

An Chúirt Uachtarach**The Supreme Court**

MacMenamin J
Dunne J
Charleton J
Baker J
Hogan J

Supreme Court appeal numbers: S:AP:IE:2021:000092 and S:AP:IE:2021:000090
[2022] IESC 35
High Court Record Numbers: 2019 No 650 JR and 2020 No 119 JR
[2021] IEHC 25

Between

**A and B
Applicants/Appellants**

- and -

**The International Protection Appeals Tribunal and The Minister for Justice and Equality
Respondents**

Judgment of Mr Justice Peter Charleton delivered on Monday 18 July 2022

1. At issue are three questions, in essence, which will decide this appeal:

- Firstly, is there a statutory lock whereby if an applicant for refugee status or subsidiary protection is refused by the International Protection Office, but there is no appeal lodged in time to the International Protection Appeals Tribunal, and where the Minister declares the person no longer to be an applicant, does the International Protection Act 2015 prohibit any re-entry into the system?
- Secondly, such a statutory lock does exist, is there any discretion in the Minister to revise a decision that a person deemed no longer an applicant may again enter the appeals system?
- Thirdly, where the legislation on its face does not provide for any residual discretion in the Minister to enable a late appellant who has been declared no longer to be an applicant, do considerations of constitutional construction enable such a discretion or does the legislation bind, to the exclusion of any executive power of the State, the Minister into the decision to remove applicant status and thus bar any appeal to the IPAT?

The statutory lock

2. A person arriving in Ireland who claims that he or she is a refugee or that their country of origin is in such a state of chaos that they are entitled to subsidiary protection against serious violence will first apply to the International Protection Office. The applications in these cases exemplify what is involved. In one case a claim of a neighbourhood dispute resulted in a man leaving for Ireland, with his wife remaining apparently to see a child through education. In the other, a dispute at work led to claims of general threat. Both applications were examined by the IPO and were rejected. Neither applicant appealed, which is an absolute right, to the IPAT. As to what the excuses might be, that is perhaps best left aside as these have nothing to do with this appeal. What is established as a certainty is that upon refusal, an applicant, under s 41, may appeal in writing, giving grounds of appeal, and may seek an oral hearing. The time limits are prescribed by the Minister through regulations made under s 77 of the Act. An appeal is required if someone is to remain in the system as an applicant, since as s 41(2)(b) provides, that step must be taken “within such period from the date of the sending to the applicant of the notification under section 40 as may be prescribed under section 77”. Section 41(4) enables the Minister “having regard to the need to observe fair procedures, prescribe procedures for and in relation to appeals”. Hence, matters are governed by Statutory Instrument No. 116/2017, The International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017. The Minister need only consult the chairperson of IPAT to make or to revise the time limits. As the Regulations now stand, Article 3(c) states that an applicant who fails before the IPO has “15 working days, for the purposes of section 41(2)(a)” to appeal to IPAT. But, ostensibly, being outside that may enable readmission since IPAT may extend time where an “applicant has demonstrated that there were special circumstances as to why the notice of appeal was submitted after the prescribed period had expired” and that “in the circumstances concerned, it would be unjust not to extend the prescribed period.”

3. Notwithstanding that the Act has replaced and revised the basic ground rules of several pieces of legislation, and that it is now no longer necessary to have applied and to have been refused refugee status before making a claim for subsidiary protection, and that the legislation strives for comprehensiveness, there are always teething problems. This present case is one such problem. Other than genuine issue, it is the duty of legal representatives to make this legislation work smoothly and inventive arguments contrary to its terms should be disposed of.

4. The statutory lock is argued by the applicants to arise, for the purpose of making a consequent argument as to unconstitutionality, in consequence of s 2(2). There has to come a point where a person is no longer entitled to make a claim that they should be given international protection in Ireland. Logically, that would arise where their claims have been decided to be unfounded, or lacking credibility, and where any appeal has been disposed of, or where they have left the country or just decided that their claims are so wanting in merit that they give up. Legislatively, that removal of any status that comes from being an applicant for international protection comes from s 2(2) which provides that a “person shall cease to be an applicant on the date on which” the Minister refuses “to give the person a refugee declaration” or “subsidiary protection” or is given general leave to remain or on finding out that they have already applied in another Member State of the European Union, the person “is transferred from the State in accordance with the Dublin Regulation.” By failing to appeal a finding of the IPO, either within the time limits for appeal or by not attending a hearing without proffering an excuse, a person may be deemed to have withdrawn the appeal and hence will no longer be an applicant under s 2(2). In this respect, the analysis of Barrett J is unimpeachable. This is as stated in the letter written to one of the applicants, to the effect that “[t]he recommendation under s.39 has been superseded by the Minister’s decision

under s.47 such that an appellant no longer has a recommendation simpliciter under s.39 against which to appeal.” The logic being that the IPO has recommended that an applicant not be given refugee status and the time for appeal being up, the process is come to an end.

5. Section 45 stands in contrast. This provides that where a date for an oral hearing is set by IPAT and an applicant “fails, without reasonable cause, to attend an oral hearing at that date and time fixed” then the application is deemed withdrawn unless “not later than 3 working days” later the applicant furnishes “an explanation for not attending ... which the Tribunal considers reasonable in the circumstances”. Thus, an applicant has 15 days to appeal from being notified by the IPO, and, when he or she appeals, if he or she misses an oral hearing date set by IPAT, there are still three working days in which to revive an appeal, once a reasonable excuse is proffered. Regarding a situation where an applicant is refused a recommendation of refugee status by the IPO, 15 days later the Minister may deem an appeal withdrawn and that means, on the argument proffered by both sides on this appeal, that an applicant ceases to be an applicant and thus IPAT has no jurisdiction to consider any appeal.

6. The argument for unconstitutionality centres on the inflexibility of the closure of an appeal, that it cannot be unlocked either by any action of the former applicant or by the Minister. Situations are posited, and again no comment is made on the current two appeals, where a person, on getting a letter from the IPO, may fall dreadfully ill, may struggle in hospital for two months, as some have during the Covid-19 pandemic, emerge weakened and be unable to attend to anything. Alternatively, through stress, a person may suffer a breakdown and be unable to cope with their affairs in any meaningful way beyond basic living.

7. As against such extreme situations, gainsaying that for a genuine fugitive from violence or persecution, that appeal to IPAT will be the most important event presenting in their life and to neglect the simple step of appealing is incomprehensible save in those extreme circumstances. There is a shared burden here: that of the State in providing proper procedures and following country of origin information meaningfully and that of the applicant in following through and presenting such data as assists in a sound determination. The United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee States and Guidelines on International Protection provides at para 196:

It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.

8. In domestic law, the obligation to comply with the refugee application procedure rests on the applicant under s 38(1). Recital 11 of Council Directive 2005/85/EC, which is given effect in part by the 2015 Act, states that it is “in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum.” Finality in the protection application process is vital, both for applicants to ensure that they are not kept in the dark as to their status within this jurisdiction during this process, and for the State in seeking to adequately protect the fair procedure rights of applicants. Delay in the protection application system prior to the 2015 Act was significantly criticised, particularly the requirement for an individual to have been refused

refugee status prior to applying for subsidiary protection; *Okunade v Minister for Justice and Others* [2012] IESC 49, Clarke J at [8]. The emphasis on efficiency in the 2015 Act informs the time limits, seeking to ensure that any ability to apply for an extension of time to appeal is not utilised to slow the entire system, but rather used solely to protect the fair procedures rights of those seeking protection. At the same time, some reasonable method of appeal is also central for ensuring that an individual's fundamental rights are protected within the international protection framework, as recognised by the United Nations Handbook, which states at para 192 that an applicant, upon being not recognised as a refugee "should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial". These procedures are provided for in the legislation and it is only the extremes of misfortune being enabled as a way through what is otherwise a justifiable and necessary end to the process that is in issue.

Executive discretion on borders

9. Central to nationhood is the ability to control borders. That is not to say that in a democratic society, the excesses of totalitarian zealotry may be mirrored to keep citizens from emigrating, not matter how vital their role for society might be perceived to be; *State (M) v Attorney General* [1979] IR 73. Consideration of the plight of occupied countries demonstrates the unwished introduction of migration by the conquering state in order to diminish the authority of the local population and to dilute culture, language and customs. It is inescapable that control over immigration vests in the State as a cornerstone of governmental power. Hence, on the existing judicial pronouncements, which have never been doubted, the executive branch is imbued with the power "to control the entry, the residency and the exit, of foreign nationals" into Ireland, per Denham J in *Bode v Minister for Justice* [2007] IESC 62 at [135]. As noted by Gannon J in *Oshoku v Ireland* [1986] IR 733, control over immigration constitutes a fundamental right of the State and thereby warrants an aspect of the separate power of government recognised in both domestic and international law; *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19 at [82]. Similarly, Baker J in *National Employee Development Training Centre Ltd v Minister for Justice and Equality* [2015] IEHC 140 at [23] underlines the proposition that the executive has an "inherent function to control immigration", as well as noting the limited role of the courts in engaging with this function to cases relating to a "challenge to a decision by the Minister in an individual case to refuse permission to be in the State". The breadth of this executive discretion is highlighted by Clark J in *Khalimov v Minister for Justice & Equality* [2010] IEHC 91 at [19] in stating that the Minister may determine immigration policy and is "entitled to adopt, formulate, tighten or loosen that policy in accordance with the evolving needs of the State as determined by the holder of that office." Hence, the Minister will always have a power to either grant permission to remain in the State on humanitarian grounds, or to implement government policy whereby immigration is to be encouraged through the grant of visas for the pursuit of particular forms of work.

10. Could it be said, for instance, that, absent s 49, the Minister would not be entitled to grant permission to a failed asylum seeker to remain in the State? Or that the Minister's power in that regard comes from or is completely circumscribed by the legislation? That would be an untenable proposition. But, here the issue is as to whether the decision of the Minister to deem an application withdrawn, which happens only on communication from the relevant bodies set up to assess the applicability of obligations for international protection, is removed by the terms of the legislation. Central to that issue, as to any question of statutory interpretation, is the meaning of the provisions as set against the backdrop of the power of the State to halt those at its borders or to remove, subject to the principle of *refoulement*, those who are illegally present. Given the amplitude of that power as an aspect of executive discretion central to the exercise of the executive power of the

State by the Government, under Article 28.2 of the Constitution, that issue refines itself into one where it must be asked whether by express words, the discretion of the Minister to direct the asylum process is utterly removed?

11. While executive discretion has historically been accepted to not extend to “repealing or overriding any legislation”, per O’Donnell J in *NVH v Minister for Justice and Equality* [2017] IESC 35, discretion is undoubtedly retained in areas fundamental to the executive power unless expressly overridden by statute. Similarly, Hogan J held in *MacDonncha v Minister for Education* [2013] IEHC 226 that permitting the executive to disapply the law would be “tantamount to saying that the Government could in effect secure a repeal of the law without the necessity of legislation” at [23]. However, where this threshold is not met through the exercise of executive discretion, particularly in the context of a core executive function such as the formulation of immigration policy, the Government need not rely on statutory authority to exercise executive power, see *Kelly: The Irish Constitution* (5th edition, Hogan, Whyte, Kenny and Walsh, Dublin 2018) at p 507. Where statute purports to limit an exercise of the executive power of the State, it must do so in clear terms, and it must do so with greater certainty than is found in the 2015 Act.

12. Certainly, as regards a finding by the IPO or IPAT that a person has applied due to flight from persecution or a situation of serious random violence following the breakdown of all social order in their country of origin, the power of decision-making previously exercised within the Department of Justice and Equality has passed to the statutory bodies. Or if it has not, if some residual power remains to the Minister, would it not be unreasonable and disproportionate for the Minister to take any decision to the contrary? Some sections are merely declaratory of what has been the law before enactment of any legislation. Hence, Ireland entered into treaties and other international obligations designed for the protection of those fleeing persecution and random widespread serious violence; the basis being that the State would not return to such countries those within our border. That backdrop informs s 50 which merely declares the prohibition on refoulement and to s 50A which deems an application to have been made for international protection where on a consideration of country of origin information the Minister sees those dire consequences even for people whose applications have failed.

Discretion

13. The danger is one of unintended consequences, against which Henchy J warned in *Minister for Industry and Commerce v Hales* [1967] IR 50, 76. While the issue there was a statute limiting by definition but ostensibly expanding that reach through statutory instrument, Henchy J quoted *Maxwell on Interpretation of Statutes* (11th edition, 1962) at p 78 to this effect:

One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intentions with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act.

14. To like effect see *Bederev v Ireland* [2016] IESC 34, [2016] 3 IR 1; *O’Connell v Governor and Company of the Bank of Ireland* [1998] 2 IR 596; context both within the enactment and within where the

enactment fits in the legislative body being information as to proper construction; Bennion, *Statutory Interpretation*, (6th edition, London, 2013) 540. The Constitution, however, is more than a context: it is an imperative to just disposal of admissible grievance through justice and towards true social order through the rule of law and it is the fundamental delimitation of legal boundaries beyond which jurisdiction is exceeded. While, generally, the penumbra of executive power is removed and made to run on fixed legislative rails through the enactment of statutes, it remains that wide general powers need be circumscribed by clear words. The argument here is that the Minister can do nothing: that the Minister cannot, if written to, revise the abolition of status as an applicant and treat the failure to appeal as merely being suspended. In the light of the clear criteria for which IPAT would, if enabled, consider the excuse for a late appeal, if credible, the possibility emerges from the legislation itself for the Minister to suspend the inadmissibility and to seek an expert assessment. The reality of the examples given, of severe physical or mental illness, are an imperative to just disposal in genuine cases. As noted, excuses would have to be extreme to enable admissibility and manifestly would be predicted to be rare. But, such cases can be accommodated.

15. As an alternative, a constitutional interpretation is not impossible; but is certainly demanded if not contradicted. Clear words are needed to completely remove the Minister's discretion and these are not to be found in prohibiting the exercise by the Minister of either an executive decision to suspend the operation of the prohibition on pursuing an appeal, under Article 28.2, or enabling the correction of internal mistakes. Were the argument presented here to be correct, a decision to be made because of a mistake in time – say due to not reckoning a leap year – or as to a name – the application of a decision to a wrong file – would result in the need for the Minister to apply to the High Court for the internal correction of error. This is not a court of record that is being dealt with here, but a department of State. The ease with which such an argument as to correction undermines a contention of inflexibility, and the importance of the power of Government over immigration, militate against an interpretation which would undermine just solutions in extreme cases.

16. In the absence of a clear restriction by the legislature of the Minister's actions in relation to the suspension of a s 47 order, it cannot be said that such a decision lies outside of the scope of the executive power, and such an interpretation would be an excessive restriction of a fundamental State power by this Court. The inherent nature of this power has been “used to uphold a variety of executive actions taken without legislative authorisation in the immigration context”, see *Kelly: The Irish Constitution* (5th edition, Hogan, Whyte, Kenny and Walsh, Dublin 2018) at p 169. The Minister's discretion in this area is significant, and undoubtedly encompasses the possibility of suspending an order made under s 47 for the purposes of allowing the appellants in this case, or any other persons subject to such an order, to seek an extension of time and appeal the recommendation of the IPO through IPAT, thereby ensuring the continued protection of their rights to fair procedures and a just remedy.

17. In the alternative to this analysis, the Minister may amend the regulations to enable a discretionary appeal.

18. In either case, however, what should be remembered is that what is involved in enabling an appeal to IPAT is a suspension of a valid Ministerial order and not that the Minister is required to overturn that decision. If IPAT does not find that there are exceptional circumstances for not pursuing an appeal, or if admitted to IPAT and rejected, all prior orders such as deportation are immediately effective.

Application

19. If the interpretation of the 2015 Act urged by the respondents is accepted, thereby restricting the Minister's ability to temporarily suspend an order under s 47 of the Act, there is no recourse for appellants who, through no fault of their own, failed to appeal a recommendation of the IPO within the time limits set by the Minister. The difficulty of such an interpretation is highlighted when considering a case of genuine mistake, in which both the applicants and the Minister accept that, for example, the wrong individual has been indicated in the order. It would be contrary to a just disposal to view the Minister as lacking the discretion to suspend such an order, as such discretion clearly falls within the scope of the inherent executive power to control immigration policy.

20. The Minister undoubtedly retains the power to temporarily suspend an order where it has been indicated that an application for an extension of time is to be made by the subject of the order, thereby allowing IPAT to consider whether the application, pursuant to the stringent test detailed in SI No 116/2017, should be accepted. If the application is extended and a subsequent appeal is successful, thereby changing the recommendation made by the IPO, the Minister similarly retains a discretion to rescind the order made under s 47, acting on the fundamental state right to exercise control over who is entitled to enter and reside within the State. Such a decision would, as an exercise of executive power under Article 28.2, be subject to the well-established and onerous test of clear disregard of constitutional rights; see *Boland v An Taoiseach* [1974] IR 338, *McKenna v An Taoiseach (No. 2)* [1995] 2 IR 10 and the concurring judgment of Charleton J in *Burke v Minister for Education and Skills* [2022] IESC 1.

Result

21. For this reason, the Act cannot be interpreted as unconstitutional. The matter should be returned to the Minister to inform her of an intention on the part of both appellants to seek an application to extend time for filing an application, and a decision can be made to uphold or alter the s 47 order on foot of this information.