As the review should address the same statutory conditions for designation as were considered when the original decision was made, the general review referred to in affidavit on behalf of the Respondents patently does not meet the requirements of s. 72A(4) of the 2015 Act (as amended). This does not necessarily mean, however, that the Minister is in breach of duty under s.72A(4) given that the frequency with which a review is required is not specified.

**175.** Insofar as the review ground constitutes a separate and distinct challenge to the continuing designation of the UK in the light of developments concerning the Rwanda Policy based on a breach of a duty to regularly review in accordance with s. 72A(4), I am satisfied that it is no longer necessary for me to determine this issue to the resolve the dispute between the parties in either of these two proceedings in the light of my conclusions as to the *vires* of the designation as set out above. Accordingly, by reason of the doctrine of judicial restraint, I purposely refrain from making any determination on the frequency with which a review in accordance with s. 72A(4) of the 2015 Act is required. This question should await a case in which it properly arises as necessary to the resolution of the dispute.

**176.** There is, nonetheless, a sense in which I see the review requirement as relevant to and informing my consideration of the *vires* of the 2020 Designation Order. As this is closely linked with my findings that the 2020 Designation Order is *ultra vires* as in breach of EU law by reason of the failure to transpose the requirements for application of a safe third country concept prescribed under Article 38(1)(b) of the Recast Procedures Directive, it is appropriate to set out why I consider the review issue to impact negatively on the vires of the 2020 Designation Order and how it is that I consider it reinforces my conclusion that 2020 Designation Order is unlawful as a matter of EU law.

**177.** As noted above, in their terms neither the Procedures nor the Recast Procedures Directive mandate any particular type of formal or periodic review with regard to the safe third country concept. While the recitals to the Recast Procedures Directive (Recitals 47 & 48) appear to envisage regular reviews in relation to safe country of origin and safe third country concepts, it mandates regular review in its operative part only in relation to safe country of origin designation (Article 37(2)) (as considered further in *WPL v Minister for Justice and Equality & Ors.* [2024] IEHC 184). It is nonetheless clear that EU law requires a member state applying a safe third country concept to be "*satisfied*" that the requirements for designation as a safe third country mandated under EU law are present when applying the concept.

**178.** During argument counsel for the Respondents queried rhetorically "*when*" it was contended that a review requirement was triggered referring to the various developments in the United Kingdom since 2022, none of which it seems have yet resulted in the actual removal of a protection applicant in reliance on the Rwanda Policy. It seems to me that posing the question in this way is to misunderstand the nature of the obligation on Member States deriving under EU law.

**179.** To my mind the requirement to be "*satisfied*" under the Procedures Directive (and Recast Procedures Directive) is couched as a continuing obligation. It is not met by the State being satisfied when making a designation order that a state qualifies as a safe third country but not so satisfied when giving effect to the safe third country concept in subsequent cases. Accordingly, although EU law does not prescribe any particular period within which designation must be reviewed or provide in terms for a review at all, as a matter of logic, for a member state to remain properly "*satisfied*" that there is compliance with the matters identified in Article 27 of the Procedures Directive (or Article 38 of the Recast Procedures Directive, where it applies), some form of assessment is required on an ongoing basis or in any event before relying on the safe third country concept in a given case to ascertain whether there are changed circumstances in the third safe country in question which have potential to impact on the application of the safe third country concept to it. An interpretation of the obligation under the Directives as a continuing obligation which applies up to the time of transfer is also one which sits most properly with the approach of the ECHR in cases such as *Ilias v. Hungary* (2019) 71 EHRR 6 where it was found that national authorities must carry out of their own motion an up-to-date assessment of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice (at para. 141 of judgment).

**180.** The Procedures Directive (Article 27(2)(b)) provides in a non-prescriptive manner that rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. The rules of methodology are a matter for national law but such methodology must include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe. Similar provision is made under Article 38(2) of the Recast Procedures Directive.

**181.** In my view the inclusion of a regular review in s. 72A(4) of the 2015 Act, whilst clearly influenced by the requirements of the Recast Procedures Directive in relation to safe country of origin designation, also flows, at least in part, from an appreciation by the State when enacting the legislation of the continuing nature of the duty to be satisfied that the prescribed minimum conditions precedent to applying the safe third country concept remain present when deciding on whether an application is admitted to the Irish international protection system for processing and when a decision is made to return an individual. To this extent the review requirement is not an additional protection under Irish law not otherwise obligated by EU law, albeit that the requirements of EU law might be discharged without a full systemic review in accordance with s. 72A(4) provided the case-by-case review conducted on an individual basis is sufficiently thorough and addresses both the prescribed considerations under Article 38(1)(a)-(e) of the Recast Procedures Directive, presuming I am correct in my findings as to the effect of Article 3(3) of the Dublin III Regulations, or Article 27(1)(a)-(d) of the Procedures Directive if I am wrong in my primary conclusion.

**182.** It is maintained on behalf of the Minister that the State complies with the obligations in Article 27 of the Procedures Directive through a combination of both case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe such that there is no breach of EU law evidenced in the case of the decisions made in respect of Applicant A and Applicant B by reason of the continuing designation of the United Kingdom of Great Britain and Northern Ireland as a safe third country. The Applicants do not accept, however, that an individual assessment on a case-by-case basis as provided for in Irish law is a substitute for the systemic review which is mandated by EU and domestic law when relying on designation of a third country as generally safe. It seems to me that neither position is fully correct.

**183.** Whether the EU law obligation to be satisfied as to the existence of conditions precedent to reliance on the safe third country concept are discharged on a case-by-case review depends on what is entailed in that review and whether it meets the requirement to consider all matters identified at Article 27(1)(a)-(d) of the Procedures Directive and/or Article 38(1)(a)-(e) of the Recast Procedures Directive.

**184.** Consideration of our domestic provisions establish that there are indeed several layers of decision making before effect can be given to the safe third country concept in any given case in this jurisdiction. In the first instance, there is a systemic assessment for the purpose of a decision to designate in accordance with s. 72A(1). The evidence establishes that this designation is then maintained under "*general*" review. It is clear from s. 72A(5) that the designation may be "*amended*" or "*revoked*". Provision is made for a full systemic review in accordance with s. 72A(4), albeit on the evidence no such review has as yet occurred in the case of the designation of the United Kingdom of Great Britain and Northern Ireland.

**185.** The ongoing "*general*" systemic review relied on by the Respondents is combined with an individual assessment on a case-by-case basis whereby under s. 21(2) of the 2015 Act the State must be satisfied that the applicant has a "*sufficient connection*" with the country concerned on the basis of which it is reasonable for him or her to return there and will not be subjected in that country to the death penalty, torture or other inhuman or degrading treatment or punishment, and will be re-admitted to the country concerned.

**186.** Systemic assessment by way of general review is further combined with a prohibition on refoulement in s. 50A of the 2015 Act (as amended) requires a case by case individual assessment by providing that the Minister cannot make a return order in the case of an applicant whose claim has been found inadmissible where she is of the opinion that (a) the life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or (b) there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. In this context, the Minister must consider whether there is a risk of either eventuality. An applicant in any given case may make the Minister aware of changes which are relevant to an opinion on either s.50A(1)(a) or (b) in accordance with s.50A(3).

**187.** Having considered the terms of each of the provisions which comprise the Irish statutory scheme I am of the view that there remains a gap between the matters considered within the parameters of s. 21 and ss. 50A and 51A and the requirements of EU law which the State is required to be satisfied as to before a safe third country concept is applied. As I read the statutory scheme no provision is made for the Minister or the Tribunal to be satisfied as to whether Article 27(1)(d) of the Procedures Directive (as reflected in s.72A(2)(d) of the 2015 Act) is met with regard to the existence in the third safe country of a possibility to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention nor Article 38(1)(b) of the Recast Procedures Directive as regards the risk of serious harm within the meaning of Article 15(c) of the Recast Qualifications Directive.

**188.** As seen in the case of Applicant A in the s. 50A report prepared in January 2023, this did not operate to preclude the Minister from nonetheless purporting to consider all matters prescribed under s.72(A)(1) which would include the existence in the third safe country of a possibility to request refugee status. In that Report it was concluded:

> *"Having considered the country of origin information on the UK, I am satisfied that the UK has been correctly and properly designated as a safe third country, pursuant to section 72(A)(1) of the Act of 2015, meaning that the Minister considers the UK to meet and to continue to meet the criteria established in section 72(A)(2) of the Act of 2015."*

**189.** It appears from this that the Minister reviewed the designation of the UK before deciding to make a return order in this case, even though this is not provided for under the statutory scheme. It seems to me that were it not for the requirement to be satisfied that there was no risk of serious harm upon removal to a designated safe third country which has been omitted from s.72A(2) of the 2015 Act, a review by the Minister to establish that the criteria for designation continue to be met would suffice for the purpose of the requirements of EU law provided such a consideration is provided for in law and the Minister had vires to conduct this review. Even so, there is a failure to review for the purpose of complying with Article 38(1)(b) of the Recast Procedures Directive.

**190.** As the review requirement under s. 72A(4) arises by way of methodology adopted domestically as the means by which the State discharges obligations under Article 27 of the

Procedures Directive, the failure to conduct a full formal review in accordance with Article 27 does not necessarily render the system non-compliant with EU law unless a similar obligation derives under EU law. It seems to me that the State is required, however, to be satisfied as to ongoing compliance with the requirements of Article 27(1) of the Procedures Directive (or as I have decided above, Article 38(1) of the Recast Directive) when relying on a safe third country designation. In my view the various layers of assessment provided for in s. 21 and s. 50A and s. 51A of the 2015 Act (as amended), do not discharge this ongoing obligation because there is no direct equivalence between the safeguards mandated under either the Procedures Directive or the Recast Procedures Directive and those provided for in sections 21, 50A or 51A of the 2015 Act (as amended).

**191.** Furthermore, no residual power vests in the Minister under s. 51A to refuse to make a return order where an application has been determined as inadmissible under s. 21(11) and the Minister is not of the opinion that the conditions for prohibition of refoulement specified in s. 50A are met. Accordingly, the Minister has not been vested with a power to consider whether the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention in the safe third country (as required by Article 27(1)(d) of the Procedures Directive and Article 38(1)(e) of the Recast Directive) or there is a risk of serious harm within the meaning of Article 15(c) of Recast Qualification Directive (as required by Article 38(1)(b) of the Recast Procedures Directive as applied by Article 3(3) of the Dublin III Regulations). Once an application is found inadmissible under s. 21(11) and return is not prohibited as a breach of the principle of non-refoulement as provided for in s. 50A of the 2015 Act (as amended), the Minister is obliged as a matter of law to make the return order in accordance with s. 51A.

**192.** It seems to me therefore that the rules of methodology prescribed under the 2015 Act (as amended) are not sufficient to ensure that the Minister may be properly satisfied that the minimum conditions or safeguards specified under Article 27(1) of the Procedures Directive and/or Article 38(1) of the Recast Procedures Directive. I have concluded that both in their terms and as applied, ss. 21, 50A, 51A and 72A of the 2015 Act (as amended) do not ensure compliance with the requirements of EU law as to the application of a safe third country concept in finding an application for international protection inadmissible and providing for the making of a return order by reason of a failure to ensure a thorough review to ensure

compliance with EU at the point in time when the decision to return is made applying a safe third country concept.

**193.** Accordingly, if I am wrong above in concluding that the Minister has designated the United Kingdom of Great Britain and Northern Ireland as a safe third country in breach of mandatory requirements of EU law by reason of the failure in Irish law to require that designation be applied when the State can be satisfied that there is no risk of serious harm to an applicant on removal to the third country in accordance with Article 38(1)(b) of the Recast Procedures Directive as applied by Article 3(3) of the Dublin III Regulations, I am nonetheless also satisfied that the State has not adopted rules of methodology which are sufficient to ensure that an applicant for international protection is not returned to a third country in breach of the minimum requirements of EU law (be those requirements specified under the Procedures or the Recast Directives).

**194.** While the Minister reviewed designation to ensure compliance with the conditions of s. 72A(1) of the 2015 Act prior to the making of the Return Order in Applicant A's case when considering making a return order as apparent from the terms of the s. 50A report referred to at paragraph 58 above, it seems to me that there is ambiguity as to whether this review is *intra vires* the Minister's statutory powers, even though it is required as a matter of EU law. It seems to me to be seriously questionable whether the Minister had power to conduct a full consideration of the requirements of s. 72A(1) having regard to the mandatory terms of s. 51A. The Minister's only potential option under the scheme of the 2015 Act, if satisfied that there was non-compliance with s. 72A(1) or any part of it, was to refuse to apply the mandatory provisions of s.51A on the basis that they were incompatible with EU law. This is a question I return to in my consideration of whether there is a duty to conduct a broader rights analysis before rejecting an international application as admissible and making a return order with the effect that the claim for protection can no longer be determined in Ireland below.

*Is there an obligation on the Minister to consider risk of rights violations before making a return order under s. 51A?*

**195.** It is the Respondents' case as pleaded and argued that it is clear from s. 21(11) of the 2015 Act that the Minister is under a mandatory obligation to determine an application to be inadmissible where the Tribunal has affirmed a recommendation of the IPO that the application

should be determined to be so. They point out that the Minister has no power to undertake any rights analysis before doing so as the Minister does not retain any discretion to depart from the inadmissibility decision once it has been affirmed by the Tribunal.

**196.** It seems to me having regard to the language of s. 21(11) that the Respondents' submission in this regard is correct. Similarly, however, there is no power vested in the Tribunal to undertake a rights analysis beyond the specific analysis provided for under s. 21(2)(c) in light of s.21(17) & (18). Accordingly, while I agree with the Respondents' contentions that the case law cited on behalf of the Applicants does not support the proposition that the Minister is obliged to consider the question of a risk to fundamental rights at the stage of a s. 21(11) determination, I do not accept their proposition that to the extent that any obligation arises to consider the question of a risk to fundamental rights at the stage of a determination of inadmissibility, this is placed, as a matter of national law, on the IPO and/or the Tribunal. The IPO's decision-making role, as provided for under s. 21 of the 2015 Act (as amended), is no more expansive than that of the Tribunal and is curtailed to the specific competence prescribed in the provision giving it decision making power.

**197.** The Tribunal clearly found in Applicant B's case that it had no role in conducting a wider rights analysis, stating that this was a matter for the Minister. It seems to me that the Tribunal is at least partially correct in this finding. In my view, the Tribunal, as a creature of statute, is limited to the powers conferred on it under s. 21. In this regard, the question it must determine is circumscribed. It quite simply has not been vested with competence to conduct a broader rights analysis unless one applies by means of the doctrine of direct effect. Given that Directives leave to the Member States the modalities of implementation, I see no scope for the application of doctrine of direct effect to vest the Tribunal with a broader rights scrutiny jurisdiction.

**198.** In consequence, when the matter comes before the Minister for the purpose of making a return order which is subject only to the prohibition on non-refoulement provided for in s. 50A, it does so in circumstances where no broader or effective rights analysis has occurred. Given the constraints of s. 51A, it seems to me that the Tribunal is not correct in its recorded position that a wider rights assessment is a matter for the Minister. None is provided for by statute at that stage of the process either, albeit on the evidence in Applicant B's case one was done on a purportedly "*without prejudice*" basis.

**199.** It must be questionable how real or meaningful a "*without prejudice*" rights analysis is when the Minister is not vested with a power to refuse to make a return order on foot of same and where fundamentally the Minister is of the understanding that no such analysis is required. As far as I can see no provision is made for a broader rights analysis at any stage of a process which is liable to result in the removal of a person from the State without a protection application being determined. The fact that one may purport to take place notwithstanding a lack of legal basis on a "*without prejudice*" or gratuitous basis does not fully address the concern a competence gap gives rise to.

**200.** It seems to me that the Respondents' plea that the statutory scheme as a whole provides for the necessary consideration in respect of Article 3 ECHR and/or Article 4 of the EU Charter before a person is returned to a country following a finding of inadmissibility ignores the issue regarding a broader rights analysis and is also at odds with the stated position of the decision makers in their decisions as evidenced in the cases before me. I have not identified where in the process established under ss. 21, 50A, 51A and 72A of the 2015 Act (as amended) provision has been made for such consideration to take place. The evidence in the two cases before me demonstrates that neither the Tribunal nor the Minister consider that they have any role in this regard under the current statutory framework, albeit both engage in some consideration of rights notwithstanding their stated positions. Indeed, while protesting that the Minister has no role in a wider rights analysis, as seen above the Minister nonetheless carried out a rights analysis on a "*without prejudice*" basis in Applicant A's case and seems to seek to defend these proceedings on the conflicting basis that there is no requirement to conduct such an analysis but in any event one has been done.

**201.** The lack of clarity as between the different decision makers in the process as to where a rights analysis falls to be conducted is unsatisfactory. From a strictly legal perspective, however, it seems to me that the statutory process does not afford real capacity for such an analysis at any stage because the IPO and Tribunal's discretion is constrained by the parameters of the question to be decided under s. 21 whereas the Minister's discretion is statutorily constrained under s. 51A.

**202.** A serious issue arises, in my view, as to whether a process which culminates in the removal of an international protection seeker from the State can be legally sound in the absence

of provision being made for a broader rights analysis in a manner which is capable of preventing removal consequent upon a finding that such removal would result in a disproportionate or unlawful interference with rights (see *Ilias v. Hungary* (2019) 71 EHRR 6 and *Uner v. Netherlands* (2007) 45 EHRR 14).

**203.** I do not accept the Respondents' contention that requiring such a rights analysis would offend Article 27 of the Procedures Directive. The Procedures Directive is but one source of obligations on the State. The State has separate obligations under the Constitution, the Charter and the Convention which extend beyond the conditions mandated under the Directives and are not supplanted by the Directives (be that the Procedures Directive or the Recast Procedures Directive). It is a matter for the State to make provision for discharge of its obligations in the decision-making processes it prescribes.

**204.** Whilst statutory discretions require to be exercised in a manner which protects constitutional rights, respects rights safeguarded under the Convention (in accordance with s. 3(1) of the European Convention on Human Rights Act, 2003) and gives effect to the requirements of EU law, a discretion or power to conduct a rights analysis and to decide in consequence that a person should not be returned to a safe third country cannot be written in either under constitutional jurisprudence or the jurisprudence of the European Convention on Human Rights Act, 2003. Nor does the Constitution or the European Convention on Human Rights Act, 2003 permit the Minister to simply disregard a mandatory duty imposed by statute which has not been invalidated by a court.

**205.** Although consideration was given to rights under the Charter and the Convention by the Tribunal in deciding the claims were inadmissible and by the Minister when deciding to make a return order, I repeat my view that there is a real question as to the reality or efficacy of such consideration in circumstances where the jurisdiction under s. 21 is limited and s. 51A mandates a return order, subject only to s. 50A. Indeed, it is pleaded in Opposition papers filed in these cases that pursuant to s. 51A of the 2015 Act, the Minister was obliged to make the Return Order subject to the formation of the opinion required under s. 50A of the 2015 Act and a consideration of the prohibition on refoulement under that provision.

**206.** No clear or express provision has been made for a residual discretion to refuse to make a return order which it has been determined would be in breach of protected rights other than

those captured by a prohibition on refoulement. It is difficult to see how this could be consistent with fundamental rights protection afforded under Irish law. Whatever about the limitations on the capacity to disapply legislation under constitutional jurisprudence or the Convention, however, it is true that the position under the Charter is somewhat different in the light of the decision of the CJEU in C-378/17 *Minister for Justice and Equality and Anor. v. Workplace Relations Commission* [2019] 2 C.M. L.R. 13. Even though that case involved the disapplication of a statutory exclusion rather than the creation of a discretionary power to refuse to make a return order which is mandatory where statutory criteria for same are met, the broad *ratio* of that case nonetheless has relevance of the issues arising in these proceedings.

**207.** The Minister has proceeded in the case of Applicant A on the basis that the Charter does not apply because the UK is no longer a member of the EU. It seems to me that the conclusion that the Charter has no application is an error in law as it is established that the Charter applies within the field of operation of EU law. In this regard I would distinguish the decision *in S.A. v. Minister for Justice and Equality* [2016] IEHC 462 (Humphreys J.) on the basis that he was there concerned with a deportation at the end of an international protection assessment process following the rejection of the claim which is not governed by EU law. While EU law does not apply to considerations on refoulement in the case of a failed asylum seekers facing deportation at the end of the asylum process because Ireland has not adhered to the Return Directive 2008/115/EC (this being the issue considered in *S.A. v. Minister for Justice and Equality*), the prohibition against refoulement applies as a matter of EU law in the case of an application of the safe third country concept by operation of Article 27(1)(b) of the Procedures Directive and/or Article 38(1)(c) of the Recast Procedures Directive.

**208.** I am satisfied that in examining a claim for international protection, even for the purposes of making an admissibility determination and return order, the State is acting in the field of EU law and is subject to the Charter. While a return order is made at a point in time where the claim has been determined as inadmissible, the questions as to whether a country qualifies as a safe third country and the prohibition against refoulement as prescribed under EU law is respected such that a return may lawfully be made remain regulated by EU law.

**209.** This being the case, the Minister is vested with a power deriving from EU law to refuse to make a return order by disapplying the mandatory provisions of s. 51A(1) unless satisfied that to do so does not offend against fundamental rights provisions of EU law or indeed any

other provision of EU law. This conclusion is supported by the decision of the CJEU in the case of C-378/17 *Minister for Justice and Equality and Anor. v. Workplace Relations Commission*. That case is authority for disapplying a national provision which is inconsistent with EU law on the facts of a given case (see para. 33 of the judgment). It is also reiterated in the judgment that the duty to disapply national legislation which is contrary to EU law is owed not only by national courts, but also by organs of State – including administrative authorities – called upon, within the exercise of their respective powers (see para. 38).

**210.** Accordingly, were the Minister to conclude that giving effect to a return order would give rise to a breach of EU law, in those circumstances it follows that the Minister would be under a duty to disapply s. 51A(1) of the 2015 Act mandating the making of a return order. This leaves the issue, however, as to how the Minister may consider rights under EU law when not empowered by the statutory scheme to do so. It is noted that in this case the Minister concluded in his "*Report on the Consideration under section 50A of the International Protection Act, 2015 (prohibition on refoulement)*" in Applicant A's case, immediately prior to making the Return Order and without further consideration in view of the mandatory language of s.51(A)(1), that a refoulement consideration was not "*the appropriate vehicle*" in which to make or to consider arguments on the State's "*alleged failure to transpose Article 27(1) of the Procedures Directive where these are not directly relevant to the prohibition of refoulement in the Applicant's specific case*". In clear and unequivocal terms, it was stated "*these arguments are therefore not considered here*."

**211.** It is difficult to reconcile this statement with the requirements of EU law and the *ratio* of the judgment in C-378/17 *Minister for Justice and Equality and Anor. v. Workplace Relations Commission*. In accordance with settled caselaw of the CJEU, the rules of secondary EU law must be interpreted and applied in a manner consistent with the fundamental rights guaranteed by the Charter. Furthermore, as the UK is no longer a member of the EU, the assumption underlying the CEAS, namely that all member states complied with the Charter, could no longer be assumed in the case of the UK.

**212.** It seems to me in accordance with decisions such as that of the CJEU in joined cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim v. Federal Republic of Germany* [2019] 1 WLR 5545 and C-578/16 *PPU CK v. Slovenia* [2017] 3 CMLR 10 that the Minister should be empowered to consider whether there has been compliance with the requirements of EU law

and whether there is risk of EU rights violations before making a return order under s. 51A where sufficient basis for concern in this regard is demonstrated, this being an order made within the field of application of EU law in accordance with Article 51 of the Charter (providing for the scope of application of the Charter).

**213.** This obligation to consider compliance with EU law arises consequent upon the primacy of EU law and the duty to disapply national legislation which conflicts with EU law which duty applies, as a matter of EU law, not only to courts but to administrative decision makers and all bodies of Member States. It is further clear from the caselaw of the CJEU that there is an obligation on the State right up to the time of transfer or return to assess on the basis of information that is objective, reliable, specific and properly updated and having regard to the standards of protection of fundamental rights guaranteed by EU law, whether there are deficiencies which may be systemic or generalised or which may affect certain groups of people (see C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim v. Federal Republic of Germany* [2019] 1 WLR 5545 at para. 88).

**214.** Cases such as C- 63/15 *Ghezelbash v. Staatssecretaris van Veiligheid en Justitie* [2016] 1 WLR 3969 establish that rights considerations under EU law, even within the Dublin III system, extend beyond Article 4 Charter rights. The decision in *Ghezelbash* was cited with approval by Baker J. in *NVU v. RAT & Ors*. [2019] IECA 183 when finding that the trial judge had been in error in taking the view that the decision maker had no obligation to consider the impact of Article 8 of ECHR or Article 7 of the Charter at para. 128. Baker J. also relied on *CK v. Slovenia* and the finding that the provisions of the Dublin III Regulation must be interpreted and applied in a manner consistent with the fundamental rights guaranteed by the Charter.

**215.** While I am satisfied that the Minister is required to conduct a broader rights scrutiny at the point of return in accordance with EU law where the need for same arises on the case made, I consider that the Minister is precluded by the mandatory terms of s. 51A(1) of the 2015 Act from doing so as no residual discretion is provided for. This in contrast with the situation under s. 4(7) of the Immigration Act, 2004 considered by the Supreme Court in *Luximon v. Minister for Justice* [2018] IESC 24 where a discretionary power arose for consideration. I do not consider that the ratio in C-378/17 *Minister for Justice and Equality and Anor. v. Workplace Relations Commission* can properly be extended to vest the Minister with the necessary power

absent a transposing measure as the means of transposition is a matter for the State. It seems to me that by its failure to properly provide for a power to conduct a broader rights scrutiny in cases where one is warranted on the basis of the material relied upon, Irish law is not compatible with EU law obligations thereby rendering the Safe Third Country Designation system unlawful.

**216.** Whether the Minister's error as to the application of the Charter or the lack of a legal basis providing for such consideration materially affected the decision arrived at in the case of Applicant A remains an open question because, as apparent from the terms of his Section 50A Report, the Minister addressed both Convention rights and Charter rights in broad terms under the umbrella of a without prejudice assessment notwithstanding the contention that the Charter did not apply. It is clear, as referred to by the Supreme Court in *MK Albania v. Minister for Justice and Equality* [2022] IESC 48 that the removal of a precarious resident in accordance with law will only be a breach of the Article 8 right to private life in exceptional circumstances (para. 30) and in the case of Applicant A, little was offered in terms of factual grounds for a breach of said rights beyond the issue of a data privacy breach.

**217.** In circumstances where I have already found that the 2020 Designation Order which underpins the entire decision-making process is not compatible with EU law and my conclusions in this regard are supported by my conclusion that a broader rights analysis is required as a matter of EU law there is little to be gained by any further consideration of whether the decision to make a return order was separately unsustainable as irrational or in breach of rights.

*Is designation rendered unlawful by reason of breach of Data Protection Rights in its implementation?*

**218.** As set out above, from the outset, the IPO engaged in data exchange with the UK authorities in relation to both applications for protection. This has been raised as an issue on behalf of both applicants on the basis that such exchange involving a transfer of data outside the territory of the EU constitutes a breach of Regulation (EU) 2016/679 ("GDPR").

**219.** Applicant A seeks declaratory relief in these proceedings to the effect that his data protection rights were breached in the exchange of communications outside the territories of

the EU. In the grounds advanced for seeking this relief he invokes data protection issues only regarding the lawfulness of the designation and the rationality of the Minister's decision to make a return order but does not ground his claim for relief on a breach of his GDPR rights *per se*. Accordingly, his objective in these proceedings is not to establish a breach of his data rights but rather to challenge the return order made by the Minister. In advancing his case he highlights the fact that the Minister has improperly relied on the adequacy decisions which expressly exclude data exchanged in the immigration context.

**220.** The claim made on behalf of Applicant B differs somewhat in that he challenges the designation system with reference to the absence of data control protection. He does not seek relief for data breaches. In the submissions to the Tribunal in Applicant B's case reliance was placed on the fact that protections are contained in the Dublin III Regulation for data exchange but there are no equivalent provisions within the safe third country return system for the protection of the Applicant's data. Rights identified as protected under the Dublin III Regulation include under Article 4(l)(e) the right to be advised of the fact that competent authorities can exchange data for purposes of implementing their obligations under the Dublin Ill Regulation and the right of access to and correction of data and for hearing claims concerning protection of data.

**221.** Notably, therefore, in both cases the Applicants rely on an asserted breach of GDPR to seek to invalidate the decisions made in designating the UK as a safe third country and/or making a return order, rather than to secure a remedy in respect of a specific data breach *qua* breach of GDPR rights. The primary thrust of the arguments advanced in short order and without detailed elaboration in the hearing before me was to the effect that (i) the Minister erred in making a return order in respect of the Applicant A; and (ii) the Tribunal erred in the Applicant B's case in finding that the claim for breach of his GDPR rights was "*a matter for the Data Protection Commissioner and not for this Tribunal*" and holding that it did not impact on the admissibility of his claim under a safe third country designation. It was contended on behalf of Applicant B that as the procedural basis for returns to the UK was based on a breach of data protection rights, this was a matter for the Tribunal's consideration under a "*reasonableness*" analysis.

**222.** It is recalled that in the case of Applicant A the Report of the Minister's considerations under s. 50A addressed, on a without prejudice basis, the data rights' breaches which had been

alleged albeit expressly not accepting that alleged data protection breaches on the part of the IPO or the UK authorities could constitute a refoulement issue under s. 50A(l) of the Act of 2015. Reliance was placed on the 2014 Memorandum of Understanding and the Associated Annex on Asylum Data but also on two adequacy decisions adopted by the United Kingdom in respect of the UK on the 28th of June 2021, one under GDPR and the other for the Law Enforcement Directive.

**223.** From the terms of the Report, it appears that the Minister proceeded, at least in part, on the basis that the adequacy decisions meant that data could flow freely from the European Union to the United Kingdom where it benefits from an essentially equivalent level of protection to that guaranteed under EU law. The Minister's position did not rest on this, however, because it was pointed out that even if data protection issues arose (which was denied) these would not render the entire system for returns to the UK unsafe.

**224.** Indeed, the Minister's position was that the appropriate avenue to resolve any data protection issues was through the Data Protection Commissioner in Ireland and the Information Commissioner's Office in the UK and/or the courts, rather than through the submission of refoulement considerations for the return order mechanism.

**225.** It seems therefore that in both cases the Applicants have been referred to the Data Protection Commissioner in respect of any data protection issues which they contend arise. There is no evidence before me that they have in fact raised any issue regarding alleged unlawful transfer of data with that office or otherwise pursued a remedy in respect of an alleged breach of their data rights.

**226.** The Respondents' point of departure in opposition to these proceedings is that, by operation of Article 2(2)(a) of GDPR, the requirements of the GDPR do not apply to the processing of personal data in the course of an activity falling outside the scope of Union law. It is maintained that any transfer of the personal data to the UK for the purpose of the safe third country system, in circumstances where the Applicant's application for international protection has been conclusively determined to be inadmissible and is therefore at an end, falls outside the scope of Union law.

**227.** In its very terms, however, GDPR recognises that flows of personal data to and from countries outside the Union and international organisations occur during an activity which comes within the scope of EU law but are necessary for the expansion of international trade and international cooperation and such flows of information are not excluded from GDPR because transfer is outside the EU. It is clear this does not render such a transfer unlawful. Chapter V GDPR provides for several different legal bases for lawful transfer of personal data to third countries. Article 44 provides for the general principle that any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in Chapter V are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation.

**228.** Article 45 provides for transfers based on an adequacy decision of the Commission. An adequacy decision may be made where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Where an adequacy decision has been made, a transfer of data shall not require any specific authorisation.

**229.** In addressing the data protection concern raised on behalf of Applicant A in relation to the exchange of data with the UK in respect of the return process in her refoulement/return consideration, the Minister referred to an adequacy decision made by the Commission in June, 2021. While the said decision records the Commission's conclusion that the UK ensures an adequate level of protection for personal data transferred within the scope of GDPR from the European Union to the United Kingdom, this conclusion is clearly expressed as not concerning personal data transferred for UK immigration control purposes or which otherwise falls within the scope of the exemption from certain data subject rights for purposes of the maintenance of effective immigration control (the "immigration exemption") pursuant to paragraph 4(1) of Schedule 2 to the UK Data Protection Act. The adequacy decision further states:

> *"The validity and interpretation of the immigration exemption under UK law is not settled following a decision of the England and Wales Court of Appeal of 26 May 2021. While recognising that data subject rights can, in principle, be restricted for*

*immigration control purposes as "an important aspect of the public interest", the Court of Appeal has found that the immigration exemption is, in its current form, incompatible with UK law, as the legislative measure lacks specific provisions setting out the safeguards listed in Article 23(2) of the United Kingdom General Data Protection Regulation (UK GDPR). In these conditions, transfers of personal data from the Union to the United Kingdom to which the immigration exemption can be applied should be excluded from the scope of this Decision. Once the incompatibility with UK law is remedied, the immigration exemption should be reassessed, as well as the need to maintain the limitation of the scope of this Decision."*

**230.** Accordingly, the adequacy decision expressly does not cover personal data that is transferred for purposes of United Kingdom immigration control or that otherwise falls within the scope of the exemption from certain data subject rights for purposes of the maintenance of effective immigration control, contrary to the apparent understanding of Minister when making the Return Order.

**231.** The Minister's apparent misunderstanding of the effect of the adequacy decision does not necessarily mean that transfer of data between Ireland and the UK is in breach of GDPR, if it does not fall outside the scope of GDPR. It is worth noting that Article 45(7) GDPR expressly provides that where an adequacy decision is appealed, amended, or suspended this is without prejudice to transfers of personal data to the third country, a territory or one or more specified sectors within that third country, or the international organisation in question pursuant to Articles 46 to 49.

**232.** An adequacy decision is therefore but one basis for lawful transfer of data envisaged under Chapter V of GDPR. The submission made on behalf of the Applicants that the fact that an area has been excluded from an adequacy decision means that no other legal basis can be invoked is therefore of questionable force.

**233.** Of the other bases provided for, the Respondents rely in opposing these proceedings on Article 49(1)(d). Article 49(1)(d) is but one of several derogating powers each of which may be used in many different data protection contexts. It provides for "*a transfer or a set of transfers of personal data*" by way of derogation "*for specific situations*" where "*the transfer*

*is necessary for important reasons of public interest*". The derogation arises even "*in the absence of an adequacy decision pursuant to Article 45(3), or of appropriate safeguards pursuant to Article 46, including binding corporate rules.*" The specific public interest invoked on behalf of the Respondents is:

a) the maintenance of fair and effective immigration control, in particular across the historic CTA, and the preservation and strengthening of the CTA;
b) the maintenance of a fair and effective system for granting persons international protection in the State; and
c) the administration of justice generally and the exercise of executive functions related to the prevention and detection of immigration abuses.

**234.** Making the case for a legal basis for transfer under Chapter V GDPR, it is deposed on behalf of the Minister in the case of Applicant A that the continued effective operation and administration of the historic CTA is dependent on the ability of the relevant immigration authorities in Ireland and the UK to exchange personal data relating to persons such as the Applicant, whose application for international protection has been determined to be inadmissible and whom it is proposed to return from Ireland to the UK. It is explained by way of background that the CTA is an arrangement which has been in existence between the UK (which covers, for the purposes of the CTA, England, Scotland, Wales, Northern Ireland, the Isle of Man and the Channel Islands) and Ireland since in or around 1922, and which provides a framework for *inter alia* free travel between these countries for those entitled so to travel (and other rights). It is confirmed on affidavit that the CTA involves a significant degree of co-operation between the UK and Irish Governments on, *inter alia*, immigration issues. It is stated that the ability of the relevant authorities in the UK and Ireland to exchange personal data relating to persons travelling between those countries is:

> *"essential to the maintenance and preservation of the CTA and the pursuit of immigration control within that administrative framework which accordingly permits and affords significant rights and benefits to the citizens of the UK and Ireland*" (Affidavit of William O'Dwyer sworn on the 31st of July, 2023, para. 10).

**235.** It is further deposed that such data exchanges or transfers are justified on a policy basis as being necessary if not essential in the public interest underpinning the maintenance of fair

and effective immigration control, in particular across the CTA, the maintenance of a fair and effective system for granting persons international protection in the State and the exercise of executive functions related to the prevention and detection of immigration (*infra* at para. 11).

**236.** The weight of this unchallenged evidence is obvious. The CTA depends on data exchange between Irish and UK authorities.

**237.** Although not abandoned it did not seem to me that the Respondents relied in any serious way on the claim that GDPR did not apply at all in reliance on Article 2(2)(a). Furthermore, they did not continue to assert reliance on the Commission's adequacy decisions previously relied upon. Instead, the focus of the Respondents case in opposition before me was that by virtue of the operation of Article 49(1)(d) GDPR, a legal basis exists for data transfer as part of the safe third country return process.

**238.** Without deciding the issue it seems to me that there are obvious frailties with the Respondents' position that data exchange falls outside the scope of GDPR by operation of Article 2(2)(a) which provides that the requirements of GDPR do not apply to the processing of personal data during an activity falling outside the scope of EU law. It is clear from Article 3 of GDPR that it has broad territorial application and applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not. I have already found that the examination of an application for international protection and the exchange of data for the purpose of determining its' admissibility falls within the scope of EU law. The making of a return order also falls within the scope of EU law given that EU law controls the conditions in which such a return order may take place. An exchange of information occurs as a necessary part of the process of determining whether a claim is inadmissible under s. 21 of the 2015 Act. Notably that process entails the third safe country accepting an international protection applicant for the purpose of processing their protection claims, something which cannot occur without the exchange of data. Without unduly trespassing into issues which I may not need to decide for the purpose of this case, it seems to me that a strong case is made that a legal basis for the transfer of data compatible with Part V GDPR is required.

**239.** While the Respondents contend for a legal basis for the transfer of data and do not accept that a breach of GDPR has been established on behalf of the Applicants, they join issue

in these proceedings not so much on the question of whether a legal basis for data transfer exists, the absence of which they consider to be a matter for a different remedy in any event, but rather on whether a breach of GDPR of the nature contended for, if established, could invalidate the third country return process. The Respondents maintain that adequate and effective remedies are available pursuant to the GDPR and the Data Protection Act 2018 in respect of any breach of data rights, which remedies are sufficient to vindicate in full the Applicant's data protection rights. It is contended that in consequence any reliance in the Impugned Decision on the adequacy decisions of the European Commission is immaterial as regards the validity of the Impugned Decision and/or the Return Order and/or does not amount to an error of law which should vitiate the Impugned Decision and/or the Return Order.

**240.** In view of these arguments, it seems to me that a separate, preliminary question arises as to whether a frailty in relation to the treatment of GDPR could invalidate the return system. I should only proceed to determine whether the safe third country system fails to protect GDPR if it would. Otherwise, I would be determining a question which does not require to be decided to dispose of the issues in these proceedings. I would also be doing so where alternative remedies exist for data breaches and where the case made for data breach has not been laid in only the barest of terms.

**241.** There is therefore a "*prior issue*" for me before I could decide the important question of whether data transfer to the UK for immigration purposes is GDPR compliant, namely, even assuming the Applicants are correct in their submissions on compliance of the third safe country return system with GDPR, would this affect the legality of any decision taken under s. 21, 51A or 72A such that it would be appropriate to impugn the safe third country return system itself in these proceedings, as the Applicants seek to do. Afterall, the Applicants seek no relief in these proceedings in respect of data transfer *qua* data transfer but rather seek to invalidate the safe third country system due to alleged data breaches.

**242.** On this "*prior issue*", I find the reasoning of the Divisional Court in *AAA & Ors. v Secretary of State for the Home Department* [2022] EWHC 3230; [2023] HRLR 4 and two judgments of the Court of Appeal in O*pen Rights Group v The Secretary of State for the Home Department* [2021] EWCA Civ 800; [2021] EWCA Civ 1573 of some persuasive assistance, notwithstanding the different considerations which arose in those cases.

**243.** In *AAA & Ors. v Secretary of State for the Home Department* [2022] EWHC 3230; [2023] HRLR 4, addressing the issue of data breach, the majority judgment records (at para. 134):

> *"As a matter of principle, it cannot be that any breach of any rule on the part of a public authority or for which that authority is responsible, occurring in the context of either making or executing a public law decision will necessarily affect the validity of that public law decision."*

**244.** The Divisional Court proceeded to examine the alleged breaches relied upon finding that the legal requirements in relation to data protection identified were not matters that could be considered integral to the validity of the decisions under the Immigration Rules. I take the point made on behalf of the Applicants that the assault example given is not analogous with the circumstances of the present case. It is clear (and as subsequently noted by the Court of Appeal at para. 389 of its judgment at [2023] EWCA Civ. 745; [2023] 1 WLR 3103) that this was but an example simply offered "*as a vivid example of the general principle*". The relationship between the alleged breaches of data protection law and the public law decisions taken in AAA's case were carefully considered in turn. Regarding the failure to conduct a data protection impact assessment, the Court of Appeal observed (at para. 135):

> *"We do not consider that circumstance is sufficient to require the conclusion that failure to assess the impact of the data processing required by the MEDP goes to the validity, in public law terms, of immigration decisions taken later within the context of the MEDP."*

**245.** It was clear that the issue was not whether there was a breach but whether it impacted on "*the validity of the public law decision*" and it was considered that it did not. The Divisional Court found, and here the parallels with the Irish system for data protection are striking, that if there was a failure to comply with UK GDPR a complaint lay either to the Information Commissioner or to a court adding (para. 137):

> *"It does not go any further. We do not consider that the validity of subsequent immigration decisions does or should depend on whether information relied on was*

*collected in circumstances that complied with article 13 of the UK GDPR. There is no relevant connection between a breach of article 13, the consequences of the breach, and any standard going to the validity of the public law decision. Nor should any such failing give rise to the possibility of a public law remedy. The remedies available for breach of the UK GDPR are those provided in the 2018 Act: compliance orders and/or an award of damages."*

**246.** In this jurisdiction detailed provision has been made for statutory remedies in the event of data breaches occurring. Provision includes the availability of a complaints mechanism before the Data Protection Commission pursuant to s. 108 of the Data Protection Act, 2018 alleging a contravention of a relevant enactment which, if upheld, may lead to enforcement by the Data Protection Commissioner including remedial steps to be taken by a data controller and/or processor and the availability of a civil action before the courts pursuant to s. 117 of the Data Protection Act, 2018 which, if upheld, may lead to compensation and/or relief by way of injunction or declaration.

**247.** The tenor of the prescribed remedies in Irish law, like those considered by the Divisional Court in *AAA & Ors. v Secretary of State for the Home Department* [2022] EWHC 3230; [2023] HRLR 4 is that either the Commissioner or the court may award compensation for past breaches and may make orders specifying what the data controller must do to ensure future compliance with data protection law. No provision is made to require past transactions which have relied on data processed in breach of data protection law to be undone or for that reason treated as void. This supports the conclusion that, in these cases just as in *AAA & Ors. v Secretary of State for the Home Department* [2022] EWHC 3230; [2023] HRLR 4 (upheld by Court of Appeal on appeal at [2023] 1 WLR 3202; [2023] EWCA Civ. 745), the validity of the decisions taken under the safe third country regime are not rendered unlawful by reason of alleged data protection issues for which an adequate and effective remedy exists under the statutory code prescribed for the purpose of protecting data rights, if a breach is established.

**248.** The point is further illustrated by the decision in *Open Rights Group v The Secretary of State for the Home Department* [2021] EWCA Civ 800, the case identified in the Commission's adequacy decision as the basis for the exclusion of data exchange in the immigration context from that decision. In *Open Rights Group v The Secretary of State for the Home Department*

civil rights organisations brought judicial review proceedings seeking a declaration that the Immigration Exemption from GDPR as applied in the UK was unlawful and an order disapplying it. There was no attempt in the challenge to invalidate any immigration decisions taken in reliance on data exchanged in breach of GDPR. The main grounds of challenge were that the so-called Immigration Exemption was incompatible with GDPR and the Charter and accordingly, by virtue of the principle of supremacy of EU law, the exemption could not stand.

**249.** The English Court of Appeal found that as there existed no legislative measure that contains specific provisions in accordance with the mandatory requirements of Article 23(2) of the GDPR, the Immigration Exemption was an unauthorised derogation from the fundamental rights conferred by the GDPR, and therefore incompatible with the Regulation. Despite this conclusion, the Court of Appeal did not make orders immediately noting in the principal judgment (Warby L.J.) (para. 56):

> *"The appropriate remedy in a case of incompatibility is a sensitive matter, that may depend on the nature of the incompatibility identified by the Court: see the decision of the Divisional Court in R (Liberty) v Secretary of State for the Home Department [2019] EWHC 2057 (Admin), [2020] 1 WLR 243 [87-90], [391] (Singh LJ and Holgate J). Here, I have identified an omission that is, in principle, capable of remedy by measures that amend or supplement the existing provision. In the circumstances, I see merit in the cautious approach of both sides. I would defer a decision on relief, inviting further submissions on that issue in the light of these reasons."*

**250.** On the 29th of October 2021 the Court of Appeal handed down a further judgment addressed to the remedies issue (*Open Rights Group v Secretary of State for the Home Department* [2021] EWCA Civ 1573) and providing for relief in the form of a declaration of incompatibility which was nevertheless suspended until 31 January 2022 "*in order to provide a reasonable time for the Data Protection Act 2018 to be amended so as to remedy the incompatibility*." In this second judgment on the remedies issue, Warby J. observed (at paras. 36-38):

> *"It is obvious that this process is bound to take some time. It requires careful thought at the policy level, legal input, and Parliamentary time.....Immediate disapplication of*

*the Immigration Exemption would, as the Appellants concede, cause serious practical difficulties at least in the short term. The evidence demonstrates that the Immigration Exemption has been and still is extensively relied on by the Home Office."*

**251.** It appears that the effect of the finding of a breach of GDPR did not ground an immediate order disallowing its application to permit data exchange in the immigration system. Whatever steps were taken on foot of the decision in *Open Rights Group v The Secretary of State for the Home Department* it appears from a later decision in *R (on the application of The3million and Open Rights Group) v. The Secretary of State for the Home Department* [2023] EWHC 713 they were considered inadequate, and a further challenge was taken resulting in yet another finding of non-compliance with Article 23(2).

**252.** The relevance of this sequence events in the *Open Rights Group* litigation is not the fact that amending provisions may have been introduced in the UK to bring them into line with GDPR requirements. While this might bear on the appropriate remedy for any established breach, it would not be an answer to the question arising as to the legal basis for transfer in the absence of a further adequacy decision. Furthermore, the basis for transfer primarily invoked by the Respondents during the hearing before me is that provided under Article 49(1)(d) which is expressed in very different terms to Article 23 GDPR such that the treatment of the data breach contended for has no bearing on any question of law as to the existence of a breach arising in these cases. What I find of some interest though is the relief sought and granted in the proceedings upon a finding of a data breach. It was neither suggested nor found by the Court that the breach invalidated decisions in the immigration system taken in reliance on data exchanged in breach of GDPR. Relief was focussed on remedying the data breach and time was afforded to do so.

**253.** The importance of appropriately tailoring remedies in cases of established data breach is reflected in the two judgments *in Open Rights Group v The Secretary of State for the Home Department*, albeit in a case where the relief sought was a declaration that the Immigration Exemption from GDPR as applied in the UK was unlawful and an order disapplying it, unlike here where the relief is directed to the third safe country system itself. The Court of Appeal did not immediately grant this relief and ultimately granted declaratory relief suspended for a period of time to allow for legislation to be introduced to bring UK law into compliance with Article 23(2) GDPR. There was no question of any action taken on foot of the data transfer

which had occurred in reliance on a measure found to be non-compliant with Article 23(2) GDPR being invalidated or rendered void. Indeed, it appears that the system may have continued to operate without the safeguards considered to be required by means of statutory amendment during the period of suspensive effect on the Declaration of Incompatibility made.

**254.** By a parity of reasoning I am satisfied that if any breach of data protection rights has been or is occasioned by the making of and/or implementation of the Return Order and/or the safe third country system this would not have the effect of rendering s. 72A of the 2015 Act and/or 2020 Designation Order *ultra vires* the Procedures Directive and/or contrary to the State's obligations under the CEAS as none of the criteria established under s. 72A(2) of the 2015 Act and/or Article 27 Procedures Directive relate to whether a returnee's data protection rights might be breached in the event of a return to a designated safe third country. There is no legal requirement for the same "*provisions ... for the protection of an applicant's data*" to be included in the Safe Third Country system as are contained in the Dublin III Regulation because this part of the Dublin III Regulation has not been applied to third country transfer cases.

**255.** Furthermore, I am satisfied that even if I am wrong in this, any alleged non-equivalence of specific provisions regarding data protection as between the Dublin Ill Regulation and the safe third country system is immaterial to the validity of the latter or to the Minister's vires to enact the 2020 Designation Order. If it were to be established that such non-equivalence is in breach of GDPR rights, a remedy exists under the Data Protection Act, 2018 or in court proceedings directed to restraining unlawful data transfer.

**256.** Finally, I wish to record that I would not be happy to arrive at any conclusions on the lawfulness of data transfer, with obvious serious, wider ramifications most particularly for the CTA which depends on data exchange for its operation, on the case as pleaded and argued before me and in the absence of a proper basis in the evidence upon which conclusions might be reached in relation to the nature and extent of any data breach and permitting an appropriate remedy to be fashioned for any breach determined to have been established. It is recalled that in judicial review proceedings the court must remain vigilant as to whether an appropriate alternative remedy exists and only exercise its discretionary jurisdiction where it is appropriate to do so. Whilst the rights to data privacy and data protection concerned in the safe third country process are important, the factual and legal context in which they have been raised in

these proceedings is not such as to allow for proper consideration of those issues where I am satisfied that remedies exist in respect of established data breaches and the issue does not go to the *vires* of the 2020 Designation Order.

**257.** Any determination as to the lawfulness of data transfer to the UK in the immigration context requires careful consideration in proceedings in which it is fully argued on an appropriate evidential basis and properly arises for determination and should await such a case.

*Rationality of Designation*

**258.** As I have decided that the original and continuing designation of the UK and Northern Ireland is unlawful for the reasons given above, it is not necessary for me to decide whether the decision that the United Kingdom and Northern Ireland was a safe third country was rationally made in the first instance or to address the argument that the designation cannot be impugned on the basis of developments subsequent to the making of the order. Whether the said developments as established in evidence and summarized above are such as might warrant the revocation of the safe third country designation is not now a question I need to decide to determine the issues between the parties in these proceedings.

*Was the Minister's assessment of prohibition of refoulement unlawful or irrational as contrary to s. 50A of the 2015 Act? Is the challenge to this decision a collateral attack on the Inadmissibility Decision?*

**259.** In the light of my findings above, it is also not necessary for me to consider whether the Minister's decision that there was no risk of refoulement is sustainable in law on rationality or reasonableness grounds. The Minister's powers under s. 51A to decide on a risk of refoulement under s. 50A is predicated on there being an effective and lawful designation of a safe third country in the first instance. Where this is absent, any decision taken on foot of it must fall.

**260.** Insofar as it was contended, however, that the decision was not amenable to rationality challenge because such a challenge would constitute a collateral attack on the inadmissibility decision which had not been impugned, my view, while strictly *obiter*, is that for so long as the grounds of challenge are directed to the findings in relation to the prohibition on non-refoulement under s. 50A of the 2015 Act and are not directed to the separate decision of the Tribunal that s. 21(17) and (18) of the 2015 Act are satisfied in this case, then this is

permissible. I agree with the Respondents, however, that the Tribunal decision on the following issues are not amenable to being revisited through a challenge to the decision of the Minister, namely:

a) having regard to the matters referred to in s. 21(18) of the 2015 Act, the applicant has a sufficient connection with the UK on the basis of which it is reasonable for the Applicant to return there, within the meaning of section 21(17)(a) of the 2015 Act; and
b) The applicant will be re-admitted to the UK, within the meaning of s. 21(17)(c) of the 2015 Act.

**261.** Contrary to the Respondents' position, however, it seems to me that the Tribunal's decision on whether an applicant will be subjected in the UK to the death penalty, torture or other inhuman or degrading treatment or punishment, within the meaning of s. 21(17)(b) of the 2015 Act does not preclude this issue being revisited through a challenge to the decision of the Minister. This is because this is a question which the Minister is separately required to determine as part of the prohibition on non-refoulement. The discretion to determine risk of refoulement under s. 50A of the 2015 Act is a standalone discretion which falls to be exercised by the Minister and while the Minister may have regard to the Tribunal's consideration of this question and may attach considerable weight to the Tribunal's decision and may even adopt the same decision for the reasons given by the Tribunal, he or she is entitled to reach a different decision and is therefore amenable to challenge on this decision where legal grounds for challenge are identified.

**262.** Furthermore, notwithstanding overlap insofar as consideration of risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, there is also a difference between the safe third country test applied under s. 21 (which provides that the country is safe if an applicant will not be subjected in the country concerned to the death penalty, torture or other inhuman or degrading treatment or punishment) and the prohibition on refoulement under s. 50A (which precludes return to a country if (a) the life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or (b) there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment).

**263.** As a separate decision in the process, it is my view that the decision under s. 51A is amenable to challenge as such regardless of any prior decision by the Tribunal that the country in question is a safe third country within the meaning of ss. 21(2)(c), 21(17) & 21(18). The reason why this must be so turns not only on the differences between the two tests but is also well illustrated by the facts in Applicant A's case where there were factual developments between the two decisions. As established in *YY v. Minister for Justice and Equality* [2018] ILRM 109 the Minister is an office holder obliged by law to be aware of up-to-date information in respect of a country and to act on it even if it had not been adverted to by or on behalf of an applicant.

**264.** As demonstrated by Applicant A's case developments may occur in the deemed third safe country between the s. 21 admissibility consideration and consideration of a return under s. 51A which impact on an assessment of the safety of the third country. In Applicant A's case there was no reference to the Rwanda Policy at admissibility decision stage by either the Applicant or the Tribunal but it was addressed in some detail at return order stage in circumstances where in the intervening period the fledging policy had evolved and was the subject of legal challenge, legislative proposals and amendments. The need to consider changed circumstances before making an order under s. 51A is recognised by s. 50A(3) which expressly requires that the Minister be appraised of a change in circumstances which may be relevant to s. 50A considerations.

**265.** I am satisfied that Applicant A may not revisit issues which were within the exclusive competence of the Tribunal in later proceedings challenging the subsequent Return Order if the matter was determined by the Tribunal and not thereafter challenged. Accordingly, it is not open to Applicant A to challenge the finding by the Tribunal that his application is inadmissible on the basis that he is a person who has arrived in the State from a safe third country that is, in accordance with 21(17), a safe country for him. This does not mean, however, that the Return Order may not be challenged where no challenge has been brought against the Tribunal determination of inadmissibility. As stated above, the Tribunal has a distinct statutory function under s. 21 which is separate from the Minister's function under s.51A. It is open to and sometimes necessary for the Minister to come to a different conclusion to that of the IPO and the Tribunal on a matter the Minister has competence to determine even though the same

question has been determined otherwise by them (see *YY v. Minister for Justice and Equality* [2018] ILRM 109 particularly at pages 138, 141 and 144).

**266.** As for the Minister's refoulement considerations, I refer to without repeating the contents of the Report prepared on the 23rd of January, 2023 addressed to those considerations (summarized above at paragraph 56). Suffice to say that it is clear that detailed consideration was given not only to the terms of the MoU between the UK and Rwanda, the *Inadmissibility Guidance* published in respect of same but also to the decision of the European Court of Human Rights in *NSK v United Kingdom* (application no. 28774/22), the decision of the England and Wales High Court in *R (AAA) v Secretary of State for the Home Department* [2022] EWHC 3230 then under appeal and the fact that proposed transfers from the UK to the Republic of Rwanda had been suspended.

**267.** Given my conclusions on the *vires* of the Minister to designate the UK it is not necessary for me to consider further when the Minister came to an unsustainable decision in failing to conclude that there were substantial grounds for believing that the removal of Applicant A to the UK would expose him to a real risk of ill-treatment as a consequence of his refoulement on an application of the test developed in cases such as *Soering v. UK* (1989) 11 EHRR 439 and *Ilias v. Hungary* (2019) 71 EHRR 6 or a real risk of the asylum seeker being denied access in the receiving third country to an adequate asylum procedure protecting him or her against refoulement (see *Ilias v. Hungary* (2019) 71 EHRR 6, paras. 134 and 137).

**268.** Without deciding the issue and avoiding the temptation to trespass into areas which no longer require to be determined, it bears reiteration that it is never for a court in judicial review proceedings to step into the shoes of the decision maker where it is demonstrated that proper consideration has been given to relevant matters, the correct legal test has been applied and the decision arrived at is one which is available to the decision maker on the material available. Similarly, a court should not be asked to consider a point which could have been made to the decision maker but was not (see, for example, *M.N. (Malawi) v. Minister for Justice and Equality* [2019] IEHC 489 (Humphreys J.). A court in judicial review proceedings should not be asked to impugn the rationality of a decision taken at a point in time with reference to developments which post-dated that decision.

*Was the Tribunal Inadmissibility Decision in Applicant B's case Irrational?*

**269.** There is no challenge to the Tribunal decision under s. 21(9) of the 2015 Act in Applicant A's case. Unlike Applicant A's case, where the challenge is focused on the designation order, a failure to review the said order and the making of a return order, Applicant B's case has not proceeded to the point of the making of a return order and he has sought to challenge the Tribunal decision under s. 21(9) of the 2015 Act that his application is inadmissible on various grounds including the rationality of the finding.

**270.** It is not necessary for me to determine whether the decision to find that Applicant B had "*sufficient connection*" with the United Kingdom was a rational decision which was properly open to the Tribunal in the light of my findings as regards the lawfulness of the 2020 Designation Order and I do not propose to do so. It may be useful to recall, however, in view of my findings above regarding a broader rights analysis as an issue which goes to the lawfulness of the third safe country return system, that it is no function of the Tribunal to conduct a broader rights analysis than that required for the specific purpose of s. 21. Similarly, it is no function of the Tribunal to determine whether there has been a breach of data protection rights and it has no jurisdiction to decide that question.

**271.** In terms of the statutory scheme and the requirement to ensure compliance with conditions precedent to application of the third safe country concept, different actors have different roles (the IPO, the Tribunal and the Minister). The question the Tribunal must determine is fixed by the terms of the statute from which it derives its jurisdiction. When one considers the terms of s. 21(17) and (18), the question is not whether it is more reasonable for a claim to be determined in this jurisdiction than a third country but rather whether there is a "*sufficient connection*" with the safe third country to make it reasonable for the claim be determined there. It is no function on the Tribunal under the statutory scheme to consider the connection with this State at all.

**272.** Insofar as rights are concerned, under s. 21 in its current form, the Tribunal is constrained and is concerned only to determine that an applicant will not be subjected in the country designated as safe to the death penalty, torture or other inhuman or degrading treatment or punishment. For this to include risks arising from the application to an applicant of the Rwanda Policy, it would be necessary for an applicant to demonstrate, firstly, that there was a real risk of the Policy being applied to that individual and, secondly, that the application of the

said Policy could result in the individual being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

**273.** In circumstances where no returns have yet taken place on foot of the Rwanda Policy, where the legislative framework required to give effect to the said Policy has not been enacted and where the evidence suggests that there is no Policy which is intended to apply to a category of protection seekers which might reasonably be understood as including Applicant B, a real question must arise as to whether a basis has been laid upon which a court could properly intervene by way of judicial review to quash the reasoned decision of the Tribunal supported by material before it in finding that the UK was a safe third country for the Applicant within the meaning of s. 21(2)(c). This is particularly so where the Tribunal's statutory function is confined to a determination of whether distinct statutory criteria are met and does not extend to ensuring that the State respects and vindicates the full panoply of Applicant B's rights.

**274.** By way of final observation, it is difficult to see how there could be a basis for challenging the reasonableness of the Tribunal's decision for a failure to consider matters which are beyond the parameters of this delimited and specific statutory competence. I do not, however, express any concluded view on the arguments pressed in this regard given my findings in relation to the 2020 Designation Order.

*Whether the decision under s. 50A is captured by s. 5 of the Illegal Immigrants (Trafficking) Act, 2000?*

**275.** In Opposition papers filed in the case of Applicant A, it is contended that he is not entitled to an order of *certiorari* quashing the Minister's decision dated the 26th of January 2023 made pursuant to s. 51A of the 2015 Act requiring the Applicant to leave the State and return to the UK. It is pleaded that, in order to be granted leave to challenge the Impugned Decision and/or Return Order, the Applicant is required by, *inter alia*, s. 5(1)(ok) Illegal Immigrants (Trafficking) Act 2000 (as inserted by s.123 of the 2020 Act)(hereinafter "the 2000 Act") to demonstrate substantial grounds for contending that the Impugned Decision and/or Return Order is/are invalid or ought to be quashed. The significance of this plea is that a challenge to decision subject of s. 5 of the 2000 Act is subject to the time limits prescribed under s. 5 as well as the requirement to seek a certificate giving leave of the High Court to appeal against its findings on the basis that the decision involves a point of law of exceptional public importance. Section 123 of the 2020 Act amended s. 5(1) by the insertion of a new s.

5(1)(ok) which has the clear effect of expanding the application of that section to a return order under s. 51A using the following words:

> *"(ok) a return order under section 51A of the International Protection Act 2015 , or".*

**276.** An issue arises from the language of the statutory amendment as to whether in circumstances where a return order under s. 51A of the 2015 Act has been made subject to s. 5 it should follow that a decision under s. 50A is also captured. Given that the proceedings come before me as lead cases, the Respondents confirmed during the hearing that they were not relying on any time limit issue which might arise under s. 5(2)(a) of the 2000 Act. They nonetheless pressed that I would determine whether s. 5 applies to a challenge to a decision under s. 50A in respect of refoulement. The reason for this was the practical necessity to determine whether a certificate for leave to appeal would be required in respect of any finding on the rationality challenge brought to the refoulement decision. It was submitted on behalf of the Respondents in urging me to decide this issue that this was a question yet to be decided by the courts which would benefit from some clarity. The requirement for a certificate for leave to appeal in respect of decisions subject to s. 5 of the 2000 Act is expressed as follows under s. 5(3)(a):

> *"(3) (a) The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."*

**277.** In argument I was referred to the decision of the Supreme Court in *A.W.K. (Pakistan) v. Minister for Justice & Ors*. [2020] IESC 10 (McKechnie J.) where it was concluded that a challenge to a refusal of permission to remain should be regarded as a decision under s. 49(4)(b) of the 2015 Act and therefore subject to s. 5 of the 2000 Act on a proper interpretation of that provision. The question to be determined is whether the challenge to a decision of s. 50A is so closely connected with the return decision under s. 51A as to lead to the conclusion that it too is subject to the restrictions imposed under s. 5 of the 2000 Act. This requires detailed

consideration of the language of the section and the statutory context to establish legislative intention adopting a similar approach to that of the Supreme Court in *A.W.K. (Pakistan) v. Minister for Justice & Ors*.

**278.** As I have concluded that it is not necessary to determine the challenge to the Minister's decision under s. 50A of the 2015 Act (as amended) in Applicant A's case, it seems to me that there is similarly no necessity to determine whether s. 5(3) of the 2000 Act requiring certification that my decision involves a point of law of exceptional public importance as a precondition of a right to appeal applies to a challenge to this decision. My conclusions in this case rest on my findings as to the lawfulness of the safe third country system and the *vires* of the 2020 Designation Order. There is no question but that these findings are amenable to full appeal to the Court of Appeal as of right. I do not consider it appropriate to make any further findings in relation to the scope of s. 5(1)(ok) of the 2000 Act where it is not necessary to do so to determine any live issue in these proceedings. This issue must await determination in a case in which it properly arises.

*Standing*

**279.** An issue was raised on behalf of the Respondents as to the Applicants standing in these proceedings in circumstances where it was contended that they had not demonstrated that they were personally at risk of removal to Rwanda. Even though it does not arise for determination based on the conclusions I have reached, I have no hesitation in accepting that the question of personal risk of removal to Rwanda is relevant to the standing of each of the Applicants to challenge an admissibility decision or a return order as to its lawfulness having regard to the application of the Rwanda Policy. In these cases, however, both Applicants have been made subject to findings of inadmissibility and have been excluded from consideration of their claims for international protection in the State by reason of the continuing designation of the United Kingdom and Northern Ireland as a safe third country. As such they are clearly affected by the designation. I am satisfied that they have an interest in challenging the lawfulness of the designation and have established standing for this purpose.

**280.** As I have not found it necessary to make findings on the case made regarding the rationality of the Tribunal's and/or the Minister's decisions having regard to the Rwanda Policy because of my findings that there has been a failure to meet the requirements of EU law in the

designation of the United Kingdom and Northern Ireland as a safe third country, no further issue as to standing requires to be determined to resolve these proceedings.

*Lack of Candour*

**281.** It came to light during the hearing that Applicant A had been convicted of a sexual offence in the UK in 2018 which he had failed to disclose in either his application for protection or his application by way of judicial review. I allowed the Respondents to raise this issue during the hearing before me as a lack of candour issue, albeit without then determining its relevance. I did so to ensure that any matter which might properly bear on my decision was before me and was considered and would be available to any appellate court in the event of an appeal.

**282.** The duty of candour has long been a feature of the public law landscape. The duty requires the parties before a court to provide all the facts and information needed for a fair determination of the issue at hand. The duty is engaged long before the parties to a judicial review appear in court and applies to applicants throughout the proceedings but is of particular importance for applicants at the leave stage in the case of *ex parte* applications.

**283.** While the duty of candour as developed in public law proceedings has tended to focus on the duty on the Respondent to place "*all cards face up*" in responding to such proceedings, the duty of candour also impacts on applicants. This is reflected in HC 81 Practice Direction in respect of Asylum, Immigration and Citizenship List in the terms of directions there set out for the conduct of proceedings. The Practice Direction provides at paragraph 7 as follows:

> *"(1). In order to give effect to the duty of candour to the court resting on all legal representatives, every ex parte application to which this Practice Direction applies shall be accompanied by a written legal submission on behalf of the Applicant*
>
> *(2). Inclusion of any matter (such as a previous civil or criminal proceeding) in a submission is without prejudice to the entitlement of an applicant to contend that such matter disclosed is not legally relevant to the grant or refusal of relief and save where otherwise stated by an applicant, the inclusion of any given matter in a written submission does not amount to a concession of such relevance by the applicant."*

**284.** It is further provided that the submissions should include a heading "Procedural history" which shall state:

> *"in succinct form any relevant procedural history including the date of grant of leave, any stays, injunctions or undertakings and any other interlocutory applications or appeals. This section shall include details of: (a). any previous proceedings involving any of the applicant(s) in the Asylum, Immigration and Citizenship List and (b). any other civil or criminal proceedings whether in the State or elsewhere involving any of the applicant(s) that could be potentially relevant to any of the issues or their factual background.….This section must contain a positive statement either that the only other proceedings that could be potentially relevant to any of the issues or their factual background are as indicated in the section, or that there are and have been no such other proceedings."*

**285.** Notwithstanding these provisions of the Practice Direction, Applicant A failed to disclose his previous conviction in the UK. On his behalf it is contended that there is no breach of the Practice Direction because the conviction is not relevant to the issues in these proceedings. The Respondents contend, in response, that the duty is to disclose convictions which could be "*potentially*" relevant and that it is not for the Applicant to determine potential relevance.

**286.** The Practice Direction flags that in the event of a failure to comply with its terms, the court may make such order as it considers appropriate including any order as to costs against a defaulting party, and/or an order as to costs against a defaulting solicitor under Order 99 rule 6, and/or an order disallowing costs as between a solicitor and his or her client under Order 99 rule 7, and/or an order disallowing the costs of an otherwise successful party as against the other party. Other options, of course, include disallowing relief on discretionary grounds where this is an appropriate response in a given case.

**287.** While I take a dim view of Applicant A's failure to disclose the fact of his previous criminal conviction and I do not accept that it was unintentional as he suggests on affidavit, I am also conscious that I should not allow an issue raised in this manner at such a late stage to result in a litigation prejudice, unless it is properly relevant to the substantive matters which I must determine. I am mindful that these cases present before me as lead cases with systemic

implications. I am also conscious that the purpose of the Practice Direction is not to hold applicants in these types of cases to a higher duty of candour than in other areas of judicial review but rather to make express that which is already the law in relation to the duty of candour applying to all applicants in public law proceedings and to set out how this obligation is discharged in this category of case. Seen in this way, the relevance of the non-disclosed matter to the issues in the proceedings is the key consideration. Afterall, there is no general duty on applicants to specifically disclose past criminal convictions in judicial review proceedings unless it bears on the issues in the proceedings.

**288.** It seems to me that the previous criminal conviction in the UK qualified as "*potentially*" relevant when these proceedings were in contemplation. I consider that Applicant A has been improperly selective with the history he has presented on this application. Afterall, it would have been reasonable for him to apprehend that the fact of a previous conviction in the UK would have a bearing on a decision to return him there. Indeed, it seems to me not unreasonable to suspect that this conviction might well have been a factor in Applicant A's resistance to returning to the UK. As such it should have been disclosed.

**289.** Notwithstanding its "*potential*" relevance as aforesaid, it is fairly accepted on behalf of the Respondents, that non-disclosure of the criminal offence in the UK is not relevant to any substantive issue I am required to determine in these proceedings. Indeed, were it otherwise, I would have expected the Respondents to disclose the information at a much earlier stage in discharge of the duty of candour which applies to Respondents in public law proceedings. No doubt had the fact of Applicant A's previous conviction been considered relevant to his international protection application, he would have been asked about his failure to refer to it on his application form at a much earlier stage. Furthermore, his non-disclosure would have been raised in these proceedings from the outset.

**290.** Separately, it cannot be overlooked that information relating to Applicant A's conviction for a sexual offence was in the possession of the Minister's agents since October, 2021 without steps being taken to raise with Applicant A his obligations under Irish law to register as a sex offender arising therefrom. I am troubled that this fact has not come to light sooner given the purpose of maintaining a sex offenders register as a safety and control measure in the public interest. The requirement to register does this by ensuring that convicted sex offenders are effectively managed and monitored while in the State. Given the routine

involvement of An Garda Síochána in immigration matters and their ongoing contact with Applicant A through the Garda National Immigration Bureau, it is a real concern that no action was taken upon becoming aware of the nature of Applicant A's conviction to alert Applicant A to the registration obligations on him as a matter of Irish law.

**291.** The late application on behalf of the Respondents to introduce the non-disclosure of a previous criminal conviction as an issue in these proceedings during the hearing itself in circumstances where the case had been identified as a lead case many months earlier and where the information was also available to the Respondents since the inception of the proceedings, for the apparent purpose of asking me to refuse to grant reliefs, risks distracting improperly from the serious issues which arise for determination. Attaching any great significance to this issue risks resulting in an unfair litigation prejudice. It was for this reason that I offered no views when the matter came to light at hearing as it seems to me that this development calls for a measured and proportionate response disconnected from a reaction against what I consider to be the dishonest intention of Applicant A.

**292.** Considered objectively, I am satisfied that there is no prejudice to the Respondents in respect of the conduct of the proceedings arising from the non-disclosure of Applicant A's previous convictions. To refuse relief in these proceedings when the fact of the criminal conviction in the UK has no bearing whatsoever on the vires of the Minister to designate the UK as a safe third country or on any issue I have determined and is therefore not relevant, would be entirely disproportionate and uncalled for. In the circumstances of this case, most importantly the concession that the non-disclosed criminal offence is not relevant to the legal issues which I am required to determine, it seems to me that no action on foot of this non-disclosure issue is warranted.

**CONCLUSION**

**293.** The safe third country concept is provided for as a matter of domestic law. It is not precluded by EU law for so long as mandatory conditions precedent to its application, prescribed by EU law, are in place and operating effectively.

**294.** Mandatory conditions prescribed by EU law have not been provided, however, through the legislative provision made for same under the 2015 Act (as amended). Specifically, no proper provision has been made for conditions precedent to the application of the safe third

country concept necessitated by Article 38(1)(b) of the Recast Procedures Directive as regards the risk of serious harm within the meaning of Article 15(c) of the Recast Qualifications which applies by operation of Article 3(3) of the Dublin III Convention. Similarly, no proper provision is made for the Minister or the Tribunal to be satisfied as to whether Article 27(1)(d) of the Procedures Directive (as reflected in s.72A(2)(d) of the 2015 Act) is met with regard to the existence in the third safe country of a possibility to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention when returning an applicant (as opposed to when the designation was made).

**295.** In the absence of these provisions, the designation of the United Kingdom and Great Britain as a safe third country is unlawful as a matter of EU law. Reliance by the Minister on the 2020 Designation Order is therefore *ultra vires* as the statutory scheme is incompatible with the requirements of EU law by reason of the failure to make provision in Irish law for effective rules of methodology to ensure that the conditions for designation continue to be met before a return order is made. Compounding matters, there has been a failure to provide for a broader rights analysis prior to the making of a return order which I consider is also contrary to the requirements of EU law.

**296.** In consequence of this decision, I propose granting a declaration that the designation of the United Kingdom and Great Britain as a safe third country pursuant to the 2020 Designation Order is contrary to Ireland's obligations under EU law. It seems to follow that decisions in reliance on this designation challenged in these proceedings should also be quashed, specifically the decision of the Minister under s.50A and 51A of the 2015 Act in Applicant A's case and the decision of the Tribunal in Applicant B's case.

**297.** The parties are invited to agree, if possible, the form of my final order as flowing from the terms of this decision. I will hear the parties as to the appropriate remedy, if necessary, and this matter will be listed to deal with any consequential matters arising following the passage of two weeks from the electronic delivery of judgment.