



**THE COURT OF APPEAL**

**[2020] IECA 64**

**Record Number: 2019/223**

**Donnelly J.  
Faherty J.  
Power J.**

**BETWEEN/**

**AJK**

**PLAINTIFF/APPELLANT**

**- AND -**

**THE MINISTER FOR DEFENCE**

**DEFENDANT/RESPONDENT**

**JUDGMENT of Ms. Justice Donnelly delivered on the 28th day of February, 2020**

**Introduction**

1. This judgment concerns an appeal against a decision of the High Court (O'Regan J.) refusing the appellant an order of *certiorari* quashing the decision of the respondent (hereinafter "the Minister") dated 31st January, 2018, which the appellant maintains amounted to a refusal to permit him enlist in the Defence Forces in accordance with law. He was also refused a declaration that as the holder of a declaration of subsidiary protection he was eligible to enlist with the defence forces (see the decision of the High Court *AJK v the Minister for Defence* [2019] IEHC 159).
2. The appellant is a Pakistani national under the age of 25. He came to Ireland as an unaccompanied minor in 2012 and secured subsidiary protection status in October 2014. At that time, he was granted permission to remain in the state for a three-year period. On 20th June, 2017, he secured an extension of that three-year period with permission valid until 20th June, 2020.
3. In August 2015, he applied to join the General Service of the Defence Forces but that application was not successful. In April 2016 he submitted a second application to join the General Service, and in May 2016 he applied to join the Naval Service. He was enlisted in the Naval Service on 19th December, 2016 and commenced training on 3rd January, 2017. He left the Naval Service on 19th January, 2017, having purchased his discharge in accordance with law, as he was confident he would secure a place with the General Service which was his preference. He could not apply to the General Service if he was a member of the Naval Service.
4. The appellant was duly selected for enlistment with the General Service and was invited to the Curragh Camp on 24th April, 2017. On that date, he was told orally that he was not eligible to enlist on the basis that he required a minimum of twelve years' permission to

reside in the State or his permission had to be open ended. This was followed up by an email the following day. On 4th May, 2017, a letter on Defence Forces headed notepaper was sent to him which stated: -

"I have the following information which may help you acquire the required Certificate of Registration from the Department of Justice, Equality and Law Reform.

As you are a non-national the current legal position is set out clearly in para. 127 of Admin Instruction A10 as follows (emphasis in bold of the critical provision) -

*Non-nationals must have a minimum of three years legal and unbroken residency in the State and they must meet residency and work permit conditions as laid down by the Department of Justice, Equality and Law Reform and the Department of Enterprise, Trade and Employment. Applicants must have established residency and must be in possession of a Certificate of Registration (also called the Certificate of Residency or the Green Book) issued by Immigration & Citizenship Division, Department of Justice, Equality and Law Reform. **This authorised period of residency must be open ended or, as a minimum, must cover the period of engagement including any reserve commitment.** Care must be taken when examining this document as the duration of residency stamps vary from case to case."*  
(emphasis in original)

5. The appellant's solicitor subsequently engaged in correspondence with the military authorities who had written this letter and cc'd that correspondence to the Minister. The import of the letter from the appellant's solicitor was that they understood this to be a stated policy position of the Defence Forces. They sought a review of the decision because they viewed it as an inflexible unpublished policy and therefore an illegality.
6. At various stages they sent reminders to both the military authorities and to the Minister. On 8th November, 2017, the Department of Defence replied acknowledging receipt of the three previous letters. That letter stated "[t]he Department is currently engaging with the military authorities in relation to this matter and we will revert to you in due course." Having received that letter, the appellant's solicitor engaged with the Minister by letter of 22nd November, 2017. The solicitor requested a final decision and gave the Minister 14 days in which to make a final decision in respect of the client. He asked for a reconsideration of the case. On 5th December, 2017, the Department of Defence replied, acknowledging the urgency for the appellant but said that the time limit of 14 days was not feasible. The Department said that the issues had been brought to the immediate attention of the appropriate military authorities. The appellant's solicitor again wrote on 12th December, 2017 giving a further period of 28 days. He again wrote on 9th January, 2018 giving a further 14 days, and on 24th January, 2018, giving a further 7 days.
7. On 31st January, 2018, the Department of Defence made a substantive reply. In the first instance they said that they engaged with military authorities and established that the

appellant's attestation in the Naval Service was administratively incorrect under current legislation. The letter stated: -

"In addition to this error, it has also been established that your client did not have a residency permission that would allow him to satisfy current Defence Forces induction criteria in terms of residency. The period of engagement for enlistment is twelve years (comprising of five years Permanent Defence Forces and seven years Reserve Defence Forces service) and as such, the authorised period of residency must be open ended or as a minimum, must cover the stated twelve year period."

The letter went on to say -

"There are currently no regulatory provisions under section 53(1) of the Defence Act, 1954 and DFR (Defence Forces Regulation) A10 to provide for your client's induction to the Defence Forces.

In order to be inducted to the Defence Forces, your client requires appropriate permission to allow him to enlist for the period set out in Defence Forces legislation. In these circumstances, your client could not have been inducted to the Defence Forces and it is up to an individual, on seeking application to join the Defence Forces to determine whether he/she satisfies the required residency criteria in the first instance."

### **The first issue**

#### ***Did the Minister have the power to review the decision of the Defence Forces dated 4th May, 2017 refusing to allow the appellant to enlist?***

8. In the Statement of Opposition, the Minister made a preliminary objection that the appellant was out of time to seek judicial review as over three months had passed from the decision of 4th May, 2017. The appellant subsequently sought to amend his Statement of Grounds seeking an extension of time in which to seek *certiorari* of that decision of 4th May, 2017. The High Court Judge refused to extend the time to seek leave. The appellant has not sought to appeal that finding. Instead, the appellant submits that the decision of the Minister dated 31st January, 2018 was the first and only review decision. Their submission is that it was made by a different decision maker and was not simply a reiteration of what was said in the decision of 4th May, 2017.
9. Central to the determination is whether the Minister had a power of review at all. It must be emphasised at the outset that there is no suggestion that the wrong respondent to these proceedings was named. It is fully accepted that the Minister is correctly named as a respondent where decisions are taken by either the military authorities or the civilian authorities in the Department of Defence. On the contrary, the Minister's position is that the Minister, having made regulations under the Defence Act, 1954 dealing with *inter alia* enlistment, had delegated the day to day decision making regarding enlistment to the military authorities. In those circumstances, the only entity with the power (*vires*) to make an individual decision on an applicant for enlistment was the Chief of Staff of the Defence Forces acting through his delegates. In the Minister's submission, despite the

control of the Minister of executive and administrative functioning of the Defence Forces, this was not a power in respect of which he had any right of review.

10. The appellant objects that this issue was not directly pleaded in the Statement of Opposition, although it was pleaded that the Minister's letter merely reiterated the original decision, from which there was no provision for an appeal. The issue was one raised by the trial judge at the hearing in the High Court. It was then addressed by both parties in the High Court without objection from the appellant. Furthermore, despite making objections in written submissions to this process, objection to the process was not a formal ground of appeal. In all the circumstances, I am satisfied that it is appropriate for this Court to address this issue in this judgment.

### ***The Legal Provisions***

11. Section 1 of the Ministers and Secretaries Act, 1924 (hereinafter "the 1924 Act") states as follows: -

"There shall be established in Saorstát Eireann the several Departments of State specified and named in the eleven following sub-paragraphs, amongst which the administration and business of the public services in Saorstát Eireann shall be distributed as in the said sub-paragraphs is particularly mentioned, and each of which said Departments and the powers, duties and functions thereof shall be assigned to and administered by the Minister hereinafter named as head thereof, that is to say:—

...

(x) The Department of Defence which shall comprise the administration and business of the raising, training, organisation, maintenance, equipment, management, discipline, regulation, and control according to law of the Military Defence Forces of Saorstát Eireann, and all powers, duties and functions connected with the same, and of which Department the head shall be, and shall be styled, an t-Aire Cosanta or (in English) the Minister for Defence."

12. Under s. 2 of the Defence Act, 1954, as amended, (hereinafter "the 1954 Act") the expression "the Defence Forces" means the Defence Forces to be raised and maintained under the 1954 Act. Section 13(1) of the 1954 Act states: -

"(1) There shall stand established in the Department of Defence a military element (which shall be known, and is referred to in this Act, as 'Defence Forces Headquarters'), the head of which shall be the Chief of Staff."

Subsection 2 of the said Act provides that -

"(2) Subject to the Defence Acts, 1954 to 1998, there shall be assigned to the Chief of Staff such duties in connection with the business of the Department of Defence as the Minister may from time to time determine."

Subsection 3 then provides –

“(3) The Chief of Staff shall be directly responsible to the Minister for the performance of such duties as may from time to time be assigned to him or her under subsection (2).”

Subsection 4 provides –

“(4) The Chief of Staff may, subject to the approval of the Minister, delegate such duties assigned to him or her under subsection (2) as he or she considers appropriate to the Deputy Chief of Staff (Operations) or the Deputy Chief of Staff (Support).”

13. Section 16 of the said Act provides –

“It shall be lawful for the Government to raise, train, equip, arm, pay and maintain defence forces to be called and known as Óglaigh na hÉireann or (in English) the Defence Forces.”

14. Section 17 provides as follows –

“(1) Under the direction of the President, and subject to the provisions of this Act, the military command of, and all executive and administrative powers in relation to, the Defence Forces, including the power to delegate command and authority, shall be exercisable by the Government and, subject to such exceptions and limitations as the Government may from time to time determine, through and by the Minister.

(2) (a) The delegation of command and authority by the Minister—

- (i) may be made subject to such exceptions and limitations as he may from time to time determine,
- (ii) may be in relation to any area, place or State ship or any military body organised under section 22 and may embrace different components of the Defence Forces,
- (iii) may, during a period of emergency, be in relation to the whole of the Defence Forces.”

15. Section 53(1)(a) provides –

“(1) (a) A person (including a minor) may be enlisted as a man of the Permanent Defence Force for service for a period of twelve years or for such less period as may from time to time be prescribed, but not for any longer period, and the period for which a person enlisting under this section is enlisted is in this Act referred to as the term of his original enlistment.”

Subsection 2 provides –

“(2) The enlistment of a person under this section shall be as follows, either—

- (a) for the whole of the term of his original enlistment in the Permanent Defence Force, or
- (b) for such portion of the term of his original enlistment as may from time to time be prescribed and as is specified in his attestation paper in the Permanent Defence Force and for the residue of the said term in the Reserve Defence Force.”

16. Section 56(1) provides –

“(1) The Minister may make regulations (in this Act referred to as recruiting regulations) in relation to all or any of the following matters, that is to say:—

- (a) the appointment and duties of recruiters;
- (b) the persons authorised to enlist recruits for the Permanent Defence Force and the Reserve Defence Force;
- (c) the manner in which recruits are to be enlisted;
- (d) the forms to be used for the purposes of enlistment;
- (e) the persons to be enlisted;
- (f) the enlistment of recruits for service in a particular service corps;
- (g) the enlistment of recruits in the Reserve Defence Force for service in a particular class of reservists;
- (h) any other matter in relation to proceedings for enlistment.

(2) Recruiting regulations shall provide for the completion by a person enlisting in the Permanent Defence Force or the Reserve Defence Force of an attestation paper in the prescribed form and the signing by such person of such attestation paper and the verification of his signature.”

17. Section 57 provides –

“Every person enlisting in the Permanent Defence Force or the Reserve Defence Force shall be enlisted in accordance with recruiting regulations.”

18. Section 58 provides for those persons enlisting to take an oath or make a declaration set out in the schedule to the Act. Section 59 provides for the signing of a declaration affirming such particulars in relation to himself that may be required by his attestation paper and of his willingness to fulfil the engagement set out in the said attestation paper. Having signed this declaration and complied with s. 58, a person is deemed to be enlisted as a man of the Permanent Defence Force or the Reserve Defence Force as the case may be.

19. A man is defined under s. 2 the 1954 Act as a person who is for the time being a member of the Defence Forces but does not include an officer.

20. On 31st July, 1941, Defence Force Regulations A10 (hereinafter “DFR A10”) were passed. These relate to enlistment, promotions, reductions, transfers to the Reserve Defence Force, and discharge. Provision was made under the 1954 Act for the existing Defence

Forces to become the Defence Forces under the 1954 Act. Section 298 provided that existing statutory instruments made under the Defence Forces (Temporary Provisions) Act, 1923 shall be deemed to have been made under the 1954 Act. Therefore, DFR A10 is a statutory instrument made under the 1954 Act. No issue has been taken with the contention that they are therefore to be considered as the regulations made by the Minister under s. 56; the "recruiting regulations".

21. Section 2 of the Statutory Instruments Act, 1947, as amended by the Statute Law Revision Act, 2015, exempts regulations made, *inter alia*, from the usual requirements of printing, notice of making, gazetting in *Iris Oifigiúil* and dissemination. Therefore, although Defence Force regulations do not have to be published in the same way as other statutory instruments, they are, in all other respects, statutory instruments. It appears that some Defence Force regulations have been published and continue to be published but some are not so published.

22. Regulation 1A of DFR A10 provides: -

"The Adjutant-General is responsible for the organisation and conduct of recruiting for the Defence Forces".

Regulation 2 provides that General Officers Commanding Commands are charged with the general administration of recruiting for the Defence Forces under the orders of the Adjutant General.

23. The 1954 Act has been amended by the substitution of the Chief of Staff for the Adjutant-General in certain sections of the Act. There was, however, no consistency in the substitution of the Chief of Staff for the Adjutant-General. Section 9 of the Defence (Amendment) Act, 1998 (hereinafter "the 1998 Act") provided that the person who held the office of Adjutant-General shall be deemed upon commencement of that Act to stand appointed to be Deputy Chief of Staff (Operations). However, s. 10 of the 1998 Act provides that: -

"(1) Subject to sections 6, 7 and subsection (3), references in any Act of the Oireachtas passed before the commencement of this Act or in any statutory instrument made before that day (other than such instruments (if any) as may be prescribed by the Minister) to the Adjutant-General or to the Quartermaster-General shall, on and after such commencement, be construed as references to the Deputy Chief of Staff (Support)."

At first glance it may appear that the reference in Regulation 1A of DFR A10 must be read as a reference to the Deputy Chief of Staff (Support). The following legal provisions must be considered however.

24. Subsection 2 of s. 10 of the 1998 Act provides, *inter alia*, that references in such statutory instruments (if any), as may be prescribed by the Minister under subs. 1, to the

Adjutant-General or to the Quartermaster-General shall be construed as references to the Deputy Chief of Staff (Operations). The Minister does not rely upon that provision.

25. The Minister contends that under s. 13(4) of the 1954 Act, the Chief of Staff delegated such duties assigned to him under subs. 2 as he considered appropriate to the Deputy Chief of Staff (Operations) or the Deputy Chief of Staff (Support). The Minister submits that he thereafter delegated recruitment and enlistment duties to the Deputy Chief of Staff. The Minister relies upon the Defence Act, 1954, (Section 13(2) as amended by section 4 of the Defence (Amendment) Act, 1998 (No. 31 of 1998)), (Duties of the Chief of Staff) Instrument, 1998 for that delegation. This instrument has been provided to us.
26. That Instrument states that the Minister in exercise of the powers conferred by s. 13 of the 1954 Act, as amended by s.4 of the 1998 Act "hereby assign[s] to the Chief of Staff the duties in connection with the business of the Department of Defence described in this instrument, for the performance of which he shall, pursuant to subsection (3) of the said section 4, be directly responsible to the Minister for Defence." Regulation C(ii) assigns, *inter alia*, duties with respect to the recruitment and enlistment of non-commissioned officers and privates to the Chief of Staff.
27. In the written submissions, the Minister refers to the delegation as being made to the Deputy Chief of Staff. In the legislation there is no office of Deputy Chief of Staff; there is either Deputy Chief of Staff (Operations) or Deputy Chief of Staff (Support). Indeed, the Instrument of 1998 specifically refers to the permitted delegation, with the prior approval of the Minister for Defence, of duties to the Deputy Chief of Staff (Operations) and to the Deputy Chief of Staff (Support). Moreover, it is an overstatement in the Minister's submissions that the 1998 Act abolished the office of Adjutant-General and replaced it with the Office of Chief of Staff. The 1998 Act did not abolish the office in a single provision, but instead provided that various references in the existing legislation to the Adjutant-General were to be construed in different contexts to the Chief of Staff, the Deputy Chief of Staff (Operations) or to the Deputy Chief of Staff (Support).
28. It seems to me therefore, that in line with s. 10 of the 1998 Act, the role of the Adjutant-General under DFR A10 was to be carried out by the Deputy Chief of Staff (Support) but this was subject to the Minister's entitlement to delegate duties (including those relating to enlistment) to the Chief of Staff pursuant to s.13 of the 1954 Act, who in turn was entitled to delegate these duties to either of the Deputy Chiefs of Staff.

### **Discussion**

29. The main argument on behalf of the Minister is that by making the recruiting regulations under the Act, the Minister has set out those who are entitled to enlist and the manner in which enlistment must be carried out. Thereafter, the individual determination on a case by case basis must be made by the military element, in this case the relevant Deputy Chief of Staff, and that the Minister has no function in individual enlistment decisions. The Minister submits that the trial judge interpreted the correspondence between the parties in the correct manner, namely that the enlistment decision was that of the Defence Forces and not of the Minister. Accordingly, the decision of 4th May, 2017 emanated from



Defence Forces Headquarters which, under the 1954 Act, is the military element of the Department of Defence, the head of which is the Chief of Staff.

30. By the Instrument of 1998, the business, *inter alia*, with regard to enlistment and recruitment was delegated to the Chief of Staff pursuant to the provisions of s. 13 of the 1954 Act. Most importantly, the Instrument specifically states that it "is in substitution for all assignments and delegations to the Chief of Staff and assignments to the Adjutant-General and the Quartermaster-General heretofore made under section 13 of the Defence Act, 1954 (No. 18 of 1954)." The original provisions of s. 13(2) had stated that there shall be assigned to, *inter alia*, the Adjutant-General such duties in connection with the business of the Department of Defence as the Minister may from time to time appoint. The result therefore is that the Minister's delegation of the enlistment and recruitment functions to the Chief of Staff operates as an effective amendment to Statutory Instrument DFR A10 in terms of the day to day control and organisation of recruitment in the Defence Forces. According to the Minister, that function has in turn been delegated to the Deputy Chief of Staff (Operations).
31. The issue thereafter is whether it is correct to say that a decision over enlistment, even one concerning the interpretation of the regulations and the Act, is one over which the Minister has retained no control or powers. Under the Constitution, the Defence Forces occupy an important and *sui generis* role within the architecture of state institutions. A significant example of the unique nature of the role is found in Article 38 which provides that the ordinary system of criminal justice does not apply to those who are subject to military law.
32. The origin and control of the Defence Forces was set out by Kingsmill Moore J. in *Attorney General and Another v. Ryan's Car Hire Ltd.* [1965] I.R. 642 at p. 663 as follows: -

"In Ireland, by Article 13.4 of the Constitution the supreme command of the Defence Forces is vested in the President and by Article 13.5.1<sup>o</sup>, the exercise of the supreme command is regulated by law. By Article 15 the right to raise and maintain military or armed forces is vested exclusively in the Oireachtas, and the Oireachtas has exercised its powers by the Defence Act, 1954. Section 16 of that Act empowers the Government to raise, pay and maintain defence forces, and s. 17 provides that the military command of, and all executive and administrative powers in relation to, the defence forces are to be exercised by the Government under the direction of the President and subject to the provisions of the Act; and that such powers are to be exercised through and by the Minister for Defence."
33. It is the appellant's submission that the above dicta reflects s. 1(x) of the 1924 Act and also s. 13 of the 1954 Act which places the military element within the Department of Defence. The submission is that the Minister has very broad statutory powers and functions in relation to all aspects of the formation and development of the Defence Forces.

34. The appellant submits that the Minister's position is to be understood that in the context of enlistment, the military element operates independently, immune from oversight, by any official in his department or even the officials at Defence Forces Headquarters. In respect of the latter part of that submission, I am of the view that the appellant has mistakenly identified Defence Forces Headquarters as part of the administrative element of the Department of Justice; the appellant has wrongly identified the "officer in charge of recruitment in Defence Forces Headquarters" as a civil servant. I am satisfied that Defence Forces Headquarters is as stated, a military element, but a military element established in the Department of Defence.
35. Notwithstanding the confusion by the appellant as to the status of Defence Forces Headquarters, I am satisfied that s. 13 of the 1954 Act is highly relevant to the understanding of the correct legal position. The head of Defence Forces Headquarters is the Chief of Staff (s. 13(1) of the 1954 Act). Defence Forces Headquarters is the military element of the Department of Defence. The Department of Defence itself is headed by the Minister (s. 1(x) of the 1924 Act).
36. Section 13(2) of the 1954 Act assigns to the Chief of Staff such duties in connection with the business of the Department of Defence as the Minister may, from time to time, determine. Under s. 17 (and through subsequent statutory instruments) the military command of, and executive and administrative powers in relation to, the Defence Forces (including the power to delegate command and authority), are exercisable through and by the Minister. That delegation of command and authority may be made subject to such exceptions and limitations as he may, from time to time, determine. The original delegation as to enlistment to the Adjutant-General, in the absence of a restriction on that delegation, arguably divests the Minister of any power in relation to enlistment decisions. That delegation has now been made to the Chief of Staff in accordance with the provisions of s. 13 of the 1954 Act.
37. Section 13(3) of the 1954 Act, states that the Chief of Staff shall be *directly responsible* to the Minister for the performance of such duties as may, from time to time, be assigned to him under subs. 2. In my view, the wording of this section refers to the chain of command rather than a disciplinary issue for the Chief of Staff. If a disciplinary or personal responsibility only was at issue, the wording may well have stated that the Chief of Staff was *personally* responsible to the Minister for the performance of his duties. Instead, the statutory provision is that the Chief of Staff is *directly* responsible to the Minister. Such phraseology is more consistent with an issue of line management; in the military it is a chain of command issue.
38. In my view, s. 17(2), which permits the delegation of command and authority to be made subject to such exceptions and limitations as the Minister may determine, cannot be read as excluding the Minister from ultimate responsibility over command issues. The ultimate command is reflected by making the Chief of Staff directly responsible to the Minister. This preserve of command functions is also reflected in the Instrument of 1998 which specifically also states that the Chief of State is directly responsible to the Minister for the

performance of those duties. The legal position therefore is that the Chief of Staff is responsible for the organisation and conduct of recruitment for the Defence Forces, although he may delegate those functions. However, as it is a duty assigned to him under s. 13(2), the Chief of Staff is, in turn, directly responsible for the performance of those duties to the Minister.

39. The Minister therefore retains a responsibility over the performance of the Chief of Staff in respect of the duties assigned to the Chief of Staff. This interpretation of the command structure is entirely in keeping with the other provisions of the 1954 Act and in particular, the general statement that the military command of, and all executive and administrative powers are exercisable by the Government and through and by the Minister. Moreover, s. 13 provides that the military element is established in the Department of Defence. The locating of the military element as part of the Department of Defence also must be read in accordance with the relevant provisions of s. 1(x) of the 1924 Act. The purpose of the Acts of 1924 and 1954, in particular when read in light of the provisions of the Constitution, are to ensure civilian control of the military powers. It is in that context that the importance of s. 13(2) must be seen. The Chief of Staff, who is the head of the military element *of the Department of Defence*, has direct responsibility to the Minister for the performance of the duties that are assigned to him by the Minister. Section 13(3) is the ultimate provision ensuring proper civilian control over the military elements.
40. Indeed, the behaviour of the military element, i.e. Defence Forces Headquarters, and the civilian element of the Department of Defence in their dealings with the appellant in this case, support the interpretation that has just been given. In the present case, the appellant's solicitors wrote to Defence Forces Headquarters and copied those letters to the Minister. Despite repeated requests to Defence Forces Headquarters, the reply ultimately only came from the Department of Defence civilian side. The Department indicated that they were in communication with the military authorities. Ultimately, it was the Minister who made the final reply, setting out the view of the Minister as to the correct legal position. It is to be noted that the legal position was phrased in a different manner to that which had been set out by Defence Forces Headquarters. It is clear that Defence Forces Headquarters was at all times deferring to the Minister.
41. I do accept that the mere fact that the Department of Defence acted in a particular manner did not or could not create an estoppel against the Minister if in fact there had been no power of the Minister to engage or carry out any function in respect of this matter. I refer to the communications merely to illustrate that, as these matters were proceeding, the Minister was of a view that he was the appropriate person to respond. Moreover, the tenor of the Statement of Opposition was also to the effect that there was no appeal mechanism within the 1954 Act. It had not directly addressed the fact that the Minister had no power at all in relation to enlistment decisions or any responsibility for the Chief of Staff's decision. Having considered the relevant legal provisions, it is clear that the manner in which the Department proceeded in this case actually reflected the legal provisions; the Minister did have a role to play in the performance of the Chief of Staff of the duties assigned to him with regard to enlistment and recruiting.

42. I am therefore satisfied that the decision of 31st January, 2018 was a decision of the Minister in respect of enlistment decisions. In so holding, this should not be understood as creating a system of review for every mishap that might befall an applicant for enlistment in the Defence Forces. The extent of such a review, if any, may have to await decision on another day in relation to particular facts. The issue here is a fundamental aspect of the performance of duties by the Chief of Staff, namely, whether he has correctly applied the appropriate law to a decision on enlistment. The decision on enlistment made by the Chief of Staff here was not a decision merely as to personal characteristics of this appellant but was a decision that all applicants in the same legal situation as the appellant were not entitled as a matter of law to enlist in the Defence Forces. The Chief of Staff was directly responsible to the Minister for the performance of such a fundamental duty of interpreting the legislation correctly. By making him responsible to the Minister, the Minister retains under the Act and the Instrument a power of review over whether those duties are being operated in accordance with law.

## **Second Issue**

### ***Is the decision of 31st January, 2018 amenable to Judicial Review?***

43. The next issue for decision is whether the Minister's letter of 31st January, 2018 is a decision amenable to judicial review. To a certain extent this has already been answered in the discussion on the previous issue. If the Minister has a power to review because the Chief of Staff is directly responsible to him for the performance of the duties assigned to him, then where a review is sought and engaged with, whatever decision is made is then a decision amenable to judicial review. The Minister has however argued that even if he had power to engage, what he did in this case was merely a reiteration of the previous decision and was not in any sense a review. The Minister has referred to the lack of any statement that it was a review in the Minister's letter and also to the fact that the appellant, through his solicitors, had misunderstood the original decision and had sought to have the Minister apply a different policy.
44. The Minister has also referred to the dictum of Carroll J. in *Finnerty v. Western Health Board* (Unreported, High Court, Carroll J., 5th October, 1998) in which she states, "Time therefore begins to run when the final decision is first made". The Minister submits that this could not be anything other than a reiteration of the earlier definitive decision.
45. In the later decision of *Sfar v. Revenue Commissioners* [2016] IESC 15 McKechnie J. also referred to the concept of the final decision. In that case, it was clear that the final decision was made ten months after an original decision. That original decision had been subject to a request for review.
46. It is generally good practice to seek a review of a decision, where such a review is permissible. It permits general oversight of whether the original decision maker has correctly interpreted the law and the facts. It can save expensive court proceedings. If a government department wish to make clear that they do not have any power of review or are not going to engage in a review because a review is out of time, this should be done at the earliest possible time. Of course, endless reviews cannot be engaged in and

decisions that have become final cannot be revised by simply claiming an entitlement to a review. Each case must be carefully considered.

47. Relevant to the present case are the following: (i) the appellant requested a review of the earlier decision, even if he did so on a misunderstanding of the basis for that decision, (ii) he was asked to withhold from taking legal proceedings in relation to the decision, (iii) he was told that the Minister was engaging with the military authorities and (iv) the final decision, being one which the decision maker had power to make, clarified the legal basis for the original decision. That original basis had wrongly relied upon an administrative circular (i.e. the Administrative Instruction) rather than referring to the precise legal provisions. Furthermore, even on the Minister's case, part of the paragraph referred to incorrectly stated the law, as will be referred to further in this judgment (although this section was not relevant to the decision in this appellant's case). In all those circumstances, I am satisfied that the decision of 31st January, 2018 was a final decision which is amenable to judicial review. In the circumstances I am satisfied that the appellant is within time to challenge the decision with regard to his enlistment in the Defence Forces.

#### **The final issue**

#### ***Is the appellant precluded from enlistment by the provisions of s. 53(1) of the 1954 Act, or by DFR A10 recruiting regulations?***

48. The trial judge decided *obiter* that neither the provisions of s. 53(1) of the 1954 Act nor DFR A10 prevented the appellant's enlistment. The Minister cross-appealed that decision. The appellant relies upon the decision of the trial judge.
49. The Minister refers to the findings of the High Court in this regard in which it was stated at para. 13 that it had been argued on behalf of the Minister that "such a fixed-term period therefore requires a guarantee by an applicant". The judgment highlighted the absence of the word "guarantee" in s. 53 and/or in the balance of the 1954 Act and also in the regulations. The Minister argues that that the judgment failed to engage with the requirement in the Act that a person seeking enlistment be available to serve for a period of twelve years, as prescribed by the regulations.
50. The Minister also submits that the High Court judge, in referring to s. 74 of the Act in circumstances where a discharge occurs when a person becomes a member of parliament, was incorrect as that section is concerned with the discharge of a reservist from the Reserve Defence Force, whereas s. 53 of the provision at issue relates to enlistment in the Permanent Defence Force. More importantly, the Minister submits that those provisions relate to discharge by operation of law rather than eligibility for enlistment in the first place.
51. The Minister also submitted that the trial judge incorrectly considered ss. 85 and 89 of the 1954 Act and that she was incorrect in referring to s. 53 as being akin to a fixed-term contract. It is submitted the trial judge was also incorrect to refer to the ability to buy out a term.

52. In the Minister's submission, s. 53(1) is clear on its face. It is submitted that the section provides for an enlistment period of twelve years or for such lesser period as may be prescribed by law. That period is now a period of five years in the Permanent Defence Forces and seven years in the Reserve Defence Forces. It is the Minister's submission that the person seeking to enlist must be in a position to commit to the period required under the Act, as prescribed by the Defence Force regulations. Counsel refers to s. 53(2) which states that the enlistment of a person shall be for the whole of the term of his original enlistment in the Permanent Defence Forces or for such portion of that term as is set out and prescribed in regulations. It is submitted that a person with a time-limited permission to reside in the State cannot genuinely provide that commitment. A person in the same circumstances as the appellant who had only eighteen months left on his permission to remain in the State could not give that commitment.
53. The Minister relied upon the affidavit of Commandant Collins who averred that the Minister took the view that the statutory intention behind the temporal limitation was one designed to ensure that enlisted persons have an allegiance to the State which is reflected in an entitlement to reside in the State on an open-ended basis, or at least for the period of enlistment concerned. Commandant Collins submitted that persons who are enlisted enter into a particularly sensitive institution designed to ensure the public security of the State and to defend that State from both internal and external threats. In submissions, the Minister expanded upon this by stating that there may be particular considerations where a person is on deployment when their permission expires. They will be a serving member of the Irish Defence Forces but not entitled to reside in the country. It is also submitted that there may be particular implications in calling such a person back from deployment in difficult to access conflict zones.

### ***Discussion***

54. As set out above, s. 53(1)(a) does not make express provision that a person must have an entitlement to reside in the country for at least the full period of twelve years. The Minister's submission is that such an interpretation is the only one that can be given to the legislation as it follows inexorably from the requirement to enlist for a prescribed term.
55. Prior to looking at the DFR A10 recruiting regulations, which provide for the class of persons who may be enlisted, it is perhaps of some value to distinguish between the eligibility of persons to be appointed officers and the eligibility of other persons to be enlisted in the Defence Forces under the 1954 Act. Section 41 provides that Irish citizens and any other persons specifically approved by the Minister are eligible to be appointed as officers. By contrast, the 1954 Act has no such restrictions on the enlistment of recruits, instead by s. 56 it delegates to the Minister the power to regulate in relation to the persons to be enlisted.
56. Regulation 12, DFR A10 provides a list of the persons who will not be enlisted. It (now) sets out thirteen categories of persons who are ineligible. Amongst those ineligible, are persons already in the Defence Forces, homeless persons, military personnel of other countries, a person ordinarily resident outside Ireland and a person who does not reach

the standard of intelligence for recruits as laid down from time to time by the General Staff. Nowhere in the list does it set out that a person is ineligible if they do not have permission to reside in the State for the entirety of the term of enlistment.

57. The Minister also points to other provisions in the Act which amount to enlistment requirements. In particular, the Minister refers to age limits, minimum heights and physical standards. As regards age limits, it appears that for the general service in any corps, the age limit is twenty-five years on the closing date for receipt of applications for each relevant competition. In that regard this appellant is entitled to reapply for enlistment and is entitled to be enlisted if he has a permission for at least twelve years' residence in the country or if in fact that is not a legally required permission, as will be discussed below.
58. As a guide to the meaning of s. 53 and the requirement to be able to commit to the entire term of enlistment, the Minister points to s. 85 which provides: -

"Every officer and man of the Permanent Defence Force shall be liable at all times to render military service within the State ..."

The Minister also relies upon s. 89 which refers to -

"Every reservist who is called out on permanent service shall be liable at all times to render military service within the State ..."

59. In the Minister's submission, the reference to "at all times" demonstrates that a person must be liable throughout the period of twelve years to render military service within the State. In my view however, the fact that s. 89 refers to the reservists who are *called out* on permanent service being liable at all times to render military service within the State, indicates that "at all times" refers back to the context in which it arises. In s. 89 therefore it is while on permanent service the liability arises for recruits. Under s. 85, the liability is while one is a member of the Permanent Defence Force. In other words, "at all times" refers to the time when one is actually a member. In my view such an interpretation is supported by the continuation of both s. 85 and s. 89 which states -

"... and, if he is employed on a State ship or service aircraft, be liable at all times while so employed to render military service outside the territorial seas of the State."

The reference to "at all times" has to be read in the context of one's membership of the Permanent Defence Force or one's employment on a particular State ship or service aircraft to be liable at that particular time for service outside the State. It is in effect a duty imposed on members of the Defence Forces, *while on permanent service*, that they be liable to render service at all times in the state, or outside the state if serving on a ship or aircraft outside the territorial seas of the State. Section 85 thus has no relevance to the interpretation of s. 53 of the 1954 Act, which relates to the term of enlistment and not the duties when enlisted.

60. I agree with the Minister's submission that the discharge provision under s. 74 does not of itself assist in interpreting the meaning of the term of enlistment. Section 74 only applies to a reservist who becomes a member of either house of the Oireachtas or a member of the European Parliament, providing that they shall stand discharged from the Reserve Defence Force. That involves a discharge and not an enlistment. It does not have a direct bearing upon the meaning of the term of enlistment. It is axiomatic that persons could, for various reasons, including illness and misconduct, be discharged from the Permanent Defence Force. Moreover, the legislation provides for the ability to purchase one's discharge from the Permanent Defence Forces in certain circumstances. The liability to be discharged does not of itself affect the term of enlistment.

61. Prior to making a determination as to the meaning of s. 53 of the 1954 Act, it is also appropriate to consider the provisions relating to those persons who are given international protection. The appellant has been declared a person entitled to subsidiary protection within the meaning of the International Protection Act, 2015 (hereinafter "the 2015 Act"). He is therefore, along with a person declared a refugee, a qualified person within the meaning of s. 53 of the 2015 Act. Section 53 states that: -

"A qualified person shall be entitled—

- (a) to seek and enter employment, to engage in any business, trade or profession and to have access to education and training in the State in the like manner and to the like extent in all respects as an Irish citizen,
- (b) to receive, upon and subject to the same conditions applicable to Irish citizens, the same medical care and the same social welfare benefits as those to which Irish citizens are entitled,
- (c) subject to section 54, to reside in the State, and
- (d) subject to section 55, to the same rights of travel in or to or from the State as those to which Irish citizens are entitled."

62. Section 11 of the 2015 Act provides that -

"(1) A person shall cease to be eligible for subsidiary protection when the circumstances which led to his or her eligibility for subsidiary protection have ceased to exist or have changed to such a degree that international protection is no longer required.

(2) In determining whether subsection (1) applies, regard shall be had to whether the change of circumstances is of such a significant and non-temporary nature that the person no longer faces a real risk of serious harm.

(3) Subsection (1) shall not apply to a person eligible for subsidiary protection who is able to invoke compelling reasons arising out of previous serious harm for refusing to avail himself or herself of the protection of his or her country of nationality or, being a stateless person, of the country of former habitual residence."

63. Under s. 52 of the 2015 Act, a subsidiary protection declaration may be revoked by the Minister for Justice and Equality if the person should have been or is excluded from being



eligible for subsidiary protection under s. 12 of the said Act. Section 12 excludes a person from being eligible for subsidiary protection where there are serious reasons for considering that he or she has committed a crime against peace, a war crime, or a crime against humanity, or has committed a serious crime or constitutes a danger to the community or the security of the State. The revocation may also occur if the person ceases to be eligible for subsidiary protection or in other circumstances where a misrepresentation or omission of facts was decisive in the decision to give protection. There is a detailed process, including the option of an appeal to the Circuit Court, to be followed before such a revocation can take place.

64. Under s. 54 of the 2015 Act, a qualified person shall be given a permission to reside in the State for a specified period of not less than three years. That permission, according to subs.3: -

“(a) shall be renewable unless compelling reasons of national security or public order (*“ordre public”*) otherwise require, and

(b) shall cease to be valid where the person to whom it was given ceases to be a qualified person ... .”

65. The appellant’s initial claim in these proceedings was that there was a prohibited discrimination against those with a declaration of subsidiary protection because the Minister permitted refugees to enlist in the Defence Forces. As qualified persons under the 2015 Act, refugees were subject to the same restrictions as those entitled to subsidiary protection. The appellant had exhibited an advertisement seeking applications to join the Defence Forces as an Air Corps Apprentice Aircraft Technician. This indicated that persons who had been granted refugee status in accordance with the provisions of the 2015 Act were entitled to enlist. It also stated that nationals of an EEA State, or the Swiss Confederation were entitled to join. Furthermore, it stated that nationals of any other State lawfully present in Ireland and who had five years’ lawful residence here were entitled to apply.

66. The provisions of DFR A10 do not make any specific reference to refugees or members of the European Economic Area. The circular produced by the military authorities under DFR A10, namely the Administrative Instruction A10, referred to citizens of European Union Member States and states that “limitations as to residency in Ireland cannot be set.” The circular does not refer to refugees at all.

67. As a matter of further complexity, the Administrative Instruction A10 provides for a residence requirement that non-nationals must have a minimum of three years legal and unbroken residence in the State. No such requirement is set out in the regulations in DFR A10. From the foregoing, as well as from evidence produced in respect of website information and application forms, it is apparent that up to the point of the appellant’s application for enlistment, different service corps of the Defence Forces were applying different minimum residence requirements.

68. It is now the position of the Minister that some of these interpretations as to eligibility for enlistment were not correct. The Minister now submits that refugees, as qualified persons under the 2015 Act, are only entitled to enlist if they have a minimum residence permission of at least twelve years in the State, thus placing them in the same position as holders of subsidiary protection. On the other hand, in the course of submissions, the Minister appears to maintain that EU citizens cannot be treated any differently from an Irish citizen and are entitled to enlist. Furthermore, the Minister no longer appears to stand over the first part of the relevant paragraph of the letter of the 4th May 2017, which stated that non-nationals required three years' legal and unbroken residence in the State prior to enlistment (in apparent reference to para 127(c)(1) of Administrative Instruction A10 which referred to non-EU non-nationals). From the foregoing, I am satisfied that there has been a clear inconsistency in how the military authorities applied the legal provisions as to enlistment.
69. The Minister has placed significant emphasis on the argument that s. 53 requires that a person must be both *willing and able* to sign up to the term of enlistment, namely the twelve year service. In the context of a person being willing to sign up to that term, the Minister gives the example of a person who states that they wish to serve for a couple of years to earn money prior to doing another apprenticeship or perhaps going to college. The Minister submits that would not be permitted under the Act as the person has to be willing to sign up to the full term. In my view, that raises a different legal and factual situation. A person who expresses those views would quite rightly not be enlisted because they were in effect repudiating the very basis of enlistment. The enlistment is for a term of the prescribed period and at the time of enlistment a person must willingly sign up to that period. In the present case, the appellant is prepared to and wishes to sign up for the full period. The willingness to commit to the term is something that the person has control over and is the basis for entering into the commitment.
70. The Minister's argument is that apart from being willing, the appellant must also be legally able, to sign up to an entire twelve year period. In his legal submissions, the Minister submitted in respect of s. 53(1)(a) that: -
- "On its face therefore it is clear that the person seeking enlistment must be able to commit to enlistment for the term which is twelve years."
71. For the purpose of countering the Minister's construction, the appellant points to other situations where at the time of enlistment there exists a possibility that the term of enlistment may not be able to be fully served. Counsel for the appellant referred to the position of Irish citizens who are not citizens by birth but citizens by naturalisation. In the Defence Force, by contrast with the position of officers, enlistment is open on a general basis to persons who are not Irish citizens. The appellant submits that if the Minister's logic is correct as to providing proof of entitlement at the time of enlistment to serve the prescribed term, there must also be a distinction between the entitlement to enlist for those ordinarily resident in the State, who are Irish citizens by birth and those who are Irish citizens by naturalisation.

72. Citizens by naturalization are liable under s. 19 of the Irish Nationality and Citizenship Act, 1956, as amended, to have their certificates of naturalisation revoked by the Minister for Justice and Equality. Revocation can be based on a number of reasons including if the issue of the certificate was procured by fraud, misrepresentation whether innocent or fraudulent, or concealment of material facts or circumstances. It can also be revoked in circumstances where the person to whom it is granted is also, under the law of a country at war with the State, a citizen of that country. A person's entitlement to reside in the country is predicated upon, in the first place, their right to citizenship and, if not a citizen, on a right to reside in the jurisdiction granted by the Minister for Justice and Equality in accordance with law.
73. The legal implication of those provisions is that a person who is a naturalised citizen can only make a commitment that they are willing and able to commit to the term of enlistment insofar as permitted by law to so serve. Indeed, a particularly striking provision is that the certificate of naturalisation would be revoked where the person is also a citizen of a country at war with this State. If such a situation happened with respect to a naturalised citizen serving in the Defence Forces, one can readily see that such a person may no longer be welcome in the Defence Forces. The provisions of DFR A10 provide for a discharge of a person whose services are no longer required. The regulation 58(r)(i) specifically states that this applies in the case of "a man whose discharge is clearly desirable in the interests of the service and in whose case no other reason for discharge is applicable." That provision is a catch-all one which would permit the discharge from the Defence Forces of those who are security risks. Indeed, I am of the view that the Minister's reliance on issues of national security to aid in the interpretation of s. 53 is wholly misplaced. If a real issue of national security arises in respect of an enlisted person, one would expect immediate and direct action to be taken by the relevant military authorities using this power or any other lawful and appropriate power, rather than waiting for the result of any other potentially lengthy procedure concerning revocation of a certificate of naturalisation.
74. The 2015 Act does not give to a qualified person the same ostensibly open-ended residence that a naturalised Irish citizen has subject to the right of the Minister to revoke the citizenship. On the other hand, s. 54(3) of the 2015 Act, states that the permission shall be renewable unless compelling reasons of national security or public order otherwise require. In my view therefore, the mere fact that the appellant's residence is only for a period of not less than three years, would not place him in any different situation to a naturalised Irish citizen by virtue of s. 54(3), as it is only in circumstances of compelling reasons of national security or public order that his permission to reside in the State would be revoked. Indeed, as stated above, if there were compelling reasons of national security, one would expect the military authorities as distinct from the Minister for Justice and Equality to make a decision that he should stand discharged from the Defence Forces. Similarly, if there are reasons of public order why he cannot have his residence renewed these should come under the same provision in DFR A10 or those which deal with convictions in the civil courts.

75. There is of course a further distinction to be made in relation to a person with a declaration of subsidiary protection to those who are naturalised Irish citizens. This is because pursuant to s. 52(3) of the 2015 Act, which is also reflected in s. 54(3)(b), the Minister may revoke a subsidiary protection declaration and consequently a person's power to reside in the State, if, *inter alia*, they cease to be eligible for subsidiary protection. That is a matter entirely outside of the control of the appellant. The cessation of eligibility for subsidiary protection occurs where a person's eligibility has changed to such a degree that international protection is no longer required. In determining whether a person ceases to be eligible for subsidiary protection, regard must be had to whether the change of circumstances is of such a significant and non-temporary nature that the person no longer faces a real risk of serious harm. Moreover, s. 11(3) provides that s. 11(1) does not apply to a person eligible for subsidiary protection who is able to invoke compelling reasons arising out of previous serious harm for refusing to avail himself or herself of the protection of his or her country of nationality.
76. As set out above, in s. 52 of the 2015 Act, there is a set procedure with which the Minister must comply before a person can have subsidiary protection withdrawn. There is also a right of appeal to the Circuit Court. This would not be in any sense an automatic process.
77. The Minister's argument that only those with a right to reside for a minimum period of twelve years or an open-ended period are entitled to enlist is not a remorselessly logical one. An Irish citizen through naturalisation may have an apparently open-ended right of residence but as a matter of law that right of residence can be cut short through the revocation of the certificate of naturalisation. The Minister has not attempted to argue that naturalised citizens are not entitled to apply for enlistment.
78. Similarly, a person entitled to subsidiary protection has what is in effect an open-ended right of residence; see, s.54(3)(a) and (b) of the 2015 Act above. In reality as long as the appellant has a declaration of subsidiary protection he is entitled as a matter of law to have his permission renewed save in circumstances of national security or public order. If such reasons of national security or public order arose, undoubtedly the Minister for Defence would be entitled to discharge him from the Defence Forces.
79. With respect to the declaration of subsidiary protection, the cessation of his qualification for the declaration may only come about in certain circumstances, many of which reflect the circumstances where a certificate of naturalisation may be revoked, e.g. misrepresentation or omission of facts. In relation to the possibility of exclusion from subsidiary protection under s. 12, these are matters which would make him liable to discharge under the general rules for the Defence Forces in any event. There can be no security concern because he might lose his subsidiary protection for reasons that he has committed crimes against peace, serious crimes, or is a danger to the community or security of the State as undoubtedly this would justify his exclusion from the military.
80. It should also be noted that the Minister was at all times free to make regulations as to how persons may be enlisted. If there was a genuine concern about persons without the

full right of residence in the State for the entire term of enlistment, those without such right of residence could have been excluded by regulations i.e. Regulation 12 of DFR A10 could have included such a person as ineligible. That observation is subject to the discussion on s. 53 of the 2015 Act below.

81. The only possible other aspect that differentiates the appellant from the circumstances that might give rise to a naturalised Irish citizen losing their certificate is under s. 11 of the 2015 Act. That provides for cessation of eligibility for protection, when the situation will have changed in his country of origin to such an extent that international protection is no longer required. That however is not an automatic process, it must be considered in a serious and deliberative fashion by the Minister for Justice and Equality. Even if circumstances have changed, there may be compelling reasons arising out of previous serious harm that a person can invoke for refusing to avail of the protection of his or her country of nationality. The Minister makes the point that subsidiary protection is a temporary status and therefore a person cannot commit to the term of enlistment at the outset. In my view however, there is no meaningful difference between that temporary status and the conditional status of a naturalised Irish citizen. To say that the s. 53 term of enlistment permits the latter but, on its face, excludes the former would be illogical.
82. For the reasons I have set out I am satisfied that there is no basis for construing or implying into s. 53 of the 1954 Act that a person must have an unimpeachable entitlement to reside within the State for the full period of the term of enlistment at the time of enlistment. It is not expressly provided for in the section and reasons of national security or public order do not necessitate that this construction must be given.
83. It is appropriate to mention further arguments that were made by the parties in support of their contentions. The appellant has also relied upon the provisions of s. 53 of the 2015 Act to argue that s. 53 of the 1954 Act cannot be given the meaning for which the Minister contends. Section 53 of the 2015 Act states that a qualified person (entitled to subsidiary protection or a refugee) is entitled to seek and enter employment "in the like manner and to the like extent in all respects as an Irish citizen". It is noted that there is no distinction made between those Irish citizens who are citizens by birth or by naturalisation. Indeed, there appears to be no basis in law for any distinction between the categories of citizenship save for the important distinction that those who are naturalised citizens may be subject to having their citizenship taken away.
84. The appellant submits that in interpreting s. 53 of the 1954 Act, regard must be had to s. 53 of the 2015 Act. The Minister submits that there is no basis for so doing as each Act is a stand-alone Act as each of the statutory provisions must be provisions must be construed on a stand-alone basis.
85. In my view, it is of some relevance that the 2015 Act gives an entitlement to work in the like manner and the like extent in all respects as an Irish citizen. As stated above, the only reference to Irish citizens who may serve in the Defence Forces is in s. 41 of the 1954 Act and this refers to officers. This Court does not have to decide whether s. 41 would override the provision in the 2015 Act. It is at least arguable however that the only

interpretation that can be given to the 2015 Act is that the reference therein “to the like extent in all respects as an Irish citizen” could only mean that even where there is a requirement to be an Irish citizen, a person with a declaration of subsidiary protection has the same rights. In the present case the matter at issue, namely the right to enlist, is not restricted to Irish citizens.

86. The Minister has not argued that the phrase “seek and enter employment” could not and did not mean employment other than the Defence Forces. Of course, according to the Supreme Court in *The State (Gleeson) v. Minister for Defence* [1976] I.R. 280 at 294 an enlisted person has a statutory contract and is not in law a “servant”. An enlisted person is nevertheless “employed” as even the reference in ss. 85 and 89 to “employed on a State ship” demonstrate. The Minister’s argument was simply that the provisions of s. 53 of the 1954 Act were specific in requiring that a person had the ability to commit to a minimum twelve year term of enlistment because of their entitlement to reside in the State throughout that entire period. The Minister submits that Irish citizens can so commit to such period and that it is such a period which is required under the Act. Aside from the observations I have made about naturalised Irish citizens, it seems to me that this argument is incorrect. The 2015 Act provides for the consequences in terms of entitlements of those who are qualified persons within the meaning of that Act. This means that in respect of the areas addressed in s. 53 of the 2015 Act, qualified persons are to be treated like Irish citizens. In terms of Irish citizens, the only excluding factors under s. 53 of the 1954 Act and DFR A10 are those set out in the relevant provisions of DFR A10. For example, an Irish citizen has to be ordinarily resident in the State to enlist and cannot be a homeless person. According to the Minister, an Irish citizen, including a naturalised citizen, is able as a matter of law to sign up to the term of enlistment. The Minister submits that the 2015 Act does not by any implication or otherwise amend the 1954 Act.
87. This issue only arises if I had found that the 1954 Act required an ability as a matter of law at the time of enlistment to commit to a twelve year period. I have held that it does not do so. Accepting for the moment that s. 53 of the 1954 Act is not so clear, the question arises as to what, if any, impact the 2015 Act might have upon it. As Dodd in *Statutory Interpretation in Ireland*, 1st Ed., (Dublin, 2008) states at para. 4.68: -

“Implied amendment or repeal may arise as between a later provision and an earlier provision which it has the power to amend. Where the later provision does not expressly amend or repeal the earlier one but is inconsistent with the earlier provision, then a court may declare that the earlier provision is amended or repealed by implication in so far as is necessary to avoid the inconsistency.”

There is of course a countervailing maxim which is *generalia specialibus non derogant*. This provides that where a provision deals with a particular situation in special or specific terms, and the language of a more general provision could be taken to apply to the same particular situation, the general provision will not be held to undermine, amend or abrogate the effect of the special words used to deal with the particular situation.

88. The Minister's position is that the 1954 Act is specialist legislation and could not therefore, be amended by the 2015 Act. In my view, the 2015 Act, in its relevant part, deals specifically with the employment rights of those entitled to subsidiary protection. Given that the Equal Status Act, 2000 and Employment Equality Act, 1998 already provide for protection against discrimination on the grounds of nationality or ethnic or national origin, there must have been a reason greater reason than simple non-discrimination in providing, in the 2015 Act, what are essentially rights equal to those of Irish citizens as far as access to employment is concerned. In those circumstances, it seems to me that s.53 of the 1954 Act must be construed in light of the provisions of s. 53 of the 2015 Act.
89. In those circumstances, the appellant is entitled to seek and enter employment in the same way as an Irish citizen would be. He cannot be discriminated against because of his status as a person entitled to subsidiary protection. He has a statutory entitlement to be enlisted in the same manner and to the like extent as an Irish citizen. He cannot be prohibited from enlistment by virtue of his status as a qualified person under the 2015 Act. To hold that the term of enlistment required him to have the right to remain in the State for at least twelve years would amount to a prohibition on his right to seek and enter employment in the like manner and to the like extent as an Irish citizen.
90. The appellant has also relied on the case of *N.H.V. v. Minister for Justice* [2017] IESC 35, [2018] 1 I.R. 246, the decision on the right of asylum seekers to work. The Minister says that that is irrelevant, in circumstances where it revolved around the right to work based upon the dignity of the person. In my view, in the particular circumstances which apply here, there is minimal assistance to be gained from reliance on this case.
91. The appellant had also relied upon the Minister's interpretation of s. 53 of the 1954 Act as not applying to EU citizens. The Minister had submitted that EU citizens after three months have an automatic right to five years' residence in the country and thereafter a right of permanent residence (see Directive 2004/38/EC of 29 April 2004, O.J. L 158/77, 30.4.2004). In my view, while the rights of EU citizens are extremely strong in terms of residence, they are not absolute. Article 27 of the said Directive gives member states the right to restrict the freedom of movement of Union citizens and family members irrespective of nationality on grounds of public policy, public security or public health. These are based on the personal conduct of an individual. Again, the restriction on freedom of movement is highly circumscribed but nonetheless demonstrates that even EU citizens do not have absolute rights to remain in this jurisdiction indefinitely. It is the case that their rights are more akin to the rights of a naturalised Irish citizen than to an Irish citizen by birth. On the other side of the coin, their rights to reside in the jurisdiction are wider than a person entitled to subsidiary protection as their rights are solely dependent upon personal conduct of the EU citizen rather than outside factors.
92. I am satisfied however, that the fact that EU citizens and Irish citizens by naturalisation can have their residence in this jurisdiction terminated within the twelve year period, lend support to the interpretation of s. 53 of the 1954 Act as one which does not support the contention of the Minister that there must be a complete and open-ended right of

residence for twelve years. Indeed, in that respect the Minister's position in the letter of 31st January, 2018 is inconsistent. If the only objection is that the period of residence must be open-ended, or as a minimum must cover the stated twelve year period, there can be no objection based upon the contention that he could cease to be a person entitled to a declaration of subsidiary protection. That is a situation where one's residence permit shall cease. Thus, a distinction between having an open-ended right of residence or a twelve year one is a meaningless distinction in the context of this case. I do accept however that the Minister's submissions were somewhat more nuanced than his letter and appear to accept that it is his temporary status *per se* that disqualifies the appellant.

93. In my view, the Minister has constructed an argument and placed upon s. 53 of the 1954 Act an interpretation that it does not bear. The Minister cannot be bound in estoppel by interpretations that his department (whether the civil or military element thereof) have given to this section previously. I simply refer to that to highlight the confusion and lack of clarity as to the meaning of s. 53 by the Department of Defence. The reason for that confusion and lack of clarity is because s. 53 actually provides for a simple requirement that those who are enlisting must sign up to a term of enlistment for a prescribed period of time. Those who are unwilling to sign up to such a period could not be enlisted under the Act. However, those who are willing to sign up and who are otherwise not disqualified by the recruiting regulations made under the Act are entitled to be enlisted. If by operation of law or otherwise, their entitlement to reside in the State ceases, then the applicable rules and regulations concerning rights of residence will come into play. If, through lack of right of residence, and therefore permission to work, or through an act of deportation, they are no longer in a position to serve in the Defence Forces, they will be liable to discharge. Up until that point occurs, they are obliged to render service to the State in accordance with the terms of their enlistment. If the Minister has a genuine concern about persons who have restricted or limited rights of residence he remains free, subject to the statutory provision, set out in s. 53 of the 2015 Act, to amend the enlistment and recruiting regulations.
94. I would therefore allow this appeal. The precise details of the Orders to be made consequential on this judgment will be finalised having considered the submissions of counsel.