THE SUPREME COURT

Supreme Court Record No: S:AP:IE:2018:000118

High Court Record No: 2018/469 JR

O'Donnell J.
McKechnie J.
MacMenamin J.
Dunne J.
Charleton J.

BETWEEN

P.N.S (CAMEROON)

APPLICANT/APPELLANT

AND

THE MINISTER FOR JUSTICE & EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

BETWEEN

K.J.M. (D.R. CONGO)

APPLICANT/APPELLANT

AND

THE MINISTER FOR JUSTICE & EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 31st day of March, 2020

Introduction:

1. The appellant, Mr. K.J.M.in the second action listed (para. 9 below), brought an application for judicial review in the High Court seeking various declarations as to his legal position in the State, pending a "decision…at first instance", made by the first named respondent on his request for consent to re-enter, for a second time, the international protection process, pursuant to s. 22 of the International Protection Act 2015 ("the 2015 Act"). In essence, he asserts a right to remain in this State until such decision has been made and further, he also seeks an injunction preventing his removal pending that decision. Humphreys J., in a judgment delivered on the 16th July, 2018, dismissed the proceedings and ordered that the injunction which he had previously granted, be discharged. The factual circumstances which gave rise to this decision will be explained in

further detail in a moment. The legal issue arising involves a consideration of certain provisions of the 2015 Act, as well as 'Council Directive 2005/85/EC of 1st December, 2005, on Minimum Standards on Procedures in Member States for the Granting and Withdrawing of Refugee Status' ("the Procedures Directive" or "the Directive"). The learned judge also refused, in a later judgment dated the 27th of July, 2018, to grant a Certificate of Leave to Appeal his decision to the Court of Appeal. By a Determination dated the 30th October, 2018 ([2018] IESCDET 159), a further appeal to this Court was permitted.

Factual Background

2. The appellant was born in the Democratic Republic of Congo ("DRC") in 1972. He travelled from South Africa to the Netherlands in 2005, having deserted from the Congolese Defence Forces. He made two asylum applications there, based on an asserted fear of persecution due to his desertion, one on the 24th January, 2005 and another on the 10th February, 2005, both of which were rejected. The immigration authorities in that country attempted to have him removed on the 27th April, 2005: however he resisted such attempts, with the result that his removal did not take place until the 17th May, 2005. He was sent to Cape Town in South Africa, because it was there whence he had travelled to the Netherlands. Upon returning to South Africa, he successfully applied for asylum and was granted a permit which allowed him to stay for two years: however, he used a false name in the course of that application. The permit expired in 2010 and he did not apply to have it renewed.

3. It appears, based on the documents exhibited by Mr. K.J.M., in his affidavit of the 8th June, 2018, that he returned to the DRC at some point between the expiry date of his South African permit and May 2011, which is when he arrived in Ireland. In this jurisdiction he applied for asylum on the 31st May, 2011 to the Office of the Refugee Applications Commissioner ("ORAC"). As part of his application he falsely stated that he had previously been returned to the Congo, whereas in fact it was to South Africa. On the 9th June, 2011, the Irish authorities requested the Netherlands to take the appellant back: this was refused. K.J.M.'s asylum claim was rejected by ORAC on the 12th September, 2011, a decision which he appealed: however the appeal was also rejected by the Refugee Appeals Tribunal on the 12th December, 2011. He then sought judicial review of this decision on the 23rd January, 2012 (*K.J.M. v Minister for Justice and Equality* [2012] No. 45 JR); however, this was struck out with no order on the 15th December, 2014.

4. While those applications and proceedings were in being, the appellant, having once more travelled to the Netherlands, was again refused entry into that country on the 31st January, 2013: however, he proceeded to make a further application for asylum there. During his subsequent period of detention, the Dutch authorities sent a "take-back" request to Ireland under Article 16(1)(c) of the Dublin II Regulation, which was acceded to and the appellant thereafter re-entered the State. Mr. K.J.M. then applied for subsidiary protection on the 5th May, 2015, which was refused on the 20th September, 2016, with an appeal from that decision being withdrawn on the 17th October, 2016. He

had by then a partner, a Ms. C.M. and two children with that partner: all three were granted Stamp 4 residency here as of the 25th August, 2016, having been in the asylum application system for 5 years.

5. In accordance with s. 3(3)(a) of the Immigration Act 1999 ("the 1999 Act"), the appellant was notified of a proposal to make a deportation order in respect of him, to which he responded by way of written submissions on the 5th December, 2016. On the 13th January, 2017, a deportation order was made under s. 3(1) of that Act. He applied to revoke this order in August of that year, under s.3(11) of 1999 Act; an application which remained outstanding at the time of the first High Court judgment. On the 10th October, 2017 he took steps to be readmitted to the protection process by making an application for the Minister's consent to that end, as required under s. 22 of the 2015 Act. On the 26th October, 2017, a letter issued notifying him that a recommendation had been made to the Minister by the international protection officer (or "IPO") that this request be denied. It is this recommendation and its legal consequences which are, amongst other matters, the subject of these proceedings. Attached to the letter was the report of the IPO who had carried out the preliminary examination of Mr. K.J.M.'s application. He appealed the recommendation to the International Protection Appeals Tribunal ("IPAT") on the 3rd November, 2017 and that appeal remains pending, though receipt of the appeal was acknowledged on the 8th November, 2017. The office of both the IPO and that of IPAT are provided for in the 2015 Act.

6. Having initially failed to report on foot of the deportation order, the appellant was eventually arrested and detained in Limerick Prison, on 31st May, 2018, following which he brought an Article 40 *habeas corpus* application on or about the 1st June, 2018 (*K.J.M. v. Governor of Limerick Prison* [2018] No. 702 S.S): this was moved on the basis of an asserted right to remain in this jurisdiction until a "first instance decision" within the meaning of Article 7(1) of the Directive had been made (para.7 *infra*): as no such decision existed at that time, his detention was therefore unlawful. Keane J. ordered that an enquiry be held on that same evening, with the Governor, at the commencement of the hearing, consenting to the appellant's release on bail pending the conclusion of the application. Subsequently, on the 6th June, 2018 the appellant's unconditional release from detention, was not objected to, on the basis that the warrant in question was defective. Nothing now turns on these proceedings.

7. On the day of his release, the 6th June, 2018, the appellant's solicitors wrote to the Minister for Justice, seeking an undertaking that no further steps would be taken to deport their client, until such time as the Minister had made a decision under either s. 22(13), to grant consent, or s. 22(15) of the 2015 Act, to refuse consent, to re-enter the process (para. 5 above): the Minister declined to provide such an undertaking. The appellant then brought plenary proceedings on the 11th June, 2018, raising very much the same issues which he ventilates in the judicial review action presently under consideration by this Court: however objection was taken to such proceedings on the basis of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended ("the 2000 Act"), which prohibits any challenge to the validity of a deportation order made under the

1999 Act, lest it be done in the manner, and within the timeframe provided for by that section. As these requirements were clearly not satisfied, he withdrew such proceedings on the 11th June, 2018.

8. On the day following, namely the 12th June, 2018, the appellant sought and was granted leave to apply for judicial review by Humphreys J.. Amongst the reliefs claimed were:

(i) A declaration that he had not yet been afforded 'a decision at first instance' within the meaning of Article 2(e) and/or Article 7 and/or Chapter III of 'Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status' ("**the Procedures Directive or "the Directive**");

(ii) A declaration that he could not be removed from the State unless and until he had received a decision from the Minister pursuant to s. 22(15) of the 2015 Act, and, thirdly;

(iii) An injunction preventing the Minister from removing the appellant from the State until such time as such a decision had been made.

The learned judge duly granted the injunction sought until the return date of the motion and further continued the order until judgment was delivered.

High Court Judgments

9. Humphreys J. has delivered two judgments in this case. As it happened, because of close issue similarity, K.J.M.'s case was heard in conjunction with another: *P.N.S. (Cameroon) v. Minister for Justice, Equality and Law Reform*, which also had a very similar fact setting. The trial judge dismissed both sets of proceedings and then subsequently refused to grant a certificate of leave to appeal in either. However, before the question of leave had been determined by the High Court, P.N.S.'s deportation order was withdrawn, which had the effect of rendering his intended appeal, largely moot. Nonetheless, he still applied to this Court for leave and by way of a Determination, dated 30th October, 2018 ([2018] IESCDET 160) it was held that due to the extreme factual and legal similarities in both cases, it would make most sense to adjourn consideration of his application, until such time as the companion case, being that of the within, had been determined.

10. The first judgment of the High Court was delivered on the 16th July, 2018. The learned judge held that the entitlement to remain in the State pending the outcome of a s. 22 application for ministerial consent to be re-admitted to the protection process, no longer continues once an adverse "recommendation" had been made by an IPO under subs (5) of that section. This and other related provisions of the 2015 Act are intended, in his view, to give effect to the Directive: Article 7(1) provides for a right to remain pending the making of a "decision…at first instance", by "a determining authority" in accordance with the procedures listed in Chapter III of the Directive. Even though the IPO's recommendation in question, was responding, not to an initial application for subsidiary protection, but rather to an application to be readmitted to the process (a "subsequent

application": being referenced in Article 32 of the Directive), that in and of itself made no difference to the legal issue: the learned judge went on to hold that such recommendation must be regarded as a first instance decision for the purpose of Article 7(1). (*S.H.M. v. Minister for Justice and Equality* [2015] IEHC 829, (Unreported, High Court, Humphreys J., 21st December, 2015)). Therefore, the right to remain ceases at that point.

11. In his analysis, the learned judge adopted a purposive interpretation of the legislative scheme, and even though Ireland had not opted into the recast of the Directive (2012/32/EU), and therefore remains bound by its predecessor, nonetheless, the recast could be used to assist in the interpretation of the original Directive (2005/85/EC), as the same was a clarifying as opposed to an amending recast. In passing, but of note is the fact that this was contrary to the view expressed by Hogan J. at para. 64 of *X.X. v. Minister for Justice and Equality* [2018] IECA 124 (Unreported, High Court, 21st December, 2015) ("*XX*"). This is a point which I will return to (para. 77 below).

12. The respondents argued that the question before the High Court was whether the "recommendation" made by the IPO amounts to a "decision" within the meaning of Article 7 of the Directive, despite how it is described by the Oireachtas. Relying on the decision of Hogan J. in *Hampshire County Council v C.E.* [2018] IECA 154 (Unreported, Court of Appeal, 7th June, 2018), the trial judge held that such recommendation should be regarded in substance, as a "decision" for the purposes of the said Article. He did so for two reasons, firstly the autonomous meaning of EU measures and secondly, the automatic nature of the Minister's approval of such a recommendation under s. 22 of the 2015 Act.

13. In short, the learned trial judge outlined his conclusion by reference to the sequential nature of the protection process, as provided for by the 2015 Act, and did so in the manner following:

i) The first instance decision under Chapter III of the Directive is that of the recommendation made by the IPO, and the appeal decision for the purposes of Chapter V of the Directive is the appeal decision of the IPAT.

ii) The ministerial decision made after the IPO's recommendation, in this instance to refuse, is a mere formalisation step and of itself does not constitute a first-instance decision for the purposes of Chapter III.

iii) Therefore, the right to remain given under art. 7(1) of the Directive applies only until such point as the IPO's recommendation has been made, in particular it does not have effect while an appeal is underway to the IPAT nor during any subsequent judicial review process: this because Article 7(1) only applies until the first instance decision of the determining authority is made and does not continue into any appeal or other "effective remedy process", as mentioned in Chapter V of the Directive.

It followed from this that no basis existed for continuing the injunction: it would therefore be discharged.

14. Humphreys J., having established that a right to remain no longer existed following the making of a recommendation by the IPO, went on to consider a secondary matter and stated that relief(s) by way of judicial review, being a discretionary remedy, should not be available to an appellant who had abused the underlying process. In his view, Mr K.J.M. had engaged in "a massive abuse of the immigration system both of Ireland and the Netherlands", this by using different names and by evading his presenting obligations. He also withdrew his subsidiary protection application; thus impliedly abandoning a claim of real risk of harm and only re-applying some months later. On this basis the trial judge said that even had he not rejected the claim on its merits, he would have done so on a discretionary basis.

15. Finally, the trial judge held that the reliefs sought had a direct effect on the enforceability of the deportation order, and consequently the proceedings were covered by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended; and therefore would be subject to its provisions, including the time limits therein specified. Given the timeline above outlined, it was quite evident to the learned trial judge that these proceedings were out of time. In dismissing the case, the trial judge also ordered that the injunction restraining the appellant's deportation be discharged.

16. The second judgment was delivered on the 27th July, 2018, in which the application for leave to appeal the substantive decision to the Court of Appeal was refused on all questions submitted.

Application for Leave and Grounds of Appeal

17. The application to this Court was filed on the 1st August, 2018 and a Determination issued on the 30th October, 2018, in which leave was granted to appeal on six of the seven asserted grounds, each of which reads as follows: -

i) The learned trial judge erred in holding that "the entitlement to remain in the State pending refusal of a s. 22 application does not apply after an IPO recommendation has been made";

ii) The learned trial judge erred in finding that "given the automatic nature of the Minister's approval of the recommendation under s. 22, the protection view [sic] is in substance, a decision";

iii) The learned trial judge erred in departing from the literal meaning of a "recommendation" in circumstances where the designation of the function of the IPO as the making of a recommendation was not absurd nor did it fail to reflect the plain intention of the Oireachtas, as gleaned from the 2015 Act as a whole;

iv) The learned trial judge erred in holding that the appellant's plenary proceedings were governed by s. 5 of the 2000 Act;

v) The learned trial judge erred in refusing an injunction;

vi) The learned trial judge erred in indicating that he would refuse relief on discretionary grounds.

18. These grounds can conveniently be structured into raising three issues: which were dealt with by both the appellant and respondents in this matter. Those issues may succinctly be stated as follows:-

i) Do these proceedings amount, in substance, to a collateral attack on the validity of the deportation order, with the result that they are captured by s. 5 of the 2000 Act and subject to its procedural requirements?

ii) Can a recommendation made by the IPO under s. 22 be regarded as a "decision at first instance", within the meaning of Article 2(e) and for the purposes of Article 7(1) of the Directive?

iii) In circumstances where the appellant has asserted a right to remain in the State under and by virtue of EU law, in what circumstances is a court seized of judicial review proceedings entitled to refuse relief on a discretionary basis?

Submissions:

Issue 1: Section 5 of the Illegal Immigrants (Trafficking) Act 2000

19. The appellant's first submission on whether these proceedings amount to a "collateral attack" on the validity of the deportation order made on the 13th January, 2017 with the result that they are "captured" by the named section and subject to its procedural requirements is that, the proceedings do not challenge the validity of the deportation order *per se*, rather they challenge the enforceability of the order until such time as a first instance decision on his s. 22 application has been made. It is submitted that this Court has implicitly accepted the distinction between validity and enforceability: at the very least it was accepted in *In Re Illegal Immigrants (Trafficking) Bill 1999,* [2000] 2 I.R. 360 that the validity of the detention of a person which appeared to flow from a deportation order could be challenged otherwise than by way of judicial review. (p. 398 of the report):

> *"Section 5 deals only with the procedural remedy of judicial review as a means of challenging the validity of the administrative decisions in question. It makes no reference to proceedings challenging the legality of the detention of a person who is also the subject of a deportation order. It is in its terms solely concerned with proceedings challenging the validity per se of the administration decision."*

Further cited is the *dicta* of Cooke J. in *Q.L. & Y.Y. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 223 (Unreported, High Court, Cooke J., 15th June, 2010) ("*Q.L. & Y.Y.*").

20. The appellant rejects the contention that *Nawaz v. Minister for Justice and Ors* [2012] IESC 58, [2013] 1 I.R. 142 is an authority for the proposition that the instant proceedings are governed by s. 5 of the 2000 Act, something which was asserted, in similar

circumstances, by Hogan J. in his judgment in *B.S.S. & A.S. v. Minister for Justice and Equality & Ors* [2017] IECA 235 (Unreported, Court of Appeal, 31st July, 2017) ("*B.S.S*"). Rather, he says that the point in *Nawaz* was that any constitutional attack on the underlying measures, necessarily meant that any order made or capable of being made thereunder was likewise under challenge. Furthermore, it is said that the reasoning of Cooke J. in *Q.L. & Y.Y*. sits more comfortably with this court's judgment in *Nawaz* than with the judgments of the High Court and Court of Appeal in *B.S.S.* and *X.X.*

21. Furthermore, it is submitted that the judgments of the High Court and Court of Appeal in *B.S.S.* and *X.X.* respectively, are not compatible with Article 34.4.1° of the Constitution, as both decisions effectively restrict the constitutional right of appeal from a decision of the High Court to the Court of Appeal. In the light of this Court consistently holding that any such restriction must be in clear terms, it is respectfully submitted that the constitutional right of appeal cannot be restricted on the basis that an application for injunctive relief to restrain the enforcement of a deportation order on grounds unrelated to its validity is captured by s. 5 of the 2000 Act.

22. The final submission made by the appellant on this issue is that the High Court, by relying on the decisions of *B.S.S.* and *X.X.* has impermissibly construed s. 5 of the 2000 Act, so as to capture the within proceedings. This has been done by effectively amending the section to add the words "or the enforceability" after the word "validity" where it appears in subsection (1). The appellant also draws attention to the judgment of Humphreys J. in which it is submitted that, as though quoting from s. 5 itself, he says "the time limits run from when the grounds of unenforceability arise" (para. 42 of the judgment). This approach it is said, is to trespass upon the exclusive legislative role of the Oireachtas. It is also claimed that even though these proceedings broadly concern Mr. K.J.M's presence in the state and his removal therefrom, nonetheless, they do not come within the powers given to the Minister by s. 5(9)(a) and & (b) of the 2000 Act, to prescribe "enforceability" as a further measure for the purposes of s. 5(1) of the Act. Accordingly, for this reason the learned judge was also incorrect in his conclusion.

23. On this first question, the respondents also examine the reasoning of this Court in *Nawaz* and several of the other decisions mentioned by the appellant, however they distinguish such cases for several reasons. Even though EU law is the founding basis for the legislative scheme, nonetheless the challenge is equally an attack on the validity of the deportation order, as would be a constitutional challenge such as that mounted in *Nawaz.* The seeking of an injunction to restrain or prevent deportation is confirmatory of this viewpoint.

24. The respondents submit that although not expressly framed in such a way, the basis upon which the appellant seeks an injunction restraining the Minister from enforcing the deportation order must be that the provisions of s. 3 of the Immigration Act 1999 are in conflict with Article 7(1) of the Directive. This can be compared directly to *Nawaz* wherein this Court found that a constitutional challenge to that section amounted to a collateral attack on the Minister's power to make a valid deportation order.

25. In response to the appellant's reliance on *In Re Illegal Immigrants (Trafficking) Bill* 1999 [2000] IESC 19, [2000] 2 I.R. 360 as an authority for the proposition that enforceability of a deportation order could be challenged otherwise than via judicial review proceedings, the respondents claim that this is incorrect. They say the Court clearly envisaged that in a situation where the basis for detention is a deportation order and the detained person makes an Article 40 application, that person would still have to institute separate judicial review proceedings in order to challenge the deportation order. This step could not be avoided by simply making a *habeas corpus* application.

26. Finally, the respondents reject the submission that the judgment of Cooke J. in *Q.L. & Y.Y.* could be used to support the appellant's position, as that case involved the seeking of a declaration that in the changed circumstances which had occurred, the implementation of a valid deportation order had become unlawful: it is said that such relief was not in fact captured by s. 5 at that time. Furthermore, the respondents state that the judgment makes clear that the appellant could not challenge the validity of the deportation order and that the granting of an injunction would be exceptional. The respondents conclude on this point by saying that the clear intention of these proceedings is to undermine the deportation order, by way of a collateral attack.

Issue 2: Can a recommendation made by the IPO be regarded as a decision at first instance within the meaning of Article 2(e) and for the purposes of Article 7(1) of the Directive?

27. The appellant's case in essence is that he has a right to remain pending a first instance decision by a "determining authority": that step is not reached in this jurisdiction until the Minister for Justice makes his decision after a recommendation by the IPO where no appeal has been taken, and after the intervention of IPAT where such an appeal has been taken. In particular, that point is not reached after a recommendation by the IPO itself. As previously stated, such a right to remain is given by Article 7(1) of the Directive, whilst the decision of the Minister for Justice is provided for in s. 22(13) or (15) of the 2015 Act (para. 7 above). As his appeal to IPAT has not as yet been determined, he has a right to remain under EU law: the fact that this is a second application made under s. 22 of the Act, does not affect this right. Accordingly, he is entitled to enforce such right in domestic law.

28. The appellant then sets out to test this interpretation by asking whether such could be said to create an absurd result when viewed as part of the 2015 Act as a whole. He submits that there cannot be a doubt but that the legislature intended to distinguish, as a matter of law, a recommendation of the IPO from the subsequent decision of the Minister. This it is claimed adds credibility to the submission as expressed. Accordingly, as the appellant has yet to benefit from such a decision, his entitlement to stay in this State remains.

29. A further point made by the appellant stems from a comparison between the 2015 Act and the Refugee Act 1996. Under the latter, it was provided that the recommendation of the Office of the Refugee Applications Commissioner ("ORAC") would be non-binding, the

reason for which is to reflect the longstanding recognition that the residency, exit, and entry of foreign nationals is an aspect of the executive power of the State to protect the nation's integrity. The appellant submits that the Oireachtas has consciously chosen to continue this approach in the 2015 Act: this is supported by the long title of the Act in which it is said that the overall scheme, as outlined, has had regard to the power of the executive in such matters.

30. In further support of the argument that he has not yet received a decision at first instance within the meaning of the Directive, he refers to *Annex I* of the Directive, wherein ORAC was given a specific concession as being a determining authority for the purposes of making decisions of first instance. The appellant questions why there is no equivalent transposing proviso for the ORAC's successor, being the IPO. The wording in question in Annex I is as follows:

> "'*Definition of a determining authority' – When implementing the provision of this Directive, Ireland may, insofar as the provisions of section 17(1) of the Refugee Act 1996 continue to apply, consider that:*
>
> > *'Determining authority 'provided for in Article 2(e) of this Directive shall, insofar as the examination of whether an applicant should or as the case may be, should not be declared to be a refugee is concerned, mean the Office of the Refugee Applications Commissioner"*

31. The appellant disagrees with the trial judge's reasoning that since the Minister no longer has any discretion in the implementation of a recommendation made by the IPO, unlike that of ORAC, such a recommendation can be regarded as being equivalent to a decision at first instance. It is not correct in his view to say that the Minister is simply formalising a decision previously made. Even if such should be the case, the particulars contained in *Annex I* of the Directive should have been updated. As there is no longer an office or officer called the "Refugee Applications Commissioner", such effectively being replaced by the IPO, the appellant submits that there is no longer any basis to continue the "concession" made to Ireland as outlined in *Annex I* of the Directive. Furthermore, and in conclusion on this particular issue, the appellant submits that the transposing legislation is not sufficiently clear, precise and predictable as is required under EU law: in addition, for this reason, the Court should grant the injunction as sought.

32. The respondents firmly reject Mr. K.J.M.'s interpretation of s. 22 of the 2015 Act. They say that there is no basis upon which it can be contended that the Minister exercises any role as a 'determining authority' under either Article 2(e) or Article 7 of the Directive: the body which examines all subsequent applications under s. 22 is the IPO. The respondents contrast the situation which prevails under the 2015 Act, wherein the assessments of the IPO and the IPAT are followed by a grant or refusal of the Minister's consent, with the situation under the 1996 Act where an assessment of ORAC or the Refugee Appeals Tribunal were non-binding on the Minister. It followed therefore that neither body in the previous process had any defining role in the making of a decision in relation to such applications. The role of the Minister under the 2015 Act, is, it is submitted, very

different: there is no discretion and his only function is to notify the applicant of the IPO's recommendation and of the right of appeal to the IPAT.

33. The Oireachtas clearly wished to conform with the Directive when it enacted the 2015 Act, and in this regard the respondents draw our attention to Article 34(3)(a) of the Directive, which obliged Member States to ensure that an applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be examined further, the reasons for the decision. In the respondents' view, s. 22(6) which requires the Minister to notify the applicant of the recommendation of the IPO, is a proper implementation of Article 34(3)(a). The interpretation of the appellant of the s. 22 process is strained, as it would lead to the Minister's decision being one of first instance, without an effective remedy as is demanded in Article 39 of the Directive. Whereas, the respondents' interpretation gives, in their view, a much more logical interpretation wherein the IPO's recommendation is the decision at first instance, with a right of appeal *i.e.* an effective remedy, to the IPAT and, an appropriate notification in the form of the Minister's mandatory grant or refusal.

34. Finally, the respondents say any consideration of *Annex I* of the Directive is irrelevant. The ORAC made non-binding recommendations under the 1996 Act which, but for *Annex I*, such a procedure would not have complied with the Directive, in that such recommendations would not otherwise have been considered decisions. However, this does not apply to the situation in s. 22 of the 2015 Act since the IPO's recommendations are binding and as such constitute decisions.

Issue 3: In circumstances where the appellant has asserted a right to remain in the State by virtue EU law, is a court seized of judicial review proceedings entitled to refuse relief on a discretionary basis?

35. The appellant submits that the High Court judge should not have, as he did, engaged in an analysis of whether the appellant was entitled to the reliefs sought, by looking at his history in the immigration and asylum process here and in the Netherlands. Only designated bodies, with up-to-date information about the country of origin are in a position to assess whether an application based on risk of being subject to inhuman or degrading treatment upon forcible return should objectively succeed. As well as this, the appellant questions the manner in which the trial judge engaged in this exercise of discretion and whether same was done fairly, by setting out only established facts and uncontroverted evidence. The appellant points to several pieces of uncontroverted evidence which were not mentioned by the trial judge and do not appear to have been taken into account by him.

36. Notwithstanding the above, the appellant submits that none of the range of factors which would normally be taken into consideration by a court as being relevant to the application of discretion are present here. The appellant questions therefore whether this was a correct exercise of the court's discretion and in this respect delves into the principles espoused in both *Smith v Minister for Justice* [2013] IESC 4 (Unreported, Supreme Court, 1st February, 2013) and also *De Smith's Judicial Review*, in particular at para. 18-059, in

which the author has said "*the claimant's motive in making a claim for judicial review is not a relevant consideration in the court's decision to grant or withhold a remedy*".

37. Particularly in the context of a claim based on an assertion of EU rights, the appellant submits that, though there is no suggestion that a claimant is entitled to abuse or fraudulently rely upon EU rights, the Court of Justice's decision in *Cussens and Ors v. T.G. Brosnan* (Case C-251/16) [2017] B.V.C. 61 is a clear authority for the proposition that a refusal of a right or advantage on account of abusive or fraudulent acts is simply the consequence of finding that, in the event of fraud or abuse, the objective conditions required in order to obtain the advantage sought are not, in fact met.

38. The appellant submits that the only matter at issue in this case is whether he has the right to remain, as a matter of law, while he awaits a decision of the first respondent on his application for readmission to the protection process. None of the issues seemingly taken into consideration by the trial judge would have been relevant to the issue of whether it would have been pointless to grant him injunctive relief by way of judicial review.

39. In conclusion, the appellant believes that for the reasons above outlined, the appeal should be allowed, or, in the alternative, that the Court should find for the appellant on the jurisdictional ground and abstain from deciding the others and remit the balance of the appeal the Court of Appeal.

40. On the final issue, the respondents have pointed out that the real the basis upon which the learned trial judge exercised his discretion as he did was set out in more detail in his second judgment, relating to the granting of a Certificate of Leave to Appeal to the Court of Appeal. The respondents posit the idea that the discretionary refusal of relief could have been more policy-based, centred around the court's concern for the integrity of the asylum process, of which judicial review forms a very important part. This was alluded to in *Dimbo v. Minister for Justice* [2008] IESC 26, [2008] 27 I.L.T. 231. The respondents further submit that whether there were falsehoods employed with the intention of grounding litigation, or there were falsehoods employed when corresponding with the Minister and the IPO, the fact remains that such falsehoods were used to improperly advance the same set of rights and therefore in both cases the appellant would be poorly positioned to obtain relief from the system which he has so abused. It is submitted also that as well as the foregoing, the High Court judge had ample material before him which would allow him to conclude that the appellant's previous behaviour gave rise to a lack of *bona fides*.

41. While the appellant has submitted that rights which derive from EU law in particular should not be overruled by such considerations, the respondents on the other hand state that the abuse of rights doctrine in EU law provides an additional support for the proposition that rights should not be abused or utilised to a fraudulent end. Furthermore, while the respondents do accept that the application of discretion should be done by reference to a framework of principles rather than an "*ad hominem* dispensation of just

desserts", in their view the trial judge took only relevant factors which went to the heart of the appellant's conduct and history in the immigration process into consideration.

42. In conclusion, the respondents submit that the appellant has managed to successfully ventilate his claim before both the High Court and this Court while remaining within the confines of judicial review and therefore it is difficult to ascertain any discernible prejudice suffered by him from the procedural requirements of s. 5 of the 2000 Act. His entitlement to remain in the State under Article 7 of the Directive ceased when the IPO made their recommendation on the 3rd of November 2017, and, finally, with the identified incidents of deceit on the part of the appellant throughout his immigration history, the trial judge was perfectly entitled to rule that the claim would have been refused on a discretionary basis had it not first been refused as a matter of law.

Issue No. 1 (para. 18 above):

43. The Oireachtas has decided that any challenge to the various and numerous notifications, decisions, orders, determinations, refusals, etc ("the measures"), set out in s. 5 of the 2000 Act. is to be regulated in a manner more restrictive than where the provisions of Ord. 84 RSC apply. It should be noted that s. 5 has been amended, first by s. 34 of the Employment Permits (Amendment) Act 2014 and then s. 79 of the 2015 Act. The constitutionality of the section, in its original form, has been tested and found compatible: there is no reason to believe that the version which applies to this case is any different. Insofar as is relevant, the section reads as follows:-

"5.(1) A person shall not question the validity of –

(a) a notification under s. 3(3)(a) of the Immigration Act 1999,
(b) a notification under s. 3(3)(b)(ii) of the Immigration Act 1999,
(c) a deportation order under s. 3(1) of the Immigration Act 1999…otherwise than by way of an application for judicial review under Ord. 84 of the Rules of the Superior Courts (S.I. No. 15 of the 1986) (hereinafter in this section referred to as 'the Order')

(2) An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in subs (1) shall –

(a) be made within the period of fourteen days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and
(b) be made by motion on notice (grounded in the manner specified in the order in respect of an *ex parte* motion for leave) to the Minister and any other person specified for that purpose by order of the High Court and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed

(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.
(b) this subsection shall not apply to a determination of the High Court insofar as it involves a question as to the validity of any law having regard to the provisions of the Constitution."

Accordingly, the procedure specified must be adhered to where the validity of a deportation order is questioned (ss. (1)(c) of s.5).

44. The manner in which a cause of action is pleaded may differ greatly from case to case, even when traversing the same tramlines. By such means, the requirements of a regime like that in s. 5 of the 2000 Act, may be skilfully avoided. As a result, the courts have developed a line of jurisprudence, so as to ensure that the will of the Oireachtas is not frustrated and that the intention behind the provision, as evidenced by its terms, is not circumvented. Hence, the concept of a "collateral attack" which, when so established, will be regarded as if it were a direct challenge to the measure itself. (para. 42 of the High Court judgment in this case).

45. When discussing the case law which we have been referred to, it is important not to treat passages from the judgments, in isolation from the facts of the individual case as establishing freestanding or self-supporting principles. A simple example will suffice. At para. 19 above, I have quoted from the judgment of this Court in the Article 29 Reference of a Bill which subsequently, was enacted as the Illegal Immigrants (Trafficking) Act 2000 ("the Article 29 Reference") ([2000] 2 I.R. 360). It is cited by the appellant in this case as a general authority for making a distinction between questioning the validity of an administrative decision (such as a deportation order), and its enforceability: such a submission in and of itself is not correct as it is devoid of context (para. 63 below). So, at a general level as we will see, care must be taken to position what judgments have said in their established context. However before summarising what principles can be deduced from the case law, I should first conduct a brief survey of some of the more important decisions in this area: I will start with "*Nawaz" (Haq Nawaz v. the Minister for Justice & Ors:* [2012] IESC 58, [2013] 1 I.R. 142).

46. In *Nawaz*, there were two sets of proceedings: the judicial review questioned whether the bifurcated system then in place whereby an application for subsidiary protection could not be made unless the subject person was a failed asylum seeker, was compatible with Council Directive (2004/83/EC) ("the Qualifications Directive"): we are not concerned with those, but we are with the second set of proceedings which were commenced by plenary

summons. Therein, Mr. Nawaz in the following circumstances, sought a declaration that s. 3 of the 1999 Act was unconstitutional.

47. An asylum seeker, following notification of a proposal by the Minister for Justice to make a deportation order in respect of him/her, and who makes representations against that proposal, could still voluntarily leave the State at any time before the Minister makes a final decision in that regard: the notification mentioned must expressly give the person that option (s. 3(4)(b) of the 1999 Act). In effect, Mr. Nawaz wanted the same opportunity but after the Minister notified him that his representations had been rejected. This was not provided for in s. 3 or elsewhere in the 1999 Act. Rather, Mr. Nawaz took s. 3 as meaning that a deportation order would be made at the same time as notification would be given, that he was not being permitted to remain in the State on what is generally referred to as "humanitarian grounds". So, he read the section as meaning that once rejection had been decided upon, a deportation order would necessarily be made at the same time as the notification issued: there being no time gap between either. As a result, he would have no opportunity in those circumstances of voluntarily leaving the State before such an order was made. Based on an asserted constitutional right to have that opportunity, he submitted that s. 3 was unconstitutional. In effect, the attack on the section, was really one of omission rather than prohibition. But the import of what he sought to achieve was clear.

48. As it transpired, the Minister had not issued any notification of his decision on the representations made under s. 3(3)(b)(ii) of the 1999 Act, nor had he made any deportation order in respect of the appellant, at the time of the hearing. The action was therefore "a pre-emptive strike", not against being notified of the rejection decision as such, but rather against the anticipated deportation order, said to immediately follow. This Court saw no distinction in terms of legal principle between a "*quia timet*" type move and where a deportation order in fact had been made. The approach would be the same in both instances. A central question therefore was whether the plenary proceedings, which challenged s. 3(1) of the 1999 Act, should be regarded as a direct attack on the Minister's ability to, in fact make a deportation order. (s. 3(1) of the 1999 Act).

49. As part of its consideration this Court in Nawaz looked at two earlier High Court decisions, *Goonery v. The County Council of the County of Meath & Ors* [1999] IEHC 15 (High Court, Unreported, 15th July, 1999) ("*Goonery"*) and *Lennon v. Cork City Council* [2006] IEHC 438 (High Court, Unreported, 19th December, 2006) ("*Lennon*"). As cautioned earlier, the facts were as different from each other as they were from *Nawaz*. However, the relevant statutory provisions, although on the planning side were of similar import to s. 5 of the 2000 Act. In short, Mrs. Goonery sought a declaration (i) that Meath County Council, as planning authority, could not have properly determined or made a valid decision on a planning application by a third party because of its failure to have regard to Council Directive 85/337/EC ("the Environmental Impact Assessment Directive") (relief no. 4) and (ii) that by virtue of the provisions of s. 26(1)(a) of the 1963 Act as amended (implementing the Directive), Meath County Council could not have made a valid decision on the planning application (relief no. 11). The fact that she did not seek a declaration

that the planning permission as granted, was invalid did not prevent the High Court from concluding that the reliefs as mentioned were indeed an attack on the validity of such permission and accordingly, were captured by the comparable section, namely s. 82(3A) of the Local Government (Planning and Development) Act 1976, as inserted by s. 19 of the Local Government and Planning Act 1992. Kelly J. held that: -

"Whatever about the way in which these (reliefs) are worded, they plainly seek to impugn the validity of the decision to grant permission. If these reliefs were granted, they would undoubtedly mean in practical terms that the decision of [the Council] was invalid. This is particularly so in the case of relief No. 11. The mere fact that an order was not sought quashing the permission in question does not mean that the validity of the permission was not being questioned. It was, and so the provisions of the section applied and were not complied with since the application was moved before Budd J. ex parte and not on notice as the section requires."

(See also *Kinsella v. Dundalk Town Council & Ors* [2004] IEHC 373 (Unreported, High Court, Kelly J, 3rd December, 2004) at p. 10).

50. The second case referred to (*Lennon v. Cork City Council* [2006] IEHC 438) where the facts disclose what an innovative mind, creative spirit and indomitable personality, Mr. J. V. Lennon, a consulting engineer with a keen eye for law, practising largely in Cork and Munster, had. The planning application, described by the trial judge as a "bold and imaginative scheme" was for the construction of a bridge with a commercial centre and residential development across the River Lee, at a point between St. Patrick's Quay and Andersons Quay in the City of Cork. Smyth J. went on to say:-

"This …development had as its inspiration the Ponte Vechio in Florence. The plaintiff who appeared in person on this hearing (and conducted the case with great skill and courtesy), is a Consulting Civil Engineer by profession…[who had formulated] a design to give effect to the concept that would do credit to Benvenuto Cellini. The plaintiff like the great 16th Century goldsmith and sculptor, had lived in Florence and thence moved to Rome."

51. As plaintiff, Mr. Lennon sought a declaration that one Marie Lennon made a valid planning application to Cork City Council on 10th August, 1998, for the development just described. The authority took the view that the planning notice did not comply with the time requirement, specified in Article 14(1) of the Local Government (Planning and Development) Regulations 1994. The application was therefore treated originally as incomplete and ultimately was rejected on the 29th October, 1998. Having lodged an appeal to An Bord Pleanála, that appeal was withdrawn in March, 1999 against the declared position that the original application was valid and accordingly, that under the provisions then in force, Ms. Lennon was entitled to a default permission as and from 10th October, 1999. Amongst many of the issues dealt with by the trial judge, was a contention that the declaration sought constituted an attack on the validity of the decision by the planning authority. Smyth J. so agreed. Citing *Goonery*, he was of the view that the fact that no formal order was sought attacking that decision was not determinative,

rather one had to look at the substance of the relief claimed. On that basis, the proceedings were captured by the relevant provision of the Planning Act. (para 49 above).

52. Drawing on the above line of authorities, this Court (Clarke J., as he then was) held that the correct approach was one of substance and not form and rhetorically asked what would the grant of relief, in that case, a declaration, mean in practical terms for Mr. Nawaz? Ultimately, the learned judge held that a constitutional challenge to the statutory provisions under which an "adverse order" may be made, being one of the specified measures (para. 43 above), should of itself be regarded as a pre-emptive attack on the validity of such a possible order, which of course in that case was a deportation order; with the result that such proceedings were therefore captured by s. 5 of the 2000 Act.

53. The strict issue of whether there was a valid distinction between the validity of a measure captured by s. 5 of the 2000 Act (a "s. 5 measure"), such as a deportation order, and its enforceability, was at stake in *Q.L and Y.Y v. Minister for Justice and Equality* [2010] IEHC 223 ("*Q.L. and Y.Y.*"): again, the facts were very much in play as they were in the High Court authority cited by Cooke J. which suggested that both were inseparable. That authority, *Lelimo*, had a complicated procedural history, largely to do with the scope of the grounds upon which the substantive application could proceed. Such may very well have had an influence on the relevant passage from the decision of Laffoy J., when dealing with a submission that a valid and unchallenged deportation order, made prior to the European Convention of Human Rights Act 2003, could not be enforced post its enactment, as it may constitute a breach of s. 3(1) of the Act. The learned judge in response said that this could not be correct and explained:-

"…such authority as any organ of state has to enforce the deportation order derives solely from the deportation order. The enforcement process cannot be severed from and has no basis in law distinct from the order itself." (Lelimo v. Minister for Justice, Equality and Law Reform [2004] 2 I.R. 178 at 190)

In *Q.L. & Y.Y.,* Cooke J. was not convinced that in all circumstances such a statement could be taken at face value, or could have general application, a viewpoint which I will come back to in a moment.

54. The case of *F.O. v. the Minister for Justice and Equality, Ireland and the Attorney General* [2013] IEHC 206 (Unreported, High Court, Mac Eochaidh J., 9th May, 2013) ("*F.O.*") is of interest, where the facts show that on 17th January, 2013, a deportation order was made in respect of a Ms. F.O., to which there was no challenge. Whilst her pre-history in the asylum system was indeed notable, it is not of direct relevance to this case. In response to being notified of that order and a requirement to leave the State by a certain date, representations were made to the Minister, for her to remain on humanitarian grounds. A decision on that application remained outstanding at the time of the proceedings. Having failed to comply with the notification requirement, she was arrested and detained: in response, she instituted proceedings seeking a declaration that she was entitled to make a subsidiary protection application and have a decision thereon, prior to deportation taking place: any move to deport her pending that would be invalid. She sought an

injunction to prohibit her actual deportation until the proceedings had concluded. As a matter of note, no such application had been made by the date of the proceedings. (*F.O. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2013] IEHC 206).

55. In his judgment, Mac Eochaidh J., reviewed a number of earlier decisions and concluded that the effect, object and purpose of the proceedings was to challenge the validity of the deportation order previously made. In his view, the proceedings inescapably meant "that the deportation order could not be implemented and that it was unlawful on the day that it was made as it precluded such application being made and determined with the presence of the plaintiff in the State". He continued "an unlawful deportation could not happen on the back of a lawful deportation order…if the deportation would be unlawful because there had been no prior determination of an application for subsidiary protection, that implies a defect in the deportation order. I therefore conclude that the effective success by the plaintiff in these proceedings would require an actual or implied finding of invalidity in a deportation order and therefore, the proceedings would have the effect of questioning the validity of that order". He continued "I find that the purpose of these proceedings, having regard to this timing, is to prevent a deportation order from having effect. Preventing such an order from having the force of law because of an error allegedly extant on the date it was made inevitably questions its validity". In essence, he held that the enforcement process could not be separated from and was indivisible from a valid deportation order. In a memorable phrase he also added "The deportation and the deportation order are as inseparable as the dancer from the dance, to borrow a phrase". Accordingly, s. 5 of the 2000 Act had to be complied with.

56. With respect there was in my view a more straightforward way of arriving at the conclusion which the learned judge did. Taking his view of the pleaded action, it was being suggested that enforcement, by way of deportation, could never take place until an application for subsidiary protection had been made and then duly determined. In effect, until such events occurred, the making of a deportation order would be at best futile and most probably invalid. Such a claim was certainly an adventurous call on what the legislation provided for, and on any reading of the scheme, could not possibly succeed, as at the most basic level such a protection application might never be made. So undoubtedly as framed, the challenge, even though no reference was made to the "deportation order" as such, rather simply to "deportation", clearly was an assault on the order itself.

57. A similar issue arose in a number of other decisions, including *B.S.S. (an infant acting by his father and next friend A.S.) and A.S v. the Minister for Justice, Equality, Ireland and the Attorney General* [2017] IECA 235 (Unreported, Court of Appeal, 31st July, 2017) ("*B.S.S.*"). In that case, a deportation order, was made in respect of the second appellant, A.S., on the 24th October, 2016, to which there was no challenge. Having failed to comply with its terms, he was subsequently arrested as part of the execution process. At that point, he informed the authorities that he had a son (B.S.S.) whose mother was an EU citizen and as a result, he asserted a derivative right to remain in the

State under Article 20 TFEU. Proceedings then followed in which he sought a declaration that the "implementation of the deportation order…at this juncture would be unlawful". At para. 12 of the court's judgment, Hogan J. said:-

"A key point to bear in mind regarding the present proceedings is that the second applicant has sought an order restraining the enforcement of the deportation order. There may well be instances where certain post hoc events would render a deportation order either spent or unenforceable: examples here would include cases where the subject matter of the order had become a naturalised Irish citizen and could include cases where the individual in question had validly married an EU national who was genuinely exercising free movement rights so that the third country national could only be removed from the State in accordance with the procedures contained in Article 20, et seq of Directive 2004/38/EC, or where the effect of the order would actually infringe the Zambrano rights of a child who is an EU citizen by obliging that child to leave the State."

58. The learned judge continued:-

"A valid administrative decision generally has both retrospective and perspective effects in the sense that a legal adjudication to this effect carries with it not only the implication that what has been done in the past was valid, but that the giving effect to that order in the future will also be valid. In the specific case of a deportation order, a finding of validity implies that the enforcement of that order by actually removing the applicant from the State would also be valid. The corollary therefore is that any application (as in this case) to restrain the enforcement that the deportation order amounts in substance to a questioning of the validity of that order so that the provisions of s. 5(1)(c) of the 2000 Act accordingly apply." (para. 14)

In so concluding he cited a passage from *Nawaz* (p. 160 of the report) as well as affirming his view that the essence of the High Court's decision in *F.O.* was correct. On that basis, the Court of Appeal had no jurisdiction to entertain an appeal from the High Court unless such was moved within the parameters of s. 5 of the 2000 Act or the trial judge certified under subs (6)(a) thereof. As neither had taken place, the action was dismissed.

59. A further decision is also worth mentioning. One of the issues raised in *X.X. v. Minister for Justice, and Equality* [2018] IECA 124 (Unreported, Court of Appeal, 4th May, 2018) ("*X.X.*"), arose in the following matter. On the 15th day of April, 2015, solicitors on behalf of the appellant, made an application to the Minister for Justice for his consent to re-enter the asylum process pursuant to s. 17(7) of the Refugee Act 1996. That application, which was marked "without prejudice", was refused by the Minister on 17th June, 2015. Such consent would be required where the Minister had previously "refused" to grant to the subject person concerned a refugee declaration. The reference to "without prejudice" was based on an assertion that the previous application so made had been withdrawn by the

appellant, and therefore had not resulted in any refusal by the Minister. In any event, judicial review proceedings were instituted seeking a declaration that on the 8th April, 2015, he had made a valid *de novo* application for asylum, which it was claimed had been refused by the Refugee Applications Commissioner, on the erroneous basis that ministerial consent was required, when in fact it was not.

60. One of the many issues raised was whether or not the declaration sought constituted an impermissible attack on the Minister's decision of the 17th June, 2015: it being accepted by all that a decision under s. 17(7) of the 1996 Act, was a prescribed measure for the purposes of s. 5 of the 2000 Act. Applying the principles set out in *Nawaz*, Hogan J. for the Court of Appeal, took the view that in substance the challenge amounted to a collateral attack on the Minister's refusal to permit the appellant to re-enter the asylum process. That conclusion was reached because in his view if the appellant was correct "then the Minister had no power to adjudicate on the s. 17(7) application because by definition that power only arises if the applicant had already made a prior application for asylum which had been "refused" in the broader sense by which that term has been defined. It is in that sense that the applicant would in substance be challenging the validity of the s. 17(7) decision, otherwise than by way of an application for judicial review. I appreciate that the applicant only made this application in 2015 on a strictly without prejudice basis, but this nonetheless cannot take from the conclusion" (para. 71 of *X.X*.). In passing, it should be noted that in a further appeal to this Court, the decisions of both the High Court and the Court of Appeal on this point were affirmed ([2019] IESC 59).

61. Mr. K.J.M., very much relies on *Q.L & Y.Y*. in support of his submission that by confining his challenge to the issue of "enforceability" and not "validity", he was not thereby attacking the order's validity and accordingly, s. 5 of the 2000 Act was not engaged. The first named applicant sought, an order of *mandamus* compelling the Minister to give a decision on an application under s. 3(11) of the 1999 Act for revocation of a deportation order made against him, a declaration that deportation would be unlawful pending that decision and finally an interlocutory injunction to give effect to that claim. The revocation application, was made on the basis of a change in circumstances, namely that in the intervening period the applicants had married and had a daughter and secondly, that they had become deeply involved in a cult which gave rise to a risk of persecution by the Chinese authorities if returned to that country. Being entirely satisfied that no grounds existed in respect of the *mandamus* application, what agitated the mind of the learned trial judge was whether, in such circumstances leave could be granted to seek the declaration where no other substantive relief was prayed for. He was satisfied that the court could so do under O. 84, r. 18(2) of the Rules of the Superior Courts, where it was "just and convenient" for that course to be adopted. That decision is not of concern to us: rather what is, is the next issue addressed, namely whether the declaration could be said to be an impermissible attack on the deportation order, which validly had been made a number of years earlier, and never challenged.

62. Cooke J. distinguished the judgment of Laffoy J. in *Lelimo* and effectively held that such should be confined to its own facts (para. 53 above). Secondly, drawing some tenuous support from *L.C. v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 133 at 155, the learned judge concluded as a matter of principle "[that]…the sole fact that a valid deportation order exists does not preclude the possibility that in the exceptional case of a material change of circumstances since the order was made, it may be just and necessary for the courts to intervene to stay its implementation until a serious legal issue has been resolved. The court cannot quash the valid order but it can delay its execution until… [the Minister has made a decision]…". He went on to say that for this jurisdiction to be exercised, the proceedings could not have as their purpose the striking down of the deportation order, but rather would have had to be motivated by some other objective such as the revocation of a valid order.

63. A further authority relied upon by the appellant is the following passage from the judgment of this Court in *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360:-

"Section 5 deals only with the procedural remedy of judicial review as a means of challenging the validity of the administrative decisions in question. It makes no reference to proceedings challenging the legality of the detention of the person who is also the subject of a deportation order. It is in its terms solely concerned with proceedings challenging the validity per se of the administration decision…

The fact that the deportation has previously unsuccessfully challenged in judicial review or had not been challenged at all within the time permitted by s. 5 may be sufficient to constitute the deportation as a lawful basis for that person's detention."

64. The passage as quoted arose in the context of a submission made to the court that s. 5(1) of the 2000 Act, then evidently in Bill form, would have the effect of preventing a detained person from challenging the validity of, for example, a deportation order in *habeas corpus* proceedings, that is in an application made pursuant to Article 40.4.2° of the Constitution. The Chief Justice said that the Oireachtas would have no competence to limit or interfere with a right guaranteed by the Constitution. He continued: -

"It is a necessary consequence of the presumption of constitutionality that it must be presumed that it was not the intention of the Oireachtas in enacting this provision to amend or circumscribe that right in any way."

There then followed the passage as above quoted. Quite evidently, what Keane C.J. was dealing with was the assertion that by enacting s. 5, the Oireachtas in fact had abridged the constitutionally protected guarantee given in Article 40.4.2° of the Constitution. Such passage was simply addressing that context. In my view it has no wider application than that.

65. It seems to me that by far the most established line of jurisprudence in this area is that commencing with *Nawaz* and followed thereafter by a series of decisions, both from the High Court and Court of Appeal, some of which have been mentioned above. I do not believe that Cooke J. in *Q.L. & Y.Y.* was saying any more but that in the very rarest of circumstances, the court might intervene in the implementation of a deportation order if grave facts demanded the exercise of such a jurisdiction. If the learned judge intended to convey a more general or widespread view than this, I would respectfully reassert the authority of *Nawaz* and those other cases as above discussed. Further, I would point out that *Q.L & Y.Y.* was a decision on a leave application, made *ex parte*, and therefore took place in circumstances where full argument was not heard and consequently, the learned trial judge did not have the benefit of being fully addressed on these central issues. Accordingly, it seems to me that the established and preferred line of authority is the *Nawaz* line.

66. The following therefore is my view of what the situation is in the context of this aspect of the appeal:-

(i) It is common case that subject to the following, a "collateral attack", properly so classified, should be regarded as the equivalent of a direct attack on the subject measure for, *inter alia,* procedural purposes.

(ii) In deciding upon the question, the Court looks at the gist and essence of the proceedings and in particular at the substance of the reliefs claimed. The phraseology used in the pleadings is not determinative: neither is a submission that there is no "*per se*" challenge to the captured measure: substance prevails over form.

(iii) It is an oversimplification to pitch the test only as being whether the purpose or motivation, object or effect of the proceedings is to mount a challenge to the measure in question. Purpose and motive alone may be sufficient: but on many occasions will not be: object together with effect will almost always be sufficient.

(iv) If an applicant can assert a right, either legally or constitutionally based, which is independently sourced, from that which underpins the validity of a deportation order, whether within the asylum process or otherwise, such a right should be given effect to even if there is consequential effect for the enforcement of the order: either conditioned in terms of time, steps or measures: such may arise in a variety of circumstances.

(v) Hogan J. gave examples of what he described as post hoc events which may have this effect: such as the naturalisation of the subject person as an Irish citizen, the *bona fide* exercise of free movement rights following a valid marriage to an EU citizen, and the application of some form of judicial protection such as that resulting from *Zambrano etc.* There may well be other like examples of supervening events which fall into this category.

(vi) In *Mekudi Yau v. Minister for Justice, Equality and Law Reform and the Governor of Cloverhill Prison* [2005] IEHC 360 (Unreported, High Court, O'Neill J, 14th October, 2005) O'Neill J. said "there are many instances where an order which was made validly can cease to have force and effect, for example a deportation order which is excessively delayed or which is used for an ulterior purpose": one may add to this, where bad faith can be established.

(vii) In addition, there could be cases where ancillary steps may have to be taken to enforce the deportation order. The arrest and incarceration of an intended deportee immediately comes to mind. Where necessary, the legal requirements for such a step(s) must be adhered to. If not, the arrest may be unlawful and even if a declaration to that effect would have consequences for the actual deportation of the individual concerned, such a challenge would not be captured by section 5.

(viii) In my view, it would be entirely contrary to law, if any of the examples given, were denied effect simply because s. 5 of the 2000 Act was not complied with. The right which these examples give rise to, could be asserted and must be recognised, if in itself, it is not captured by s. 5 of the 2000 Act. In those circumstances, the right must be fully vindicated.

67. In the context of the above circumstances, the precise procedural way, by which it is sought to prevent actual deportation on foot of an order, not challenged within the specified time, may be open to debate. Some discussion must yet be had as to whether, if such circumstances should arise, it would also be necessary to have the order itself set aside. If that should turn out to be the preferred route I would not anticipate any difficulty in an applicant getting the required extension of time for the purposes of s. 5 of the 2000 Act, provided of course the application was made with diligence and proximate to such events being discovered. However, as this issue did not arise in the case and therefore was not the subject of debate, I express no concluded view on what the most appropriate procedure might be.

68. Thus far the situation is reasonably clear: but how do these principles play out in this case? In my view, it is necessary to explore Issue No. 2 before coming to a conclusion on this point (paras. 91 and 92).

Issue No 2. (para. 18 above).

69. To get a greater overall sense of the legal framework involved and to further assist in understanding the discussion which follows, it would be helpful at this stage to refer in some detail to the pertinent measures of the Directive as well as the relevant domestic provisions. First, the Directive:

The Procedures Directive – 2005/85/EC:

70.

(i) As its title states, this Directive sets the minimum standards on procedures for the granting and withdrawing of refugee status within Member States. It came into force on the 1st day of December, 2005 and the transposition deadline was the 1st

December, 2007. It is divided into six Chapters and has forty-six Articles. Following its initial implementation, the domestic provisions giving effect to it have changed over the years, with the version currently applicable to this case being found in the 2015 Act. It is not suggested that this Member State has failed in its obligation to reflect in Irish legislation the provisions of the Directive.

(ii) Article 7, in Chapter I of the Directive, which is headed "Right to Remain in the Member State Pending the Examination of the Application", reads as follows: -

"(1) Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit."

Subparagraph (2) creates an exception to this obligation but is not relevant to this case.

(iii) A "determining authority" is defined as meaning "a *quasi*-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases subject to Annex 1" (Article 2(e)).

(iv) The procedures within which such a decision is made by the determining authority, are set out in Chapter III. This Chapter starts with Article 23 and ends with Article 37. It is headed "Chapter III – Procedures at First Instance".

(v) Within Chapter III, there is Section IV which includes Article 32, under the heading "Subsequent application". It is such an application that this case is concerned with.

(vi) The Directive provides for an "Appeals Procedure" in Chapter V which has a single Article, namely Article 39. This provision obliges each Member State to ensure that aggrieved applicants have a right to an effective remedy before a court or tribunal. So, a clear distinction in procedural terms is made between the minimum requirements of the process at first instance level and those which apply at appellate level. In this regard the recitals may be of relevance, and as such I will revert to them.

The above represents a brief summary of the Directive's requirements in the overall protection process.

71. Some key elements should be emphasised:

• The Directive clearly recognises a distinction between a first instance process and an appellate process;

• The right to remain as provided for is anchored in and is a requirement only of the first instance process;

• Central to that process is a "determining authority", either *quasi*-judicial or administrative, which is competent both to examine and make decisions in respect of applications which are covered by the Directive;

• The process, by which such decisions are arrived at, is *via* the procedure outlined in Chapter III, which by its very heading applies only to "Procedures at First Instance";

• The right to make more than one application is recognised: a subsequent application to re-enter the process is permitted: whilst some procedural derogation from the basic assessment is provided for, nonetheless such an application is otherwise within the first instance process;

• At appellate level Member States must provide appropriate procedures so as to ensure that an aggrieved party has a right to an effective remedy. This is provided for in Article 39 contained in Chapter V under the heading "Appeals Procedure".

The International Protection Act 2015 ("the 2015 Act"):

72. Whilst s. 22 is the most direct provision of the Act which applies to this case, it would possibly if not probably, convey little if that section only was quoted; that is, in isolation from an understanding of the sequential structure of the entire protection regime, which is set out in the Act as a whole. Stripping that to what is necessary, it will be sufficient in broad terms to describe the entities or bodies and their respective roles, which are influential in the process under discussion. It will of course also be necessary to identify and position the role of the Minister in this process. This exact exercise is in fact one which I have conducted in *A.W.K. (Pakistan) v. Minister for Justice & Equality, Ireland and the Attorney General* [2020] IESC 10, where the arrangement, distribution and organisation of the Act is reviewed. From paras. 4 – 7 inclusive of that judgment, I identified how the process was intended to operate both at first instance level and at appellate stage.

73. Basically, could I summarise the position as follows:-

(i) Under Part 5 of the Act, which is headed "Examination of Applications at First Instance", every application for international protection is in the first place examined by the IPO, who makes a recommendation under s. 39(2)(b) of the Act; such may be that a refugee declaration should be granted, that it should not but in its place a subsidiary protection declaration should be granted, or that neither should be given.

(ii) Evidently, no appeal is provided for or required when the recommendation is that a refugee declaration should be given, for the simple reason that no higher protection is available under the Act. In either of the other situations the recommendation as made can be appealed.

(iii) That appeal is to IPAT under s. 41, which is contained in Part 6 of the Act under the heading "Appeals to Tribunal". Depending on the nature of the appeal, that body has a number of options open to it, but it cannot downgrade or reduce the status of

any positive recommendation previously made by the IPO. It can of course elevate or enhance that status by substituting a recommendation that a refugee declaration should be given, in place of a subsidiary protection declaration. Finally, it can recommend that neither should be given.

(iv) The role of the Minister in this context is set out in Part 7 of the Act which is headed "Declarations and Other Outcomes". By virtue of s. 47, the Minister is obliged to give effect to the involvement of both the IPO and IPAT, which as the Act makes clear, is *via* "recommendations". Even as described however, the Minister, as stated, has no discretion but must give full effect to such recommendations. He does so by making a "decision" to that end.

(v) The only exceptions are where in his/her view, to follow a recommendation would endanger the security of the State, or where by reason of a criminal conviction for a serious offence, the subject person would constitute a danger to the "community of the State".

This brief description relates to the process for dealing with a straightforward refugee or subsidiary protection application.

74. As above noted, the principal statutory provision applicable to this case is s. 22 of the 2015 Act. It is headed "Subsequent application" and in its material aspects reads as follows: -

"22. (1) A person shall not make a subsequent application without the consent of the Minister given under the section.

(2) An application for the consent referred to in subs (i) shall include…

(4) An international protection officer shall recommend to the Minister that the Minister give his or her consent…[in the circumstances therein outlined].

(5) An international protection officer shall recommend to the Minister that the Minister refuse to give his or her consent…[in the circumstances therein outlined]

(6) Where an international protection officer makes a recommendation under subs (5)…[the Minister shall notify the applicant of the recommendation, of the reasons therefor and inform him or her of a right to appeal under subs (8)]

(8) A person to whom a notification under subs (6) is sent may…[appeal to the Tribunal against the recommendation concerned]

(9) Sections 41, 44, 45 and 46(8) shall apply to an appeal under subs (8) subject to the following modifications, and any other necessary modifications:

(a) the Tribunal shall make its decision without an oral hearing,
(b) ….

(10) Before reaching a decision on an appeal under subsection (8), the Tribunal shall …

(11) In relation to an appeal under subsection (8) the Tribunal may decide to,

(a) affirm the recommendation of the [IPO], or
(b) set aside the recommendation of the [IPO],

(12) The decision of the Tribunal… and the reasons for the decision…shall be communicated…to the person concerned, to the Minister…

(13) Where - -

(a) an International Protection Officer makes a recommendation under subsection (4), or
(b) the Tribunal…sets aside a recommendation under subsection (5),
the Minister shall give his or her consent to the making of a subsequent application by the person concerned

(15) Where a recommendation is made under subsection (5) and

(a) [there is no appeal therefrom], or
(b) the Tribunal…[affirms the recommendation]

The Minister shall refuse to give his or her consent to the making of a subsequent application by the person concerned"

Accordingly as can be seen, the Minister is bound to give effect to a positive recommendation of the IPO and likewise to a positive decision by IPAT. It is clear and not argued otherwise, that he has no discretion in any of the circumstances as outlined.

75. As stated, there is no challenge to the transposition of the Directive: the real issue is what interpretation should be given to the relevant provisions of the 2015 Act, in light of the requirements of that Directive, and in particular Art. 2(e) and Art. 7 (1) thereof. In this context, the primary focus must be to determine at what point it can be said, within the domestic legislation, that "a decision at first instance", by a "determining authority" in accordance with the procedures provided for in Chapter III, has been taken. Because when that has been determined, the right to remain under the Directive, no longer applies. This in turn involves an understanding of the process provided for in the 2015 Act and coming to a conclusion as to when the first instance process ends and on the flip side, when the appellate process commences.

76. With great respect to the trial judge, I am not convinced that this process necessarily involves a choice of construction approach: whether that be literal or purposive or otherwise. The underlying obligation in respect of all legislation, whether primary or secondary, enacted or made to implement EU law, is that, subject to the *contra legem* rule, the same should be given a conforming interpretation. That approach, in the context of a Directive, is influenced by the requirements of Article 288 of TFEU. As distinct from a Regulation, which is binding in its entirety and directly applicable to all Member States, a

Directive is said to be binding as to the result to be achieved. Consequently, whilst the purpose and objectives of every Directive have to be satisfied, the precise means by which that is done, allows for a margin of judgment to the implementing state. Therefore, there is some discretion in the procedural or process regime, provided always that the core elements of a Directive are substantially given effect to. In other words, that the domestic regime, howsoever structured, satisfies in essence both the procedural and substantive rights contained in the Directive.

77. Before I pass from this question of interpretation however, I wish to make an observation on what the learned trial judge had to say at para. 31 of his judgment (para. 11 above). Even though Ireland has not adopted the recast Directive, nonetheless, that could be considered as an aid to interpretation because in his view it should be regarded not as an amending Directive, but as a clarifying one. That view, as previously noted, was directly contrary to the expressed opinion of the Court of Appeal, in a judgment delivered by Hogan J. in *X. X.* In that case, the learned judge, now Advocate General in the Court of Justice, had this to say at para. 64 of his judgment: "*…One can, I think, leave to one side the provisions of the recast Asylum Procedures Directive (2012/32/EU) since it does not apply to Ireland. It could not, therefore, be relied for any purpose in interpreting the relevant provisions of s. 17(7)*."

78. Whilst it is not necessary to be definitive on this point, I am very much inclined to the view that the restraint expressed by Hogan J. is far more appropriate than the adventure which the learned trial judge would have us take. At the level of principle, if a Member State remains bound by an original Directive, as a result of a deliberate decision to opt out of its replacement, then it seems somewhat troublesome to suggest, that notwithstanding such decision, the courts of the Member State concerned could and should have regard to the later Directive, in their interpretation of the original one. There is certainly a high level of disconnect with this proposition. However as stated, whilst I do not have to express a definitive view on the point, I am much inclined towards the opinion of Hogan J.

79. Another aspect of the approach adopted by Humphreys J., is based on his reference to a publication by Hart and Sacks, which in another case (*A.W.K. (Pakistan) v. Minister for Justice & Equality, Ireland and the Attorney General*, para. 72 above) the learned judge cited therefrom the following general proposition: a purposive interpretation can be applied to every legal text (para. 55, [2020] IESC 10). The rationale for this is given as being a particular passage from a publication by the authors just mentioned: *"Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living… Legal arrangements (laws) are provisions for the future in aid of this effort. Sane people do not make provisions for the future which are purposeless*" (The Legal Process (Cambridge C.U.P 1958 at 148)). Let me immediately say that I greatly encourage and applaud any judge to cite prestigious works of authority in his/her judgment. However, the publication of Hart and Sacks runs to some 1536 pages and is really a philosophical discussion about the theories of law. Such an exercise has engaged brilliant and scholarly minds for several centuries, if not longer. Multiple theories and

variations on basic themes have emerged, with many of the most commendable academics having expressed a variety of diverse views. However, I see great difficulty with quoting a passage from a text, even as renowned as this is, but one with such a complex subject matter, in the expectation that it might establish a precedent in a given area: this is highly dubious. Of course, I understand that not more than a short passage can be quoted, but for such passage to have any traction in the precedent area, it must be contextualised. It is virtually impossible to do so in a judgment as distinct from perhaps some academic writing. Whilst therefore I gratefully appreciate, the value of such studies, articles and related matters, and the knowledge which my judicial colleagues may have of them, nonetheless it must be understood, from a point of view of statutory interpretation, that such an isolated manner of reference cannot really establish a sound basis for the creation of a precedential platform.

80. There is no doubt but that for compliance with the Directive, a "determining authority" must have the power to examine and make a "decision", in accordance with "Chapter III" of the Directive, on the application before him or her. The Member State concerned can designate who is the "determining authority" for the purposes of the Directive. It is certainly not challenged that the IPO qualifies in this respect (para. 73 (i) above) and depending on the argument, IPAT, may also qualify; in fact it is also said that in either situation such "decision" is not made until the involvement of the Minister is complete. The conditional reference to "IPAT" is in respect of the submission made that its role in the protection process as outlined in the 2015 Act, remains part of the "first instance" process, rather than being that of and comprising the appellate element. Leaving that aside for a moment, at what point can it be said that a "decision" is taken under the 2015 Act which represents the objective of Article 7(1) of the Directive?

81. The word "decision" is not defined in the Directive, nor is the word "recommendation" defined in the 2015 Act. A reference to established and well recognised dictionaries will not answer this question, save and except to illustrate, vividly it must be said, the different meanings which both words may have in different contexts. For the purposes of an applicant, who makes an application for international protection, a decision, for him or her, must be a decision which affects or, subject to an appeal, potentially affects his rights, including his status, either current or future, within the State. Asked differently, at what point would a lawyer, experienced in this area, advise an applicant that his interests have been affected. either in a positive or negative way?

82. Would the lawyer concentrate on what precise badge, description or label is put on what may constitute the "decision" in question? Taking a main stream application, as an example, once the IPO has made a recommendation that neither a refugee declaration or a subsidiary protection declaration should be made, how would a competent lawyer advise his client, in respect of such recommendation, having regard to the other relevant provisions of the Act? That lawyer would know that if no appeal is taken, the Minister must implement such recommendation. At that point, the applicant has no method of influencing what the Minister might do, and neither does the Minister have any discretion in that regard. In those circumstances, it is correct in my view to say that his involvement

is but the formalisation of that recommendation. If, for example, for some reason the Minister refused to implement the recommendation, let's assume one to grant a refugee declaration, an applicant would have an unanswerable right to enforce the recommendation as against the Minister. An order *ex debito justitiae* might certainly follow, unless for example, the Minister could argue that the existence of state security grounds or the interests of the community as a whole, should prevail. Thus, in doing what he must, the Minister has no independent role: he simply completes the process. It is therefore the antecedent recommendation which critically affects the interests of the applicant. Accordingly, no matter what definition or description the word "decision" is given, a "recommendation", within the 2015 Act, has the same effect. Therefore, I reject the view that somehow such a recommendation is provisional or tentative and requires an additional step to be taken before the interests of the affected applicant is known.

83. According to the ordinary meaning of the relevant provisions, read in the context of the Act as a whole and having regard to its structure, the involvement of IPAT starts only when an aggrieved party lodges an appeal to it. Indeed, the Act describes Part 6, under which its role kicks in, as "Appeals to Tribunal" (para 73 (iii) above). In respect of a first time application, such an appeal is moved under s. 41 of the Act; in respect of an appeal from the IPO recommendation that the Minister should refuse his consent to a re-entry request, that step is taken under s. 22(8) of the Act, In the latter situation the provisions of sections 41, 44, 45 and 46(8) apply as to how such an application is dealt with. Staying with the facts of this case, having conducted the exercise as provided for, the IPAT may decide under s. 22(11) of the Act either to affirm the recommendation of the IPO, or to set aside the recommendation as made. As with the situation where no appeal has been taken, the Minister, under s. 22(13) or (15) of the Act must give full effect to what the Tribunal has decided.

84. As we have seen in all cases the IPO and the Minister for Justice will be involved, with IPAT also having a role where an appeal is taken. In essence, the critical argument advanced by the appellant is that the involvement of both the Minister for Justice and IPAT takes place as part of the first instance process, whereas the respondents assert the contrary, namely that once a recommendation is made by the IPO, that process is at an end. When that point arises, it is also said that the right to remain ceases. Of course, it is acknowledged that the Oireachtas could have made provision in the 2015 Act so as to permit an appellant to remain until the decision of IPAT has been arrived at; however it is not suggested that such a provision exists. Having carefully considered what has been urged and the text of both the Directive and the 2015 Act, I am satisfied that the submission of the Minister on this aspect of the case is correct.

85. Although Mr. K.J.M.'s application was to re-enter the process, it is accepted by all that the same must be treated for Article 7 purposes, as a first-time application. Accordingly his right to remain, under that Article of the Directive, as given effect to in domestic law, lasts until a decision is made by the designated body in accordance with the specified procedure. A "determining authority" means the body "responsible for examining applications for asylum and competent to take decisions at first instance in such cases,

subject to *Annex I*". In national law it seems clear to me that the IPO is that authority. This because its recommendation has all the hallmarks and characteristics of a decision which impacts on the rights or entitlement of, or those asserted on behalf of, an applicant. Those rights, if resulting from a positive recommendation, must be given effect to. Accordingly, as described at para. 82 above, I do not see the Minister's involvement as conferring upon him any power or authority to make substantive decisions which affect an applicant. His role is I think as the learned trial judge said, purely a formulistic one, which is to implement the determination of either the IPO or IPAT, as the case may be.

86. To my mind it is extremely difficult to suggest that the role of IPAT is part of the first instance process. What is critical is the substance of its role and the actual power which it exercises: rather than what particular tag might be given to its final view. Its involvement, in that substantive sense, is as a body determining an appeal from the IPO. Therefore, it seems to me that a clear division exists between the responsibility of the IPO and IPAT.

87. In ordinary parlance an "appeal" conveys simply that, which is, that subject to the scope of the providing measure, some other and independent body gets to re-hear or review what has occurred at the previous stage of the process. If the role of IPAT is not that, one must ask what precisely is it? What would be the purpose of getting a second body to perform the same function and traverse the same grounds as that dealt with by the previous entity? If IPAT is to operate at the same level as the IPO, why should its decision supersede that of a body with equal authority? Why would the Oireachtas establish a regime with such a role, which to my knowledge, would be the first time for it to have done so in an administrative context? Such is certainly not demanded by the Directive. To give the legislation the meaning which the appellant argues for, would result in a superfluous, cumbersome and indeed in a totally confusing regime. What is provided for is a two-stage process, with the role of IPAT satisfying the effective remedy requirement. I am therefore satisfied that the interpretation suggested by the Minister fits a good deal more appropriately with the demands of the Directive and the wording of the 2015 Act, than that as advanced by the appellant.

88. Although curious I do not think the following offsets this view point. As previously outlined the structure of the Act is that in general terms, both the IPO and IPAT make recommendations which the Minister must give effect to. In s. 22 sub sections (4) to (6), of the 2015 Act the latter is referred to in the context of making "recommendations", whereas in sections (9) to (13) as well as subsection (15) IPAT is said to make "decisions". It is difficult to understand why this is so, nonetheless it does not in my view change the proper meaning and operation of that section.

89. Lest there was any doubt about my conclusion, the same is I think confirmed by the content of *Annex I* of the Directive. As previously outlined in the regime which existed prior to 2015, the "determining authority" within the meaning of Article 2(e) of the Directive, was expressly declared to be the "Office of the Refugee Applications Commissioner" (paras. 29-31 above). That office of course was quite distinct from the

Refugee Appeals Tribunal. In very broad terms, the former can be aligned to the IPO and the latter to IPAT. It would therefore be entirely surprising for Ireland to opt for a significantly changed regime post-2015 than what existed prior to that. In my view, this is a telling feature of what the true intent of the Act is.

90. In that context, I do not believe that any legal consequences, certainly at domestic level and certainly between the appellant and the respondents, emerge from the fact that Ireland has not notified the Commission of the repeal of the 1996 Act, and of the enactment of the 2015 Act. Whilst formally perhaps that should have been done, in essence there was no need for this step as the office of ORAC no longer exists. I am therefore satisfied that what is stated is how the 2015 Act should be interpreted.

91. The result therefore is that the appellant no longer has a right to remain in this jurisdiction, either under the Directive or the 2015 Act after the IPO has made its decision. In light of this conclusion, can I now refer back to Issue No. 1.

92. To recall, the subject matter of that ground of appeal: it was whether or not the appellant's asserted right to remain in the State pending a decision at first instance on his application to be readmitted to the protection process under s. 22 of the 2015 Act, constitutes an indirect challenge, (a "collateral attack"), on the deportation order made on 13th January, 2017, which he has not sought to review? The answer to this question, indeed the application of the above principles to this case, turn on whether his submissions on Issue No. 2 are correct. If for the purposes of the Directive, the "decision" is that of either IPAT or the Minister, then as a matter of EU law he is entitled to remain until such decision has issued. On the other hand, if the submissions of the State are accepted, as upheld by the High Court, then the right to remain ceases at the time of the IPO's recommendation. I do not understand him to argue that even if the latter is correct, nonetheless he still has in such circumstances, a right to remain until the appeal has been heard and the Minister formalises whatever the resulting recommendation might be. Accordingly given the view which I have expressed on the right to remain, Issue No.1 is not as critical or as central as first thought. It is not therefore necessary to express a concluded view on it.

Issue No. 3 (para 18 above).

93. The final ground upon which leave to appeal was granted was whether, if the appellant's asserted right to remain under the Article 2(e) and Article 7(1) of the Directive was found to exist, the judge seized of the judicial review proceedings was nonetheless entitled to refuse the reliefs sought, on a discretionary basis. Humphreys J. made it quite clear that he would have dismissed the case on such grounds, by reason of his findings that the appellant had engaged in a massive abuse of the immigration system, in both Ireland and the Netherlands. In response the appellant's main argument was to focus on the fact that the right being relied upon, is one derived from EU law. Despite the Directive having been transposed domestically through various pieces of legislation up to and including the 2015 Act, it still provides the original basis for and the original source of that right. Without a doubt, therefore the right being asserted, is so based.

94. As is readily acknowledged, there is no separate system, external to that of each Member State for the enforcement of EU measures: so the mechanism is through the laws of each State. This was articulated many years ago in Case 33-76, *Rewe-Zentralfinanz eG and ReweZentral AG v Landwirtschaftskammer für das Saarland* [1976] E.C.R. 1989 ("*Rewe*") where at para. 6, the Court of Justice held that in the absence of community rules in any given sector, it would be a matter for each Member to determine the procedures which would govern proceedings intended to ensure the protection of citizen's rights under EU law. In this context, 'procedural autonomy' has been variously described as 'procedural competence' and 'national procedural responsibility': however, the CJEU will most frequently use the term 'national procedural autonomy' (*EU Law: Text, Cases and Materials*, Craig and de Búrca, Oxford University Press, 2015, 6th Ed, pg. 227). Although it is commonly said that all Member States, in this area, retain their individual competence when it comes to the implementation and enforcement of Union law, nonetheless that statement is quite conditional. For our purposes it must be viewed, at the very least, in line with the twin concepts of effectiveness and equivalence.

95. Again in the seminal case *Rewe*, the Court stated that the procedures chosen by a Member State for the enforcement of EU measures could not "be less favourable than those relating to similar actions of a domestic nature". In other words, the processing of EU asserted rights or actions must be equivalent to that available in respect of comparable rights or actions litigated under domestic law. This is complimented by its sister rule, of effectiveness, or as Craig and De Búrca describe it, 'practical possibility': meaning that national law is also obliged not to render it practically impossible or excessively difficult to exercise the rights conferred by EU law (*Palmisani v. INPS* (Case C-261/95) [1997] E.C.R. I-4025). So, we have the parallel principles of equivalence and effectiveness.

96. There can be no doubt but that a judge's capacity to condemn abusive conduct by the exercise of discretion, is fundamental to the functioning of any legal system. It is certainly part of our national law and where EU rights or entitlements are asserted, it is almost certainly also to have a foundation there. The 'qualification' of it being a 'general principle' relates only to the manner in which the case law of the Court of Justice has developed: in broad terms it seems to have been sector by sector (*Halifax plc and Ors v. Customs and Excise Case* (C-255/02) [2006] E.C.R. I-1609 and *Cussens and Ors v. T.G. Brosnan* (Case C-251/16) [2017] B.V.C. 61). In any event such power is particularly important in the context of refugee and asylum cases, as where an applicant engages in serious abusive practices, they put the integrity of the entire system in jeopardy. That system, to successfully reflect genuine cases depends on fairness, good faith and transparency; all are seriously at risk with such abuse Therefore, there is and must be the jurisdiction for such behaviour to be recognised and controlled at a judicial level.

97. In the context of a case like this, it is of interest to note that in the latest edition of their works the authors of Hogan and Morgan point towards a contemporary line of authority which suggests that courts have become increasingly less patient with immigrants and asylum seekers who have in some way illegal tried to circumvent the rules of the

immigration and asylum system (*Administrative Law in Ireland*, Hogan and Morgan, 5th Ed, Round Hall, 2019 at p. 1047). Although understandable, restraint must be exercised in this respect. However, sight must not be lost of the nature of the asserted right.

98. In my view, this jurisdiction must be used sparingly and in a cautious manner; it should only be resorted to, where the abuse in question is serious and flagrant; where it has been deliberately engaged in, such that self-evidently the applicant, by his or her actions, has shown a clear disregard for the asylum system. This may take a variety of forms, such to be determined by the trial judge. In this respect, I would tend to agree with the views expressed by Birmingham J., as he then was, in *D.W.G v. Minister for Justice and Equality* [2007] IEHC 231 (Unreported, High Court, Birmingham J., 26th June, 2007). The applicant in question in that case wished to benefit from subsidiary protection which, at the time, came from European Communities (Eligibility for Protection Regulations, 2006) S.I. 518/2006: however the learned judge felt that his conduct was such that it had disentitled him to any relief in judicial review, he described the backdrop of the applicant's situation as being one of quite serious delay and ongoing illegality. He was careful to point out however that he reached this decision while also holding the view that only in certain rare cases would the conduct of an applicant disentitle them to relief (pg. 15 of his judgment)

99. Given the views which I have expressed in regard to the other issues, it is not necessary to reach a separate conclusion on this ground; but I should add the following. Firstly, a court undoubtedly has jurisdiction to terminate the proceedings on such basis and may do so where it is satisfied that the disclosed facts so demand. However and secondly, given the clear desirability of reaching a conclusion on the facts and the law, particularly where the asserted right is EU derived, a court should be reluctant to exercise this power unless quite satisfied that it should do so.

Conclusion

100. In relation to the three issues as posed (para. 18) the answer to each is as follows:

i) Issue No. 1: Does not strictly arise in this appeal.

ii) Issue No. 2: The right to remain ceases once the IPO has made a recommendation under 22(5) of the 2015 Act.

iii) Issue No. 3: The court has jurisdiction to dismiss an application for judicial review under the 2015 Act for abusive conduct but the same must be exercised sparingly and only where that conduct can be considered serious and significant in the context of the system as a whole.

Therefore, I would dismiss the appeal.