THE SUPREME COURT

[RECORD NO.: 2021/70]
[2022] IESC 49

O'Donnell C.J.
MacMenamin J.
O'Malley J.
Baker J.
Hogan J.

BETWEEN:

ASA

APPELLANT

AND

MINISTER FOR JUSTICE & EQUALITY

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 24th day of November, 2022

Introduction

1. The International Protection Act, 2015 ("the Act of 2015" or "the Act") established new procedures for persons applying for asylum in this State. The Act identifies two categories of international protection which may take the form of asylum or subsidiary protection. Alternatively, if unsuccessful in applying for either category of international protection, applicants may still be granted leave to remain in the State by the Minister for Justice. All these matters are now dealt with on the basis of information provided in one singular process. In this appeal, the appellant contends that the manner in which the respondent ("the Minister") operated this new system under the Act of 2015 creates a conflict of roles between International Protection Officers ("IPOs"), who administer the international protection system, and civil servants who are officials of the Minister, who deal with the leave to remain process. International protection involves the application of EU legal principles, now embodied in the 2015 legislation. Leave to remain decisions, on the other hand, are governed by national law, and are determined by officers of the Minister; provision for this is also contained in the 2015 Act.

2. At its simplest, the appellant's case is that the alleged conflict of roles derives from the possibility that IPOs, who administer the international protection system might also be asked to consider leave to remain applications. In this appeal and another linked matter, *MK (Albania) v. Minister for Justice & Equality* ("*MK*"), the appellants staged a two-pronged attack on how the system is operated. In addition to this alleged conflict of roles argument, *MK* deals with a further broad question, that is, the right of an unsettled migrant to consideration of their constitutional or Convention rights prior to deportation.

3. This judgment outlines:

(i) the circumstances and the procedure adopted.

(ii) the High Court judgment and findings.

(iii) The appeal to this Court.

(iv) The law applicable.

(v) Textual analysis of the Act.

(vi) Application of the *Carltona* principle.

(vii) Interpretation in accordance with EU law.

(viii) Ruling of 5th February, 2022.

(ix) Conclusion on EU law argument.

(x) The Refugee Act, 1996.

(xi) Conclusion and Summary

(i) The Circumstances and Procedure

3. The applicant in this appeal is ASA. He is a national of Nigeria. He left that state in December, 2016. He travelled to Germany on a visa and lived there for two years. He did not apply for international protection whilst in Germany. He entered this state in December, 2018, and unsuccessfully claimed international protection.

4. What follows is now a broad description of the procedures sufficient to understand the chronology. On the 2nd March, 2020, the appellant was notified by letter from the international protection office that an IPO had recommended that he should not be given a refugee or subsidiary protection declaration. This decision was made pursuant to s.39(3)(c) of the 2015 Act. A "Report to assist in the preparation of" the s.39 decision was signed by "E.S., International Protection Officer". An additional document entitled "Report pursuant to s.35(12) of the International Protection Act" accompanied those two sets of documents. This third report was divided into two parts and had a dual purpose: first, to set out any additional information which, in the opinion of the IPO was relevant concerning the application, and second, to provide any information relevant to a voluntary return to country of origin or a leave to remain application (ss. 48 and 49 of the Act respectively).

The Order Challenged

5. Also included was a notice pursuant to s.49(5) of the Act which informed the appellant that, having considered his application, the Minister had decided, pursuant to s.49(4)(b) of the 2015 Act, to refuse him permission to remain in the State. This "refusal decision" was accompanied by a "Statement of Reasons" made under s.49(5) of the Act signed by Ms. S.N., described as "Case Worker, International Protection Office". This document concluded with a paragraph headed "Decision", which stated that, having considered the applicant's family and particular circumstances, and his right to respect for private and family life, he should not be given permission to remain in the State under s.49 of the 2015 Act. The High Court granted the appellant leave to seek judicial review of the Minister's refusal of leave to remain on 8th July, 2020. The challenge was based primarily on the alleged conflict of roles, as based on the *Carltona* principle, referring to the power of officials to act in the name of the Minister.

6. For reasons that will become clear later, it is necessary to point out that the appellant did not raise any claim to the international protection process followed in his case. His challenge was confined to the leave to remain decision.

(ii) The High Court Judgment and Findings

7. In the High Court, Tara Burns J. dismissed the judicial review challenges (*ASA v. Minister for Justice,* [2021] IEHC 276) . She made a series of findings as to how the procedure actually operated within the Department of Justice. She held that the officials in what is termed the "International Protection Office" of the Immigration Service Division in the Department of Justice could lawfully perform two separate roles under the Act of 2015. But, she pointed out, for the purposes of dealing with applications for international protection, such persons functioned as 'international protection officers', having been so appointed by the Chief International Protection Officer. For the purposes of performing the Minister's executive functions under s.49 of the Act (leave to remain), they were also understood to be acting as civil servants and officers of the Minister for Justice. The judge did not find evidence of a conflict of roles or functions. It will be helpful at this stage to briefly outline her findings on the evidence before her.

Case Processing Unit

8. Burns J. found that a "Case Processing Unit", established in 2018, is now solely responsible for examining applications for international protection. The Unit is staffed by civil servants/case workers who examine applications and make recommendations in their capacity as IPOs, and who must act independently of the Minister. The overall management of this Unit is the responsibility of the Chief International Protection Officer. When an IPO makes a recommendation under s.39(3)(c) of the Act, to the effect that an applicant should not be given any form of international protection, the applicant's file is then passed to a different unit, known as the "Permission to Remain Unit".

Permission to Remain Unit

9. The High Court judgment held that the "Permission to Remain Unit" is separate and distinct from the Case Processing Unit. It is staffed by different civil servants, and dedicated to making decisions on applications for permission to remain in the State, made under s.49 of the Act. In this instance, the case workers/officials make decisions in their capacity as officers of, and under the authority of, the Minister. The High Court judge held that where an officer of the Minister makes a leave to remain decision under s.49, he or she is not exercising the functions of an IPO, but, rather, acting solely as an officer of the Minister, even though case workers may have also been formally appointed as IPOs.

Appeals and Subsequent Procedure

10. In the case of international protection, the Act allows for appeals to the International Protection Appeals Tribunal ("IPAT"). Where that body affirms a recommendation of an IPO that an applicant should not be given international protection, the Minister reviews the permission to remain decision, and has regard to whether an applicant has submitted new information that would have been relevant to the original decision, or if an applicant has informed the Minister of a change of circumstances (see s.22 of the Act). This decision is then made by a different case worker, acting as an officer of the Minister within the Permission to Remain Unit. This review is not performed by an officer who made the original permission to remain decision. The High Court judge held there was no evidence that any decision concerning this appellant involved any overlap of function between the International Protection and Leave to Remain offices. I return to this point later.

11. As originally initiated, the appellant's case was based on the "*Carltona* doctrine". This doctrine or principle is based on a presumption that ministerial officials acting in this capacity do so in the persona of the Minister. At the outset of the case, the appellant contended that the Act of 2015, in terms, prohibited persons from functioning both as IPOs for international protection purposes, and also, potentially, acting as the alter ego of the Minister when it came to leave to remain decisions. His counsel sought to rely on *Carltona Ltd. v. Commissioner of Works* [1943] 2 All ER 560 ("*Carltona*"), approved and applied in *Tang v. Minister for Justice* [1996] 2 ILRM 46 ("*Tang*"); *Devanney v. Shields* [1998] 1 I.R. 230 ("*Devanney*"); and *W.T. (a minor) & Anor. v. Minister for Justice & Equality & Ors.* [2015] 2 ILRM 225 ("*W.T.*").

12. Burns J. concluded that the appellant had not established that there were any breaches or violations of the *Carltona* doctrine, and that, an invocation of the principle did not in fact assist the appellant's case. She held that no provision of the 2015 Act had expressed or implied that a decision to grant permission to remain to a failed asylum seeker pursuant to s.49 of the 2015 Act could only be taken by the Minister herself, as such interpretation would lead to what is termed as an "absurdity".

13. The judge adverted to the fact that a decision to grant permission to land, made pursuant to s.4 of the Immigration Act, 2004, is taken by Immigration Officers acting on behalf of the Minister, not by the Minister herself. She pointed out that s.49(11)(a) of the 2015 Act actually deems such s.4 decisions to be ones made pursuant to s.49(11)(a) of the 2015 Act. It would, therefore, be incongruous that an immigration officer be expressly permitted to make such a s.4 decision on behalf of the Minister, but that by contrast, the 2015 Act should be interpreted as meaning that only the respondent Minister herself, acting personally, could take a s.49

permission to remain decision when, for statutory purposes, such decisions are deemed to be one and the same. The judge observed that, had any such limitation or demarcation of roles been intended by the Oireachtas, specific legislative words would have been necessary. Had it been intended that such decisions be taken personally by the Minister, the Act would have had to so provide in terms. Similarly, express words would have been necessary to confine consideration of s.49 permission to remain decisions only to officers of the Minister who were not IPOs.

14. Turning then to the EU law issue raised, the judge rejected the contention that the Minister exercised any role as a "determining authority" responsible for making decisions at first instance under Article 2 the Procedures Directive 2005/85/EC. (See *PNS v. Minister for Justice & Equality* [2020] IESC 11.) Such authority is defined in the Directive as any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection on first instance in such cases. But, she held the Minister did not perform any such role which was independently performed by IPOs.

15. Burns J. was not persuaded that the position was altered by the fact that an "International Protection Office" did not, in fact, exist in statutory form. In her view, the system which had been set up was such as corresponded with a description of a determining authority as identified in the Procedures Directive. She rejected the proposition that the structure of the 2015 Act, which differentiated between the powers of international protection officers and those of the Minister, carried with it a statutory implication that the powers of the Minister could not, on other occasions, be exercised by case workers in the International Protection Office.

(iii) The Appeal to this Court

16. This Court granted leave to appeal directly in a Determination ([2021] IESCDET 115) that identified two issues: first, whether the Act of 2015 itself precluded IPOs from making leave to remain decisions; and second, whether, by exercising their devolved powers under s.49 of the 2015 Act in dealing with leave to remain decisions, IPOs were in conflict with the duties and functions they are mandated to carry out in the area of international protection under the 2015 Act.

The Appellant's Case in this Appeal

17. In presenting his case to this Court, counsel for the appellant made a number of preliminary submissions on the *Carltona* principle. He did not suggest that the decision of this Court in *W.T.*, which, relatively recently, again approved *Carltona*, was incorrect. Rather, he contended that, more recently, in *R v. Adams* [2020] UKSC 19; [2020] 1 WLR 2077 ("*Adams*"),

the Supreme Court of the United Kingdom had distinguished *Carltona* on the facts and law, and had not applied a presumption that an official acted as alter ego of the Secretary of State. The UKSC so decided on the basis that the Northern Ireland legal instrument in question was worded in a manner where there was a clear inference that the power in question was exclusively reserved to the Secretary of State, and was a prerogative power of the utmost seriousness, involving deprivation of liberty. Counsel submitted that the 2015 Act could, and did, raise an exclusion of the *Carltona* principle. Counsel submitted that the evidence adduced in the High Court indicated the potential for confusion of roles between that of an IPO, carrying out functions under the international protection function, and that of an officer with the same job description carrying out a leave to remain decision. He contended that the very nature of a leave to remain determination differed substantially from a question of international protection which came to be decided at first instance. He submitted that, for the reasons he outlined, the manner in which the system worked could potentially raise the spectre of *nemo iudex in causa sua*, and that there was a risk of breach of that principle between international protection applications, on the one hand, and a requirement for an analysis of *non-refoulement* which might arise under s.50 of the Act when leave to remain issues arose. Counsel cited the joint CJEU judgments of *B* and *D* (C-57/09 and C-101/09) and Article 4.1 of the Procedures Directive (2005/85/EC) which, he contended, raised the question of whether IPOs were competent to make international protection decisions before they made permission to remain decisions, rather than *vice versa*. Article 4.1 of that Directive provides that "*Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of the applications in accordance with this Directive, in particular Articles 8(2) and 9."* Article 8(2), in turn, lays down requirements that decisions be taken objectively and impartially on the basis of precise and up-to-date information from appropriate sources, and that the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law. Counsel contended that the procedure called into question whether the Directive was complied with.

(iv) The Law Applicable

19. The issue of leave to remain decisions under the earlier Immigration Act, 1996 was considered by this Court in *FP & Anor. v. The Minister for Justice* [2002] 1 I.R. 164. This present case, however, involves analysing the text of the successor 2015 Act in order to determine whether there is, or can be, a conflict of roles in the two functions. At the outset, it is useful to recall what is contained in the *Carltona* doctrine as it has evolved and been applied

in this State. Both the decision and subsequent case law establish the principle that officials acting on behalf of a minister of government are *presumed* to be acting as the alter ego of that minister, such that a decision made by that official will, subject to certain limited conditions, be presumed to be that of the minister. The *Carltona* principle may be displaced, but only when there is clear legislative intention to the contrary, indicating that the decision should be made by a Minister personally. In this appeal, Counsel argues that the text of the 2015 Act shows that the presumption does not apply; alternatively, he submits that *Adams* provides recent persuasive authority which suggests that there should not be such a presumption; and that whether the principle of devolved power applies, should, rather, depend on an open-ended, case-by-case analysis of the wording of the subject legislation in addition to any other relevant factors. Thus, it is said the system as it operates involves IPOs acting *ultra vires* and without statutory authority.

The Procedure for International Protection

20. The decision-making procedure under the 2015 Act is described by the High Court judge, as well as in other recent case law. (See *PNS v. Minister for Justice*, [2020] IESC 11.) It is fundamental that persons making international protection decisions are independent and impartial. (Cf. *D and A v. Refugee Applications Commissioner* (Case C-175/11, 31st January 2013.) Under s.39 of the Act, IPOs acting impartially make recommendations concerning entitlement to international protection, refugee or subsidiary protection. Adverse decisions can be appealed to the International Protection Appeals Tribunal ("IPAT") (ss. 40 and 41 of the Act). Dependent on the outcome of an appeal, the Minister may accept a favourable recommendation by an IPO or IPAT (s.61 of the Act), and grant refugee status or subsidiary protection declarations. Alternatively, the Minister may issue a refusal (s.47 of the Act). In the event of such refusal, the Minister shall then make a decision as to whether an applicant may nonetheless be granted leave to remain in the State on humanitarian grounds, which include his private and family life (s.49).

21. Leave to remain decisions are governed by national law. An unsuccessful applicant may volunteer to return to their country of origin (s.49). But s.52 of the Act provides that, if the Minister has refused to issue an international protection declaration, and then refuses to grant an applicant leave to remain in the State, then she "*shall*" make an order for deportation (s.51). The appellant's case is that the Act does not permit the type of system operated by the Minister, which, it is said, allows for a conflict of roles between officers operating the international protection system, and officials involved in deciding leave to remain applications.

The Act

22. The question in this case is whether the provisions cited and relied on do, or do not, indicate a legislative intention that IPOs are legally precluded from engaging in s.49 leave to remain decision-making? The appellant's case is that such a meaning can be discerned or taken as implied from the provisions cited. Even before analysing the text of the Act, this first requires a precise determination as to *how* the Act should be scrutinised, and whether the *Carltona* presumption applies. It is necessary, therefore, to make some further observations on *Carltona* and subsequent case law, even at the cost of re-traversing old ground.

The *Carltona* Judgment and its status in the law of the State

23. In *Carltona,* the decision challenged related to the requisition of factory premises in England. The appellant contended the Commissioners of Works were not entitled to take possession of the premises on the grounds that the notice was invalid, as the decision to requisition had not been personally made by the Minister concerned.

24. In the Court of Appeal of England and Wales, Greene M.R. pointed out that, even at the time of the judgment, the functions given to ministers of state were so multifarious that no such minister could ever personally attend to them. Speaking in the context of the requisition decision, he observed that thousands of orders had been made by individual ministers. It could not be supposed that the regulation permitting requisition meant that, in each individual case, the Minister in person should direct his mind to the matter. Speaking more generally, he observed the duties appointed upon ministers, and the powers given to them, were normally exercised under the authority of those ministers by responsible officials of the department. Public business could not be carried out if that were not the case. Constitutionally, the decision of such an official was, in fact, a decision *of* the minister, for which he or she would be responsible, and must answer to the legislature. If, in an important matter, a Minister selected an official of such junior standing that they could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration was based on the concept that, being responsible to Parliament, ministers would see that important duties are committed by experienced officials. If they did not do that, Parliament was the place where complaint should be made against them (paras. (a) to (c), at p.563).

25. Correctly understood, the principle does not involve the delegation of powers. Instead, officials are *understood* to act as the alter ego of the minister, so that in this State a decision made on behalf of the Minister by one of his or her officials is taken as the decision of that Minister. In general, a delegation of power, including the requirement that the degree of

supervisory control is preserved, must be close enough for the decision to be identifiable as that of the delegating authority. But in *Carltona* this requirement does not apply. The Minister is seen as acting through her official. The official acts as a surrogate, not a delegate. This principle is the basis of the *Carltona* doctrine, whereby the presumption that an official is acting on behalf of a minister applies, unless there are clear statutory words which indicate otherwise.

26. It is fair to comment that the principle has acquired near canonical status. It establishes that the courts recognise that, in the absence of express statutory language to the contrary, the *doctrine* will generally apply, save in circumstances where the legislation specifically provides that the decision is to be taken by the Minister herself. As classically defined, even the seriousness of a decision does not determine whether or not a decision could be devolved to officials. However, that official must be sufficiently qualified to make a decision of the type under consideration.

27. These statements of principle were all approved by Hamilton C.J., speaking for this Court, in *Tang*. The *Tang* judgment is highly relevant, not only for its strong affirmation of the principles there identified, but also because of the fact that the approval of this Court was expressed in the context of the devolved power of officials of the Minister – the same respondent as in this appeal – to make leave to remain decisions under the Aliens Act, 1935. It is hard to see any real distinction in the scope of the power considered in *Tang* and the same type of decision under consideration. Such decisions are highly significant to the people concerned. Officials must demonstrate the greatest care in considering and applying the approach to decision-making. In *Tang*, Hamilton C.J. stated, definitively, that he was satisfied that Greene M.R.'s observations in *Carltona* represented "*an accurate statement of the law as regards the powers of the Minister in relation to the granting or refusal of permission to aliens* ***to remain in the State***" (p. 28, emphasis added).

28. Hamilton C.J. continued:

> *"Having regard to the extensive powers conferred on the Minister the Aliens Act, 1935, and the regulations made thereunder, it cannot be* ***supposed*** *that it was the intention of the legislature that the Minister personally should exercise these powers.*
>
> *The duties imposed upon the Minister and the powers given to the Minister can be and are normally exercised under the authority of the Minister by responsible officials of the Minister's department."* (p. 29, emphasis added)

The advised usage of the word "supposed" in the passage quoted is significant. It derives from the fact of there being an assumption that the principle applies.

29. The observations in *Tang*, were, if possible, more definitively iterated in *Devanney v. Shields* [1998] I.R. 230. In *Devanney* the Court (Hamilton C.J., O'Flaherty, Denham, Barrington and Keane JJ.) revisited the issue, in the context of a decision by the High Court, wherein it was held that the decision to appoint a District Court Clerk should be made personally by the Minister.

30. The High Court judge took the view that the position of a District Court Clerk was an important statutory position which carried serious responsibility in the administration of justice. District Court Clerks were not only appointed by the Minister, but held office at the will of, and could be removed by, the holder of that office. The judge did not consider that the *Carltona* principle applied to such a position. He was of the view that *Carltona* was a principle that had very general application in administrative matters, but that it originated in *"rather peculiar wartime circumstances*", and in a case where the relevant decision was one of thousands of similar decisions which would have been impractical for the Commissioner of Works or the Minister to make personally. The judge held that the appointment of a District Court Clerk was clearly an important statutory position carrying serious responsibilities, and that the holder of that office, once appointed by the Minister, could be removed by the Minister.

31. On appeal, Hamilton C.J. pointed out, on behalf of the Court, that he had already, in terms, specifically approved the *Carltona* principle in *Tang*. Quoting the then current edition of *Wade on Administrative Law*, the Chief Justice pointed out that there was no question of even delegation in *Carltona* decisions, as delegation would require a distinct act by which the power was conferred upon some person not previously competent to exercise it. But, in *Carltona*, the authority of officials to act in their ministers' names derived from a general rule of law, and not from any particular act of delegation. Legally and constitutionally, the act of the official *is* the act of the minister, without any need for specific authorisation in advance, or ratification afterwards. Even where there are express statutory powers of delegation, they are not, in fact, employed as between a minister and his own officials. Such legal formalities would be out of place within the walls of a government department. (Quoting from *Wade*, 7th Edition, page 357).

32. In *Devanney*, Hamilton C.J. also took the opportunity to consider the case of *Regina v. Home Secretary, ex p. Oladehinde* [1991] 1 AC 254, where, sitting as a member of a Divisional Court, Woolf L.J. had expressed some doubts in relation to the extent or rigour of the principle. Delivering judgment in the Court of Appeal in *Oladehinde*, Donaldson M.R. pointed out that Woolf L.J. had opined that the *Carltona* principle should be regarded as "*an implication which*

is read ***into a statute*** *in the* ***absence of any clear contrary indication by Parliament that the implication is not to apply****."* (p. 282, emphasis added) Donaldson M.R. put matters this way:

> *"In this we think that he must be mistaken because* [the implication] *applies equally where the minister's powers are derived otherwise than from statute: e.g. from prerogative powers. We think that the better view is that this is a common law constitutional power, but one which is capable of being negatived or confined* ***by express statutory provisions****…".* (p. 282, emphasis added.)

In *Devanney*, Hamilton C.J. stated, in terms, that he accepted the view of Donaldson M.R. that the principle outlined in *Carltona* was a common law constitutional power, but one which was *capable* of being negatived or confined only by express statutory provision.

33. In a concurring judgment in *Devanney*, Denham J. pointed out that, whilst not named as such, the *Carltona* principle had been previously applied by Finlay P. in *Director of Public Prosecutions v. O'Rourke* (High Court, Unreported, Finlay P., 25th July, 1983), where the assignment of a District Court clerk was found not to be a matter which required the Minister's personal decision. She explained that, although it was referred to as a "principle" and had entered the law of this State by way of common law, the doctrine was, in fact, a "fundamental concept" which enabled a democratic government to function, and for ministers to act efficiently in, yet to accept responsibility for, their actions in complex modern government, where a vast number of decisions must be taken. The doctrine, or principle, enabled ministers to remain responsible and accountable to the legislature while having responsible officials make many of the decisions. It was "*an eminently practical rule which has important constitutional implications – it retains accountability*" (p. 260, per Denham J.). The principle arose in relation to the statutory power of a minister, where it was a matter of construing the relevant legislation. It envisaged the official acting "*as*" the Minister, rather than "*delegated by*" the Minister. But, she held, even the mere existence of words by staff describing the powers as "delegated", or a document so stating, did not preclude that person from acting as minister. The official was the alter-ego of the minister, exercising devolved power. In expressing these views, Denham J. located the exercise of the power within the function of the government by the Minister, acting under Article 28.1 of the Constitution, exercising the executive power of the State (Article 28.2), and responsible to Dáil Eireann (Article 28.4.1).

34. Also concurring, Keane J. also pointed out that, in *Devanney*, no challenge had been advanced to the correctness of the decision of this Court in *Tang*, and that it would be remarkable if the principle, unanimously held applicable by the Court in that case, to decisions "*by officials as to whether immigrants should be allowed to remain in the State*" (p. 263) was,

for some reason, not applicable to the appointment and assignment of a District Court clerk to a particular area.

35. It is, of course, true that nothing directly in relation to the issue of deportation arose in *Tang*. (By contrast, see *LAT & Others (Applicants) v. The Minister for Justice & Equality & Ireland*, [2011] IEHC 404 ("*LAT*").) But, like this case, *Tang* did deal with a leave to remain decision, a matter of significant consequence. On the *Carltona* principle, the judgments in *Devanney* were clear to the point of being definitive. They expressed settled law.

36. In *W.T.*, the issue to be determined was whether the decision to make a deportation order pursuant to s.3(1) of the Immigration Act, 1999 had to be taken personally by the Minister. The argument had been considered and rejected by the High Court in *LAT*. In *LAT*, Hogan J. pointed out that an examination of the 1999 Act referred consistently to the Minister without any qualification, unlike in *Oladehinde* referred to earlier. At risk of repetition, in *W.T.*, the court again pointed out that it was "*well recognised in the law*" that each minister must both bear political responsibility to the Dáil, and legal responsibility to the courts, for actions taken by their own departments; that ministers are regarded as being one and the same as the government departments of which they are the political heads; that departmental officials act in the name of the minister; that in making administrative decisions, discretion is conferred on a minister, not merely as an individual, but rather as the person who holds office as head of a government department, which collectively holds a high degree of collective corporate knowledge and experience, all of which are imputed to the political head of the department (para. 1). The court observed that, frequently, a minister's officials will prepare documents for consideration, consider objections, summarise memoranda, and outline a policy approach to be taken by the minister as an integral part of the decision-making process. Part of this arrangement is that the functions entrusted to departmental officials are performed at an appropriate level of seniority, and within the scope of responsibility of their government department. No express act of delegation is necessary.

37. Having cited and approved prior authorities, including *Carltona*, *Bushell v. Secretary for State for the Environment* [1981] AC 75, *Oladehinde*, *Tang* and *Devanney*, the court went on to hold that the principle involved a significant degree of reciprocal trust between ministers and officials, as the actual decision-maker is vested with the minister's devolved power. As a matter of prudence, if no more, a minister might often put in place sufficient procedures to ensure that decisions which are of high significance to individuals (such as deportation), are actually reflective of government policy, and are, truly, exercised in a manner which is genuinely discretionary (para. 2).

38. It is true that the principle is capable of being negatived or confined by "*express statutory provisions or by clearly necessary implication*" (Hogan & Morgan, *Administrative Law in Ireland*, 11-83, 5th Edition). In such cases, the test is whether it could be established that a statute "*clearly conveys that the Carltona principle is not to be recognised, or clearly implies such a conclusion*" (*W.T.*, para. 3). The principle does not apply to statutory office holders exercising decision-making functions which are delegated by statute. While legislation might restrict or prohibit a minister's power to devolve a decision and might require the minister to exercise such decision-making power personally, this would require *very clear* statutory terminology, for example, words to the effect that a direction or decision should be made or performed by a minister "and not by a person acting under his authority". The judgment in *W.T.* concluded that it followed:–

> *"... that a court will be very slow to read into a statute any such implicit limitation; providing that the devolved power does not conflict with the duties of an official in the discharge of their specific functions, and that the decision in question is suitable to their grading and experience."* (para. 5)

39. These passages from *W.T.* and the earlier judgments are cited to show the extent to which *Carltona* is embedded in the case law. Denham J.'s description of its constitutional background is not easily ignored. It has not been argued that these judgments are incorrect in some aspects; still less clearly incorrect to the point they should not now be followed. Each judgment specifically approves the *Carltona* presumption. In *Devanney*, Keane J. pointed out that there had been no suggestion that *Tang* had been wrongly decided or did not represent the law. In this case, counsel sought to navigate these shoals and waters by suggesting that *Adams*, considered below, is an evolution of the law; but that *W.T.*, *Devanney*, and *Tang*, remain the law. As will be seen, when *Adams* is considered below, this is not an easy course to chart. It is first necessary to consider the case of *R(Bourgass) v. Secretary of State for Justice* [2015] UKSC 54; [2016] AC 384 ("*Bourgass*").

Bourgass

40. That there may, on occasion, actually be statutory words from which an exclusion can be implied is clear from *Bourgass*. There the UK Supreme Court considered the question of whether the Secretary of State could authorise the segregation of prisoners for greater than 72 hours. The court decided that, in such a situation, there was an unlawful devolution of power. While prison governors were civil servants, they were also independent statutory office holders. The powers of the Secretary of State and prison governors were laid down in prison rules. A prison governor was empowered to order initial segregation. But, critically, by statute,

the Secretary of State was expressly given the power to extend the segregation beyond 72 hours. In the light of such a clear statutory provision, it was hardly surprising that the U.K. Supreme Court held that *Carltona* presumption was implicitly excluded. *Bourgass*, based on a distinct statutory context from that under consideration, does not assist the appellant.

R v. Adams

41. Counsel for the appellant asked the Court to consider the judgment of the Supreme Court of the United Kingdom in *R v. Adams* [2020] UKSC 19, [2020] 1 WLR 2077. There, the Supreme Court of the United Kingdom held that:

(i) While it was unnecessary for the purpose of deciding the case, the court was not minded to characterise the *Carltona* principle as a legal presumption; rather, its provisional view was that the matter should be approached as a matter of technical analysis unencumbered by application of presumption;

(ii) That the legislation did not necessarily contradict the *Carltona* principle was not determinative;

(iii) The structure of the legislation may indicate that Parliament's intention was that a minister should take a decision personally (see discussion below);

(iv) The severity of the consequences of a decision for an individual may be a factor pointing towards a parliamentary intention that the minister take the decision personally;

(v) In *R v. Adams* there was no reason to think that signing custody orders would be an impossible burden; a further factor pointing to the exclusion of the *Carltona* principle.

(cf. De Smith's *Judicial Review*, Fourth Supplement to 8th Ed., Donnelly, Hare & Bell, Eds. 113 et seq.)

42. *Adams* can only be seen as something of a departure, and it must be seen in its historical context, having regard to the power in question - that of temporary detention- on the order of the Secretary of State for Northern Ireland. Lord Kerr was of the view that, despite Parliament's willingness to displace the *Carltona* doctrine with express statutory language on occasion, that alone did not amount to the "*creation of a presumption in law that the principle must be taken to apply unless it has been removed by express statutory language*". He advocated, rather, an "*open-ended examination*" of factors previously identified in the Northern Ireland Court of Appeal decision of *McCafferty's Application* [2009] NICA 59, where Coghlin L.J. had outlined factors which could be taken into account such as the framework of the legislation, the language of pertinent provisions contained therein, and the importance of the subject matter. In other

words, Coghlin L.J. placed emphasis on the gravity of the consequences following from the exercise of the power, rather than the application of a presumption, *per se*.

43. *Adams*, and indeed *McCafferty* must, however, be considered against their respective statutory and historical contexts. In *Adams*, the court explained Article 4(1) of the Detention of Terrorists (Northern Ireland) Order 1972 provided:

> *""Where it appears to the Secretary of State that a person is suspected of having been concerned in the commission or attempted commission of any act of terrorism or in the direction, organisation or training of persons for the purpose of terrorism the Secretary of State may* ***make*** *an order (hereafter in this Order referred to as an 'interim custody order') for the temporary detention of that person."."* (Emphasis added)

44. Article 4(2) of that order provided:

> *"An interim custody order* ***of the Secretary of State shall be signed by the Secretary of State****, Minister of State or Under Secretary of State."* (Emphasis added.)

45. The fact of a requirement for a signature by the Secretary of State must be seen as critical to the *Adams* decision. It renders it less surprising that, in light of those words and the context, the Supreme Court of the United Kingdom held that the *Carltona* principle should not be applied, and that, in the circumstances, the Secretary of State should have personally considered the case. As a consequence of the absence of such consideration, the interim custody order in question was invalid, because it was not considered by the Secretary of State personally. But the statutory wording is obviously critical. It led the court to the view that the distinction between *making* (Article 4(1)), and *signing* (Article 4(2)), the order was of such significance that it called for quite distinct interpretation and application. The custody order to *be signed* was that of the Secretary of State. This denoted that it was a personal decision. It is difficult to envisage how the Secretary of State could have been called on to sign a document depriving a person of their liberty without personal consideration of the substance of what was being signed. This was a reasonable inference from the text of the legislation. Added to this was the fact that the power was a "momentous" one, and that there was no reason to believe that this would place an impossible burden on the Secretary of State (paras. 31 to 40). When seen in that light, it is easy to understand the judgment in *Adams*, which perhaps did not even require an "open-ended" analysis. The decision has, however, been the subject of some commentary in the neighbouring jurisdiction expressing concern as to its scope in future administrative decision-making.

46. It must nevertheless be said that the principle, as originally enunciated, has been specifically approved by this Court in *Tang*, *Devanney*, and *W.T*. Counsel's argument was as

forceful as it was erudite. The Court has been referred to *De Smith*, Eighth Edition, where some doubt is cast on the scope of the doctrine, noting that Lord Woolf remained among the distinguished panel of editors. I remain unpersuaded that, for the purposes of this case at least, the Court should depart from the safe ground of *Carltona*, which has been long understood as the premise for administrative decision-making in government.

V Textual Analysis of the Act

47. While it is a "substantially overused" metaphor in legal writing, it is fair on this occasion to regard *Carltona* as the interpretative prism through which the 2015 Act should be examined. The question is whether a legislative intention can be discerned from the 2015 Act, and whether, in fact, the Act does evince a legislative intention that there should be a distinct separation of roles between IPOs and the Minister's officials in determining international protection applications, by contrast with leave to remain determinations made by the Minister, through her officers?

S.2: "International Protection Officer"

48. The independent status of an IPO is a key feature. In s.2 of the Act "international protection officer" is defined as a "*person who is authorised under s.74 of the Act*" to perform the functions conferred on an international protection officer by or under the Act. Section 74, in turn, provides that the Minister may authorise in writing such and so many persons as he or she considers appropriate to perform the functions conferred on an international protection officer by or under the Act.

49. But what follows next is important for establishing whether there was a legislative intention to create a complete wall of separation between the IPO decision-makers and Minister's officers dealing with leave to remain applications. Section 74 goes on to provide, in addition:

> *"... (2) An authorisation [of an IPO] under this section shall cease -*
>
> *(a) where the Minister revokes, under this section, the authorisation,*
>
> *(b) in the* ***case of a person who is an officer of the Minister****, where the person* ***ceases to be an officer of the Minister****, or*
>
> *(c) in the case of an authorisation that is for a fixed period, on the expiry of that period.* (Emphasis added)

Even were it seen in isolation, and in the absence of any other words, this provision is obviously telling. It clearly envisages that whatever about the decision-making *process* which must be independent as a matter of national law giving expression to EU principles, an IPO decision-maker *may* also be an officer of the Minister. As s.74(2)(b) provides, when a person ceases to

be an officer of the Minister, they will also cease to be an IPO, as they have been appointed to that position. The implication is that a person may have *been* an officer of the Minister, but then appointed to the role of an IPO, which requires independence and impartiality. It precludes an argument that the legislative intent is that the two decision-makers are to be in entirely separate categories. The very wording of this sub-section militates strongly against the appellant's case. It strongly supports the respondent's case that there is no intention to create an absolute segregation of decision-makers of the type urged. But, to repeat, one point is also crystal clear: whether a person is an officer of the Minister or when acting as an IPO they must be entirely independent in carrying out their functions of *decision-making.*

50. Reflecting the Procedures Directive, the Act itself contains guarantees of independence for international protection officers. Section 74(4) provides:

> *"(4) An international protection officer* ***shall be independent*** *in the performance of his or her functions."* (emphasis added.)

This is a statutory guarantee that officers must carry out this function independently of any outside influence or pressure. There can, therefore, be no question of compromising the independence of any person acting as an IPO in the performance of their functions as a decision-maker.

Chief International Protection Officer

51. Similarly, the position of Chief International Protection Officer must also be independent. Section 75 of the Act provides that the Minister shall appoint a person, being an international protection officer, to perform the functions conferred on the Chief International Protection Officer by or under the Act. The section goes on to provide that the Minister may revoke an appointment under this section (s.75(2)); and that the functions of the chief international protection officer under this Act shall include "*the management of the allocation to international protection officers, for examination under this Act, of applications for international protection*".

52. But, just as in the case of an IPO, the Act provides that the Chief International Protection Officer *"shall be independent in the performance of his or her functions."* This does not evince any statutory intention, other than independence in the performance of the role of Chief International Protection Officer. But what is provided as to independence is not in itself sufficient to displace the *Carltona* presumption; this is especially so in light of the provisions of s.74(2).

53. It must be recollected that this was a case where the High Court heard evidence on which it based its findings. Just as in the case of an IPO, there was no finding by the High Court

judge that the fact that a person may also have been an official of the Minister created some conflict of roles in the task of actual decision making. If there had been any such evidence or finding then, irrespective of *Carltona*, this would be a very different case. There would be a violation of the Act, and of EU law. There was no evidence or finding that the system as now administered creates a conflict or compromises independence in the task of decision-making.

Functions Other than under Section 39(3)(c)

54. Section 76, in turn, provides that the Minister "*may enter into contracts for services with such and so many persons as he or she considers necessary to assist him or her in the performance of his or her functions under this Act and such contracts with such persons shall contain such terms and conditions as the Minister may, with the consent of the Minister for Public Expenditure and Reform, determine*." (s.76(1)). But there is then an exclusion providing that such person "*may perform any of the functions (other than the function consisting of the making of a recommendation to which subsection (3) of section 39 applies) of an international protection officer under this Act."* (s. 76(2).

55. Seen in context, this permits the Minister to assign such "contract persons" to carry out functions, *other* than the important role of determining whether an adverse recommendation should be made under s.39(3)(c). The section refers to the performance of the Minister's functions under the Act. But, again, there is nothing sufficient to displace the *Carltona* principle. Nor does it contain anything suggesting the conflict of roles in decision making. Section 39(3)(c) is considered presently. If anything, s.76(1) again illustrates the fact that negative recommendations must be performed by persons independent in their functions.

Interview Procedure

56. The Act contains provisions giving effect to the unified "one stop procedure". Section 35 provides that, following the conclusion of a personal interview, the interviewer shall prepare a report in writing of what emerged. As outlined earlier, the report prepared under s.35(12) is to comprise two parts: (a) one of which shall include anything that, in the opinion of the international protection officer, is relevant to the application; and (b) the other, which shall include anything that would, in the opinion of the international protection officer, be relevant to the Minister's decision under s.48 (voluntary return), or s.49 (leave to remain), in the event that the section concerned were to apply to the applicant (s.35(13). This procedure was implemented in the appellant's case.

57. Thus, the information provided by this process not only deals with the application for international protection application; but also with anything that might relate to a leave to remain

question. This is part of the "one stop" process. But there is no indication of a displacement of *Carltona*, or evidence of conflict of functions in the actual process of decision making.

Examination of an Application and Report by IPO

58. Section 34 deals with the examination of an application for international protection. It provides that an IPO is to decide whether to recommend under s.39(2)(b) that the applicant should be given a refugee declaration, or should not be given a refugee declaration, and should be given a subsidiary protection declaration, or *"s.39(3)(c) the applicant should be given neither a refugee declaration nor a subsidiary protection declaration*".

59. Section 39 is closely connected to the procedure denoted in s.34. Section 39 provides, *inter alia*:

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

60. In the event of the IPO reaching an adverse conclusion, s.39(3)(c) provides that, following the conclusion of an examination for an application for international protection, the officer shall cause a written report to be prepared in relation to the matters referred to in s.34, which may include, at s.39(3)(c), a recommendation that "*the applicant should be given neither a refugee declaration nor a subsidiary protection declaration".* There is no indication of any legislative intention to displace the *Carltona* doctrine. Nor are there High Court findings regarding a conflict of roles in decision making between international protection decisions and those concerning leave to remain now considered.

Leave to Remain

61. Leave to remain determinations are dealt with in s.49 of the Act. This is a distinct function carried out under national law, by an officer of the Minister acting in the person of the Minister. The section provides that where a recommendation referred to in s.39(3)(c) is made, that the applicant should be given *neither* a refugee declaration *nor* a subsidiary protection declaration, the Minister shall then consider, in accordance with this section, whether to give the applicant concerned a permission under this section to remain in the State (in this section referred to as a "permission") (s.49(5)). For the purposes of his or her consideration under this section, the Minister shall have regard to (a) the information (if any) submitted by the applicant under subsection (6), and (b) any relevant information presented by the applicant in his or her application for international protection, including any statement made by him or her at his or her preliminary interview and personal interview. In deciding whether to give an applicant a

permission, the Minister shall have regard to the applicant's family and personal circumstances and his or her right to respect for his or her private and family life, having due regard to:

"... (a) the nature of the applicant's connection with the State, if any,

(b) humanitarian considerations,

(c) the character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions),

(d) considerations of national security and public order, and

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

62. The section goes on to provide, at sub-section 4, that, having considered the matters referred to in sub-sections (2) and (3), the Minister shall decide to (a) give the applicant a permission to remain in the State, or (b) refuse to give the applicant such a permission. Thereafter, sub-section (5) provides that the Minister shall, in writing, notify the applicant concerned and his or her legal representative of the Minister's decision under sub-section (4), which notification is to be accompanied by a statement of the reasons.

63. Under sub-section (6) an applicant may, at any stage prior to the preparation of the report under s.39(1) in relation to his or her application, submit information that would, in the event that sub-section (1) applies to the applicant, be relevant to the Minister's decision under this section. Succeeding sub-sections deal with the procedure to be adopted in the event of additional information coming to hand which may be relevant regarding change of circumstances. There is nothing in these provisions, or the High Court findings, which assists the appellant's case.

64. As mentioned earlier, s.4 of the Immigration Act, 2004 empowers immigration officers to grant permission to land in the State to non-national persons. Section 49(11)(a) of the 2015 Act refers to that provision, stating, *"(a) A permission given under this section (for leave to remain) shall be deemed to be a permission given under section 4 of the Act of 2004 and that Act shall apply accordingly ...",* and that a reference in any enactment to a permission under section 4 of the Act of 2004 shall be deemed to include a reference to a permission given under this section. (s.49(11)(b)).

Deportation

65. For completeness, s.51(1) provides that, subject to s.50, the Minister shall make a deportation order in relation to a person where the Minister has refused under s.47 both to give a refugee declaration and to give a subsidiary protection to the person, and is satisfied that s. 48 (5) does not apply in respect of the person, and has refused under section 49 (4) to give the

person a permission under that section. (s.51(1)(a),(b) and (c)). Decisions of this type are made by officers of the Minister. Again, there is nothing which assists the appellant's case.

(vi) Application of the *Carltona* principle

66. In summary, I am not persuaded any of the provisions cited or any other provision assist the appellant. Section 74, quoted earlier, speaks in terms of the Minister revoking the authorisation of an *international protection* officer *who is an officer of the Minister*. The implication is clear. Rather than there being a contrary intention, the 2015 Act actually provides that a person can, potentially, be an officer of the Minister but, if acting as an IPO, must be permitted total independence in decision making. Clearly, there is no suggestion that such individual could perform both roles in the same case or be engaged in both functions simultaneously.

67. The express words of the Act simply cannot be put to one side. In a sense, they put the matter beyond doubt. There is nothing in s.75 which would prevent a Chief International Protection Officer also being an officer of the Minister, but he or she must be entirely independent when engaging in international protection decision making. Contractors may perform certain functions, but certainly not making s.39 recommendations. But it is the Minister who is later to consider s.39(3)(c) recommendations, decide on them, and, where necessary, consider leave to remain applications. By contrast, leave to remain and deportation orders will be made by the Minister's officers acting in the person of the Minister, just as an Immigration Officer may issue a permission to land under s.4 of the Immigration Act, 2004. It is sufficient to say there is nothing to be found in any of the sections quoted or in the findings which suggests the implication, still less the stipulation for which the appellant urges in this case.

68. There is nothing in the High Court judge's factual findings regarding the operation of the system which would indicate that there is an unlawful confusion or conflation of decision-making functions between persons carrying out the function of an IPO, and persons engaging in leave to remain decisions. The question at issue is not whether the situation is desirable, but whether it is lawful. It goes without saying that the deciders from the same division cannot simultaneously perform the two distinct roles in any individual case. The fact that these functions are now carried out in separate decisions, involving separate criteria and legal considerations, may not mean that, in other cases, officials are incapable of making these separate decisions; but they and the Minister must recognise the very distinct nature of the

decision-making role. Self-evidently, no official could or should be involved in making *both* a decision on international protection and thereafter on a leave to remain issue in the same case. In fact, the judge found that these functions were now carried out by distinct persons and distinct units within the Department. One point stands repetition: if there had been evidence of a conflict in the function of decision-making, the outcome of this case could be different. If evidence of a conflict of functions were to emerge it would, at minimum, raise a question mark over strict compliance, and whether the functions were being performed in accordance with the clear requirements of EU law to which this judgment presently moves.

69. I add this. Even if an open-ended *Adams* approach had been adopted in this case, the outcome would have been no different. Even a purely textual analysis leads to the same conclusion. The legislation says nothing suggesting a disapplication of *Carltona*. The structure of the Act of 2015 does not suggest any intention by the Oireachtas that the Minister personally should take the decisions. While the consequences are undoubtedly significant for the appellant, that is not, in itself, determinative. *Per contra Adams*, there is reason to infer that requiring the Minister to sign and consider the order would be a significant burden.

(vii) Interpretation of the Act in accordance with EU Law

65. As well as advancing submissions under the *Carltona* principle, counsel for the appellant correctly submits that the 2015 Act was brought into effect to reflect a number of EU legislative instruments, including the Procedures Directive and Directive 2004/83/EC ("the Qualifications Directive"). He contends that the effect of these Directives is that international protection decisions should be made entirely separately, by separate bodies, known as determining authorities, which are to be independent of the Minister.

66. A number of points are very clear. An applicant has a right to be interviewed, heard and have decisions concerning them made by an independent decision-maker who is familiar with the relevant law. As well as under statute, these rights arise under the Procedures Directives as applied in this State under Article 41 of the Charter. The procedure must be transparent. Fairness and impartiality must be at the centre of the process. The reasons for any decision must be clear. EU law requires no less (*Mukarubega v. Préfet de police*, Case C-166/13; *MV v. Minister for Justice, Equality & Law Reform*, Case C-277/11; *European Commission v. Republic of Poland*, Case C-530/16). Failure to effectively implement the fundamental requirements laid down in the Directives and the case law will lead to a violation of EU law. Judicial review which allows for a thorough opportunity to examine the reasons for a decision provides an adequate remedy under EU law.

67. Counsel referred the Court to EU case law on the Directives as authority for his argument. He submitted that his case was reinforced by what was previously provided in s.6(2) of the Refugee Act, 1996, which preceded the 2015 Act. The 1996 legislation provided that the Refugee Appeals Commissioner was to be independent in the exercise of his or her functions under the Act. However, prior to consideration, it is important to set out the fact that the appellant's advisers endeavoured to substantially broaden the case.

(viii) Ruling of 5th February, 2022

68. On the 5th February, 2022, this Court delivered a ruling on the scope of this appeal. The ruling must be read in conjunction with the judgment. As set out there, the appellant applied to introduce issues which had not been argued before the High Court. The application to introduce a new argument was brought on foot of a notice of motion seeking to contend that, in circumstances where the international protection office did not exist as a statutory body or entity, that office, without staff or other personnel, was incapable of meeting the definition of a "determining authority" for the purposes of Article 4.1 of Directive 2005/85/EC on minimum standards of procedures in member states for granting and withdrawing refugee status ("the Procedures Directive").

69. This is a court of final appeal, as designated under the Constitution. In general, it concerns only issues first canvassed in a court of first instance, where both parties have the right to make their case and adduce evidence. In the course of its ruling, this Court pointed out that:

(i) A fundamental distinction existed between the procedures necessary to determine an asylum subsidiary protection issue under s.39 of the 2015 Act, which was not challenged; and, on the other hand, an application under s.49 of the Act in relation to leave to remain within the State, which the appellant did challenge in these proceedings.

(ii) In these proceedings, the appellant challenged *only* the s.49 decision made in his case. He never raised any challenge to the s.39(c) decision, or the procedures employed. More specifically, the appellant made no challenge whatever to whether or not the procedure which had earlier been employed in his case complied with any provision of the Procedures Directive.

(iii) In ruling on the application, the Court also observed that the appellant had already been permitted to file an amended statement of grounds in the High Court on the 26th February, 2021. In response to that, the respondent filed an amended notice of

opposition. The case in the High Court was run on the basis described. Evidence was called on this basis.

70. In its ruling, this Court also pointed out that, in determining an application under s.49, the question was not whether the appellant was entitled to asylum or subsidiary protection, but rather, whether, having regard to his family and personal circumstances, the right to respect for private and family life, any connection with the State, other humanitarian considerations, character and conduct, and other criteria, including national security and the common good, he should be given permission to remain in the State. (cf. s.49(4) of the 2015 Act; *AWK (Pakistan) v. Minister for Justice & Equality, Ireland & The Attorney General* [2020] IESC 10).

71. The ruling of this Court contained a timeline of the proceedings in the High Court and outlined the original grounds upon which judicial review had been sought, and the amended broader statement of grounds which have been permitted. As the Court pointed out in its ruling, the issue before the High Court remained essentially one of *vires*, albeit combined with a claim of factual error. But the relief in question was confined to s.49(4) of the Act. The appellant had no *locus standi* now to challenge the earlier international protection procedure applied in his case. He was long out of time to do so. He was not entitled to advance a case premised on a *ius tertii* basis, that is the potential rights of a hypothetical third party. Had it been necessary to do so the respondents might have been required to call entirely different evidence to deal with the international protection decision. Moreover, there was no *evidence* that the procedures adapted in the international protection aspect of the appellant's case were suspect or tainted by a conflict of function.

(ix) Conclusions on EU Law Argument

72. With that argument as to scope, I turn then to the second leg of the appellant's argument. This relates to the interpretation of the Act, and the *administration* of the system concerning him by reference to the Procedures Directive, and the Qualifications Directive. The fundamental question again is to what extent must there be a separation of function. The requirements for fairness and independence are set out, *inter alia*, in the case law cited earlier, and the Directives. But it must also be based on the facts as found by the High Court judge which were not challenged.

73. It is true that *B* and *D*, Cases C-57/09 and C-101/09, the CJEU stated that state protection which a member state has discretion to grant in accordance with its own national law must not be confused with international protection within the meaning of Directive 2004/83/EC, and that there must be a clear distinction between both. This is fundamental. But

it does not assist the appellant in this case. It is necessary again to have regard to the underlying factual situation relating to the permission to remain arising in this case.

74. The 2015 Act does draw a clear distinction between international protection and permission to remain, setting out two separate processes with separate criteria made by separate decision-makers, namely, IPOs in the former instance, and the Minister's officers in the latter. The fifth question raised before the CJEU in *B* and *D* was whether it was compatible with Article 3 of the Directive 2004/83/EC for a member state to recognise that a person excluded from refugee status by Article 12(2) of the Directive ((a) "Crime against peace, war crime, crime against humanity", (b) serious non-political crime, (c) acts contrary to the purposes and principles of the United Nations) has a right of asylum under its *constitutional law*. The applicants had been granted protection under German national law which, for that purpose, was not to be confused with refugee status within the Directive. But the CJEU held that such grant *under national law* did not infringe the system established by the Directive. This is a different issue from that which arises in this case. There is no confusion of status between protection under national law and that under EU law. The Act of 2015 clearly makes the distinction between international protection procedures, on the one hand, and leave to remain, where national law applies, on the other. On the facts as presented and unchallenged in this case, the judgment does not assist the appellant.

75. In any case, the appellant did not initiate the case on the basis that the Act in its text or operation contravened EU law. The ruling on the scope of this case applies national procedural law. It is based on the concept of fair procedures guaranteed under the Constitution. This Court cannot reconstitute itself as a court of first instance now to hear evidence which was not addressed in the High Court. There are no findings to base any adverse conclusion as to how the Act is now administered. Had evidence been adduced of an actual violation of EU law principles, the position would be different.

(x) The Refugee Act, 1996

76. Counsel also made reference in this context to s.6(2) of the Refugee Act, 1996, which he contended had provided, that previously the *Office* of the Refugee Appeals Commissioners ("ORAC") was to be independent in the exercise of his or her functions under the Act. In fact, the statutory reference is not to the Office of the Refugee Appeals Commissioner, but to the independence of the office holder.

77. Section 6 of the 1996 Act, in full, provides:

> *"6(1)(a) For the purposes of this Act, there shall be a* ***person*** *(referred to in this Act as "the Commissioner")* ***who*** *shall be known as the* ***Refugee Applications Commissioner****.*

(b) The Commissioner shall perform the functions conferred on him or her by this Act."

(2) ***The Commissioner*** *shall be independent in the exercise of his or her functions under this Act.*

(3) The provisions of the First Schedule shall have effect in relation to the Commissioner."

None of the sub-sections makes any reference to the *Office* of the Refugee Applications Commissioner. That term is not deployed in the Act of 1996. The sections refer to the *Commissioner*, not the Office.

78. Insofar as the appellant seeks to make the case that the Act of 2015 constitutes a radical departure in relation to either function or independence of persons having charge of making such decisions, I am not so persuaded.

79. In fact, under the 1996 Act, the first instance decision-making body was formerly the Refugee Applications Commissioner, and his or her staff or authorised officers. These were *recognised* as the Office of the Refugee Applications Commissioner ("ORAC"). Since 2015, this first instance function is now performed by individually appointed international protection officers working within what is known to those engaged in the work as the International Protection Office. The fact that para. 2 of the First Schedule of the 1996 Act referred to the "term of office" of the Commissioner does not alter the position that what is in reference is simply to the duration of office which the holder of that position would remain in it, subject to renewal. I am not at all persuaded that this phraseology actually created a *statutory entity* known as the Office of the Refugee Applications Commissioner, a term which is not to be found in the 1996 Act. But, again, this argument suffers from two frailties: first, the international protection was not challenged; second, it has not been alleged, at any stage, that there was some actual unfairness in the procedure.

(ix) Conclusion and Summary

80. In conclusion, nothing in this judgment should be read as a diminution of the importance of the decision-making process which is considered. The persons entrusted with these functions are making decisions which can fundamentally affect the lives and well-being of these individuals whose applications are being considered. It is true the judgment in this case can be seen as "technical law": but the substance of the decisions touches on the lives of people who at minimum are entitled to an effective and efficient decision-making process. Unnecessary prolongation of the process can lead to continuing uncertainty in the lives of persons who, for whatever reason, found it necessary to leave their countries of origin. Such

people are entitled to an independent, impartial and objective determination of their status and entitlements. Those entrusted with the task will necessarily have these points to the forefront of their minds.

81. But there is nothing in the findings of the High Court to indicate that the appellant did not actually receive an independent, impartial and objective determination in relation to the leave to remain application which is the decision actually challenged. It has not been said that some material matter was left out. It was not suggested that the relevant decision was tainted other than in the manner contended for. The findings in the High Court were based on the evidence adduced there. Those findings are not a sufficient basis for this Court to draw any adverse conclusion in relation to the integrity of the s.49(4) decision made in this case. There are no findings from the High Court judgment from which an inference could be made that the decision made in the appellant's case was flawed as a result of some procedural issue.

82. It is to be noted that while High Court judgment determined that the 2015 Act did not establish the International Protection Office, and that it is not a legal entity, it went on to observe that it was clear that such office did have a *de facto* existence, that correspondence issued from it notifying applicants for international protection of the outcome of their application, together with the outcome of the Minister's permission to remain consideration pursuant to s.49(4) of the 2015 Act. Neither the evidence, nor the High Court judgment, supported a contention that there has been some fundamental departure in terms of procedure or substance between the procedures operated under the 1996 Act, and those now in being in the 2015 Act.

83. I would affirm the High Court judgment for the reasons set out. On the basis of the High Court findings and the law there is no conflict of roles or functions as alleged. This judgment holds that the *Carltona* principle remains in effect and in force as a matter of Irish law. The presumption derived from that principle does not assist the appellant in this case, where there are no express or implied words to be found in the 2015 Act which provide a basis that the presumption is to be rebutted or dis-applied. There is nothing in the Act, or in the procedure adopted in the leave to remain decision concerning the appellant that gives rise to any finding of unlawfulness under EU law. The appellant's case that the decision was made by an unauthorised officer of the Minister must fail. Insofar as arises within the scope of this appeal, there is nothing to suggest that the decision-making in the appellant's case denied him any procedural or substantial right to which had was entitled. For the reasons set out in this judgment, I would, therefore, dismiss the appeal.