Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

ASA v. Minister for Justice & Equality
On appeal from: [2021] IEHC 275
Judgment delivered on 24th November 2022 [2022] IESC 49

Headline

The Supreme Court has held that the fact that the role of an International Protection Officer ("IPO") may involve considering first instance international protection claims or, on other occasions, may involve acting as a servant of the Minister in considering leave to remain applications, does not create a conflict of roles or functions.

Composition of Court

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

Judgment

MacMenamin J., with whom O'Donnell C.J., O'Malley, Baker and Hogan JJ. agreed.

Background to the Appeal

The issue raised in this appeal was whether a conflict of roles derived from the possibility that IPOs, who administer the international protection system, might also be asked to consider leave to remain applications. The applellant, a national of Nigeria who entered Ireland in 2018, was refused international protection. He was subsequently informed that the Minister for Justice had refused him leave to remain, pursuant to s.49(4)(b) of the 2015 Act. This decision was signed by an officer described as "Case Worker, International Protection Office".

The appellant issued judicial review proceedings in the High Court. The High Court judge (Tara Burns J.) found that there exists a Permission to Remain Unit and a Case Processing Unit within the Immigration Service Division of the Department of Justice. These units are staffed by different personnel. The judge held that when an officer of the Minister makes a leave to remain decision, they are not exercising the functions of an IPO, but acting solely as an officer of the Minister, even if formally appointed as an IPO. Burns J. dismissed the proceedings. The appellant appealed to the Supreme Court.

Reasons for the Judgment

The question in this case, as identified by Mr Justice MacMenamin, was whether the provisions of the 2015 Act do, or do not, indicate a legislative intention that IPOs are legally precluded from engaging in s.49 leave to remain decision-making. He considered first the *Carltona* principle, which established the principle that officials acting on behalf of a Minister are presumed to be acting as the alter ego of that Minister, such that a decision made by that official (subject to certain conditions) *is* that of the Minister **[19].** Mr Justice MacMenamin set out the extent to which the *Carltona* principle is embedded in Irish law, citing the decisions in *W.T., Devanney* and *Tang*. The principle is capable of being negatived; the test being whether a statute "*clearly conveys that the Carltona principle is*

not to be recognised, or clearly implies such a conclusion" **[38].** The Court examined the appellant's contention that the UKSC's decision in *Adams* had distinguished the principle. That court placed emphasis on applying an "open-ended examination" and the gravity of the consequences from the exercise of the power. Mr Justice MacMenamin accepted that the decision was something of a departure, holding the decision had to be considered against its statutory and historical context **[41-46].**

The judgment outlined an application made on behalf of the appellant to broaden the scope and the appeal and the reasons for rejecting this application. It proceeded to analyse the text of the Act to determine whether there was a legislative intention for there to be a distinct separation of roles between IPOs and officials making leave to remain decisions. S. 74 on the independence of IPOs supported the respondent's case that there was never a legislative intention to create an absolute segregation of decision-makers, but that IPOs were to be entirely independent in decision-making **[48-50].** Following an analysis of other relevant sections, Mr Justice MacMenamin was satisfied that there was nothing supporting the appellant's argument that the Act intended for there to be a strict separation of roles between IPOs, and those making leave to remain decisions on behalf of the Minister. He made clear however, that there was no suggestion that an individual could perform both roles in the same case, or be engaged in both functions simultaneously **[57-67].** The judge added that, even if an open-ended *Adams* approach were applied, the outcome would be no different as there was nothing in the Act that suggested any intention that the Minister personally should make leave to remain decisions **[69].**

Mr Justice MacMenamin considered what effect, if any, EU law Directives on international protection should have on the separation of international protection and leave to remain functions. He referred to the CJEU judgment in *B and D* which made clear that leave to remain is at the discretion of the member state, while international protection is governed by EU law. This did not help the appellant's case, however, as it dealt with a different issue; the 2015 Act clearly distinguished between international protection procedures and leave to remain procedures **[72-75].**

Finally, Mr Justice MacMenamin addressed the previous statutory scheme under the Refugee Act, 1996. This provided that the Commissioner would be independent, but made no reference to the independence of the *Office* of the Refugee Applications Commissioner **[76-79].**

In conclusion, Mr Justice MacMenamin affirmed the High Court decision that there was no conflict of roles or functions as alleged, and affirmed that the *Carltona* principle remains in effect and in force as a matter of Irish law **[80-83].**

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Case history

22-23 February 2022	Oral submissions made before the Court
[2021] IESCDET 115	Supreme Court Determination granting leave
[2021] IEHC 276	Judgment of the High Court