# THE COURT OF APPEAL

**CIVIL**

**[2024 No. 144]**
**[2023 No. 104 JR]**
**[approved]**
**Neutral Citation Number [2024] IECA 290**

**Costello P.**

**IN THE MATTER OF SECTION 5, ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED)**

**BETWEEN**

**FOM**

**APPLICANT/RESPONDENT**

**AND**

**MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS/APPELLANTS**

**AND**

**[2024 No. 145]**
**[2023 No. 640 JR]**

**BETWEEN**

**KE**

**APPLICANT/RESPONDENT**

**AND**

**THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS/APPELLANTS**

**JUDGMENT of Ms. Justice Costello delivered on the 26th day of November 2024**

**1.** The appeals in which this procedural motion arises were brought in proceedings by FOM and KE, respectively (collectively 'the Respondents'), whose International Protection Applications had been determined to be inadmissible on the basis that the United Kingdom was a safe third country to which they could be returned. The United Kingdom had been designated as a safe third country by the International Protection Act 2015 (Safe Third Country) Order 2020 (SI 725/2020) ('the 2020 Order'), made pursuant to s. 72A of the International Protection Act 2015 ('the 2015 Act') which was in force at all relevant times.

**2.** In the case of FOM, the Minister for Justice ('the Minister') issued a Return Order pursuant to s. 51A of the 2015 Act, on 26th January 2023. In the case of KE, the International Protection Appeals Tribunal ('the IPAT') had decided that KE's application should be deemed inadmissible on the basis that the UK was a safe third country for KE, and on 10th May 2023, the Minister determined that the application was inadmissible pursuant to s. 21(11) of the 2015 Act. FOM challenged the legality of the 2020 Order, the Refoulement Consideration by the Minister and the Return Order, while KE challenged the validity of the IPAT decision, the Minister's decision and impugned the legality of the 2020 Order.

**3.** On 22nd March 2024, the High Court (Phelan J.) declared the 2020 Order to be contrary to Ireland's obligations under EU law, and in the FOM proceedings, quashed the Return Order and the Refoulement Consideration, and in the KE proceedings, quashed the IPAT decision and the Minister's decision.

**4.** The State appealed the High Court conclusion that the 2020 Order was invalid and the respondent cross-appealed on a number of issues. In particular, in each of the

respondent's Notices, the respondents pleaded in that part of the Notice headed '*Additional grounds on which decision should be affirmed'* as follows:

> "*The Respondent also respectfully requests that the Honourable Court take judicial notice of pronouncements by the Minister for Justice that 'emergency legislation' will be brought forward to address the deficit in the law in direct response to the Judgment of the Learned High Court Judge. This constitutes both an admission of the main findings and renders all or part of these proceedings moot."*

**5.** On 10th July 2024, the Minister moved an amendment to the Courts, Civil Law, Criminal Law and Superannuation (Miscellaneous Provisions) Bill 2024, in a debate before the Dáil. The deputies voted to pass certain amendments, in particular, an amendment to s. 72A of the 2015 Act. The 2024 Bill was enacted and commenced on 23rd July 2024 ("the 2024 Act").

**6.** Part 5 of the 2024 Act amends the 2015 Act by:

(i) Revoking the 2020 Order (section 6)

(ii) Amending s. 21(17) of the 2015 Act to include further conditions for a finding that a designated safe third country is a safe country for an applicant: whether the person has the possibility of requesting refugee status in the safe third country and (if found to be a refugee) to receive protection in accordance with the Geneva Convention; and whether that person may be subject in the safe third country to Article 15(c) serious harm (section 8).

(iii) Section 50A of the 2015 Act is substituted with a new provision which precludes the return of an individual where:

(a) The life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or, a risk of Article 15(c) serious harm would arise; or

(b) Where return would be prohibited under any enactment or rule of law as a breach of that person's fundamental rights (section 9).

(iv) Section 72A(2) of the 2015 Act is amended to require the Minister to be satisfied that there is no risk in a country to be designated a safe third country that a person would be subjected to any of the kinds of 'serious harm' identified in Article 15 of Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or persons eligible for subsidiary protection, and for the content of the protection granted (recast), ('the Recast Qualification Directive'), (section 13).

**7.** Pursuant to further directions for the hearing of the appeal, which I gave on 19th July 2024, the Appellants delivered a reply to the Respondents' Notices of Cross-Appeal. These were delivered on 27th September 2024. While noting that the contention that the appeal is moot is not a ground of cross-appeal as such, the submissions stated that for the avoidance of any doubt, the Appellants pleaded that they would state the following at the hearing of the appeals:

"(*a) The decisions impugned were made pursuant to the [2020 Order]. While s. 6 of the [2024 Act] revokes the 2020 Order, it is nonetheless the legality of the 2020 Order on which the lawfulness of the decisions impugned by the Respondent[s] continue to depend. Pursuant to s. 27 of the Interpretation Act 2005, the revocation of the 2020 Order 'does not . . . affect the previous operation' of the 2020 Order or anything duly done or suffered under' it and does not 'affect any. . . obligation or liability acquired, accrued or incurred under' it. Similarly, whether the 2020 Order itself complied with the minimum EU law standards by which Ireland is bound, or*

*whether the High Court was correct to find otherwise, remains a fully live controversy as between the parties.*

*(b) While ss. 8, 9 and 13 of the 2024 Act do amend the law in a manner which addresses certain incompatibilities with EU Law found by the High Court judge to exist in the safe third country. . . system as implemented in Ireland (which findings are the subject of the within appeal), it is the provisions of the [2015 Act] as they stood before the introduction of such legislative amendments which were before the High Court and which thus remain relevant to the question whether the decisions of the Tribunal and the Minister in the Respondent[s'] case were lawfully made.*

(*c) Nor does any provision in the 2020 Act constitute 'an admission of the main findings' in the Judgment. The Oireachtas is fully entitled to legislate by applying certain standards to future statutory decision-making processes without those standards somehow becoming, or being admitted as constituting, binding EU law obligations on the State."*

**8.** In further compliance with the directions given for the hearing of the appeals, the Appellants, in their written submissions, addressed the Respondents' contention that the appeals are moot. They did so at paras. 3.1 to 3.11 of their joint submissions on both appeals. For the purposes of this motion, paras 3.4 and 3.5 are relevant. They read as follows:

"*While these amendments to the [2015 Act] operate to address what the High Court found to be incompatibilities with EU law, it does not follow - either as a matter of logic or of law – that enacting such legislation 'constitutes. . . an admission of the main findings' in the Judgment or that the appeals are moot. Subject to the Constitution, the Oireachtas is fully entitled to legislate into the statutory framework establishing the [safe third country] system requirements or*

*standards that exceed the minimum standards required by EU law ['gold-plating'], and without those provisions thereby becoming or being regarded as binding obligations on the State as a matter of EU law. Moreover, Article 5 [of the Asylum Procedures Directive] provides expressly that 'Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, insofar as those standards are compatible with this Directive'."*

**9.** At para. 15 of their written submissions, the Respondents argue:

"*Contrary to the Appellants' contention that the 2024 Act makes no admissions of the main finding, the amendment at s.6 was clearly enacted to cure the problems identified by the High Court. The Appellants have sought liberty to adduce evidence from the debate in Dáil Éireann on 10th July 2024 during which the Minister explained the reasons for the proposed amendments."*

**10.** By a motion issued on 8th November 2024, returnable for 15th November 2024, the Respondents sought an order "*pursuant to Order 86A, rule 4 of the Rules of the Superior Courts, granting the Respondents permission to furnish further evidence*". The application was grounded upon the affidavit of Brian Burns, Solicitor for the Respondents. At para. 2, he said that he made the affidavit "*further to Order 86A, rule 4(a), (c) and/or (e)"* of the Rules. He said that his purpose was to furnish the relevant part of the Dáil Debate with respect to the amendments to the 2024 Bill. He quotes from the record of the Dáil Debate on 10th July 2024, and avers to the fact that the Bill was enacted and then commenced on 23rd July 2024. He avers that "*the additional evidence proffered had been alluded to in the Respondents' Notice of Opposition and referred to in the Respondents' Submissions*". These are references to the Respondents' Notices and submissions filed by the Applicants/Respondents.

**11.** In addition, he says that the:

"*additional evidence is necessary to address a dispute between the parties. In their submissions, the Appellants' contend that the 2024 Act makes no admissions of the main finding of the High Court in [these proceedings]. The Respondents submit that the amendments were enacted to cure the problems identified by the High Court."*

**The Jurisdiction of the Court to Admit New Evidence.**

**12.** Order 86A, r. 4 provides as follows:

*"4. Subject to the provisions of the Constitution and of statute:*

*(a) the Court of Appeal has on appeal full discretionary power to receive further evidence on questions of fact, and may receive such evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner,*

*(b) further evidence may be given without special leave on any appeal from an interlocutory judgment or order or in any case as to matters which have occurred after the date of the decision from which the appeal is brought,*

*(c) on any appeal from a final judgment or order, further evidence (save as to matters subsequent as mentioned in paragraph (b)) may be admitted on special grounds only, and only with the special leave of the Court of Appeal (obtained by application by motion on notice setting out the special grounds),*

*(d) the Court of Appeal may draw inferences of fact in accordance with law,*

*(e) if the Court of Appeal considers that the record available to it of the proceedings in the court below is deficient, it may have regard to such evidence, or to such verified notes or other materials as the Court of Appeal deems expedient,*

*(f) where the Court of Appeal considers it necessary, it may direct the Registrar to apply to the trial Judge for a report to the Court of Appeal on the trial or any part of the trial."*

**13.** The Notice of Motion invokes r. 4 without distinction. The affidavit of Mr. Burns refers to r. 4(a), (c) and (e). I believe the reference to subrule 4(e) is in error as it could have no conceivable relevance in the circumstances of this motion.

**14.** The debate in which it is said that the Minister indicated that the purpose of the amendment was to rectify the errors identified by the High Court in the regime for safe third country referrals occurred on 10th July 2024, nearly four months after the High Court

delivered its judgment. It follows, in my judgement, that subrule (c) cannot apply as it expressly excludes matters subsequent (as mentioned in para. (b)) which in turn refers to matters which have occurred after the date of the decision from which the appeal is brought. It follows that the application can only be brought pursuant to subrule 4(b), and I will treat it as such despite the affidavit of Mr. Burns.

**15.** The principle applicable to applications to admit new evidence without leave of the court have been addressed on a number of occasions by the Supreme Court, and this Court, by the judgment of Ryan P. in *University College Cork v. Electricity Supply Board* [2017] IECA 248. Ryan P. noted that r. 4(b) provides that:

> "*'Further evidence may be given without special leave ... in any case as to matters which have occurred after the date of the decision from which the appeal is brought."*

He then summarised the caselaw, interpreting the equivalent provision governing the Supreme Court appeals at para 22:

> "*22. The law, as set out in the authorities cited by the parties may be summarised as follows. Although the rule does not actually say it, the appeal court has a discretion as to whether to admit further evidence that is permissible under the provision [See: Fitzgerald v Kenny [1994] 2 IR 383]. The essential criterion of admissibility is relevance to the appeal before the Court [See: Rye Investments Ltd v Competition Authority]. The Courts have not suggested a comprehensive rule to cover all situations. In Fitzgerald v Kenny, the Supreme Court adopted the three principles proposed by Lord Wilberforce in his speech in the House of Lords in Mulholland v Mitchell [1971] AC 666 at 679/80. These are first that evidence will not be admitted when it is something that the trial judge has decided. Secondly, it may be admitted if some basic assumptions common to both sides had*

*been falsified by subsequent events, particularly if this happened by the act of the defendant. Thirdly, there is a broad undefined category when to refuse to admit the evidence 'would affront common sense, or a sense of justice.' Another principle which is a classic of legal logic is that changes made after an event are not in themselves evidence of a prior deficiency or failure: one must be careful to avoid the error of post hoc ergo propter hoc. This means as it seems to me that the evidence must be of events that happened after the trial; that it is relevant to the appeal; that it is not revisiting something decided at the trial; and that it is reasonable and just to admit and consider the evidence at the appeal. The primary question in this case is relevance."*

**16.** At para. 24, Ryan P. quoted the judgment of O'Flaherty J. in *Fitzgerald v. Kenny* [1994] 2 I.R. 383, at p. 392:

*"'Nonetheless, this Court must apply a discretion. Like any discretion, it must be exercised in a fair and just manner though in [sic] may be impossible to lay down a general rule that will cover all circumstances. Each case must be approached as requiring the exercise of the discretion in relation to its facts. In the circumstances of this case I hold that the possibility that a serious injustice would be suffered by the plaintiff must prevail over the desirability of having finality in litigation."*

At para. 27, Ryan P. observed that the courts do not take an absolute position in regard to further evidence on appeal. He explained that this was so at para. 37, because *"some new circumstance or situation will arise where justice demands that some leave or liberty be given to a party*." I would add that the evidence sought to be adduced must be admissible evidence, as clearly the court could not exercise its discretion to receive new evidence which, as a matter of law, would be inadmissible.

**The Purpose of the Amendments Effected by the 2024 Act.**

**17.** The Respondents say that the debates in relation to the Bill shows that the amendments were not introduced to "*gold-plate*" Irish protections for applicants for international protection but were for the purposes of rectifying deficiencies in Irish law in relation to safe third countries, as found by the High Court. The Respondents say that the Dáil Debates are not being relied upon to *construe* the Act, and accordingly, they do not come within the exclusionary rule. They contend that there is an issue whether the introduction of the amendments and the enactment of the 2024 Act, incorporating those amendments, renders the appeals, whether in whole or in part, moot. They say that the statements of the Minister in the Dáil are relevant to that issue. They say that it is an issue that has been raised by the Appellants in their pleadings and submissions, and therefore the Respondents may rely upon this material to rebut their arguments. Therefore, this Court should exercise its discretion to receive the new evidence.

**18.** On the other hand, the Appellants contend that the evidence is inadmissible and therefore the Court should exercise its discretion to refuse to receive the new evidence.

**19.** If the Appellants are correct and the Court may not have regard to the debates at all, this disposes of the motion. If, on the other hand, the court may receive the evidence, then other factors, as identified by Ryan P. in *UCC v. ESB,* must be considered.

**20.** The starting point is the judgment of the Supreme Court in *Mallon v. Minister for Justice* [2024] IESC 20. Collins J., delivering the judgment of the Court, addressed an argument concerning the aim of a statutory provision establishing a mandatory retirement age of 70 for certain individuals. He noted that reference had been made in an affidavit to Ministerial statements made in the Dáil and that no issue had been raised in the High Court as to the appropriateness of relying on ministerial statements in the Dáil. He said that at the hearing of the appeal, the Supreme Court raised the question of whether it was appropriate

to have regard to these statements, having regard to decisions such as *Crilly v. T & Farrington Ltd* [2001] 3 I.R. 251, and *Controller of Patents v. Ireland* [2001] 4 I.R. 229. At para. 80, Collins J. held:

> "*In Crilly. . . this Court declined to depart from what Murray J characterised as the 'classical exclusionary rule' which excluded reliance on anything said in the Oireachtas as an aid to the interpretation of statutes. However, it appears that the scope of the rule extends beyond the interpretation of statutes. Recourse to Oireachtas debates for the purposes of establishing legislative intention or motive is generally impermissible".* [Emphasis added]

**21.** Collins J. observed that the exclusionary rule applies also where the proportionality of legislation is at issue, and at para. 81, he continued:

> *"The precise status and scope of the 'exclusionary rule' (and in particular whether it is to be seen as a rule of law or as a prudential rule founded on considerations of pragmatism and practicality) was not the subject of any significant debate in this appeal and it is not necessary to express any definitive view as to whether it operates to exclude recourse to Ministerial statements in the circumstances here, where reliance is sought to be placed on them as statements of general policy rather than as guides to the meaning or intended effect of a specific statutory provision."*

He, thus, left slightly open the question whether it might be permissible for a court to have regard to statements of general policy, notwithstanding the exclusionary rule. This observation does not assist the Respondents in this motion as they do not seek to rely on the Ministerial statements as statements of general policy.

**22.** *Mallon* reaffirmed the decision of the Supreme Court in *Crilly* which held that parties may not introduce debates from the Dáil or Seanad as aids to the construction of

legislation. It is worth noting the observations of Fennelly J. on a passage he cited from *In Re Illegal Immigrants (Trafficking)* Bill 1999 [2000] 2 I.R. 360, where, in that case, counsel sought to rely upon the speeches by members of the Oireachtas as illuminating the purpose of the provisions under discussion. Fennelly J., at p. 306 of the report, observed:

> *"This passage prompts a number of observations. Counsel's purpose in citing Oireachtas debates was apparently to cast light on the purposes of the legislation. It is not absolutely clear whether a distinction was being made between the meaning and the purpose of a statutory provision. In other words, parliamentary debates might be admissible to assist in discerning the first, but not the second. The general context of the passage suggests that the court did not make such a distinction. For my own part, I think such a distinction must be too theoretical to be a reliable guide to the circumstances in which extraneous materials will be admissible…"* [Emphasis added]

Thus, the distinction which the Respondents sought to draw in argument on this motion between relying on debates as an aid to statutory interpretation (which is prohibited) and the purpose behind the legislation (which they contend is admissible) has been rejected by Fennelly J. as being too theoretical a distinction to be applied and the latter was held by Collins J. to be "*generally impermissible*".

**23.** The matter, in my judgement, was put beyond doubt by the decision of the Supreme Court in *Heather Hill Management Company CLG v. An Bord Pleanála & Ors* [2022] IESC 43. Murray J, with whom the other members of the court agreed, addressed the limits of identifying the "*purpose"* of legislation. He held as follows:

> *"113. First, 'legislative intent' as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer into minds of parliamentarians when they enacted legislation and as the decision of this court in Crilly v. Farrington*

*[2001] 3 IR 251 emphatically declares, their subjective intent is not relevant to construction. Even if that subjective intent could be ascertained and admitted, the purpose of individual parliamentarians can never be reliably attributed to a collective assembly whose members may act with differing intentions and objects.*

*114. Second, and instead, what the court is concerned to do when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and latterly statute) has developed for that purpose (see DPP v. Flanagan [1979] IR 265, at p. 282 per Henchy J.). This is why the proper application of the rules of statutory interpretation may produce a result which, in hindsight, some parliamentarians might plausibly say they never intended to bring about.*

. . .

*115. Third, and to that end, the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about . . . Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed."* [Emphasis added].

**24.** I am thus satisfied that where a court must consider arguments regarding the aim or the purpose of legislation, it must do so by reference to the language of the statute read as a whole. It may have some limited regard to the context, but it may not have recourse to the debates in either House of the Oireachtas.

**Decision.**

**25.** Applying this principle to the motion before this Court, I am satisfied that the distinction sought to be made by counsel does not assist him in any way, even assuming he could overcome the observations of Fennelly J. that such a distinction is too theoretical to be applied by a court. Taking the Respondents' argument at its height, it only extends to the submissions of the Minister in the Dáil. The will of Parliament is expressed through the legislation passed by the two Houses of the Oireachtas. Unless and until the Bill was enacted, no such intent at all could be attributed to Parliament and the Bill would have no legal effect. As has been observed, the individual arguments of any particular parliamentarian cannot be relied upon as aiding the intention or purpose or aim of Parliament in enacting the legislation. It follows that the evidence of the Dáil Debates is not admissible for the purposes advanced by the Respondents.

**26.** It follows that it is not necessary to consider further whether the evidence sought to be adduced ought to be received by this Court for the hearing of the appeal: it would not be appropriate to receive evidence which itself is inadmissible for the purposes upon which the parties seeking to introduce it wishes to rely upon it.

**27.** For this reason, I would refuse the reliefs sought in the Notice of Motion.