

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 138
[2019 No. 762 JR]

BETWEEN
SE, BZE, BHUSE (A MINOR) SUING BY HER FATHER AND NEXT FRIEND SE AND BHASE
(A MINOR) SUING BY HER FATHER AND NEXT FRIEND SE
APPLICANTS

AND
THE MINISTER FOR JUSTICE AND EQUALITY
RESPONDENT

JUDGMENT of Mr. Justice Heslin delivered on the 11th day of February, 2022

Introduction

1. In the present proceedings the applicants seek an order of certiorari quashing the decision of the respondent ("the Minister") under s. 49 (7) of the International Protection Act, 2015 ("the 2015 Act") as notified by letter dated 26 September 2019 to refuse to review the decision of the Minister under s. 49 (4) (b) refusing the first applicant permission to remain in the State ("the decision"). On 11 November 2019 this court (Humphreys J.) made the relevant order granting leave for the relief set out at para. (d) on the grounds set out at para. (e) in the applicant's statement of grounds. It is not in dispute that on or about 12 June 2020 leave was granted to amend para. (e) of the applicant's statement of grounds which, as amended, states as follows, with para. (e) (iv) being of most relevance to these proceedings:

"(e) Grounds upon which such reliefs are sought:

- (i) In considering whether refusing permission to remain to the first applicant would breach the applicant's rights under Articles 40.3 and 41 of the Constitution, the Minister failed to consider the desirability of enabling the applicants to remain together in the State, given that the second to fourth applicants have been granted permission to remain in the State and given the second applicant's epilepsy and diabetes for which she is in receipt of disability allowance and the fact she has suffered from a depressive illness.*
- (ii) Refusing permission to remain to the first applicant despite having earlier granted such permission to the other applicants constituted unjustified discrimination as between the parents and contravened Article 40.1 of the Constitution and s. 3 (1) of the European Convention on Human Rights Act 2003 by breaching the State's obligations under Article 14 of the ECHR (taken in conjunction with Article 8).*
- (iii) The Minister's decision refusing permission to remain to the first applicant was disproportionate and contravened the substantive rights of the applicants under Articles 40.3 and 42A of the Constitution and Article 8 of the ECHR.*

(iv) The Minister breached constitutional justice, s. 49 (2) (a) as applied by s. 49 (8) of the 2015 Act, and failed to consider relevant materials by failing to consider the applicant's solicitor's letter dated 3 April 2018 and the documents enclosed with it.

2. The first and second named applicants, who are nationals of Mauritius are husband and wife, respectively. The third named applicant is their child who was born in Mauritius and the fourth named applicant is their child who was born in Ireland in 2014. The first three applicants came to Ireland, without permission, exactly ten years prior to the hearing of this matter which took place on 9 December 2021.

Background

3. The applicants applied for International Protection and their applications were unsuccessful. The first named applicant's application of 6 August 2014 was refused by the office of the Commissioner for Refugee Applications ("ORAC") on 10 February 2015 and, later, by the International Protection Office ("IPO") on 16 June 2017. Correspondence of 16 June 2017 notifying the first named applicant of the failure of his application for protection included a decision which set out the reasons for a refusal of his application for permission to remain in the State, dated 2 June 2017 ("the first-instance decision"). Following adverse first-instance decisions, the applicants sought permission to remain in the State under s. 49 of the 2015 Act and the first named applicant's wife and children were granted permission to remain for three years, the terms of which are recorded in a letter dated 29 March 2018. Once the second named applicant obtained this permission, she did not pursue her asylum claim any further by way of an appeal against the first-instance refusal. Thus, it concluded with international protection being refused to her.
4. The first named applicant proceeded with an appeal in respect of the first-instance decision and the refusal of the first named applicant's claim for international protection was upheld on appeal by a decision of the International Protection Appeals Tribunal ("IPAT" or "the Tribunal") dated 27 February 2018. The first named applicant then sought a review of the earlier decision to refuse him permission to remain. He did so by letter dated 12 March 2018. Over eighteen months later, on 26 September 2019, a negative decision was given in respect of the said review.
5. Of particular significance to the dispute between the parties in the present proceedings is that the 26 September 2019 decision was made in circumstances where the respondent did not consider a letter from the applicant's solicitors dated 3 April 2018 and the documents enclosed with it. It is not in dispute that the aforesaid letter, with enclosures, was sent and received. Nor is it in dispute that it appears to have gone missing at some point thereafter. Moreover, the fact that the foregoing correspondence and enclosures were not considered by the respondent Minister in the context of making the decision which is challenged in the present proceedings is not in dispute.

Pleadings and affidavits

6. I have carefully considered the contents of all pleadings, affidavits and the exhibits thereto. It is not necessary to comment on the affidavits on a paragraph by paragraph

basis particularly in circumstances where the applicants' claim has been distilled to an application for *certiorari* of the decision based on the grounds pleaded at para. (e) (iv) to which I have referred. It is, however, appropriate to note that the first named applicant has made inter alia the following averments in his affidavit sworn on 23 October 2019:

"33. *I have come to the adverse attention of the gardaí. I have been convicted on three occasions for road-traffic offences. In 2013, I was fined €300 and disqualified from holding a driving licence for two years in relation to what I understand was an offence of driving with no insurance. In 2014, I was involved in a road-traffic collision and was sentenced to two months' imprisonment in lieu of a fine which I could not afford to pay for driving with no insurance. I was imprisoned for a few hours and released on the same day in relation to this sentence. In 2016, I was fined €100 for driving with no insurance. I received an adult caution in 2013 after I was arrested for shoplifting. I acknowledge that I have acted irresponsibly in driving with no insurance. I am now very conscious of my obligations in this regard and of the importance of being insured when driving and I have not driven without insurance since my last offence and nor have I come to any adverse garda attention since then. In relation to the 2013 shoplifting incident, it occurred when I stole milk and biscuits to give to my child at a time when I had no money. This was before I and my wife applied for asylum and obtained RIA accommodation.*

34. *I was relocated within RIA provided accommodation following violent incidents involving my wife when we were living at the Old Convent accommodation centre in B... Our subsequent period of separation, during which I had ongoing contact with my wife and children, helped me realise how important my family is to me and how I have to respect my wife and control and manage any feelings of anger or frustration. Both my wife and I contacted RIA to be re-accommodated together, but were refused on the basis that the CFA recommended that we not be re-accommodated together as it deemed my wife and children no longer "at risk" as long as I ceased to reside with them. My wife following the grant of permission to remain to her and our children eventually managed to obtain private accommodation and left the Old Convention (sic) accommodation centre for our current address in the summer of 2019 and I joined my family there in late August. We reside together as a loving family unit. I don't present any risk to my wife or children and there is no social worker involvement in our family."*

Reasons

7. Internal page 2 (of 12) of the written reasons, dated 17 September 2019, which accompanied the decision which is challenged in the present proceedings states inter alia the following:

"The following documentation was submitted by or on behalf of the applicant in support of his application for review:

- *Submissions from the applicant's legal representatives, dated 12/03/2018.*

- *Section 49 Review form signed by the applicant, dated 07/03/2018.*
- *Further submissions from the applicant's legal representatives, dated 14/03/2018 and 23/08/2019.*
- *Letter from the applicant's wife, BZE, dated 14/08/2019.*
- *Copy of completion certificate from Local Enterprise Office Longford regarding Start your Own Business, dated 2018.*
- *Additional submissions from legal representatives including letter from applicant's wife and school reports for the children, dated 06/09/2019.*

It is noted that the applicant's legal representatives, Conor O'Briain Solicitors, provided additional submissions by post, dated 20/03/2018 and 06/04/2018. However, despite extensive searches of this office, these submissions cannot be located. The applicant's legal representatives submit that these were originals of documents that had been faxed previously. All representations and correspondence received from or on behalf of the applicant relating to permission to remain and permission to remain (review) have been considered in the context of drafting this report, including the S. 35 interview report/record and Matters to be considered for PTR review arising from S. 35 Interview record."

In the manner which will be explained in this judgment, to say that the applicant's legal representatives provided additional submissions "*dated ... 06/04/2018*" was not correct. In fact, the relevant submissions were dated 03/04/2018. The reference to 06 April 2018 may well have been when the relevant submissions were initially *received* by the respondent (before going astray) but there were, in fact, no submissions "*dated*" 6 April 2018 furnished. That may well explain why a degree of confusion appears to have arisen. At this point the following comments seem appropriate. Although the "bullet points" do not make reference to submissions by the applicant's solicitors dated 03 April 2018 the decision does state explicitly that "*All representations and correspondence received by or on behalf of the applicant relating to permission to remain and permission to remain (review) have been considered*". Thus, nowhere is it made clear that submissions dated 03 April 2018 had not been considered. Nothing turns on the foregoing observation but it does seem an appropriate one to make in circumstances where the respondent points out, entirely correctly, that the grounds pleaded in the claim as originally framed did not assert that the decision was unlawful by reason of a failure to consider relevant material, in particular the failure to consider the letter from the applicant's solicitor of 03 April 2018 and its enclosures.

Section 49 of the 2015 Act

8. It is uncontroversial to say that, pursuant to s. 49 of the 2015 Act, when a person is refused international protection the Minister must consider whether to grant discretionary permission to remain. Section 49(3) which uses the mandatory term "*shall*" requires the

Minister to have regard to certain things and it is appropriate at this juncture to set out s. 49(3) *verbatim*:

"[49](3) *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."*

9. Section 49(9) makes clear that, within a prescribed period, an applicant for the purposes of a review:

"(a) *may submit information that would have been relevant to the making of a decision under (b) of subsection (4) had it been in the possession of the Minister when making such decision, and*

(b) *shall, where he or she becomes aware of a change of circumstances that would have been relevant to the making of a decision under subsection (4)(b) had it been in the possession of the Minister when making such decision, inform the Minister, forthwith, of that change."*

10. For the sake of clarity, s. 49(4) refers, at subsection (a) to the giving by the Minister of a permission and at subsection (b) to the refusal to give the applicant a permission, the Minister having considered the matters they are obliged to consider. The prescribed period referred to in s. 49(9) can be found in S.I. 664 of 2016 and it is not in dispute that the period is five days from notification of the decision. No issue arises in the present case in respect of that five-day period. In other words, it is not suggested that the initial letter sent by the applicant's solicitors, dated 12 March 2018, was 'out of time' having regard to the recommendation of the Tribunal of 5 March 2018.

11. Against the foregoing statutory backdrop, part 3 of the decision refers to s. 49(3) of the 2015 Act and confirms that regard has been had by the Minister to the applicant's family and personal circumstances and his right to respect for his private and family life having regard to the factors detailed at (a) to (e) inclusive. It is unnecessary to repeat those factors but they plainly include *inter alia* the applicant's *connection with the State* as well as his *character and conduct* including any *criminal convictions*.

12. Section 4 of the decision deals with matters arising with regard to s. 49(3)(a), being the nature of the applicant's connection with the State. Section 5 goes on to deal with issues pursuant to s. 49(3)(b), being humanitarian considerations, and it seems appropriate to quote, *verbatim* and in full, section 6 of the reasons for the decision challenged, which appears in the following terms: -

"6. Section 49(3)(c) – Character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions)

The character and conduct of the applicant both within and outside the State has been considered in this case.

There is information on file at this time to indicate that the applicant has come to the adverse attention of the gardaí. The applicant has been convicted on three occasions for road traffic offences. In 2013, he was fined €300 and disqualified from holding a driving licence for two years. In 2014, the applicant was involved in a road traffic collision and was sentenced to two months imprisonment for driving with no insurance. In 2016, the applicant was fined €100 for driving with no insurance. The applicant also received an adult caution in 2013 after he was arrested for shoplifting. The applicant was also relocated within RIA provided accommodation following violent incidents involving his wife in his accommodation centre in Mayo. Both the applicant and his wife contacted RIA to be re-accommodated together, but were refused on the basis that Tusla recommended that they no longer be re-accommodated together as they deemed the applicant's wife and children no longer at risk as the applicant ceased to reside with them. It is noted that the applicant, his wife and children are currently residing together in private accommodation since 27/08/2019.

The character and conduct of the applicant before entering the State cannot be verified."

The reasons for the decision go on, at s. 7, to deal with matters pursuant to s. 49(3)(d), relating to considerations of national security and public order. Section 8 of the decision relates to s. 49(3)(e) concerning the common good. Section 9 proceeds to deal with issues under Art. 8 of the European Convention on Human Rights ("ECHR") under the heading of private life whereas s. 10 proceeds to deal with issues relating to family life.

Section 10 of the decision challenged – 'the most salient part'

13. During submissions on behalf of the respondent, the court's attention was drawn to the following paragraphs in section 10 of the decision which, according to the respondent's counsel, constituted "*the most salient part of*" the decision which is challenged in the present proceedings. I now set these paragraphs out *verbatim*:

"In circumstances where the Minister has an obligation to prevent disorder or crimes, and protect the rights and freedoms of others, it is noted that the applicant has been convicted of offences as listed above in s. 49(3)(c).

It is reasonable to conclude that the right of the State to refuse and remove the applicant, in order to protect the public against further crimes, which is in pursuit of the legitimate aim of the prevention of disorder or crime, is weighty. Although the rights of the applicant and his family as considered above, are not underestimated, it is considered that in the particular circumstances of the case the family's interests are outweighed by the rights of the State."

14. With regard to the foregoing which the respondent contends to be the most relevant part of the decision, it is submitted that the Minister's review was conducted upon a basis which the missing information could have had no possible bearing. Furthermore, counsel for the respondent submits that if an applicant were to furnish (what was acknowledged to be the facetious example of) "*dry cleaning stubs*" or "*the contents of the telephone directory*" there could be no question of the Minister having an obligation to consider this material. It was clear that the foregoing submission was made in order to suggest that, whilst not as extreme an example, the documentation and information furnished by the applicants' solicitor, by letter dated 03 April 2018, was no less irrelevant than, say, dry cleaning stubs. Thus, submitted the respondent, there was no obligation to consider it and the self-same decision would have been reached by the Minister regardless of whether, or not, such material had been considered. It was conceded that if the 03 April 2018 submissions had been the *only* submissions made to the Minister, the position would be otherwise but the submission was made that, when one takes into account what was put before the Minister prior to and after the 'missing' submissions, this court can very safely come to the view that no relevant information was excluded from the respondent's consideration. Thus, the respondent submits, the decision is entirely valid. It was acknowledged by the respondent's counsel that the question of relevance is "*a somewhat subjective matter*" but it was submitted that, in the present case, there is no basis by which relevance of the missing information and documentation could be established and, thus, entirely safe for this court to hold that the missing submissions could have made no difference to the decision challenged. I now turn to look at the missing material and the sequence of events before and after it was sent.

The 'missing' submission

15. It is not in dispute that on 12 March, 2018 the applicants' solicitor wrote to the IPO in a letter headed "*Application for permission to remain – further representations for S.49 Review*", naming the first named applicant, enclosing a s.49 review form signed by the first named applicant and making explicit that this was "*enclosed for the purposes of meeting the deadline for submission of same*". In addition to the submissions contained in that letter, the final paragraph of same concluded with the statement: "*The applicant reserves the right to submit further information in support of this application*". The next item of correspondence, in terms of the relevant chronology, comprised the letter from the applicants' solicitors dated 03 April, 2018 which, it is common case, was not

considered (and which is also referred to in this judgment as the missing submission). It is appropriate to quote the contents of the 3 April 2018 letter *verbatim*, as follows: -

"Application for permission to remain – further representations for S.49 Review

Dear Sirs,

Further to the above please find attached the following: -

- 1. Copy letter, dated 29.03.18, from the International Protection Office granting our client's spouse, Ms. BZE, and his two daughters SE and SE, permission to remain in the state.*
 - 2. Copy birth certificate of our client's daughter, SE.*
 - 3. Copy birth certificate of our client's daughter, SE.*
 - 4. Copy pre-school report, of SE.*
 - 5. Two copy school reports, dated 14.06.16 and June 2017, of SE.*
 - 6. Two copy letters, the Principal, Scoil Náisiúnta G-An-G, dated 23.02.16 and 20.03.18.*
 - 7. Copy certificate for swimming, dated 19.12.17 issued to SE.*
 - 8. Copy certificate for soccer schools programme, issued to SE.*
 - 9. Copy letter, Paula Murphy, Assistant Centre Manager, Richmond Court Accommodation Centre, dated 14.03.18 re our client.*
 - 10. Copy letter Angela Killion, Outreach and Development Officer, Volunteer Centres, Longford re our client together with copy email Martina Glennon, Optimum Events to the Longford Volunteer Centre.*
 - 11. Copy letter, driver theory test, dated 04.03.18, issued to our client.*
 - 12. Copy certificate for cooking, dated 2017, issued to our client.*
 - 13. Copy appointment letter, Mater Misericordiae Hospital, issued to our client..."*
16. Among the exhibits before the court is a copy of the letter dated 6 April 2018 sent by the IPO to the applicants' solicitors which refers to the first named applicant by name and, having quoted the respondent's reference number and the first named applicant's "Person Ref" number, stated as follows:

"Dear Sirs,

I wish to acknowledge receipt of your correspondence dated 03 April 2018 in relation to the above named applicant.

Your letter and enclosed documents have been forwarded to the relevant section for their attention.

Yours sincerely"

17. In opposing the present application, the respondent submits, *inter alia*, that all the documentation and information contained in the missing submission was either exactly the same, or the same in substance, as the information which was made available to the Minister and which was considered. In this regard, counsel for the respondent referred to para. [1.3] of the Tribunal's 22 February 2018 decision which comprises a list of documentation submitted by the first named applicant (described therein as the appellant) in support of his claim. The Tribunal heard the relevant appeal on 18 October 2017 as is made clear in its 22 February 2018 decision.

Items 9,10 and 13 of the missing submission

18. It is a matter of fact that the letter from the applicants' solicitors dated 3 April 2018 (which obviously post-dates the Tribunal's February 2018 decision) furnished the respondent with documents which were *not* previously (or subsequently) considered. They comprised items 9, 10 and 13 in the 03 April 2018 letter and I propose to refer to these in order, as follows.

14 March, 2018 letter from Richmond Court Accommodation Centre

19. One of the documents which the respondent did not consider when coming to the decision which is challenged in the present proceedings is a copy of a letter dated 14 March, 2018 which was sent "to whom it may concern" by Ms. Paula Murphy, Assistant Centre Manager of Richmond Court Accommodation Centre (being item 9 of the missing submission). That 14 March 2018 letter identified the first named applicant by name and stated as follows: -

"This is to confirm that the above-named person has been a resident of Richmond Court since the 3rd April, 2017 and resides in room...Since he arrived at the Richmond he has been a pleasure. He has never caused any problems and always has a friendly smile and a kind word. I wish him all the best in all future endeavours. If you have any questions, please contact me on the number above or on mobile..."

20. It is no function of this Court to make decisions with which the respondent is tasked. It seems fair to say, however, that the foregoing letter is in the nature of a positive reference which is of potential relevance to the first named applicant's conduct and/or character. Regardless of the extent to which the respondent's character and/or conduct were addressed in previous submissions in the context of prior decisions, it seems plain that this 14 March 2018 reference was tendered by the applicant with a view to demonstrating that he was and/or remained of good character, as of 14 March 2018, in the view of someone authorised to speak for an Accommodation Centre with which he had a connection for almost a year. It is not in dispute that s.49(3)(c) mandates the Minister

to have regard *inter alia*, to the character and conduct of the applicant including any criminal convictions. It will be recalled that, what the respondent regards as “*the most salient part of*” the decision under challenge is that part which referred to the applicant’s conviction in respect of criminal offences in the context of s.49(3)(c). It is not in dispute that the last of the offences went back to 2016 (a €100 fine for driving with no insurance) and, that being so, it does not seem to me that this Court can safely exclude the possibility that when conducting the review in the manner mandated by s.49 which resulted in the decision made on 17 September 2019 and communicated to the applicant on 26 September 2019, the Minister would have considered the 14 March 2018 reference letter provided by Ms. Murphy to be not at all relevant. I now turn to a second document which was not considered by the respondent.

Letter from Outreach and Development Officer, Volunteer Centres, Longford

21. A second document which the respondent did *not* consider was a copy of a letter dated 14 March, 2018 which was written “To whom it may concern” by Ms. Angela Killion, Outreach and Development Officer of Volunteer Centres, Longford (being item 10 in the missing submission). It is not in dispute that the foregoing entity is supported by the Department of Rural and Community Development and exists to connect those wishing to carry out volunteer work with organisations keen to avail of this support; with what appears to be the aim of advancing social inclusion and the work of community-based organisations. The said 14 March, 2018 letter refers, specifically, to the first named applicant and states as follows: -

“SE registered with Longford Volunteer Centre in May 2018 (sic). S has volunteered in the following roles:

- *Fundraiser with the Irish Heart Foundation and Longford Tidy Towns.*
- *Sports Assistant with the Garda Schools Sports Day.*
- *Volunteer Steward at the Longford Bikers Brunch.*

I was responsible for the volunteers at the Schools Sports Day and S was diligent in his role. He undertook all the tasks that were assigned to him, was approachable, friendly and dealt with difficulties as they arose.

Should you wish to clarify any of the above please feel free to contact me on...(Wed-Fri)

Kind regards”

22. It is not in dispute that what is at issue in the context of a s.49 review is a *discretionary* permission. It is plain that the Minister is under an obligation to consider a range of matters but, ultimately, it is at the discretion of the Minister whether or not to grant permission. In other words, this is not a situation where the Minister is, for example, working through a “check list”, with a view to deciding whether a particular statutory entitlement is or is not satisfied. The Minister is not constrained in the foregoing manner.

Rather she is unfettered in her discretion, save for the fact that s.49 imposes upon her a mandatory obligation to consider the factors itemised at sub. (3)(a) to (e) of s. 49. Again, I stress in the clearest terms, that this Court is not purporting to usurp the decision-maker's role, but it seems uncontroversial to say that the contents of Ms. Killion's 14 March, 2018 reference has the potential to speak to more than one of the factors listed in sub. (3), in particular, the nature of the applicant's connection with the State ((3)(a)) and the applicant's character and conduct within the State, including any criminal convictions ((3)(c)).

23. It seems entirely reasonable to infer that the letter from the Volunteer Centre, Longford was sought and proffered with a view to demonstrating that the first named applicant was of good character, as of 14th March 2018, and had a verifiable history of certain positive conduct. What the respondent Minister might or might not have done with this information is unknown and unknowable but, regardless of the obvious skill and sophistication with which counsel for the respondent urges it, I cannot agree that this Court can be "*quite sure the material was not relevant*". It seems to me to be *prima facie* relevant, in particular to s.49(3)(c) which, it seems, played a crucial part in the decision which is challenged.
24. Earlier in this judgment I quoted, *verbatim*, the paragraphs in the decision where specific reference is made to s.49(3)(c) and it is fair to say that the reasoning disclosed by those paragraphs is that the first named applicant was convicted of offences and the right of the State to protect the public and to prevent disorder or crime is weighty and, when weighed against the rights of the applicant and his family, the latter are outweighed by the rights of the State. What is not referred to, for obvious reasons, is such weight as might have been given to references post-dating the last of the criminal convictions by some two years, which references appear to speak both to good character and to some track-record of positive conduct, including within the wider community, as of 14th March 2018. At the risk of stating the obvious, the respondent was deprived of the opportunity to consider the positive references of 14 March 2018 or to take same into account in any way. This is because, at some point after having been received, the letter of 3 April 2018 and all enclosures, went missing. Before leaving the said letter I should refer to a third document which the Minister did not consider because it went missing.

29 March 2018 – Mater Misericordiae Hospital appointment

25. A third document which the respondent did not consider was a letter from the Clinical Radiology Directorate of the Mater University Hospital, Dublin which was sent to the first named applicant confirming an appointment for an abdominal ultrasound scan which was to be carried out on Thursday 29th March 2018 (i.e. item 13 in the missing submission). It seems fair to say that an applicant's health condition might well comprise part of his or her personal circumstances, including in the context of humanitarian considerations to which the Minister is mandated to have regard in light of s.14(3)(b). That said, the document goes no further than confirming an appointment for an abdominal ultrasound scan on 29th March, 2018. Thus, taken in isolation, it does not appear to say much about the health of the first named applicant in circumstances where, of itself, it does not

provide any details of any alleged health complaint or how serious, or not, that might be. Furthermore, it is clear that the applicant previously submitted *inter alia*, medical correspondence with regard to medical appointments dated 21 March, 2014; 16 April, 2014; 30 September, 2013 and 7 December, 2015 (See para. [1.3] of the Tribunal's decision dated 22 February 2018).

26. Returning to the submission by counsel for the respondent as to what constituted the key part of the decision under challenge (and that part was not at all related to health considerations) it seems to me that if the foregoing confirmation of a medical appointment was the *only* missing document I might well take the view that, although a document conceivably coming within s.49, it was a document which the Court could confidently say would have made no difference to the decision challenged (being no more than the latest in a series of letters confirming medical appointments). This is, however, *not* the position.

Positive references submitted in relation to the first-instance decision

27. Counsel for the respondent is entirely correct to say that submissions and documentation were proffered by or on behalf of the first named applicant in the context of the first-instance decision (of which the decision challenged in these proceedings, amounted to a review). Section 2 of the first-instance decision lists the information and documentation submitted and which was relevant to the Minister's first-instance decision. I entirely accept that this material included documentation speaking to the applicant's good character. These included the following which are specifically referenced in the first instance decision: -

- "- *Reference letter from John Nally, Manager at the Old Convent B..., dated 27/01/2016 in respect of the applicant's good character;*
- *Letter dated 25/01/2016, from Dr. Caroline Noone, confirming applicant as a patient and that he is of good character."*

28. Despite the fact that these 2016 letters were before the Minister in the context of the first-instance decision (and remained before the Minister in the context of the review decision challenged in these proceedings) the foregoing does not mean that this Court can be at all sure that the respondent Minister would have regarded as of no relevance whatsoever positive references which appear to speak to the applicant's character and/or conduct and/or connection with the State and which are dated 14 March 2018. This is particularly so in circumstances where the references which were referred to in the first instance decision date from 2016 which, it is not in dispute, was when the first named applicant received the *last* of his criminal convictions and, in the manner analysed earlier, convictions plainly played a very material role in the decision which is challenged and did so without the possibility of any counterweight as regards references from 2018 being considered. Similar comments apply insofar as counsel for the respondent refers to the report pursuant to s. 39 of the 2015 Act, dated 2 June 2017, in which the relevant international protection officer recommended that the first named applicant be given neither a refugee declaration nor a subsidiary protection declaration. Internal pages 3 and

4 of the aforesaid s.39 report list, under the heading "Documentation", the very same documents which are listed in s.2 of the first-instance decision.

29. In my view, it would not be at all fair to characterise the positive references, dated April 2018, as mere or bare repetition of prior documents. That is neither true in form, nor in substance. Not only were they authored by *different* parties who had not previously furnished positive references (and, thus, it is conceivable that a decision-maker might consider them as potentially of greater weight than if they had been produced by the same individuals who previously furnished positive references) they were produced later in time and clearly appear to relate to a *later* period than the references which the Minister had before her. In principle at least, it seems fair to say that there is the potential for a material difference as between, on the one hand, considering positive character references from 2016 in the context of criminal offences the last of which was 2016 and, on the other hand, considering the foregoing but with the added element of positive references relating to the period up to March 2018. It seems, at least in principle, that a decision-maker might have taken the view that, although someone had previously been convicted of criminal offences, the fact that two years *after* the last of them, more than one individual had furnished positive references touching on character and/or conduct and/or connection with the State was of relevance in the context of the decision the Minister was mandated to make. To say the foregoing is not for a moment to decide what weight the respondent might have placed on positive references from 2018. It is merely to say that this Court cannot be sure that the Minister would have regarded such documents as of no relevance. That being so, it seems to me that the decision under challenge is infirm and that is a view which seems to me to be supported by the authorities to which counsel for both parties very helpfully directed the court and to which I now turn.

Legal authorities

30. The judgment of Cross J. in *M.T.T.K (Democratic Republic of Congo) v. The Refugees Appeals Tribunal & Anor.* [2012] IEHC 155 concerned an application for judicial review in respect of a decision by the first named respondent ("RAT") which affirmed an earlier recommendation of the Office of the Refugee Applications Commissioner, (ORAC), that the applicant should not be granted a declaration of refugee status. In the present proceedings, counsel for the respondent placed considerable reliance on the judgment in *M.T.T.K* and it is appropriate to quote paras. 30-34 from the learned judge's decision wherein - with reference to *F.V. v. Refugees Appeals Tribunal* [2009] IEHC 268; *Talbot v. An Bord Pleanála* [2008] IESC 46, [2009] 1 IR 375; and *Okito v. Refugee Appeals Tribunal (Unreported 16th July, 2010)* - the learned judge stated as follows: -

30. *In Talbot, the High Court judge attempted to predict the outcome of a planning permission decision, concluding that it had no prospect of success. In F.V., the High Court was deciding whether the RAT had a duty to consider something, in respect of which no cogent evidence had ever been supplied to it and found that it did not. The discretion was exercised not on the basis that the applicant would ultimately*

fail, but on the basis that no cogent evidence had been put before the RAT to support the claim so as impose a duty to consider it.

31. *Therefore, having faced the alleged conflict between Talbot and F.V. and having found there to be none, I will now turn to the manner in which this Court may assess the evidence.*

32. *In F.V., Irvine J. expressed the view that failed asylum seekers are not, as a matter of course, members of a social group. Irvine J. recognised the possibility that this type of claim was open to abuse, and accordingly required that particularly cogent evidence would be required before the RAT decision would be quashed for a failure to consider it. The test outlined at para. 37 of F.V., which I accept is as follows: -*

"...given the scope for abuse of the asylum process, the court is satisfied that cogent, authoritative and objective COI that failed asylum seekers were targeted for persecution in the person's country of origin and demonstrating a Convention nexus would have to be shown."

33. *In Okito, Ryan J. when faced with similar circumstances, stated:*

"If the material achieves a certain minimum level of materiality and credibility, then it should have been taken into account and the method by which it should have been weighed and considered and balanced out in the context of the case as a whole is a matter for the Tribunal. So in those circumstances, if the material does achieve this standard, then judicial review ought in general to follow. I say that it ought in general to follow, because there may be exceptions and qualifications, depending on the circumstances. On the other hand, if the material does not achieve this standard of relevance and credibility, then it is legitimate for the court to say that it is not sufficiently important to warrant the remedy of judicial review and the discretion is appropriately and properly exercised in refusing relief."

34. *I do not see any conflict between the observations of Irvine J. in F.V. and Ryan J. in Okito. The evidence must be cogent, authoritative and objective but that does not mean that the court should in any way engage in a judgmental issue to determine its merits (that would fall foul of the Supreme Court's observations in Talbot) but the level of materiality and credibility as stated by Ryan J. need only achieve a minimum of standard that would require them to be assessed as evidence by the RAT. When the court is assessing whether there is in existence, cogent, authoritative and objective COI, it must not fall into the trap of weighing up and coming to any decision on the merits of this evidence.*

31. Relying, in particular, on para. 33 of the decision in *M.T.T.K.*, counsel for the respondent in the present proceedings rhetorically asked "How can the material in this case achieve even a minimum level of materiality?" or words to that effect. The respondent's counsel went on to submit that if the applicant's case is no more than the filing of any

documentation whatsoever (such as the contents of “*the telephone book*”) it could not be the case that the respondent Minister was required to consider it.

32. Several comments seem appropriate to make with regard to the foregoing. Firstly, *M.T.T.K.* arose in an entirely different context. Wholly unlike *M.T.T.K.*, the respondent in the present case is not assessing an entitlement to refugee status. In the present proceedings, the Minister was required to consider a range of matters in the context of exercising a discretionary permission. I take the view that this Court cannot safely or lawfully look at documents which, on any analysis are *prima facie* relevant, and decide that this information would not have made any difference to the decision-maker in the context of making a decision which involved the exercise by the respondent of discretion.

Documents which are *prima facie* relevant

33. I fully agree with the submission that the respondent is not required to consider the contents of the telephone directory or irrelevant “*bric-a-brac*” (to cite another description proffered by the respondent’s counsel during the course of skilled and sophisticated submissions). It seems to me, however, that if the material which was not considered is *prima facie* relevant to any of the categories specified in s.49(3)(a) to (e), inclusive, this Court should be very reluctant indeed to come to the view that the information or documentation would have made no difference to the decision-maker. This is because this Court simply cannot usurp the decision-making function, particularly in the context of the respondent’s exercise of her discretion (a discretion exercisable by the respondent Minister who is required to have regard to the applicant’s family and personal circumstances and his or her right to respect for private and family life, having due regard to the factors identified in s.49(3)(a) to (e)). That is not to say that *all* an applicant need do is demonstrate that the documentation is *prima facie* relevant to one of the foregoing factors. There could well be circumstances in which *prima facie* relevance was insufficient. An obvious example was where a copy of the document in question had previously been submitted in the context of an earlier submission (*e.g.* a first- instance decision). Furthermore, one can conceive of a situation where, in the context of an earlier submission, reference was made to a particular diagnosed medical condition and to the treatment of same, with documents submitted to prove appointments with regard to such treatment. Depending on the circumstances of the case, one could certainly conceive of a situation where, if the only “missing” document was the most recent in a long series of similar documents, which did no more than confirm the existence of the most recent appointment in respect of the same treatment being received for the same condition of which the Minister was previously aware, a court in that theoretical scenario might well be justified in refusing to set aside a decision made without reference to that particular document (notwithstanding that such a document is *prima facie* relevant under, say, s.49(3)(b)).
34. It seems to me, however, that where documentation is *prima facie* relevant and does *not* constitute mere repetition of earlier documents and is (as in the present case different in form and substance) the court should set aside a s.49 review decision made by the

respondent which was taken without the Minister having had regard to that “missing” documentation.

A test

35. No submission was made to me in relation to what “test” the court might apply but it seems to me, from a first principles analysis, that the wrong test is for the court to look at the matter on the balance of *probability*. In other words, it does not seem at all satisfactory for the court to ask: “Would the missing documentation, as a matter of probability, have made any difference to the respondent’s decision, had it been before her when she considered the matter?” Such a test seems to me to involve an impermissible usurping of the decision-maker’s role because it is, in reality, for the court to put itself in the decision-maker’s position and to make a value-judgement as to whether missing documentation would or would not have made a difference to the outcome, as a matter of probability. Although a judicial review application plainly constitutes proceedings on the civil side, it seems to me that something akin to the criminal standard would need to guide the court. In other words, it seems to me that unless this Court is satisfied, beyond a reasonable doubt, that the missing documentation could have made no difference to the Minister’s decision, judicial review should be granted in respect of a decision made in the present circumstances where *prima facie* relevant documents were missing.

Blame

36. Counsel for the respondent fairly and very appropriately acknowledges that his client must shoulder a material part of the blame for the fact that the documents were missing. Thus, there is no question of this Court exercising its discretion against the granting of relief (such as might arise if the *entire* blame for the missing documents lay at the feet of the applicant).
37. In *Kouaype v The Minister for Justice* [2005] IEHC 380, [2011] 2 IR 1, Clarke J. (as he then was) emphasised that the grounds upon which a decision by the respondent Minister to make a deportation order in the case of a failed asylum seeker can be challenged are “necessarily limited”. Nevertheless, the learned judge went on (at para. 30.(d)) to make clear that one of those limited grounds was where the respondent did not consider representations made within the terms of the statute in question. There is no dispute as to the proposition that, in general, a decision maker must consider the submissions which are made to her or him. Nor is there any doubt about the fact that certain submissions made to the respondent in the present case were *not* considered. Despite the great skill with which counsel for the respondent suggests otherwise, this court cannot safely hold that the “missing” documents were (i), not relevant and (ii), would have made no difference to the decision maker’s consideration and ultimate exercise of her discretion in accordance with what she is required to consider pursuant to s. 49.
38. In light of the facts which emerged from an examination of the evidence in this case, I reject the submission that the flaw in the decision-making process is somehow ‘severable’ on the basis that the flaw does not ‘infect’ the findings which underpin the conclusions. To my mind this argument - which is made by analogy with respect to the decision of MacEochaidh J. in *I.G. v Refugee Appeals Tribunal & Anor* [2014] IEHC 207 - cannot avail

the respondent. This is for the simple reason that this court cannot safely take the view that, had the missing submission been before the respondent, it would have made no difference to the decision made. Insofar as the submission is made that the actual grounds upon which the permission was refused still stand and continue to justify the refusal, unaffected by what are described by the respondent's counsel as "*peripheral matters*" contained in a "*stocking filler*" submission, the facts paint a different picture, particularly in regards to Items 9 and 10. In the manner I have explained, the submissions which went missing and which were not considered, include *inter alia* positive references which are *prima facie* relevant and which are different in substance and in form to earlier references submitted. These references appear to speak directly to factors which are specified in s. 49(3) - in particular (a) and (c) - and I simply cannot agree with counsel for the respondent who submits that this court can feel sure that quashing the decision so that matters can be considered afresh, including the missing submissions, is a futile and wasteful exercise. For the reasons detailed in this judgment, this court cannot feel sure of the foregoing.

Submissions made in a 'piecemeal' manner

39. It is true that submissions were made on behalf of the first named applicant in what might be called a 'piecemeal' manner. That is, perhaps, unsurprising given the length of time it took before the final decision to be made. To say the foregoing is not for a moment to criticise the respondent who, no doubt, was and is dealing with numerous and various applications and doing so without limitless resources. It is also fair to say that, despite the time limits laid down in statute, the respondent very understandably accepts "late" submissions and it is not argued, in the present case, that the submissions which went missing fell outside a strict time limit and did not require to be considered at all. On the contrary, it is accepted, very fairly, that they *would* have been considered, had they not gone missing, the thrust of the respondent's argument being that a consideration of them would have made no difference. I refer to the foregoing because nothing related to the piecemeal nature of the submissions made, or the particular dates when submissions were furnished, seems to me to weigh against exercising what is a discretionary jurisdiction.

17 February 2020 CSSO letter

40. Staying with the topic of discretion, it is appropriate to point out, by letter dated 17 February 2020, the Chief State Solicitors Office wrote to the applicants' solicitors as follows:

"Dear Sirs,

We refer to the above matter, which is next listed before Mr. Justice Humphreys on 17th February 2020, for the filing of opposition papers.

While it was not a ground of complaint ventilated within the current application for judicial review, in the course of drafting opposition papers it has come to the Minister's attention that the parties were at cross-purposes in the correspondence concerning the supplementary submissions dated 3 April 2018 and that these

submissions were not properly before the decision-maker (Exhibit W in the Applicant's grounding affidavit.) It seems clear that this oversight was inadvertent and it would be suggested that neither party was entirely blameless for the confusion which gave rise to it in circumstances where there was a long delay in completing the application and where submissions were filed on a piecemeal basis.

*As you will be aware, the omitted 'submission' comprised principally of documents which were offered in support for matters which were advanced elsewhere and for this reason it is suggested that the **submission would not seem likely to have materially affected or altered the conclusions which were arrived at on the basis of the balance of the Applicant's submissions, which were referenced by the decision-maker and which were evidently considered.** Nonetheless, it may be considered preferable if the missing correspondence were to be brought to the decision-maker's attention, for completeness. So, in ease of a full and fair consideration of the Applicant's case the Respondent is prepared to adopt this course of action, should the Applicant indicate a preference that this be done. On the other hand, should Mr. E. take the view that this oversight was not material to the consideration of his case and is happy to so confirm then no further action would seem to be necessary and the application for judicial review herein could proceed as usual.*

*If the decision is to be revisited in the manner outlined, and subject of course to the agreement of the Court, the Respondent would suggest that the current set of proceedings could be held in abeyance whilst this being done, which should not in any event take very long. Once this has been completed, **the original decision could then be supplemented by way of a brief addendum, if that were to be considered appropriate by the decision-maker** the proceedings could then resume once the decision-maker has had this opportunity and the Respondent would not take objection to the Applicants' making such application to amend their existing pleadings as they see fit, in the event that the reconsideration gives rise to further issues or otherwise necessitates a change in those pleadings.*

You might indicate in early course what action your client considers preferable to address this unforeseen development."

41. At the outset of the hearing, I explored with counsel for both sides the nature and significance of the foregoing 'offer'. It was made clear to me that the position adopted by the respondent was *not* that the original decision would be set aside or re-visited. In other words, there was never an offer made by the respondent to set the relevant decision at naught and to look at all matters afresh, including the missing submissions. Rather, it was made clear that the respondent's position was that the decision was valid and would stand. Against that backdrop, the respondent's offer was described as '*an intermediate course*' to deal with an '*unusual situation*' and a '*practical suggestion not easily categorised*' within the framework of judicial review, namely, for the relevant decision to stand and for the missing submissions to be put before the respondent who

would add an addendum to the decision if this was felt necessary following a consideration of the missing submissions.

42. The foregoing was described by counsel for the respondent as an offer in the spirit of something which might meet the applicants' concerns. That offer was not accepted but it seems appropriate for me to make clear that the offer, although doubtless made *bona fide*, could not be considered to be an alternative remedy which was available to the applicants, in particular the first named applicant. In other words, the first named applicant cannot, in my view, be criticised for failing to take up the offer made in the 17 February 2020 letter, which made no concession that the decision challenged was in any way flawed. On the contrary, it is explicitly asserted in the said offer that the missing documents would not have materially affected or altered the conclusions reached by the respondent; and it was in this context that the somewhat unusual offer was made. In short, the decision not to take up the offer does not in my view weigh against the applicant in the context of the granting by this court of what is a discretionary remedy.
43. It is entirely fair to say that it was the respondent who drew the attention of the applicants' solicitor to the error and it was very appropriate that this was done. It is also true to say that, having been alerted to the fact that documents went missing, the applicants appear to have abandoned their previous grounds of challenge and focused exclusively on the sole ground discussed in this judgment. The foregoing does not appear to me to be determinative of anything which this court is required to decide, nor does it count against the applicants insofar as the granting of discretionary relief, having regard to the facts.

Conclusion

44. For the reasons set out in this judgment, the manner in which the relevant decision was made breached the obligation on the respondent pursuant to s. 49(2)(a) of the 2015 Act due to her failure to consider relevant materials submitted by means of the letter from the applicants' solicitors dated 3 April 2018, particularly having regard to the provisions of s. 49(3).
45. In circumstances where this court simply cannot take the view that a consideration of the missing submission would have made no difference, the relief sought must be granted. It seems clear that the failure to consider the missing submissions constituted an innocent error on the respondent's part, but this court simply cannot take the view that it was immaterial to what might have been the outcome, had the submission been considered.
46. The submissions made on behalf of the respondent can be summarised as the contention that an admitted defect in the process by which the relevant decision was made does not mean that the decision-making process was other than perfectly fair and the court should hold that the outcome of the decision was utterly unaffected by the error. For the reasons set out in this judgment, I cannot agree and it is appropriate that this court make an order of *certiorari* quashing the decision notified by letter of 26 September 2019.

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

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

Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs which should be made. My preliminary view is that there are no facts or circumstances which would justify a departure from the 'normal rule' that costs should 'follow the event'. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within 14 days. Finally, an effort was made to include appropriate redactions in this judgment but if the parties agree that further or other redactions are appropriate, they are invited to make such proposals as are agreed between the parties in that regard, again, within 14 days.