THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 124

Record No. 2017/169

Peart J.
Irvine J.
Hogan J.

BETWEEN/

X.X.

APPLICANT/

APPELLANT

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 4th day of May 2018

1. This is an appeal brought by the applicant against the decision of the High Court delivered on the 24th June 2016 in which the applicant's claim that the Minister (or, in strictness, the Refugee Applications Commissioner) had wrongly refused to consider his application for asylum was itself refused: see *XX v. Minister for Justice* [2016] IEHC 377. There is no doubt but that this appeal presents important and difficult issues relating to the practical operation of our asylum law.

2. The applicant, Mr. X., is a Jordanian national of Palestinian extraction. He arrived in the State in 2000 in circumstances I will presently describe. He originally applied for asylum on his arrival, but he later withdrew that application on the basis that he had been granted residency by reason of the existence of an Irish born child. In more recent times Mr. X. has come to official attention by reason of his suspected involvement (which, to be fair, is denied by him) in radical Islamic organisations. Indeed, Mr. X. was deported to Jordan in 2016 on national security grounds following an unsuccessful attempt by him to challenge the validity of that deportation order in a second set of judicial review proceedings.

3. In those judicial review proceedings challenging the validity of that deportation order (2015 No. 727JR) the High Court (Humphreys J.) refused to grant the applicant leave to appeal to this Court. It is accepted that any challenge to the validity of that deportation order comes within the scope of s. 5(1) of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act") so that a certificate of leave to appeal to this Court is also required by the provisions of s. 5(6) of that Act (as amended). Humphreys J. refused to grant the applicant the necessary certificate for this purpose. It is accordingly clear that this Court lacks any jurisdiction to entertain any appeal against that particular decision of the High Court concerning the validity of that deportation order. That much is accepted by the applicant.

4. That, however, is not the issue so far as this particular appeal is concerned which is exclusively concerned with the first set of judicial review proceedings (2015, No. 647JR). Briefly put, the applicant contends that he made a valid *de novo* application for asylum to the Refugee Applications Commissioner pursuant to the provisions of s. 8 of the Refugee Act 1996 (as amended) ("the 1996 Act") on the 8th April 2015 which the Commissioner declined to accept, saying that in view of the earlier (and abandoned) asylum claim, the applicant now required the consent of the Minister for Justice to re-enter the asylum process pursuant to s. 17(7) of the 1996 Act. The applicant's solicitors then made what was described as a "without prejudice" application for permission to re-enter the asylum system to the Minister under s. 17(7), which application was refused by decision dated the 17th June 2015.

5. The applicant then commenced these separate judicial review proceedings seeking a declaration that he made a valid asylum application pursuant to s. 8 of the 1996 Act which the Commissioner was bound to consider and determine. The applicant's case in these proceedings ultimately turns on whether the Minister had previously "refused to grant a declaration" within the meaning of s. 17(7) of the 1996 Act when Mr. X's original application for asylum was withdrawn at some stage in 2000 or 2001 and whether the present proceedings amount to a collateral attack on the June 2015 s. 17(7) decision.

The applicant's withdrawal of his asylum application

6. It is next necessary to summarise some of the background facts to the present appeal. As I have already indicated, Mr. X. is a Jordanian national with a Palestinian background. He claims that he was harassed, detained and tortured by the Jordanian security forces during this period by reason of his Islamic beliefs and support for the Palestinian cause. He and his family originally arrived in Ireland in 2000 whereupon he duly applied for asylum based on these grounds.

7. Subsequent, however, to his arrival in Ireland, Mr. X.'s wife gave birth to a baby boy in July 2000, whereupon the applicant then withdrew (or, at least, sought to withdraw) his asylum application. The applicant and his family were then subsequently granted residency status in the State based on the existence of the Irish born child.

8. On the 24th June 2009, the applicant was issued with a Jordanian passport which was valid until the 23rd June 2014. In late 2010, one of the applicant's children was detained in Jordan. In or about April 2013, the applicant's older son died while fighting in Syria on behalf of what appears to have been an Islamic faction which was engaged in that conflict.

9. In August 2013, the applicant's wife returned to Jordan with two of the children, and subsequent to that date there was intermittent travel by family members back and forth between Ireland and Jordan. Critically, however, on the 23rd August 2014, the applicant's residence permission in the State, which had been renewed from time to time from 2000 onwards, expired. The applicant did not, however, take steps to seek to renew it for a number of months. Mr. X's Jordanian passport was, however, renewed on the

8th December 2014 for a further five year period.

10. On the 15th January 2015 Mr. X. went to the Garda National Immigration Bureau (G.N.I.B.) to apply for a renewal of his residence permission. His Irish born child had been in Jordan for a period (where the applicant's wife and children and other children also were at this time). Given the uncertainties associated with the whereabouts of the Irish citizen child and the other family members, Mr. X. was requested to clarify details regarding his family's situation.

11. In February 2015, the applicant returned to the G.N.I.B. to renew his permission with his Irish-born child, but it was not, however, renewed at that point. On the 18th February 2015, Mr. X.' solicitors wrote to the Minister applying for the renewal of the residence permission. On the 13th March 2015, Mr. X. received a proposal from the Minister to deport him. The reasons underlying the proposal stated that he was believed to be an organiser for the organisation known as the Islamic State of Iraq and the Levant which is more popularly known as by its acronym ISIS. Mr. X. maintained that this was the first notice he had that he was considered to be an Islamist suspect.

12. On the 8th April 2015, the applicant's solicitors wrote to the Refugee Applications Commissioner making a *de novo* application for refugee status, stating that there should be no need to apply for consent under s. 17(7) of the 1996 Act (an application for the Minister's consent to re-enter the asylum process). The Refugee Applications Commissioner responded to this application on the 9th April 2015, stating that the applicant had withdrawn his asylum claim in 2000. As Humphreys J. observed in his judgment, "the clear implication of this letter was that the consent of the Minister under s. 17(7) was indeed required."

13. On the 15th April 2015, following receipt of this letter, Mr. X. then made an application under s. 17(7) of the 1996 Act, which application was stated to be without prejudice to his view that the consent of the Minister was not required. That application for a s. 17(7) consent to re-enter the asylum process was refused by the Minister on the 17th June 2015.

14. On 14th July 2015, Mr. X.'s solicitors wrote to the Minister and the Refugee Applications Commissioner formally enclosing an application form under s. 8 of the 1996 Act for a de novo refugee application and asserting again that s. 17(7) consent was not required. The Commissioner replied on the 30th September 2015 refusing to accept the s. 8 application and stating that this was a matter for the Minister:

> "It is considered that ORAC requires the consent of the Minister under s. 17(7) of the Refugee Act 1996 before accepting your client's asylum application. Therefore, any queries regarding the matter should be addressed to the Minister."

15. The present judicial review proceedings (i.e., the proceedings concerning whether he had made a valid asylum claim) then ensued.

What happened in relation to the original application for asylum in 2000?

16. Since the contention that the applicant's claim for asylum in 2000 was withdrawn (and not "refused") is central to his case, it is essential to scrutinise the correspondence from that period. Before looking at that correspondence in relation to this issue, however, a word of explanation regarding the then contemporary immigration law and practice may be in order. First, the asylum process was not then governed by any statutory process, but such applications were rather determined by reason to what was then known as the Hope Hanlon procedure, i.e., a reference to a non-statutory arrangement for asylum applications which had been agreed by the Government with the UN High Commissioner for Refugees. The 1996 Act had, of course, already been enacted by the Oireachtas but it had yet to be commenced. (This would only occur in November 2000).

17. Second, following the conclusion of the Belfast Agreement in 1998, Article 2 of the Constitution provided that all persons born on the island of Ireland were also entitled as of right to Irish citizenship. (This would later by changed by the 24th Amendment of the Constitution Act 2004). The practice, moreover, was to provide the parents of Irish citizen children with a right of residency in the State as this was understood at the time to be required by the provisions of Article 41 of the Constitution: again, this was before the Supreme Court decision in *L. & O. v. Minister for Justice* [2003] 1 I.R. 1.

18. The first letter in this sequence was dated the 14th August 2000. In that letter the applicant stated:

> "Having already applied to Immigration in Stephens Green for residency on the basis of my Irish Born Child, I now wish to withdraw my asylum application."

19. The copy of the letter was stamped as received by the Asylum Division of the Minister's Department on the 14th August 2000. At that stage, of course, the 1996 Act was not in force and there was not, in any event, any formal procedure governing the withdrawal of an asylum application. (The 1996 Act was subsequently amended so that s. 11(9) of the 1996 Act would state that "[a]n applicant may withdraw his or her application for a declaration by sending notice of withdrawal to the Commissioner", but that procedural requirement was not present in the Act until it was inserted by the Immigration Act 2003.)

20. As it happens, the Minister acknowledged the withdrawal and raised no issue about its effectiveness. A clerical officer in the Asylum Division wrote to the applicant by letter of the 15th August 2000. This letter stated:

> "I am directed by the Minister for Justice, Equality and Law Reform to refer to your recent letter regarding your wish to withdraw your case for asylum which has been noted on our files. I note also that you wish to apply for residency in the State on the basis of your Irish Born Child.
>
> Your application for residency will be forwarded to the Immigration Division of this Department for further consideration. All future enquiries should be made in writing to Ms. Mary Sayers, Immigration Division, Department of Justice, Equality and Law Reform, 72-76 St. Stephen's Green, Dublin 2."

21. It is hard to disagree with the applicant's submission that the letter of the 14th August 2000 conveyed the Minister's view to the effect that the asylum application had been withdrawn. If the Minister had not been not satisfied that the letter received on the 14th August 2000 had validly withdrawn the asylum application, it is inconceivable that he would not have alerted Mr. X. to this fact in the letter of the 15th August 2000. That letter noted the wish to withdraw without adverse comment and no suggestion was made that some further formality or consent was required.

22. Rather confusingly, however, the applicant wrote another undated note addressed to Ms. Sayers in the Minister's Department and which was stamped as received by the Refugee Application Commissioner on the 19th January 2001. It stated (in rather poor English):

> "**Object**: Requirement to cancel my asylum seeker

> Dear sir,
>
> As regards the God grant us a new Irish born child in your country in: 4/7/2000 (The birth certificate joins).
>
> As regards of your country law which bestow upon to give a residence
>
> To the family concerned.
>
> As you know and aware, please we hope for to cancel our requirement
>
> As asylum seeker and to firm and apply for the residence only.
>
> Note: I apologize for the delay and incompetence to give the letter by Hand to your office because I have a Cardial chirurgical operation in St James Hospital this week."

23. The Commissioner wrote a letter to Mr. X. in response dated the 25th January 2001 which stated:

> "I am directed by the Refugee Applications Commissioner to refer to your recent letter regarding your wish to withdraw your application for asylum, and to apply for residency in the State on the basis of your Irish Born Child.
>
> Your file, along with your original residency application, has already been forwarded to the Immigration Division of the Department of Justice, Equality and Law Reform, who are dealing with your residency application. You should hear from them in due course.
>
> All future enquiries should be made in writing to the Immigration Division, Department of Justice, Equality and Law Reform, 72-76 St. Stephen's Green, Dublin 2. Please quote your 69/ reference number on all correspondence with the Immigration Division."

24. This later exchange of correspondence is perhaps surprising, but it does not alter my conclusion that the operative date for the withdrawal of the application was the 14th August 2000. That, in any event, was the view of the Minister because when the applicant subsequently sought to make the "without prejudice" s. 17(7) application in 2015, that decision referred to the withdrawal of the initial application in the following terms:

> "Before the applicant was invited to attend for interview with the Office of the Refugee Applications Commissioner (ORAC) to examine his application, the applicant submitted a signed letter on 14 August 2000 stating that he wished to withdraw his asylum application, having already applied for residency on the basis of his Irish Born Child. An earlier similar but unsigned letter dated 5 July 2000 gives his name as [name supplied]."

25. In the High Court Humphreys J. considered that it was of some importance that, "while the applicant initially wrote of his 'wish' to withdraw the asylum claim prior to the commencement of the 1996 Act, he wrote again referring to the fact that 'we hope for to cancel our requirement as asylum seeker' (sic)." The judge inferred from this that the withdrawal had not been finalised prior to the commencement of the 1996 Act.

26. For my part, I think that this represents an over-interpretation of language written not only by a non-lawyer, but also by one whose command of English was very far from fluent. The plain fact of the matter was that in mid-August 2000 the applicant withdrew the asylum application and it was treated as such by the Minister at the time. This was also confirmed by the subsequent correspondence by the Minister - not once, but twice - in 2015. While I agree that on one interpretation the subsequent letter from Mr. X. might suggest otherwise - *i.e.*, that the application for asylum was still in some sense pending in January 2001 - this cannot take from the fact that the asylum application had in fact been treated as having been withdrawn in August 2000, a fact inferentially confirmed by the terms of the Commissioner's letter which refers to the fact that the file had been already been sent to the Immigration Division.

27. Humphreys J. then further stated (at para. 59):

> "In any event, I consider that the withdrawal of an application is not automatically a unilateral act, and in this context, the withdrawal required an acceptance by the Minister of the withdrawal. By way of analogy, a party having made an application to the court cannot simply withdraw unilaterally, and in certain circumstances the court might refuse liberty to withdraw. Another analogy might be parliamentary procedure, where under the standing orders of each House of the Oireachtas, leave of the house is required for a member to withdraw an amendment, once it has been moved. In all of these contexts, and in the context of the 1996 Act, a "wish to withdraw" is not an actual withdrawal."

28. For my part, I would think that an applicant applying under either a non-statutory or a statutory scheme for a benefit personal to him (in this instance, an asylum application) is perfectly free to withdraw that application at any time without the necessity for leave, unless the requirement in respect of leave was stipulated by either the express terms of the administrative scheme or (as the case may be) the relevant statute. Nor do I find either references to court or parliamentary procedures particularly helpful, because in those instances the necessity for leave is specifically provided for (see, *e.g.*, Ord. 26, r.1). In any event, in the case of court proceedings, the necessity in some instances for leave of Court is quite obviously designed to safeguard the interests (particularly the costs interests) of the other parties to the litigation, as the terms of Ord. 26, r.1 itself makes clear.

29. It is not, in any event, necessary to express any further view on this topic because it is plain that the Minister did, in fact, accept the withdrawal of the application by acting upon it, as the letter of the 15th August 2000 itself makes clear. It follows, therefore, that contrary to the inferences drawn from the correspondence by the trial judge, I find myself obliged to conclude that Mr. X. withdrew this application on the 14th August 2000 and, insofar as any acceptance of this application was required by the Minister, it was in fact simultaneously accepted by the letter of the 15th August 2000.

30. It follows in turn that Mr. X. withdrew his previous asylum application prior to the commencement of the relevant provisions of the 1996 Act on the 20th November 2000 (by virtue of the Refugee Act 1996 (Commencement) Order 2000 (S.I. No. 365 of 2000)). His application was therefore one under the non-statutory Hope Hanlon scheme in place prior to the commencement of the 1996 Act and it was not an application for a declaration of asylum status under s. 8 of the 1996 Act.

The High Court judgment on the jurisdictional issue

31. In his judgment Humphreys J. held that the decision at issue in the first set of proceedings – *i.e,* the refusal on the part of the Commissioner to accept the asylum application on the basis that an earlier application had been "refused" by the Minister, so that her consent to a fresh application was now required by s. 17(7) - was captured by the provisions of s. 5 of the 2000 Act. It followed, therefore, on this view, that the applicant was required to obtain the appropriate certificate of leave to appeal to this Court under s. 5 which the High Court refused to grant. The very first jurisdictional question, therefore, which this Court is required to consider is whether an appeal lies at all, because a central feature of the State's argument is that this appeal should be dismissed for want of jurisdiction. For this purpose it is accordingly necessary to consider the provisions of Article 34.4.1 of the Constitution and the relevant case-law.

This Court's jurisdiction under Article 34.4.1 of the Constitution

32. Article 34.4.1 of the Constitution was inserted by the provisions of the 33rd Amendment of the Constitution Act 2013 and came into effect on the 28th October 2014 following the establishment of this Court. It provides:

> "The Court of Appeal shall:
>
> (i) save as otherwise provided by this Article, and
>
> (ii) with such exceptions and subject to such regulations as may be prescribed by law,
>
> have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law."

33. Article 34.4.1 may be regarded to all intents and purposes as the successor to the (old) Article 34.4.3 which had previously regulated the right of appeal from the High Court directly to the Supreme Court, so that the pre-2014 case-law dealing with this latter provision is applicable, *mutatis mutandis*, to this new provision as well. It is clear from the large corpus of case-law dealing with these provisions that while the Oireachtas is, in principle, free to regulate and even except that appellate jurisdiction, the general principle nonetheless is that any law excepting or regulating this appellate jurisdiction must be clear and unambiguous. As Walsh J. stated in *The People v Conmey* [1975] I.R. 341, 360:

> "any statutory provision which had as its object the excepting of some decisions of the High Court from the appellate jurisdiction of this [ie the Supreme] Court, or any particular provision seeking to confine the scope of such appeals within particular limits, would of necessity have to be clear and unambiguous. The appellate jurisdiction of this Court from decisions of the High Court flows directly from the Constitution and any diminution of the jurisdiction would be a matter of such great importance that it would have to be shown to fall clearly within the provisions of the Constitution and within the limitations imposed by the Constitution upon any such legislative action."

34. In *Minister for Justice v. Connolly* [2014] IESC 34 Hardiman J. quoted this passage of Walsh J. with approval, stating that any party who sought to rely on a statutory provision excluding the appellate jurisdiction "would face the obstacle" of satisfying the test contained in the second sentence of this passage from *Conmey*.

35. More recently in *Stokes v. Christian Brothers High School, Clonmel* [2015] IESC 13, [2015] 2 I.R. 590, 633 Clarke J. said that:

> "in the light of the constitutional status of the right of appeal, this Court has consistently expressed the view that the wording of any statute which is said to restrict that constitutional right of appeal must be very clear."

36. It cannot be surprising therefore to learn that both this Court and the Supreme Court have been reluctant to exclude an appeal of this kind absent clear statutory words. Any number of examples could be given to illustrate this basic point of constitutional law, but three must suffice for present purposes. The first example concerns s. 12 of the Solicitors (Amendment) Act 1960 (as inserted by s. 39 of the Solicitors (Amendment) Act 1994) which provides for a right of appeal from the High Court "within a period of 21 days from the date of the order." In *Law Society v. Tobin* [2016] IECA 26 the defendant had failed to appeal within the statutory period, but this Court did not accept the argument that this meant that no appeal lay. Finlay Geoghegan J. rejected the submission that the Oireachtas in expressly providing for a right of appeal within 21 days must "by implication have intended to exclude any appeal outside that time", as in her view the need for clear and unambiguous words "to limit or exclude [the right of appeal] required a different conclusion."

37. The second and third examples are even more directly on point since both concern the exclusions effected by the 2000 Act which are at issue in this very appeal, namely, *AB v Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 296 and *A. v. Minister for Justice and Equality* [2013] IESC 18. The decision in *AB* concerned the issue of whether the right of appeal against the High Court's refusal to extend time to apply for judicial review in an asylum case was *impliedly* barred by the structure and the general policy considerations of s. 5 of the 2000 Act, even though it was accepted that there was nothing in terms contained in that section which excluded such an appeal in express terms.

38. The Supreme Court nonetheless concluded that an appeal lay. Thus, Keane C.J. observed ([2002] 1 I.R. 296, 309) that, given the ambiguity of the legislation, 'it follows inevitably that the provisions in question cannot be regarded as having clearly and unambiguously excluded the constitutional right of appeal to this Court' and Fennelly J. observed ([2002] 1 I.R. 296, 325) that this right of appeal "should not be lightly encroached upon or invaded by ambiguous language." As Geoghegan J. said ([2002] 1 I.R. 296, 319):

> "In either event the issues involved on the application for an extension of time may be substantially different from those involved in the application for leave. Under the express terms of the Act the restrictions on the right of appeal to the Supreme Court apply to the application for leave or the application for judicial review and as a matter of ordinary grammar and syntax, I find it difficult to see how it could be argued that there is an ouster of the right of appeal from a refusal to extend time. If the Oireachtas had intended that, it should have said so. Until the extension is granted there is no application for leave in existence. But even if as a matter of grammar and syntax, such an argument could be made, there is certainly not a clear and unambiguous ouster of the right of appeal which is required under the constitutional jurisprudence …"

39. In *A.* the applicant sought to challenge the validity of a decision of the Refugee Application Commissioner that she was not entitled to asylum status. The Minister brought a motion seeking to have the proceedings struck out as doomed to fail and the High Court acceded to that request. The applicant sought to appeal that decision, but the Minister argued that no such appeal lay in the absence of the appropriate certificate as required by s. 5 of the 2000 Act.

40. The Supreme Court rejected that argument, with Denham C.J. saying that the motion to strike out did not come within the enumerated categories of excluded appeals otherwise requiring a certificate contained in s 5 of the 2000 Act. She applied the principles in *AB*, holding that there is not a "clear and unambiguous ouster of the right of appeal, such clear language being necessary under the constitutional jurisprudence."

41. In the light of this jurisprudence - and, frankly, an abundance of other case-law all consistently to the same effect - there is simply no basis at all for the fundamental argument advanced by the counsel for the Minister to the effect that this Court could not go behind the conclusion of Humphreys J. that s. 5 of the 2000 Act applied to the decision in question and that, absent the grant of a certificate, this Court lacked jurisdiction to entertain the appeal. If that were so, it would mean that the High Court could by a ruling which was erroneous in law as to the scope of s. 5 of the 2000 Act effectively deny an appellant an otherwise perfectly valid constitutional right of appeal granted to him by Article 34.4.1 of the Constitution and which had never been validly excluded by a law duly enacted by the Oireachtas. Any such conclusion would mean in turn that the courts simply would have failed in their constitutional obligation to uphold the Constitution and to ensure, in the words of Walsh J. in *Conmey*, that the diminution of the appellate jurisdiction of this Court – itself a matter of great constitutional importance – was lawfully achieved. That argument, accordingly, cannot be accepted.

42. This conclusion is, in any event, clear from the provisions of s. 5(6)(a) of the 2000 Act (as inserted by s. 34 of the Employment Permits Act 2014) which provides:

> "The determination of the High Court of an application for leave to apply for judicial review *to which this section applies*, or of an application for such judicial review, shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court." (emphasis supplied)

43. It follows, therefore, that for the exclusion of the High Court determination from the appellate jurisdiction of the High Court to take effect, the determination must be one "to which this section applies." At the risk of stating the obvious, the fact that the High Court ruled that the determination in question was one to which the section applied could not in any sense preclude this Court from deciding whether this preliminary jurisdictional question had been answered correctly by the High Court. Naturally, in the event that this Court were to determine that the High Court was correct regarding the application of s. 5 to the present case, then, in the absence of a certificate, no appeal would lie. Conversely, were this Court to hold that the High Court's determination on the application of s. 5 to the case at hand was wrong in law, then, as the Supreme Court's decision in AB itself illustrates, an appeal would lie, the absence of a certificate notwithstanding.

44. The real question, therefore, is whether the determination of the High Court is one to which the provisions of s. 5(1) of the 2000 Act apply, so that the certificate requirements of that section also apply. It is to a consideration of this issue to which we must now turn.

Whether the provisions of s. 5 of the 2000 Act apply to the Commissioner's decision to refuse to accept Mr. S.'s application for asylum in 2015

45. Section 5(1) of the 2000 Act (as inserted by s. 34 of the Employment Permits Act 2014) provides that:

> "A person shall not challenge the validity of…..
>
> (i) a refusal under section 17 (as amended by Regulation 34 of the European Union (Subsidiary Protection) Regulations 2013 (S.I. No. 426 of 2013)) of the Refugee Act 1996…..
>
> otherwise than by way of a judicial review proceedings brought under Ord. 84 of the Rules of the Superior Courts…. ."

46. It follows, therefore, that a refusal by the Minister to grant a declaration of refugee status under s. 17 of the 1996 Act is caught by s. 5 of the 2000 Act. The determination of the High Court as to the validity of that refusal is itself final and no appeal will lie to this Court unless the appropriate certificate has been granted by the High Court; see s. 5(6)(a) of the 2000 Act.

47. But is this really what happened here? To my mind, however, the Minister never previously refused to grant Mr. X. a declaration of an entitlement to asylum under s. 17 of the 1996 Act, since what had in fact happened was that the first application had been withdrawn in 2000 and the applicant had instead pursued his entitlement to residency based on the existence of an Irish citizen child. It is true that s. 17(1A) of the 1996 Act (as inserted by s. 7(j) of the Immigration Act 2003) now provides that where an asylum application is withdrawn, "the Minister shall refuse to give the applicant a declaration." This provision was, however, only commenced on the 15th September 2003 (see Article 2 of the Immigration Act 2003 (Section 7)(Commencement) Order 2003 (S.I. No. 415 of 2003)) and, accordingly, does not apply to withdrawals of asylum applications made before that date unless the transitional provisions of s. 28 and s. 28A of the 1996 Act also apply.

Whether the transitional provisions of s. 28 of the 1996 Act apply?

48. Section 28 of the 1996 Act (as amended) provides:

> "Where *before the commencement of this section* a person had made an application to the Minister for asylum but a decision in relation thereto had not been made by the Minister, the application shall be deemed to be an application under s. 8 and shall be dealt with accordingly; any step taken by the Minister before such commencement in relation to the application (being a step required to be taken under this Act in relation to an application under this Act) shall be deemed to have been taken under this Act." (emphasis added)

49. Section 28A(1)(b) provides that:

> "Where an application has been made under s. 8 before the commencement of s. 7 of the Immigration Act 2003:-
>
> (b) ….then, upon such commencement, this Act, as amended by the said section 7, shall apply to the application."

50. Accordingly, if the transitional provisions in s. 28 of the 1996 Act apply, the application is deemed to have been made under s. 8 of the 1996 Act. Section 28A then provides in turn that any such s. 8 application is effectively deemed to have been made after the commencement of s. 7 of the Immigration Act 2003. The net effect of this series of interlocking and deeming provisions is that a pre-November 2000 asylum application is deemed to have been "refused" by the Minister so that the consent provisions of s. 17(7) of the

1996 Act come into play.

51. The words which I have just italicised when reproducing the text of s. 28 were inserted by s. 11(1)(r) of the Immigration Act 1999. Section 28 was commenced with effect from the 20th November 2000: see Article 2 of the Refugee Act 1996 (Commencement) Order 2000 (S.I. No. 365 of 2000). The applicant certainly made an application for asylum prior to the commencement of s. 28, but the Minister did in fact make a decision prior to November 2000 in relation thereto by treating the application as having been withdrawn. The net effect of this is that there was by the 20th November 2000 no longer any live asylum application in being which could then be deemed to be carried over for s. 8 purposes once the 1996 Act entered into force.

52. For these reasons, therefore, I consider that the transitional provisions of s. 28 (and, by extension, s. 28A) do not apply to the present case and this has the consequential effect that the withdrawal of the application in August 2000 is not deemed to have been a refusal of asylum status for the purposes of s. 17(7) of the 1996 Act.

Whether s. 5 of the Interpretation Act 2005 could properly be invoked with reference to the construction of s. 17(7) of the 1996 Act

53. In his judgment (at para. 84) Humphreys J. also indicated that he would invoke the provisions of s. 5 of the Interpretation Act 2005 ("the 2005 Act") in order to construe s. 17(7) of the 1996 Act. The judge thus said he could invoke s. 5 of the 2005 Act to construe s. 17(7) of the 1996 Act "as referable to a person to whom the Minister "advised 'failed or' refused to give a declaration, failure in that sense being referable to a withdrawal of an application not giving rise to a formal refusal, and a 'declaration' being referable to a declaration as a refugee whether statutory or pre-statutory." Humphreys J. stated that his reason for invoking s. 5 of the 2005 Act was because he considered that a literal interpretation "does not give effective and clear statutory intention."

54. I cannot help thinking that this is not an appropriate use of the s. 5 power in these circumstances. Section 5(1) of the 2005 Act can certainly be used to depart from the literal words of the Act where, for example, this produces an obvious absurdity or inconsistency with another provision of the same legislation. A very recent example of this is provided by this Court's own decision in *IF v. Mental Health Tribunal* [2018] IECA 101 where the literal construction of one section of the Mental Health Act 2001 meant that another section of the same Act was rendered effectively meaningless.

55. I do not think, however, that the present case comes within this rubric of absurdity or failing obviously to have effect to the true meaning of the Oireachtas. As counsel for the appellant, Mr. Lynn S.C, pointed out, when the Oireachtas set about amending the 1996 Act in 2003 when enacting the Immigration Act 2003, it had the opportunity to do, by way of legislation, what the High Court did by way of interpretation and yet it chose not to do so. As we have seen, the 1996 Act was expressly amended by the 2003 Act so that, from then on, the (amended) s. 17(1A) of the 1996 Act provided that any applicant who withdrew an asylum application would be made the subject of a refusal decision. The Oireachtas was, of course, doubtless aware that over the years prior to 2003 applications had been withdrawn without being refused. The Oireachtas could have chosen to provide by way of legislation that every application made under the 1996 Act which had been withdrawn prior to 2003 was now to be deemed as having been refused by the Minister, but yet it did not in fact do so.

56. To my mind, therefore, this is rather a case to which the comments of Denham J. in *Board of Management of St. Malóga's School v. Minister for Education* [2010] IESC 57, [2011] 1 I.R. 362, 372 directly apply:

> "As the words of s.29 [of the Education Act 1998] are clear, with a plain meaning, they should be so construed. The literal meaning is clear, unambiguous and not absurd. There is no necessity, indeed it would be wrong, to use other canons of construction to interpret sections of a statute which are clear. The Oireachtas has legislated in a clear fashion and that is the statutory law."

57. One might equally say that s. 17(7) of the 1996 Act is perfectly clear. The section applies only where the Minister has "refused" a prior application for asylum. That definition has been extended by the 2003 Act and the transitional provisions of s. 28 and s. 28A of the 1996 Act apply to certain defined categories of cases where an applicant withdrew an application prior to September 2003. I have concluded that, as a matter of statutory construction, these provisions did not apply to the withdrawal of the asylum application by the applicant in August 2000 and in these circumstances it is the Court's duty to apply the law as so found. In these circumstances there is no basis for employing s. 5 of the 2005 Act to arrive at any opposite conclusion.

Whether the applicant failed to name the correct respondent, and if so, whether for that reason, it would not be appropriate to grant the relief sought?

58. The only party named as a respondent to the proceedings is the Minister for Justice, yet the essence of the complaint is that the Refugee Applications Commissioner failed to accept what the applicant maintained was a valid asylum application under s. 8 of the 1996 Act. In these circumstances I agree with Humphreys J. that the Commissioner should have been made a party to the present proceedings. As the judge stated (at para. 77 of his judgment):

> "The first judicial review proceeds upon the incorrect basis that the Minister is a sufficient party to a challenge to a failure to process an asylum application. However the processing of such a claim - its investigation and consideration - is carried out by the Commissioner and not the Minister. The Commissioner is independent in the exercise of his functions (s. 6(2)) and all applications for a declaration are referred by the Minister to him. Section 8(1)(c) of the Act provides that a person in the State seeking the status of a refugee "may apply to the Minister for a declaration". But the applicant is reading s. 8(1)(c) of the Act in isolation from s. 8(4). The latter provision states that the application "shall be addressed to the Commissioner." Reading the two provisions together it is clear that an asylum claim is nominally made to the Minister but in fact must be addressed to the Commissioner, who in substance processes it on her behalf. The applicant has failed to make the Commissioner a party to the proceedings as would be required if his complaint is of a failure to process an asylum claim. It is therefore not appropriate to grant the applicant the relief sought, the applicant having failed to name the correct respondents. It is not appropriate to grant an order of mandamus (or other relief to the same effect) compelling the processing of an application by an officeholder who has allegedly failed to process the application but who has not been named as a party."

59. There is much in this passage with which one may agree. Specifically, it would be inappropriate to grant the relief of mandamus against an office holder when that personage was not a party to the proceedings. This, however, does not necessarily mean that the proceedings should not succeed by reason of this omission.

60. While the Commissioner is, of course, independent in the exercise of his functions, this does not, for example, mean that the Commissioner would have been separately represented even if he had been joined. The invariable practice is that one legal team represents all State bodies, including the Minister, the Commissioner and International Protection Appeal Tribunal. It is perhaps also

significant that the Minister in his statement of opposition did not plead that the applicant had wrongly failed to name the Commissioner as a respondent. Had such an objection been taken, then the High Court would doubtless have permitted the applicant to have his statement of grounds amended in order to join the Commissioner. Here it might also be convenient to observe that Ord. 15, r. 13 provides that "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

61. I also agree that the trial judge was in error in his approach to the determination of the issues raised by the statement of grounds and by the statement of opposition in this judicial review application. He was not entitled to consider and determine matters which went beyond the issues raised by the statement of opposition: see *Balchand v. Minister for Justice* [2016] IECA 383, [2016] 2 I.R. 749, 762, *per* Finlay Geoghegan J. While, as I have indicated, I would not have been prepared to grant any coercive relief such as mandamus against the Commissioner given that he is not a party to the proceedings, I do not otherwise think that the omission to join the Commissioner in the proceedings should be regarded as material.

The High Court's reliance on the Procedures Directive(s)

62. Humphreys J. also relied (at para. 82) on the provisions of the 2005 Procedures Directives in support of his conclusion that s. 17(7) of the 1996 Act should be read purposively so as to apply to previous withdrawn applications made under the earlier non-statutory Hope Hanlon scheme. :

> "Section 17(7) implements Article 32 of the asylum procedures directive (2005/85/EC) which allows for subsequent applications on the basis of "new elements". Article 40 of the recast asylum procedures directive (2013/32/EU) (not applicable to Ireland) is even more explicit on the need for new elements to be identified before substantive examination … Article 32(1) refers only to "a person who has applied for asylum in a member state" and does not distinguish between statutory and pre-statutory applicants, or applicants under EU law or pre-directives."

63. Humphreys J. went on to state (at para. 88):

> "Even if a purposive interpretation was not mandated by s. 5 of the [Interpretation Act 2005], the fact that the provisions of s. 17 on re-application for asylum give effect to EU law in the form of Article 32 of the 2005 Procedures Directive is an independent reason to adopt a purposive approach, as mandated in the EU law context."

64. One can, I think, leave to one side the provisions of the recast Asylum Procedures Directive (2012/32/EU) since it does not apply to Ireland. It could not, therefore, be relied for any purpose in interpreting the relevant provisions of s. 17(7). So far as the original 2005 Directive is concerned, it is sufficient to observe first that Article 44 of that Directive provides that:

> "Member States shall apply the laws, regulations and administrative provisions set out in Article 43 to applications for asylum lodged after 1 December 2007 and to procedures for the withdrawal of refugee status started after 1 December 2007."

65. Article 2 defines the term 'applicant for asylum' as meaning "a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken." The term "final decision" is in turn defined as meaning:

> "…..a decision on whether the third country national or stateless person be granted refugee status by virtue of Directive 2004/83/EC and which is no longer subject to a remedy within the framework of Chapter V of this Directive irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome, subject to Annex III to this Directive."

66. It is clear that Mr. X. does not come within the scope of this definition because no final decision was ever taken in his case pursuant to the provisions of the Qualification Directive (Directive 2004/83/EC). He, accordingly, was not an applicant for asylum within the meaning of Article 2 of the 2005 Directive, so that Article 44 of that Directive had no application to his case.

Whether the proceedings amount to an impermissible collateral attack on the Minister's section 17(7) decision

67. A central feature of the judgment of Humphreys J. is that the present proceedings constituted an impermissible collateral challenge to the Minister's refusal of the s. 17(7) application which Mr. X.'s solicitors had made in 2015 and which had also been expressed to be without prejudice. In that regard, Humphreys J. relied, *inter alia*, on the Supreme Court's decision in *Nawaz v. Minister for Justice* [2012] IESC 58, [2013] 1 I.R. 142.

68. In *Nawaz* the applicant, who was facing deportation proceedings, had commenced a separate plenary action in which he challenged the constitutionality of s. 3 of the Immigration Act 1999, the very section providing for the power to make a deportation order in the first place. The essence of the applicant's case in those plenary proceedings was that the s. 3 power lacked the appropriate safeguards.

69. Clarke J. stressed that the question was whether the proceedings amounted in substance to a challenge to the validity of administrative decisions which s. 5(1) of the 2000 Act had ordained could only be challenged by way of judicial review. He held, however, that the plenary proceedings amounted to such a collateral attack on the deportation proceedings, stating ([2013] 1 I.R. 142, 160-161):

> "The only purpose of Mr. Nawaz questioning the constitutionality of s. 3 of the Act of 1999 is so that any measures which might be adopted under that section will be regarded as invalid. If Mr. Nawaz were not exposed to the risk of orders being made under s. 3 then he would, of course, have no *locus standi* to challenge the constitutionality of the section in the first place. It is only because he is exposed to such orders (dependent on the Minister's decision on humanitarian leave) that he could have *locus standi*. However, that very fact seems to me to place Mr. Nawaz in a category where it can be said that the only purpose of his constitutional challenge is to render any such measures as might be adopted by the Minister invalid. It is a pre-emptive strike designed to prevent the Minister from making a deportation order at the same time as communicating a decision to decline humanitarian leave (assuming that such be the Minister's decision). It seems to me that such a pre-emptive strike is clearly one designed to question the validity of any order which might be made."

70. As we have already seen, challenges to the validity of the Minister's decision to refuse to permit an applicant to re-enter the asylum process can only be challenged by way of judicial review: see s. 5(1)(i) of the 2000 Act. It seems to me, however, that, applying the Nawaz test, the principal relief sought in the present proceedings – namely, a declaration that the applicant had filed a

valid first instance application for asylum in 2015 – does in substance amount to a collateral challenge to the validity of the Minister's s. 17(7) decision to refuse to grant the applicant permission to re-enter the asylum process.

71. I take this view because if the applicant is correct, then the Minister had no power to adjudicate on the s. 17(7) application because by definition that power only arises if the applicant has already made a prior application for asylum which has been "refused" in the broader sense by which term has been defined. It is in that sense that the applicant would in substance be challenging the validity of the s. 17(7) decision otherwise than by way of an application for judicial review. I appreciate that the applicant only made this application in 2015 on a strictly without prejudice basis, but this nonetheless cannot take from this conclusion.

72. In arriving at this conclusion I have not overlooked one of the applicant's fundamental submissions to the effect that the 2015 decision was and is a nullity. But even if it is, it must nonetheless be pointed out that, as O'Donnell J. said in *Cullen v. Wicklow County Manager* [2010] IESC 49, [2011] 1 I.R. 157, 161:

> "The difficulty is that invalidity is a relative and not an absolute concept, and is furthermore dependant upon court determination - something which is by definition not available to a County Manager when he or she receives a s.4 motion. As Lord Radcliffe perceptively observed, in *Smith v East Elloe Rural District Council* [1956] A.C. 736 at 769 an act "bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders". Similarly Craig, *Administrative Law* (1993) page 390 observes, "It is difficult to see how, if there was no challenge … it would be possible to say that the decision was *ultra vires* at all". The position has now been reached where it may be said that an invalid act is an act which a Court will declare to be invalid. As Professor Wade observed "… the truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances" and, it might be added, at the right time."

73. A further difficulty is that in the strict, abstract theory of administrative law every administrative decision which is tainted by jurisdictional error and is found to be *ultra vires* is also a nullity. Perhaps Lord Reid was wrong to say in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147, 170 that there are no degrees of nullity and it may be that there are indeed categories of administrative decisions which are so flawed that invalidity may be assumed without the necessity of a court order recording that this is so.

74. But even if all of this is assumed in Mr. X.'s favour, the fact remains that the legislative policy as embodied in s. 5 of the 2000 Act is that in this particular statutory context at least any challenge to the validity of this administrative decision must be brought by way of judicial review proceedings even if it could also be properly regarded as a nullity.

75. It is for this reason that I find myself obliged to uphold the decision of Humphreys J. on this single, narrow ground, namely, that the present proceedings amount to a collateral attack on an administrative decision which could only have challenged by way of judicial review proceedings brought under s. 5 of the 2000 Act. It is for this reason that Mr. X. cannot be heard to claim that he had made a valid asylum claim under s. 8 of the 1996 Act in the absence of a direct challenge brought by way of judicial review in the manner specified by s. 5 of the 2000 Act to the validity of the June 2015 decision refusing him re-entry into the asylum system.

Conclusions

76. In summary, therefore, I am of the view that:

77. First, the present proceedings do not come within the scope of s. 5 of the 2000 Act and, accordingly, an appeal will lie to this Court even in the absence of a certificate. I reach that conclusion because I am of the view that Mr. X.'s original application was not "refused" by the Minister, but was rather withdrawn in August 2000. The transitional provisions of s. 28 and s. 28A of the 1996 Act do not alter this conclusion.

78. Second, had the applicant not also made the admittedly without prejudice s. 17(7) application in 2015, I would have held that his 2015 asylum application was a valid one which the Commissioner was obliged to hear and determine.

79. Third, I fear, however, that I cannot ignore the fact that Mr. X. did make a s. 17(7) application in 2015 and that this was refused by the Minister, even if this application was quite understandably made on a without prejudice basis. It is perfectly clear that the validity of such a decision can be challenged only by way of judicial review proceedings: see s. 5(1)(i) of the 2000 Act.

80. Fourth, in the light of the reasoning of the Supreme Court in *Nawaz* the present proceedings amount to a collateral attack on an administrative decision which could only have challenged by way of judicial review proceedings brought under s. 5 of the 2000 Act. It is for this reason that Mr. X. cannot be heard to claim that he had made a valid asylum claim under s. 8 of the 1996 Act in the absence of a direct challenge brought by way of judicial review in the manner specified by s. 5 of the 2000 Act to the validity of the June 2015 decision refusing him re-entry into the asylum system pursuant to s. 17(7) of the 1996 Act.

81. I would accordingly dismiss the appeal and affirm the decision of the High Court, albeit for somewhat narrower reasons than those contained in the judgment of Humphreys J.