THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 188JR]

BETWEEN

THOMAS BEBENEK

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

AND

IRELAND AND THE ATTORNEY GENERAL

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

Judgment of Mr. Justice Keane delivered on the 30th May 2018

Introduction

1. The applicant has withdrawn these proceedings and in considering the respondents' application for the legal costs they have incurred in defending them, I have raised, *sua sponte* (that is to say, of my own accord), the question of whether it is appropriate to make a wasted costs order against the applicant's solicitors under Order 99, rule 7 of the Rules of the Superior Courts, as amended ('the RSC'). The conduct of this litigation on behalf of the applicant gives rise to a wide range of concerns. For that reason, I must also consider the exercise of the court's inherent jurisdiction to hold to account the behaviour of lawyers whose conduct of litigation falls below the minimum professional and ethical standards which must be demanded of *all* lawyers who appear before the courts

Background

2. The applicant is a Polish national, born on 16 June 1988, who claims to have entered the State in 2005.

3. The applicant was committed to prison on 17 September 2014 where he began serving various terms of imprisonment imposed on him for different offences under ss. 4 and 15 of the Criminal Justice (Theft and Fraud Offences) Act 2001, s. 3 of the Misuse of Drugs Acts 1977 and 1984, and s. 13 of the Criminal Justice Act 1984. The applicant was due for release on 17 March 2016.

4. According to the records held by An Garda Síochána, the applicant had by then accumulated approximately 39 previous convictions for offences of the type previously mentioned, as well as for offences under the Criminal Damage Act 1991, the Criminal Justice (Public Order) Act 1994 and the Road Traffic Acts.

5. On 2 February 2015, the Garda National Immigration Bureau ('GNIB') wrote to the Irish Naturalisation and Immigration Service ('INIS'), setting out details of the applicant's previous convictions and requesting that the Minister consider making a removal order against him under Regulation 20 of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 ('the Regulations').

6. On 13 February 2015, the INIS wrote to the applicant at the Midlands Prison, informing him that the Minister was proposing to make a removal order against him. The stated reason for that proposal was on grounds of public policy because of the threat posed to the fundamental interest of society by the applicant's persistent criminal conduct. A copy of the GNIB letter of 2 February 2015, setting out details of the applicant's previous convictions was enclosed. The applicant was informed of his entitlement to make representations against the proposal in the manner prescribed under Schedule 9 to the Regulations.

7. The applicant responded by letter dated 19 February 2015, in which he made representations against the proposal. Included with that letter were a copy of his son's Irish birth certificate and letters from his brother, his new partner and his new partner's mother. The INIS responded by letter dated 3 March 2015, requesting documentary evidence in support of the applicant's claims concerning his work history, his medical history and his claim to have been living in the State since 2005. The applicant responded with details of his social insurance contributions from 2006 onwards. He later provided a medical report through the doctor in the Midlands Prison.

8. On 22 April 2015, the INIS wrote to the applicant, inviting him to make any final representations he might wish in opposition to the proposal to make a removal order against him. No such representations were received.

9. On 10 June 2015, the INIS wrote to the applicant, informing him that Minister had decided to make a removal order against him, incorporating an exclusion period of five years. The applicant was informed of his entitlement to request a review of that decision in the manner prescribed in Schedule 11 to the Regulations. A copy of the removal order dated 10 June 2015 and of the Minister's seven-page decision of the same date were enclosed with that letter. The applicant did not request a review.

10. In accordance with the requirements of Article 28.1 of Directive 2004/38/EC ('the Citizens' Rights Directive') and Regulation 20(3)(a) of the Regulations, the Minister's decision took account of the applicant's period of residence in the State, his age, state of health, family and economic situation, social and cultural integration into the State, and the extent of his links with his country of origin, Poland, before going on to consider the potential application of the principle of non-refoulement under s. 5 of the Refugee Act 1996 and the application of the requirements of Article 7 of the Charter of Fundamental Rights of the European Union.

The *ex parte* application for leave

11. At just after 3 p.m. on Wednesday, 16 March 2016, counsel for the applicant made an application *ex parte* to Barrett J, then assigned to hear cases in the Non-Jury/Judicial Review List, for leave to seek judicial review of the removal order against the applicant.

12. That application was grounded on a short affidavit sworn on 16 March 2016 by the applicant's solicitor. In that affidavit, the applicant's solicitor gave a brief and fragmentary account of the events that led to the removal order made against the applicant on 10 June 2015.

13. The applicant's solicitor did not identify the prison term the applicant was then serving or the offences of which he had been convicted. Nor did she provide details of the applicant's previous convictions.

14. The applicant's solicitor did not refer to or acknowledge the notification to the applicant, pursuant to Regulation 20(2)(a) of the Regulations, of the proposal to deport him, dated 13 February 2015.

15. The applicant's solicitor did refer to the written representations the applicant made by letter dated 19 February 2015, although she did not exhibit a copy of them and did not explain what was in them. The applicant's solicitor incorrectly averred that those representations were made at a time when the applicant was not legally represented.

16. The applicant's solicitor did exhibit the INIS letter of 3 March 2015 requesting further information but did not refer to or identify the information provided on behalf of the applicant in response.

17. Finally, the applicant's solicitor did exhibit the INIS letter of 22 April 2015, inviting the applicant to make any further representations he might wish within 15 days, although without comment or explanation concerning the applicant's failure to take up that invitation.

18. The applicant's solicitor exhibited a copy of the removal order of 10 June 2015 but not the INIS letter of the same date with which it was enclosed nor, most significantly, the Minister's notification in writing to the applicant, under Regulation 20(3)(b)(ii) of the Regulations and Article 30 of the Citizens' Rights Directive, of the reasons for the decision to make the removal order, which notification was also dated 10 June 2015 and was also enclosed with that letter. The applicant's solicitor did not explain how she had come into possession of a copy of the removal order *i.e*. whether it had been furnished to her by the applicant or obtained by her elsewhere.

19. The applicant's solicitor then curtly averred: 'I say that I only became aware of the removal order dated 10th June 2015 on the 16th March 2016 when the matter was brought to my attention.' The applicant's solicitor did not explain in what circumstances she only became aware of the order on the day of the application, nor did she state who brought it to her attention then. It is difficult to accept that these omissions were merely inadvertent.

20. The applicant's solicitor next averred that, on becoming aware of the existence of the removal order, she wrote immediately by fax to the Arrangements Section of the Repatriation Unit of the Department of Justice and Law Reform ('the Department'). The applicant's solicitor exhibits a copy of that letter, together with the relevant fax transmission sheet. The fax transmission sheet records that it was sent at 11.18 a.m. on 16 March 2016, less than four hours before the *ex parte* application was made. The letter states in material part:

> 'Our client instructs us that he has been the recipient of a removal order from the INIS.
>
> We would be obliged if you would forward us as a matter of urgency the removal order and the letter underpinning the decision to issue the removal order.
>
> We asked (*sic*) you to refrain from removing him from this jurisdiction until we are in receipt of same and same is considered by this office.'

21. This sequence of events calls for an explanation that neither the applicant nor his legal advisers have yet provided. The INIS furnished the applicant with a copy of both the removal order against him and the Minister's seven-page reasoned decision for it, under cover of a letter dated 10 June 2015. At 11.18 a.m. on 16 March 2016, over nine months later, the applicant's solicitor faxed a letter to the Department seeking a copy of the order and of the decision underpinning it. At some time before 3 p.m. on the same date, she swore an affidavit grounding an *ex parte* application for leave to seek judicial review of the Minister's decision. The applicant's solicitor exhibited to that affidavit a copy of the removal order but not a copy of the Minister's notification in writing of the reasons for making it. Very shortly afterwards, counsel for the applicant sought a stay on the removal of the applicant from the State on the ground that the removal order against him was bad because no reasons had been provided for making it and there was no good reason to do so.

22. The applicant's solicitor concluded her affidavit by averring that the applicant was in imminent jeopardy of being detained and removed from the State on foot of the removal order, which she believed, and had been advised by counsel, was made in excess of jurisdiction and was invalid.

23. This was the evidential basis upon which counsel made an application *ex parte* to the High Court for leave to seek judicial review.

The relief sought, grounds advanced and arguments made *ex parte*

24. In his statement of grounds dated 16 March 2016, the applicant sought: an order of certiorari quashing the Minister's decision of 10 June 2015 to make a removal order; a stay on the execution of that order pending the determination of the application; damages; and costs.

25. The grounds upon which the applicant sought those reliefs were, in summary:

> (a) The Minister's decision was *ultra vires* and made contrary to the express provision of Regulation 20(6)(b) of the Regulations [and, it might have been added, Article 28.3 of the Citizens' Rights Directive] as the Minister had not pleaded (*sic*) that there were imperative grounds of public security permitting it to be made.
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> (b) The Minister erred in making the decision on grounds of public policy because there was no basis to do so.
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> (c) The removal order was invalid because it did not recite the reasons for making it.
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> (d) The removal order was invalid because the applicant and his legal representatives did not know the basis upon which it was made.

(e) The procedure adopted by the Minister breached the applicant's right to fair procedures, was not transparent and breached the principle of *audi alteram partem*.

(f) The removal order was bad in failing to specify 'the grounds or legislative provisions relied upon to justify the removal of the applicant from the State.'

(g) The decision to make a removal order against the applicant was invalid as disproportionate.

(h) The Minister's decision was invalid because she failed to inform the applicant of the public policy concerns informing the decision to remove him, beyond citing his previous convictions.

(i) The Minister's decision was invalid because the applicant and his legal representatives did not know what consideration and weight was given to his period of residence in the State and his family circumstances.

(j) The Minister's decision was invalid because the applicant and his legal representatives did not know what weight was given to the fact that he had no family members residing in Poland.

(k) The Minister's decision was invalid because, in an unspecified way, she had breached Article 31 of the Citizens' Rights Directive [which deals with review procedures in respect of exclusion decisions].

26. Because an issue later arose concerning the extent to which the terms of the perfected order accurately reflected what Barrett J had decided on the *ex parte* application, I acceded to the Minister's application for an order directing the production of a transcript of that hearing. Accordingly, I am in the unusual position of knowing precisely what was – and was not – said to Barrett J on behalf of the applicant in seeking *ex parte* relief.

27. Counsel opened his application by informing the Court that it had not been possible to file papers in the Central Office or to complete an *ex parte* docket because of the urgency occasioned by the proposed removal of the applicant from the State that same afternoon. However, the Court was told nothing about why a challenge was only being mounted to the removal order on the day of – or, as it turned out, the day before - its proposed execution, when that order had been made and served on the applicant over 9 months earlier and the applicant had known about the date of his proposed release from prison (and, hence, his likely removal from the State) for at least that long.

28. Counsel then informed the Court that there were a number of issues with the lawfulness of the proposed removal of the applicant from the State, and that a primary issue was that nowhere on the face of the order did it state the reasons for making it, other than that the applicant was a person in respect of whom such an order could be made under Regulation 20 of the Regulations. Counsel did not open the Regulations to the Court. Had he done so, it would have been immediately obvious from the express terms of Regulation 20(3)(b) and the prescribed form of removal order set out in Schedule 8 that, where the Minister makes a removal order, the person is to be separately notified in writing of both the Minister's decision to do so and the reasons for that decision. It is thus not surprising that no authority whatsoever, whether statutory or judicial, was cited for the proposition that a removal order is required to state on its face the Minister's reasons for making it. One might just as well say that an order of this court is bad on its face if it fails to recite the reasons for making it set out in the decision or judgment on which it is based.

29. Counsel next went on to provide the court with 'some background' that was nowhere reflected in the very limited evidence placed before the court and which fell some way short of full and frank disclosure. Counsel informed the court that the applicant had at 'some time previously' been 'arrested' on foot of charges under the Criminal Justice (Theft and Fraud Offences) Act 2001 (possession of an article with the intent it be used in a theft, burglary, robbery or offence of deception) and s. 13 of the Criminal Justice (Public Order) Act 1994 (trespass on a building in a manner likely to cause fear), without making it clear that the applicant had been convicted on those charges and several others besides and sentenced to various terms of imprisonment, some concurrent and some suspended, which had resulted in the applicant spending the preceding 18 months in prison.

30. Counsel did confirm that the applicant had been lodged in the Midlands Prison where he had been informed of the Minister's proposal to make a removal order against him, and that unspecified 'correspondence' had ensued at a time when the applicant was not legally represented, which culminated in the applicant being afforded 15 days in which to make representations, a step that counsel thought was 'quite a formality.'

31. Counsel then referred to the removal order made on 10 June 2015, a copy of which was before the court, before laconically observing:

> 'No submissions are attached. No details as to what considerations were taken into account. The applicant and his legal advisers haven't had sight of that so we would say the order is bad.'

32. That was, of course, profoundly misleading. As already noted, the uncontroverted evidence before the court is that the applicant received a copy of the removal order of 10 June 2015 under cover of a letter from the INIS with which the Minister's seven-page notification in writing of the reasons for that decision was also enclosed. The way in which counsel presented the application invited the court to draw the inference that the removal order provided to the applicant had not been accompanied by a copy of the Minister's decision.

33. The alternative interpretation of counsel's submission - that this was simply an unfortunate ambiguity that arose as counsel attempted to explain that the applicant's legal representatives had only been provided by the applicant (or some other person) with a copy of the removal order but not a copy of the notification of the Minister's reasons in writing that had originally accompanied it - gives rise to a quite separate problem for the applicant's legal representatives in that they did nothing to apprise the Court of the steps they had taken to seek instructions from the applicant and to comply with their duty of inquiry *i.e.* the duty of a lawyer to ensure that he or she has the fullest possible information before drafting an application to the court.

34. Counsel then returned to his submission that there was an arguable case to be made either that the Minister had failed to comply with the obligation to give reasons for the expulsion decision or that she had failed to comply with a separate obligation to recite those reasons on the face of the removal order - it is not clear which.

35. In that context, instead of pointing the court to the obligation to provide reasons for an expulsion or removal decision set out in both Article 30.2 of the Citizens' Rights Directive and Regulation 20(3)(b) of the Regulations, counsel referred the court instead to a passage from the decision of the European Court of Human Rights in the case of *Üner v The* Netherlands (2007) 45 E.H.R.R. 146 (at

para. 36) or, more particularly, the text set out there of paragraph 4 of the Council of Europe Committee of Ministers *Recommendation Rec (2000)* 15 concerning the security of residence of long-term migrants, which deals with the criteria that should be taken into consideration when contemplating the deportation of a long-term immigrant. That was, to use a neutral expression, an eccentric approach, since the non-binding criteria set out there run broadly, though not entirely, parallel to the binding criteria under both Article 28.1 of the Citizens' Rights Directive and Regulation 20(3)(a) of the Regulations, to which counsel did not refer the court.

36. Counsel expressly asserted - presumably by way of further 'background', as it was nowhere averred to in the grounding affidavit of the applicant's solicitor - that the applicant did not have any family members residing in Poland. This reflected the ground set out at (j) in paragraph E of the applicant's statement of grounds, that the applicant did not know what, if any, weight, the Minister had given to that fact in deciding to make a removal order against him. The assertion was false. In an affidavit the applicant later swore in these proceedings on 17 February 2017, he averred that his mother lives in Poland.

37. Nor did counsel refer the court to the express provisions of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, as substituted by s. 34 of the Employment Permits (Amendment) Act 2014 ('the Act of 2000'), which states in material part:

> '5.(1) A person shall not question the validity of-
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> …
>
> (k) a removal order under Regulation 20(1) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006),
>
> (l) an exclusion order under Regulation 23(1) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006),
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> …
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> made on or after the date on which section 34 of the Employment *Permits (Amendment) Act 2014* comes into operation, otherwise than by way of application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (hereafter in this section referred to as "the Order".
>
> (2) An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in subsection (1) (hereafter in this sections referred to as "an application") shall be made within the period of 28 days commencing on the date on which the person was notified of the…making of the order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the…order is invalid or ought to be quashed.'

38. Section 34 of the Employment Permits (Amendment) Act 2014 came into operation on 3 October 2014, pursuant to the terms of the Employment Permits (Amendment) Act 2014 (section 34) (Commencement) Order 2014 (S.I. No. 435/2014).

39. Counsel did not inform the court that the specific test for leave to seek judicial review that the applicant had to meet was the 'substantial grounds' one, under s. 5(2) of the Act of 2000, rather than the more general 'arguable case' one identified by the Supreme Court (per Finlay CJ) in *G v Director of Public Prosecutions* [1994] 1 IR 374 (at 377-8).

40. Nor did counsel apprise the court that, under s. 5(2) of Act of 2000, he was obliged to seek an order extending the period within which the application for judicial review could be made, which could only be granted if the court could be persuaded that there was good and sufficient reason for doing so.

41. Further, insofar as certain of the grounds on which the removal order was challenged assert or assume that a more rigorous test for making it should have been applied because the applicant had been resident in the State for in excess of 10 years, counsel failed to draw the court's attention to the *Communication from the Commission to the European Parliament and Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* (COM(2009) 303 final), which states (at para. 3.4): 'as a rule, Member States are not obliged to take time actually spent behind bars into account when calculating the period of residence under art.28 where no links with the host Member State are built.'

42. Nor did counsel draw to the attention of the court the decision of the CJEU in Case C-378/12 *Onuekwere v Secretary of State for the Home Department* EU:C:2014:13 in which it was held that periods of imprisonment in the host Member State of a third-country national, who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods, cannot be taken into consideration in the context of the acquisition by that national of the right of permanent residence for the purpose of the relevant provisions of the Citizens' Rights Directive. In reaching that decision, the CJEU observed (at para. 26) that:

> 'The imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition by family members of a Union citizen who are not nationals of a Member State of the right of permanent residence for the purposes of Article 16(2) of Directive 2004/38 would be clearly contrary to the aim pursued by that directive in establishing that right of residence.'

43. It is hard to see how the same principle would not apply to the acquisition of the enhanced protection against expulsion decisions available to Union citizens under Article 28 of the Directive.

44. It is common case that the applicant had served 18 months in prison prior to 16 March 2016. Hence, even if it were accepted that he had been resident in the State since 2005, he would still not have accumulated ten years *lawful* residence in the State by that date. In the circumstances, it is almost superfluous to add that, while the grounding affidavit of the applicant's solicitor acknowledges that the Minister had sought evidence in support of the applicant's claim that he had been residing in the State since 2005, the only evidence the applicant had provided to the Minister related to certain social insurance contributions that he paid from 2006 onwards, and no evidence of his period of residence in the State was provided to the court in support of the application for

leave.

45. Thus, the court was misled by omission about the correct test for leave; the necessity to obtain an extension of time in which to seek leave; and the applicant's inability to meet either of those tests on the limited evidence that he had adduced.

46. The basis upon which Ireland, the Attorney General and the Commissioner of An Garda Síochána were made respondents to these proceedings in addition to the Minister has never been made clear. It was entirely unnecessary and inappropriate to do so on the basis of the particular grounds advanced or for the purpose of any of the specific reliefs sought.

47. Those are the circumstances in which the court was persuaded to grant the applicant leave to apply by way of judicial review for the reliefs sought in his statement of grounds on each of the grounds set forth there, and – as has since been clarified - to place a stay on the removal order against him pending the outcome of that application.

Concerns about professional conduct and standards
i. the inherent jurisdiction of the court to hold lawyers to account

48. The court has an inherent jurisdiction, in governing the conduct of proceedings before it, to hold to account the behaviour of lawyers whose conduct of litigation falls below the minimum professional and ethical standards which must be demanded of *all* lawyers who appear before the courts; see, most recently, the decision of the Administrative Court, a divisional court of the High Court of England and Wales, in *R (Sathivel) v Secretary of State for the Home Department* [2018] EWHC 913 (Admin) ('*Sathivel*').

ii. the conduct required of lawyers

49. Paragraph 5.19 of the Code of Conduct of the Bar of Ireland states:

> 'In a civil case barristers must, at the appropriate time in the proceedings, inform the court of any relevant decision on a point of law and, in particular, of any binding authority or any applicable legislation of which they are aware and which the barrister believes to be on point whether it be for or against their contention.'

50. The Law Society of Ireland *Guide for Good Professional Conduct for Solicitors*, 3rd ed, provides (at para. 5.1) that:

> 'A solicitor has an overriding duty to the court to ensure, in the public interest, that the proper and efficient administration of justice is achieved and should assist the court in the administration of justice, and should not deceive, or knowingly or recklessly, mislead the court.'

51. Giving judgment in the High Court in *Adams v Director of Public Prosecutions* [2001] 2 ILRM 401, Kelly J stated (at 416):

> 'On any application made *ex parte* the utmost good faith must be observed, and the applicant is under a duty to make a full and fair disclosure of all of the relevant facts of which he knows, and where the supporting evidence contains material misstatements of fact or the applicant has failed to make sufficient or candid disclosure, the *ex parte* order may be set aside on that very ground.
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> …
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> The obligation extends to counsel. There is an obligation on the part of counsel to draw the judge's attention to the relevant Rules, Acts or case law which might be germane to his consideration. That is particularly so where such material would suggest that an order of the type sought ought not to be made.'

52. In an ex tempore judgment in *Balogun v Minister for Justice* [2002] IEHC 134 (Unreported, High Court, 19th March, 2002), Smyth J felt obliged to comment:

> 'Yet again this an *ex parte* application which had I been given the facts now on affidavit I would have viewed in a different manner. Either selective facts were made known to the legal advisors, or there was a complete failure before counsel was instructed to critically analyse instructions so that the duty and obligation to observe good faith with the Court on an *ex parte* application could be observed.
>
> It should be unnecessary – but it is clearly imperative that once again I should record what was stated by Donaldson M.R. in the Court of Appeal [for England and Wales] in *Re C (Wardship: Medical Treatment*) [1990] Family 26 at 36:
>
> > "The fundamental duty of members of the legal profession is to assist the courts in the administration of justice regardless of the views or interests of their clients."'

iii. has a problem in England and Wales become a problem in Ireland?

53. In *Sathivel*, already cited, Green J (with Sharp LJ) described the following problem in the immigration and asylum field there:

> '4. The conduct of practitioners in the field of immigration and asylum poses a particular problem for the courts and tribunals. It is for this reason that the Courts have been forced to exercise their inherent jurisdiction to govern proceedings before them to hold to account the behaviour of lawyers whose conduct of litigation falls below the minimum professional and ethical standards which must be demanded of *all* lawyers appearing before the Courts.
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> …
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> 5. In [*R (Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin) ('*Hamid*')] in 2012, the President of the Queen's Bench Division, later to be Lord Chief Justice, expressed the hope and expectation that with that judgment the problem of professional misconduct amongst immigration and asylum practitioners would come to an end. It has not. It remains in 2018 an issue of deep concern.
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> 6. In 2018, the present Lord Chief Justice has expressed concern at the lack of the exercise of the duty of candour on the part of practitioners in the context of last moment applications for injunctions to restrain removals. He also reiterated

the importance of the *Hamid* jurisdiction….

7. There are of course many highly professional practitioners in this complex and difficult field who successfully reconcile the need to act in their client's interests with their duties to the Court. However, there is also a substantial cohort of lawyers who consider that litigation is a tactic or strategy that can be used to delay and deter removal proceedings.'

54. Green J went on to describe the following situations that frequently confront the courts and tribunals in England and Wales:

'9. [M]ost of the practitioners in this area do not have legal aid franchises. The clients are privately funded, and they are frequently vulnerable and desperate. We sought information as to the level of fees demanded by the solicitors in the cases before us. The sums vary: but they invariably run into multiples of thousands of pounds. To raise funds to pay for legal assistance clients must often seek support from family and friends. The solicitors will generally not act unless they are placed in funds beforehand. Some lawyers promise the highest quality of representation and we have no doubt that there are solicitors and other representatives who do provide excellent services. But there are other solicitors who having promised high quality specialist services then instruct paralegals and unqualified persons to draft what would ordinarily be viewed as complex and specialised proceedings and court documents (often prepared by counsel). The cases that are then advanced may be wholly lacking in merit. Judges are presented with lengthy pleadings much of which is irrelevant and has been cut and paste from template documents, often available on the internet.

…

11. [W]hen the Home Office sets a date and arrangements for removal a different dynamic sets in. Last minute applications to restrain removal are made to the High Court, and often to the "out of hours" duty Judge literally hours or even minutes before the removal flight departs the runway…. There is often a lengthy history. However, what happens is that at the last moment the applicant changes solicitors. The new solicitors draft the last-minute application seeking the restraining of removal and they explain to the judge that they have been instructed late on and that they have had no time to obtain instructions (the client will be in detention). Frequently, the new lawyers do not have access to the prior documentation and they have not (because of lack of time they argue) sought or obtained the documentation from previous solicitors or [the immigration authorities]. For this reason, arguments advanced to the judge are based on details provided by the client who being in detention can only give the barest of instructions over the phone. Judges complain that all too often the version of events provided to them is materially inaccurate and/or incomplete. It is almost unheard of for the [State] to be notified of the application or to have a chance to advance submissions, even in writing.'

55. This circumstances of this case cannot but contribute to a growing sense of unease that a similar problem may be emerging in this jurisdiction.

56. What does this mean for the proper administration of justice and the integrity of the asylum and immigration system?

57. In *Hamid*, already cited, Sir John Thomas P observed (at para. 10):

'These late, meritless applications by people who face removal or deportation are an intolerable waste of public money, a great strain on the resource of this court and an abuse of a service this court offers.'

58. In *R (Butt) v Secretary of State for Home Department* [2014] EWHC 264 (Admin), Sir Brian Leveson P stated (at para. 3):

'In my judgment, it remains equally critical that solicitors who work in this field make applications only when based upon a proper consideration of the evidence, having assembled appropriate proof and taken care to ensure that the time of the court is not being wasted.'

59. And later (at para. 4):

'In these days of austerity, the court simply cannot afford to spend time on processing abusive applications; still less is it a proper use of the time of out-of-hours and overnight judges, hard pressed at the very best of times, to deal with such applications.'

60. In *R (Adil Akram) v Secretary of State for Home Department* [2015] EWHC 1359 (Admin), Sir Brian Leveson P had to return to the issue, stating (at para. 2):

'There is a pressing need for legal representatives acting for claimants in judicial review proceedings to do so in a professional manner both towards their clients but also towards the Court, bearing in mind that the paramount duty of all legal representatives acting in proceedings before courts is to the Court itself. The need for this warning to be taken seriously increases as the resources available to the Courts to act efficiently and fairly decreases. If the time of the Court and its resources are absorbed dealing with utterly hopeless and/or unprofessionally prepared cases, then other cases, that are properly advanced and properly prepared, risk not having devoted to them the resources that they deserve.'

61. Returning to the judgment of the divisional court in *Sathivel*, and its consideration of the problems caused for the administration of justice in the asylum and immigration field by the prevalence of unmeritorious claims advanced in last-minute applications, Green J stated in conclusion on that issue (at para. 12):

'In the midst of all of this it is crucial that the courts and tribunals retain the integrity of their processes. It is unacceptable that they should be used as part of a continuing game played between applicants and [the immigration authorities]. If the processes of the Court and tribunals are abused in this manner then those individuals who do, genuinely, have proper cases to advance (and there are many) find that they sit in a long queue waiting to be heard. The judges who should be devoting their time to resolving genuine and important disputes are distracted dealing with abusive cases. Justice is delayed and can be denied.'

iv. the duties of legal representatives in 'last-minute' applications

62. The duties of legal representatives who, 'at the last minute', take over the representation of a person who has already had extensive dealings with the immigration authorities of the State and is facing deportation or removal, were specifically considered in *Sathivel*, already cited. In his judgment for the divisional court, Green J acknowledged (at para. 43) that an advocate owes a duty to

his or her client to advance, fearlessly, that client's position but went on to point out that any lawyer appearing before a court owes a *paramount* duty to the court. Green J continued (at para. 44) that it is difficult to comprehend how a lawyer who inherits such a case can give proper advice and act professionally unless aware of the background. In that situation, an advocate or lawyer must take *all* due steps to ensure that he or she has the fullest possible information before drafting any sort of application to the court or tribunal. As Green J explained, that is a duty of inquiry. It is an important duty and exists to ensure that an advocate can furnish the court or tribunal with the most accurate version of events possible and thereby avoid misleading the judge.

63. Later, Green J went on to state:

> '46. We recognise that there might be (rare) circumstances where time is so much of the essence that there is a limited opportunity to conduct inquiries. What is the situation if, for entirely genuine reasons, it is simply impossible for the lawyer to obtain full instructions? In such a case the lawyer still has a powerful duty of candour to ensure that the Court is made fully aware of the limitation of the evidence that is placed before the Court. This is essential so that the Court can make a measured assessment of the probative value of the evidence. The lawyer will have to set out exactly why no steps were taken to seek out and obtain fully the full background documents and facts. This might very well weaken the client's case, because, by the very nature of the explanation, the Court might not be able to attach great weight to the facts relied upon. But this is the necessary price that must be paid.
>
> 47. What is unacceptable is for the lawyer to advance a case based upon incomplete and inaccurate instructions and present them to the Court (by commission or omission) as true when no steps have been taken to obtain the full file and to verify the facts.
>
> 48. Context is important. There are two points we would make. First, it is evident to Judges hearing these cases in the High Court and in the tribunals that instructions are switched around for strategic reasons and it is often highly convenient for new solicitors or representatives to be able to pray in aid ignorance. If the Courts were to condone the argument advanced to this court, that there is no obligation upon lawyers to ensure that they put the full facts before the courts and to verify their client's instructions, then this is tantamount to creating a system where through the device of a late change of instruction, lawyers can mislead the courts with impunity. The second point arises from the argument advanced by [counsel] that he was entitled to take his client's instructions at face value. We do not accept this. Clients in this field rarely have perfect recall of the facts and they cannot be assumed to know the law…. Any lawyer given such instructions must start from the proposition that it is the lawyer and not the client who knows how the legal system operates. Lawyers in the position of [those in that case] should have been put on immediate notice that the instructions could very well be wrong….
>
> …
>
> 50. In our judgment the solicitors in this case have failed in their duty to ensure that a full and accurate account was placed before the Court. They have failed in their duty to make proper enquiries to ensure that they are fully informed before taking any steps to pursue proceedings and their duty of candour to the Court because they failed to set out fully the serious limitations in the evidence that they were presenting as true….
>
> …
>
> 52. These were serious failings. They have led to the immigration and asylum system being undermined and the High Courts' scarce resources being taken up with a wholly unsubstantiated case that was totally without merit. ' (emphasis in original)

v. the need for an inquiry

64. In this case no explanation whatsoever was placed before Barrett J concerning the circumstances in which the applicant's legal representatives only came to challenge a nine-month old removal order on the day prior to its long-heralded enforcement. If there were genuine reasons for their failure to obtain full instructions (that is to say, reasons other than the applicant's own tardiness in seeking representation or providing instructions, or the legal representatives own delay in taking instructions, making enquiries or bringing the application, or both), then there was a powerful duty of candour on those legal representatives to ensure that the court was made fully aware of that explanation and the consequent limitation upon the evidence placed before it. If there were no genuine reasons for their failure to do so then, obviously, the application should never have been brought. This is an issue of professional conduct that will have to be resolved. It cannot be disregarded merely because the proceedings were later abandoned. The integrity of both the immigration process and the judicial process is at stake.

The post-leave conduct of the proceedings

i. general

65. The applicant's solicitor wrote to the INIS on 16 March 2016 (wrongly dating her letter 15 March 2016), informing it that Barrett J had granted an interim order that day restraining the implementation of the removal order against the applicant, having granted the applicant leave to seek judicial review of that removal order in proceedings that had been made returnable to 12 April 2016.

66. The Order made by Barrett J on 16 March 2016 records on its face that it was perfected on 21 March 2016. Presumably due to an administrative error, the order did not recite that a stay had been granted on the execution of the removal order against the applicant. The transcript of the application for leave later obtained establishes that Barrett J did grant a stay on the execution of that order 'pending the outcome' of the proceedings. But the applicant's legal representatives do not appear to have taken any steps whatsoever subsequently to seek leave to take up a copy of that transcript or to have the perfected order amended to correctly reflect the interim relief granted.

67. On 18 April 2016, the applicant swore a short *pro forma* affidavit verifying the contents of the statement of grounds and of the grounding affidavit of his solicitor. That affidavit was entirely unsatisfactory for two reasons. First, the information provided in both the statement of grounds and grounding affidavit had been inadequate at best. The contents of those papers thus required extensive explanation, amplification and clarification by the applicant, not merely verification by him. Second, as we shall see, the applicant subsequently contradicted on oath certain of the information that he was purporting to verify on oath in that affidavit.

ii. the Minister's motion to dismiss

68. On 6 December 2016, the Minister issued a motion returnable to 12 December 2016, seeking an order striking out the proceedings on the basis either that the application for leave had not been brought within the 28 days permitted under s. 5(2) of the Act of 2000 or that it had not been brought promptly and in any event within three months from the date when the grounds first arose, which is the requirement under Order 84, rule 21(1) of the Rules of the Superior Courts, as amended ('the RSC'). The Minister also sought an order permitting her to obtain a transcript of the *ex parte* application for leave in order to clarify whether Barrett J had granted a stay on the enforcement of the removal order and, if so, in what terms, since the curial part of the perfected order of 16 March 2016 included no such relief. The Minister's application was grounded on the affidavit of Tom Doyle, an assistant principal officer in the Repatriation Division of the INIS, sworn on 25 November 2016.

69. The applicant's solicitor swore a second affidavit, in reply to that of Mr Doyle, on 27 January 2017. In it, she averred incorrectly for the second time that the removal order against the applicant was made at a time when he was not legally represented.

70. The applicant's solicitor went on to aver as follows. While in custody in Castlerea Prison, the applicant had written to her at her office. That letter is exhibited. It is dated 28 January 2016 but was not delivered to that solicitor's office until 2 March 2016. In it, the applicant identifies himself and his place of detention and asks the solicitor if her office can represent him 'in Immigration Department' (*sic*). He gives his date of proposed release, correctly, as 17 March 2016.

71. The applicant's solicitor then avers that: 'once that letter was brought to my attention I began enquiries as to the precise nature of the immigration matters referred to.' The applicant's solicitor does not say when that letter, addressed to her and received at her office on 2 March 2016, was brought to her attention or by whom. She does not say what enquiries she made, when she made them or to whom they were directed. These points are significant because, in the very next sentence of her affidavit, that solicitor avers: 'I only became aware of the removal order [dated 10 June 2015] on [16 March 2016] and that the [applicant] was due to be removed that same day.' Once again, the applicant's solicitor does not disclose how she became aware of the removal order on 16 March 2016 or how she obtained the copy of it exhibited to her affidavit sworn on that date. The applicant's solicitor discloses nothing about what enquiries she conducted in the two week period between 2 March and 16 March 2016. Further, she is silent concerning what instructions she sought from the applicant and what steps she took to verify those instructions during that period. This persistent vagueness and use of the passive voice (with the applicant or the applicant's solicitor as the subject but without identifying the object) is hard to reconcile with the duty of both solicitor and counsel to ensure that a full and accurate account is placed before the Court.

72. The applicant's solicitor avers that, upon perusal of the removal order, she formed the view that it was invalid and immediately sought the views of counsel who so advised. The applicant's solicitor does not identify the infirmity in the removal order that was evident to her and to counsel from a perusal of it. The removal order was in the form prescribed at Schedule 8 to the Regulations. The terms of Regulation 20(3)(b) are clear in providing that, quite separately from making the removal order, the Minister is to notify the person concerned in writing of the decision to do so and of the reasons for that decision.

73. The applicant's solicitor next avers that she contacted the Minister by fax 'requesting an undertaking and also any consideration given to the [applicant's] case in determining to make a removal order' against him. That sworn statement is not correct. The exhibited letter, faxed at 11.18 a.m. on 16 March 2016, requested a copy of the removal order and 'the letter underpinning the decision to issue the removal order.' It then went on to request that the Minister refrain from removing the applicant from the jurisdiction until the applicant's solicitor had received and considered copies of those documents but it did not require an undertaking to that effect nor did it warn of an application to the court in the event of the Minister's failure to provide either those documents or any such undertaking by return.

74. The applicant's solicitor then avers that no reply was received to that letter, without expressly acknowledging that a period of less than four hours was allowed for one. According to the applicant's solicitor, this made it 'imperative to proceed with expedition' to bring an application to court. The solicitor does not clarify whether that imperative was brought about, as seems to be the case, by the failure of the applicant and his legal representatives to challenge a 9-month old removal order until the day before the long-established date of the applicant's release from prison (and, hence, the likely date of its enforcement) or, as their determined reticence on the point may have led the court to infer, by some unexpected and precipitate action on the part of the Minister.

75. The distinction is, of course, vital. An applicant cannot rely on grounds of urgency when he has brought that urgency about by his own failure to challenge a long-standing decision until the last moment before it takes effect. The potential for abuse is obvious, as applicants frequently seek, and generally obtain, a degree of latitude on grounds of urgency in the presentation of an application for leave *ex parte* that they could not otherwise claim and it would be wrong to permit any applicant to benefit from his own default. I will return to that topic later in this judgment.

76. The applicant's solicitor concludes her second affidavit by submitting, in effect, that the delay on the part of the Minister in issuing a motion to dismiss the proceedings ought to offset the delay of the applicant in bringing them. That, of course, ignores the fact that there is a fundamental difference between the breach of a statutory time limit for bringing proceedings, on the one hand, and any delay in the conduct of proceedings, on the other. For the sake of completeness, I should note that Mr Doyle swore a second affidavit on behalf of the Minister on 26 April 2017 in which he asserts that the delay in bringing the motion to dismiss was caused in part by a desire first to resolve the confusion about the interim relief Barrett J had granted to the applicant, as the perfected order did not include any.

77. In this final portion of her second affidavit, the applicant's solicitor advances three reasons for the applicant's failure to bring his application within time: first, he speaks limited English; second, he was in prison throughout the period concerned; and third, he did not have legal representation. None of those reasons stands up to the mildest scrutiny.

78. On 17 February 2017, the applicant swore a second affidavit in the proceedings. Once again, he averred that he was doing so to verify the facts in the statement of grounds.

79. In that affidavit, the applicant acknowledged for the first time that he had been legally represented at all material times while in custody. The applicant's case was now that he did not feel that he was properly represented, although he does not explain in what way his representation was deficient.

80. The applicant averred that, while he did speak some English, he found it difficult to read documents in that language, and was obliged to rely on the assistance of an interpreter to make and swear his affidavit.

81. The applicant coyly stated that he came to the attention of the Gardaí while engaged in criminal behaviour and was convicted and imprisoned for a period of 18 months. He does not identify the crimes for which he was convicted, nor does he disclose his

criminal record.

82. The applicant gave the following garbled account of his correspondence with the Minister. While in custody, he received a letter dated 22 April 2015 from the INIS informing him that the Minister was proposing to make a removal order against him. He wrote in response making representations against his removal. He received further correspondence from the INIS on 13 February 2015 (*sic*), informing him that a removal order had been made against him. He was due for release on 17 May 2016.

83. I pause here to note that the inaccurate and illogical account that I have just summarised was prepared at a time when the applicant had the assistance of both an interpreter and his current legal representatives. Those legal representatives had been furnished some months earlier with a copy of the entire correspondence between the applicant and the authorities dealing with his proposed removal from the State, as an exhibit to Mr Doyle's affidavit. The applicant had informed his solicitor in his letter to her of 28 January 2016 that his anticipated release date was 17 March 2016.

84. The correspondence between the applicant and the authorities confirms that: the applicant was informed of the proposal to deport him in a letter of 13 February 2015; the applicant made representations by letter dated 19 February 2015 (in English, notwithstanding any language difficulties); the INIS requested further information in a letter of 3 March 2015; the applicant provided it *via* the Department of Social Protection and the Midlands Prison doctor; the INIS invited the applicant to make any further representations he might wish by letter dated 22 April 2015; the applicant did not respond; and the INIS wrote to the applicant on 10 June 2015, informing him that a removal order had been made against him and enclosing a copy of both the removal order and the Minister's seven-page decision setting out her reasons for making it.

85. The continuing failure of the applicant and his legal representatives, even at this point, to deal with the question of the applicant's receipt of both the removal order against him and the Minister's written reasons for making it is particularly troubling in light of the 'no reasons/bad reasons' case that they had advanced *ex parte* to Barrett J almost a year previously.

86. The applicant averred that he did not fully understand the implications of the removal order that was made against him and that he did not fully consider the possibility of being removed from the State. Ignorance of the law is no excuse, particularly where – as in this case – the applicant had access to legal representation and legal advice at all material times.

87. The applicant confirmed that he wrote to his present solicitor at her office on 28 January 2016 and that it was his understanding that, for unknown reasons, his letter was not received there until 2 March 2016. He then avers that his solicitor explained to him that she would make enquiries with the immigration authorities and would seek to ascertain the full circumstances surrounding the making of the removal order. The applicant fails to explain how and when this communication occurred. Did the applicant's solicitor provide this explanation to the applicant on the telephone , in writing or in person by video-link with the prison? When did she do so? Nor does the applicant explain what instructions he provided to his solicitor. Did he provide her with details of his own criminal record and, more importantly, of the extensive information and documentation he had received from the immigration authorities?

88. The applicant then averred that the purpose of his affidavit was to provide an explanation for his failure to apply for leave to seek judicial review within the statutory period, despite having earlier averred that its purpose was to verify (for the second time) the facts relied upon in his statement of grounds.

89. The explanation provided by the applicant was broadly as follows. First that his ability to speak and read English was limited and that he had to get by without an interpreter while in prison. Leaving aside the applicant's claim that he had been in Ireland since 2005, he did not explain how, on being notified by letter dated 13 February 2015 of the proposal to order his removal from the State, he managed promptly to make written representations in English on 19 February 2015. Nor did he explain how the services of an interpreter, insofar as they may have been necessary, could not have been secured through his legal representatives at the material time. Second, in an affidavit that was presumably drafted for him by his present legal representatives, the applicant asserted that those representatives had taken all appropriate steps on his behalf, culminating in an application for judicial review that was made 'at the earliest opportunity.' Regrettably, the limited evidence before me fails to establish that claim. Third, the applicant sought to pray in aid his own ignorance of the applicable time limits.

iii. the hearing of the Minister's motion

90. The Minister's motion to dismiss the proceedings came on for hearing before me on 11 May 2017.

91. In his submissions to the court on that motion, counsel for the applicant referred several times in the third person to the counsel who had made the *ex parte* application to Barrett J on 16 March 2016 before acknowledging, in answer to a direct question from the court, that the counsel who did so was him.

92. Counsel for the applicant informed the court that, from his own knowledge, he could fill in none of the gaps in the narrative contained in the affidavits of the applicant and his instructing solicitor. I indicated that, in those circumstances, I was minded to direct the applicant's solicitor to swear a further affidavit addressing those matters and would likely adjourn the application for that purpose if I still considered it to be necessary at the conclusion of the hearing.

93. Counsel for the applicant submitted that, on his instructions, the order made by Barrett J on 16 March 2016 had been later amended to reflect that the court had granted a stay on the removal order against the applicant. A copy of that 'amended' order was then handed in to the court by the applicant's solicitor. It turned out to be a copy of the order as originally perfected, which did not include a stay on the removal order. Counsel for the applicant accepted that, if – as now seems unlikely - an application had been made to amend the terms of the order as perfected (whether under O. 28, r. 11 of the RSC ('the slip rule'), or pursuant to the inherent jurisdiction of the court, or otherwise), he could not say when or in what circumstances that had occurred or by whom it had been made.

94. Counsel for the applicant conceded that, in moving the application for leave *ex parte* before Barrett J, he had not drawn the court's attention to the 28-day time limit for challenging a removal order under s. 5(2) of the Act of 2000, still less had he attempted to establish good and sufficient reason for the court to extend it. This was so despite his acceptance that the applicant had been notified of the making of the removal order against him on, or shortly after, 10 June 2015 and that the application for leave to challenge it was made on 16 March 2016, over nine months later and, thus, over eight months out of time.

95. The significance of this last concession appears to have entirely escaped the applicant's legal representatives. Counsel for the applicant sought to argue that the issue was, in essence, simply one of delay and that the nine month delay on the applicant's part before making the leave application should be set against the Minister's subsequent delay of almost nine months before applying to

dismiss the proceedings. Thus, those delays should be viewed as cancelling one another out with the result that the proceedings should be allowed to continue.

96. Delay by any party to litigation is, of course, entirely unacceptable. The Minister's delay in this instance may be partly mitigated by her difficulty, as respondent, in working out the case she had to meet from the applicant's papers, which were both terse and difficult to follow. It may also be partly mitigated, as the Minister submits, by her desire first to resolve the confusion about what, if any, interim relief Barrett J had granted to the applicant, as the perfected order of 16 March 2016 did not include any and no application had been made to take up a copy of the transcript or to amend the order. Nonetheless, the Minister's delay in bringing her application must be deprecated.

97. While the same is true of the applicant's delay in applying for leave, the difference is that delay is only one of several criticisms that he and his legal representatives face and it is by no means the most serious one.

98. Unlike the Minister, the applicant and his legal representatives have to address not only whether they delayed in bringing their application but also whether they brought that application in breach of statute. An application brought in breach of statute is not the same thing as an application brought after some delay. Moreover, the applicant's legal representatives have to address the obvious further issue that arises, which is whether they failed to comply with their duty of inquiry and their duty of candour in bringing that application.

99. Counsel for the applicant sought to place those issues to one side and to argue, most unconvincingly, that Barrett J had been made aware of the delay in bringing the application for leave because he had been provided with a chronology. The transcript of the application establishes that the only papers before the court were the statement of grounds and supporting affidavit, which were unstamped and unaccompanied by an *ex parte* docket. I can find no reference in the transcript to there being a chronology before the court.

100. Further, the transcript discloses that the only date that counsel for the applicant referred to in his oral submission to Barrett J was that of the removal order; 10 June 2015. Nonetheless, there was a consistent undercurrent in the submission that he made to me that it was for Barrett J to consider the issue of time limits, *ex proprio motu*, and to join the dots, as it were, in relation to the date of the removal order and the date of the application for leave, at least as far as that appeared to establish that the application for leave was being made outside the three-month time limit under the RSC. Thus, counsel for the applicant appeared to suggest, the applicant and his legal representatives were entitled to assume that the court had noted the applicant's breach of the time-limit for seeking leave under the rules and was, thus, in granting leave, extending time for the application for leave *sub silentio*.

101. I do not accept that proposition for several reasons. First, leaving aside entirely the heavy volume of work that a judge presiding over the Non-Jury/Judicial Review list is likely to have to deal with on any given day, I cannot emphasise strongly enough that there is a heightened duty on counsel making an application *ex parte* to draw the judge's attention to any statutory provision, rule of court, or judicial authority relevant to the matter at hand, particularly where it represents an obstacle to the case counsel is making. As the applicant's legal representatives now acknowledge, that simply was not done in this case.

102. Second, as counsel for the applicant is well aware, the order of 16 March 2016 does not include any term extending the time-limit for seeking leave, whether under the RSC or the Act of 2000.

103. Third, that is not surprising because counsel for the applicant did not make any application for that purpose, which is a condition precedent to the grant of any such extension of time under the express terms of O. 84, r. 21(3) of the RSC.

104. Fourth, no attempt was made in the course of the *ex parte* application to persuade the court that there was any good or sufficient reason for doing so or that the circumstances that resulted in the failure to make the application for leave within three months were either outside the applicant's control or could not have been reasonably anticipated by him, each of which is a necessary precondition to the grant of an extension of time under the same paragraph of the same rule.

105. And fifth, any such argument entirely fails to acknowledge the express terms of O. 84, r. 21(7) of the RSC, whereby the time limit for applying for leave to seek judicial review fixed by that rule is expressly stated to be without prejudice to any statutory provision imposing any such time limit. At pain of repetition, under s. 5(2) of the Act of 2000, as amended, an application for leave to apply for judicial review under O. 84 of the RSC in respect of a removal order under Regulation 20(1) of the Regulations, must be made within the period of 28 days commencing on the date on which the person concerned was notified of the making of the order unless the High Court considers that there is good and sufficient reason for extending that period. Thus, the general time limit under O. 84, r. 21 of the RSC for seeking leave to apply for judicial review and the court's discretion to extend the time limit under that rule were completely irrelevant to the application for leave in this case.

106. In those circumstances, I offered counsel for the applicant a further opportunity to explain why he had not brought the applicable 'substantial grounds' test and the 28-day time limit under s. 5 of the Act of 2000 to the attention of Barrett J in making the application for leave *ex parte*. Counsel for the applicant reiterated that the application was brought in great haste and then added that he was still at that time in his devilling year. This, regrettably, gives rise to two further issues of professional conduct, which will now have to be resolved. First, why did counsel for the applicant accept instructions to advise the applicant on, and represent the applicant in, an urgent *ex parte* application for judicial review if he lacked the necessary knowledge, experience and skill to do so competently? Second, why did the applicant's solicitor instruct that counsel in those circumstances?

107. In the course of his submission to me, counsel for the applicant offered an apology for his various acknowledged failures in bringing the application for leave *ex parte* before Barrett J. While that apology was entirely appropriate, I regret to say that - as with the vast majority of the proliferation of apologies I have received from various counsel since being assigned to the Ayslum List - it is of little practical value where what is at stake is the proper administration of justice in accordance with law.

108. When the hearing of the application resumed after lunch on 11 May 2017, counsel for the applicant applied for an adjournment of the Minister's application to dismiss the proceedings. Counsel explained that his purpose in applying for an adjournment was to enable the applicant belatedly to bring a motion seeking an extension of time, under s. 5(2) of the Act of 2000, in which to apply for leave to seek judicial review of the removal order, grounded on the necessary affidavit or affidavits properly setting out the evidence establishing that there were good and sufficient reasons for granting one.

109. Although counsel for the applicant acknowledged that, as part of the 'good and sufficient reason' test for an extension of time, he would have to establish an 'arguable case' (on the authority of the decision of the Supreme Court in *G.K. v Minister for Justice* [2002] 2 IR 418), it is important to remember that the test an applicant is obliged to meet to obtain leave to apply for judicial review

of a removal order under s. 5(2) of the Act of 2000 (quite apart from the test to obtain an extension of time in which to seek that leave) is one of 'substantial grounds' and that counsel for the applicant had failed to bring that test to the attention of Barrett J in obtaining leave on 16 March 2016. Thus, even if the court was otherwise entitled to permit the applicant an opportunity to mend his hand after he had misled the court on his initial *ex parte* application (and I did not adjudicate on the point at that time), he would still have to satisfy the court that he had 'substantial grounds' to challenge the removal order, if the proceedings were to be maintained in accordance with law.

110. Anxious to avoid any possible unfairness to the applicant, I granted the adjournment sought, subject to the following directions. The applicant's motion, grounded on the necessary affidavit(s), was to be filed and served within 7 days, *i.e*. by 18 May 2017; it was to be made returnable for 1 June 2017, two weeks thereafter; and the Minister was to have until close of business on the preceding Tuesday, 30 May 2017, to file any affidavit(s) she may wish in opposition to it.

iv. The applicant's motion for an extension of time

111. In breach of the court's direction, the applicant's motion did not issue until 23 May 2017. Inexplicably and inappropriately, it sought an order pursuant to O. 84, r. 21(3) of the RSC extending the period within which the application for judicial review of the removal order could be made, once again ignoring the requirements of s. 5 of the Act of 2000, which displaces that rule in respect of any challenge to a removal or exclusion order.

112. The application was grounded on an affidavit sworn by the applicant on 19 May 2017. The applicant's solicitor did not swear an affidavit, a point to which I will return below.

113. In his affidavit, the applicant avers that, shortly after receiving the letter from the INIS of 13 February 2015, informing him of the Minister's proposal to make a removal order against him, he contacted the solicitor who was then representing him, seeking his assistance. The applicant avers that the solicitor concerned was to resolve 'the removal order matter' for him but failed to contact him again 'in the days and weeks afterwards.' It was in those circumstances, the applicant avers, that he made his own written representations to the Minister on 19 February 2015 (although that was within five days of the date of the INIS letter). The applicant states that, in August and September 2015, he repeatedly contacted his solicitor's office but was told that his solicitor was busy. Why he did not contact his solicitor between February and July 2015 or, as we shall see, between October 2015 and January 2016, he does not say.

114. The applicant avers that it was only in or around January 2016 that he received correspondence from the immigration authorities informing him that a removal order had been made against him. He provides no further information concerning that correspondence and does not exhibit it. He then avers that the receipt of that correspondence prompted him to write to his present solicitor on 28 January 2016. He goes on to aver that he cannot explain why his letter was not received by that solicitor until 2 March 2016 because he was reliant upon the prison authorities to deliver - he might more accurately have said 'to send' - his post and he had handed it directly to an unidentified member of the prison staff after writing it.

115. The applicant alleges that the prison authorities would not permit him to contact his present solicitor by telephone, because they refused to add her name and number to his telephone card. In an affidavit sworn on 31 May 2017, Anthony Shally, an assistant governor at Castlerea Prison, joins issue with that claim, exhibiting a copy of the applicant's prison telephone call records, which appear to demonstrate that he telephoned that solicitor's office on 21 separate occasions between 1 February 2016 and 16 March 2016. Assistant Governor Shally also exhibits the applicant's prison visit records, which appear to record that the applicant had three separate video-link conferences with that solicitor's office from Castlerea Prison on 25 February, 4 March and 11 March 2016.

116. The applicant avers that, on the morning of 16 March 2016, he was informed that he was to be transferred from Castlerea Prison to Cloverhill Prison to facilitate his return to Poland pursuant to the removal order that had been made against him. He requested permission to contact his solicitor and was allowed to do so. He spoke to his solicitor by telephone, informing her that his removal to Poland was imminent. The applicant avers that he was 'given to believe' by unidentified prison staff that his removal to Poland was to be effected within hours, although he does not explain how that is to be reconciled with his earlier averment that he had been informed that he was to be transferred to Cloverhill Prison. The applicant avers that the telephone call with his solicitor lasted 'approximately five minutes' and that is borne out by the telephone records exhibited by Assistant Governor Shally, which note a telephone call to that solicitor's office at 10.31 a.m. on that date that lasted 4 minutes and twenty-four seconds. The applicant acknowledges that he was transferred to Cloverhill Prison later that same day.

117. Towards the conclusion of his affidavit, the applicant repeats the same reasons for his failure to bring an application for leave to challenge the removal order within time already asserted by his solicitor in her affidavit of 27 January 2017 and by him in his earlier affidavit of 17 February 2017: first, that he speaks limited English; second, that he was in prison throughout the period concerned; third, that he did not have legal representation; and fourth, that his present legal representatives moved with all practicable speed in seeking relief on his behalf.

118. The motion and grounding affidavit just described were entirely unsatisfactory in addressing the deficiencies in the application for leave and, thus, of little or no use in seeking to persuade the court to permit the proceedings to continue.

119. Of course, it might well have been the case that no such application could have succeeded. After all, the applicant had sought and obtained leave in direct breach of s. 5(2) of the Act of 2000 and had done so by failing to draw that provision to the attention of Barrett J, thereby misleading the court. Ultimately, it was always going to be necessary to consider whether the only appropriate course was to strike the proceedings out and not to entertain any *ex post facto* application for an order retrospectively extending the time for bringing a leave application that had already been made. Indeed, it would have been necessary to consider whether the discretion conferred on the court by s. 5(2) of the Act of 2000, properly construed, is capable of being positively exercised in that way *i.e*. as either a condition precedent *or a condition subsequent* to the consideration of an application for leave to challenge a decision captured by that section.

120. But, assuming for the purpose of argument that a broad discretion of the type implicitly contended for on behalf of the applicant does exist (a proposition I would tend to doubt), he would still have to satisfy both the test for an extension of time in which to seek leave and the test for leave under s. 5(2) of the 2000 Act; that is to say, he would have to establish both that there were good and sufficient reasons for extending time and that there were substantial grounds (not merely arguable grounds, as Barrett J had been wrongly permitted to believe) for challenging the lawfulness of the removal order against him.

121. The affidavit sworn by the applicant on 19 May 2017 fails to establish anything approaching a good and sufficient reason for extending the time to seek leave.

122. In the first place, the applicant's averments concerning when he was notified of the removal order against him – which is when, under s. 5 of the Act of 2000, time began to run against him - are hopelessly, if not deliberately, vague. He avers that he became aware of a proposal to make a removal order against him in February 2015 (para. 3); that he was aware at some unspecified time that a removal order had been made against him (para. 10); and that 'in or around January 2016' he received further correspondence from the immigration authorities informing him that a removal order had been made against him (para. 12).

123. The applicant does not exhibit the correspondence he claims to have received from the immigration authorities 'in or around January 2016.' More significantly, he completely fails to engage with the correspondence exhibited to the affidavit sworn by Mr Doyle on 25 November 2016, which includes the INIS letter to the applicant of 10 June 2015, enclosing a copy of the removal order against him and the written statement of reasons for the decision to make that order, each also dated 10 June 2015.

124. Second, the applicant's reasons for seeking an extension of time, presented in an affidavit prepared with the assistance of his current legal representatives and an interpreter, are entirely inadequate. His criticisms of his former solicitor are uncorroborated and do not appear to have been inquired into by his current legal representatives, who seem to have been content merely to draft an affidavit for the applicant to swear, naming that solicitor and setting out those criticisms of him, without first putting those criticisms to that solicitor, as part of their duty of inquiry, or offering him an opportunity to respond, as a tenet of professional ethics. That raises yet another issue of professional conduct against the applicant's current legal representatives.

125. Third, even if there were merit to the applicant's claim that his former solicitor failed to provide him with any effective legal assistance or advice from February 2015 onwards, the applicant does not adequately explain why he waited until January 2016 to seek advice and representation from his current solicitor.

126. Fourth, the applicant baldly asserts his English literacy difficulties as part of the reason for his delay in challenging the removal order against him without providing any corroboration for that claim or explaining how he was able, while in prison, to make written representations on 19 February 2015 in response to the INIS letter to him of 13 February 2015, or to write to his current solicitor on 28 January 2016. Differently put, if he could write to the Minister in February 2015 and could write to his current solicitor in January 2016 without evident difficulty, why could he not write to his former or current solicitor in February 2015?

127. And fifth, the applicant's repeated assertions of his personal ignorance of the law cannot avail him, since, even leaving aside the absence of any inhibition or obstacle preventing him from seeking legal advice and assistance from any one of a range of sources (whatever his problems with his own solicitor might have been) at any material time, *ignorantia iuris non excusat* ('ignorance of the law excuses not').

128. The applicant's failure to establish substantial grounds for challenging the lawfulness of the removal order against him is even more striking. In consistently failing to deal with the INIS letter to him of 10 June 2015, enclosing a copy of the removal order against him and the written statement of reasons for the decision to make that order, both also dated 10 June 2015, the applicant effectively concedes that the arguments that were made to Barrett J on 16 March 2016 concerning the absence of any reasons for the Minister's decision to make a removal order against him were without any foundation in fact.

129. Those removal documents were exhibited to the affidavit sworn by Mr Doyle on 25 November 2016. Among them is the Minister's seven-page written notification of the reasons for the decision to make a removal order against the applicant. It includes the following paragraph (at pages 4-5):

> 'Mr Bebenek submits that he has resided in the State since 2005. Time spent in prison is not considered when calculating does a person qualify for permanent residency (Communication from the Commission to the European Parliament and the Council COM (2009) 313). Between the periods of 2010, 2014-2016, Mr Bebenek will have spent approximately 22 months in prison. It is accepted that Mr Bebenek does qualify for permanent residency having been resident over 5 years which would require serious grounds of public policy to justify his removal. Mr Bebenek falls far short of the 10 year period of residency [which] would require imperative grounds of public policy to justify removal. Mr Bebenek's 39 convictions in the State demonstrates the total disregard that he holds for the laws of this State.'

130. While the applicant and his legal representatives never attempted to engage with that reasoning or with any of the legal authority relevant to it, the applicant concludes his affidavit of 19 May 2017 with the following sweeping averment:

> 'Finally, I would ask this Court to take into account the underlying strengths of the merits of my application in these proceedings. In particular, I am advised that very strong points of challenge have been identified with respect to the removal order, having regard to the fact that I had been living here for ten years at the time it was made.'

131. For the reasons I have given, it is very difficult to see how Barrett J could have been satisfied that there were substantial grounds for challenging the removal order against the applicant, had the applicant's legal representatives complied with their duty of inquiry and their duty of candour in making application to the court *ex parte* on 16 March 2016.

v. the release and immediate disappearance of the applicant

132. Simon Duignan, a detective member of An Garda Síochána assigned to the Arrangements Unit of the GNIB, swore an affidavit on 30 May 2017 on behalf of the Minister. In it, he avers as follows.

133. The applicant was due for release from prison on 17 March 2016. On 9 March 2016, the Arrangements Unit booked flights to Warsaw, Poland on 17 March 2016 for the applicant and two accompanying members of An Garda Síochána. To facilitate those arrangements, the applicant was transferred to Cloverhill Prison in Dublin on 16 March 2016. When the applicant's solicitor confirmed to An Garda Síochána on 17 March 2016 that an injunction had been obtained preventing his removal from the State, those arrangements were abandoned and the applicant was released from custody.

134. Just before the applicant was released, he was handed a notice, pursuant to Regulation 19 of the Regulations, requiring him to reside at the address in Kildare that he had given and to attend in person at the GNIB in Dublin at a specified time on 14 April 2016.

135. The applicant failed to attend at the GNIB as required and has not been located since.

136. Subsequent enquiries carried out by An Garda Síochána established that the applicant was not residing at the address in Kildare that he had given. In the written representations he had made against the proposal to make a removal order against him, the applicant had identified the property concerned as one rented by his partner's mother. With those written representations, the

applicant had enclosed a letter, ostensibly from his partner's mother, confirming that he had her permission to reside at that address upon his release from prison. Further, in the affidavit that he swore on 17 February 2017 in opposition to the application to dismiss his proceedings, the applicant had given that as his address.

137. In the further affidavit that he swore on 19 May 2017, in support of his application for a retrospective extension of time to seek leave to bring these proceedings, the applicant gave a different address – this one in County Laois. Subsequent enquiries carried out by An Garda Síochána established that the applicant was not residing, and never had resided, at that address.

138. It follows that the applicant was evading the State's immigration authorities while continuing to pursue these proceedings from 14 April 2016 onwards and, in particular, when he swore affidavits in these proceedings with the assistance of his legal representatives on 18 April 2016, 17 February 2017 and 19 May 2017.

vi. the application to come off record by the applicant's solicitors

139. On 1 June 2017, the return date of the applicant's motion for an extension of time in which to apply for leave to seek judicial review, senior counsel appeared on behalf of the applicant. He informed the court that he had been instructed the previous day to advise the applicant. He stated that, upon receipt of his advice, the applicant had chosen to discharge both solicitor and counsel. He continued that the applicant had then been advised that if he wished to maintain the proceedings he would have to attend court in person or have another legal representative attend court to appear on his behalf. He concluded by applying for leave for his instructing solicitors to come off record. I ruled that, if an application to come off record was to be made, the appropriate motion would have to be issued and served in the usual way.

140. Counsel for the Minister submitted that she now had firm instructions to seek an order from the court permitting the Minister to take up a transcript of the *ex parte* application for leave that had been made to Barrett J on 16 March 2016.

141. I granted each side leave to bring the relevant motion, returnable in each instance to 20 June 2017. On that basis, I adjourned the proceedings, the Minister's motion to dismiss the proceedings, and the applicant's motion for an extension of time in which to apply for leave to bring the proceedings, to the same date.

142. On 13 June 2017, the applicant's firm of solicitors issued their motion to come off record. It was addressed to the applicant at the address he had provided in his affidavit sworn on 19 May 2017. There is no reason to believe that the applicant's solicitor had not by then received a copy of the affidavit sworn by Detective Garda Duignan on 30 May 2017, in which he averred that enquiries carried out between 19 May 2017 and 30 May 2017 had established that the applicant was not living, and had never lived, at that address.

143. The application to come off record was grounded on an affidavit of the applicant's solicitor, sworn on 9 June 2017. In it, she refers to the proceedings and to the motion that had been brought on behalf of the applicant for an *ex post facto* extension of time in which to seek leave to bring the proceedings, noting that the motion had been listed for hearing on 1 June 2017.

144. The applicant's solicitor avers that 'Senior Counsel's advices were sought and subsequently obtained on the 31st May 2017.' While that averment is perhaps ambiguous about when those advices were sought, it will be remembered that the senior counsel who appeared before me on 1 June 2017 stated that he had been instructed on the previous day, that is 31 May 2017. For reasons that will become evident, it is disturbing to recall that senior counsel had also informed me that the applicant had chosen to discharge his legal representatives, rather than that the applicant's solicitor had resolved to terminate her retainer.

145. The applicant's solicitor then avers to specific legal advice given by senior counsel. I am sorry to say that these averments appear to me to be a breach by the solicitor concerned for her own ends of the privilege vested in the applicant as her client over the confidentiality of legal advice given to him by his own legal representatives in the course of litigation. This lamentable state of affairs seems to have come about because, having sought and obtained leave *ex parte* to bring an application for judicial review, and having only afterwards brought an unorthodox application for a retrospective extension of time in which to do so, the applicant's legal representatives now belatedly acknowledged, with the benefit of the opinion of a more senior lawyer, that the prospect of obtaining that extension of time was 'remote', necessarily implying that the institution of the proceedings in disregard of the applicable time limit had been wrong in law from the outset.

146. The logic of the position adopted by the applicant's legal representatives is that this volte face on their part created a problem not for them but for their client, the applicant. The applicant's solicitor avers that a member of her office contacted the applicant - she does not say how or where - and explained to him that her office was now 'unable and unwilling' to make the application for an extension of time that it had prepared on his behalf in the proceedings that it had instituted on his behalf. The applicant's solicitor goes on to aver that the reasons for this were explained to the applicant but does not disclose what they were, other than that it 'would expose the [applicant] to the costs of the application being awarded against him.' Of course, the applicant was at all times exposed to the risk of an award of costs against him in the application and, indeed, in the proceedings, each brought on his behalf on the advice of his legal representatives.

147. The applicant's solicitor avers that the applicant expressed the view that he wanted the application for an extension of time to proceed, no matter how remote the prospects of success. This prompted the applicant's solicitor to write to the applicant on 8 June 2017, at his last known address, advising him that her office was going to bring a motion to come off record, which it duly did.

148. On the return date of that motion, 20 June 2017, the applicant's solicitor was not in a position to prove service of the motion papers on the applicant. Accordingly, I adjourned the application to 25 July 2017 to afford the applicant's solicitor an opportunity to do so. In adjourning the application, I indicated to counsel instructed by the applicant's solicitors that I would require to be addressed on the law in relation to what constitutes a valid ground for the termination of a retainer by a solicitor.

149. In the meantime, the Minister had duly issued a motion on 12 June 2016 seeking permission to take up a copy of the transcript of the *ex parte* application for leave. It was grounded on an affidavit sworn by Mr Doyle, an assistant principal officer in the Repatriation Division of the INIS, on 9 June 2016. There was no objection to that application when it came before the court on the return date, 20 June 2016. Accordingly, I acceded to it.

150. On the 25 July 2017, the applicant's solicitor was again unable to prove service on the applicant of her motion to come off record but counsel for the applicant's solicitor insisted on proceeding with it on the basis of his instructions (presumably, from the applicant's solicitor) that proper service had been effected, even if it could not be formally proved, a submission that I have to say I consider unprecedented. As service of the motion papers had not been proved, I refused that application.

151. Just before I did so, counsel for the applicant made a submission that, I think it is fair to say, gives rise to the deepest misgivings about the conduct of these proceedings by the applicant's legal representatives. That submission was that counsel for the applicant was no longer opposing the Minister's application to dismiss the proceedings. I asked counsel to explain who was instructing him in that regard. Counsel did not answer that question directly but, rather, submitted that the applicant was no longer 'in a precarious position' because it was now more than two years since the removal order against him had issued, which meant that the Minister would now have to 'reaffirm' the order, which decision in turn would be susceptible to judicial review. Although counsel for the applicant was unable to identify the legal basis for that assertion, I have since clarified that it was a reference to the provisions of Regulation 20(1)(e) of the Regulations, reflecting the requirements of Article 33(2) of the Citizens' Rights Directive, whereby a removal order that is more than two years old shall not be enforced 'unless the Minister is satisfied that the circumstances giving rise to the making of the order still exist.'

152. There are (at least) two problems with that submission. First, counsel for the applicant was seeking to substitute his own judgment for his client's instructions, in circumstances where he had no instructions and was seeking leave for his instructing solicitor to come off record for that very reason. Second, it strongly suggests that the purpose of these proceedings was as a tactic or strategy to delay or deter the removal of the applicant from the State, since the applicant's counsel was now evincing no concern to vindicate his client's position on the asserted unlawfulness of the removal order and, more tellingly, no concern about his client's potential liability for the legal costs of the proceedings he had brought to challenge that order. I will return to the implications of using litigation in that way later in this judgment.

153. Counsel for the applicant then sought a further adjournment to take instructions and I acceded to that application, adjourning the proceedings and the Minister's application for an order dismissing the proceedings to 12 October 2017. Counsel for the Minister expressed the understanding that the application for an *ex post facto* extension of time in which to seek leave to bring the proceedings had been withdrawn on behalf of the applicant. Although counsel for the applicant did not demur and I foolishly accepted that as the position, I now realise on reviewing my note that counsel for the applicant had made no such application, having no instructions to do so, and that the applicant's solicitor was seeking to come off record precisely because the applicant had instructed her that he wished to proceed with that application. This provides a good illustration of the relentless entropy that has characterised these proceedings over the two years that I have been dealing with them.

vii. the second application to come off record by the applicant's solicitors

154. When the proceedings came back before me on 12 October 2017, senior counsel had been instructed on behalf of the applicant. He informed me that liberty had been obtained from Humphreys J on the previous Monday, 9 October 2017, to effect short service of another application by the applicant's solicitor to come off record. Service of the relevant motion papers had then been attempted by sending a copy of them by registered post to the last known address of the applicant. I pause here to note that the applicant's legal representatives have never acknowledged, much less engaged with, D/Garda Duignan's averment, in his affidavit sworn on 30 May 2017, that enquiries conducted by An Garda Síochána had established that the applicant was not residing at that address and never had been.

155. There was also a difficulty in that the applicant's solicitor had sworn two conflicting affidavits regarding the date on which she had written to the applicant to notify him of the application. It was submitted to me by counsel, though nowhere averred to in evidence, that the relevant averment in the first affidavit was a typographical error and that the conflicting averment in the second affidavit should be viewed as an implied correction of it. But that does not make sense. The motion in respect of the second application to come off record is dated, and was issued on, 9 October 2009. It is clear that the applicant's solicitor had to be in error in purporting to solemnly aver in an affidavit sworn on 6 October 2009 that she had written to the applicant on 20 July 2017, enclosing a copy of those motion papers. But is entirely unclear how the applicant's solicitor could have written to the applicant on any other date prior to swearing that affidavit, enclosing motion papers that were not issued or filed until the following Monday, 9 October 2017. So it is plain that the relevant averment in the first affidavit amounted to a misstatement of fact, rather than a mere typographical error.

156. Be that as it may, in view of what was at stake for the applicant, I was not satisfied to permit his solicitor's application for liberty to come off record to proceed in circumstances where he had received, at best, less than four days clear notice of it. For that reason, I adjourned all matters for a further two weeks to 26 October 2017, with appropriate directions to the applicant's legal representatives to write to the applicant to put him on notice of the adjourned date.

157. The applicant's solicitors failed to properly comply with that direction, writing to the applicant at the wrong address. Thus, on 26 October 2017, I was obliged to adjourn all matters again to 9 November 2017.

158. Before doing so, I took the opportunity to remind counsel for the applicant that, should the application proceed on the next date, I would require to be addressed on whether the ground invoked by the applicant's solicitor to justify the termination of her retainer could be considered a valid one. I drew the attention of the parties to the passage in O'Callaghan, *The Law on Solicitors in Ireland* (Dublin, 2000) (at paras. 3.54 and 3.55) which deals with the implied term in a retainer that a solicitor may terminate it on reasonable notice for good cause. I had in mind the most closely analogous example provided in O'Callaghan (at para. 3.55) whereby a solicitor is not bound to go on acting for a client in court proceedings if the client insists on some step being taken which is against the best judgment of the solicitor.

159. The authority for that proposition is the decision of the old Irish Court of Appeal in *Chance v Tanti* (1901) 34 ILTR 126 but the facts there were very different. The clients in that case wished to have the solicitor they had retained to act for them in certain lunacy proceedings file an affidavit on their behalf the contents of which that solicitor considered to be scandalous, prolix, irrelevant and likely to lead to the censure of the court. The Court of Appeal, having found that the solicitor's judgment was correct in that regard, held that he was entitled to terminate his retainer on reasonable notice in those circumstances, rather than obliged to comply with that instruction.

160. In this case, it would seem that the solicitor concerned and the counsel she instructed were the very persons who advised the applicant that leave should be sought to bring these proceedings in the manner in which that was done and, later, that an application should be brought for an extension of time with retrospective effect for that purpose. It was only later still that they contradicted their own earlier advices by informing him that the prospects of obtaining that extension of time were 'remote' and, by necessary implication, that the application for leave to seek judicial review that they had brought on his behalf, although initially successful because they had misled the court, was wrong in law. That appears to be the basis upon which, when the applicant requested that his legal representatives proceed in accordance with their earlier advice to him, the applicant's solicitor informed him that she was no longer 'able or willing' to act on his behalf in these proceedings, before embarking on two consecutive applications for liberty to come off record.

viii. the dismissal of the proceedings and the issue of costs

161. By the time the matter came back before the court on 9 November 2017, the issue had become moot. The applicant's solicitor had succeeded in making contact with the applicant, through the applicant's partner. The applicant had instructed his solicitor that he had returned to Poland and no longer wished to continue with the proceedings. In those circumstances, counsel for the applicant indicated that he had no instructions to oppose the Minister's application for an order striking them out.

162. Counsel for the Minister then formally moved her application to dismiss the proceedings and applied for an order granting the Minister her legal costs against the applicant, including all reserved costs, to be taxed in default of agreement. Counsel for the applicant had no submission to make concerning why the usual rule should not apply; that is to say why costs should not follow the event.

163. However, I then indicated that I was obliged to consider the application of O. 99, r. 7 of the RSC, as I had reason to believe that the costs of these proceedings had been improperly or without any reasonable cause incurred, and that it was therefore necessary to call on the applicant's solicitor to show cause why those costs should not be disallowed as between that solicitor and the applicant and also, in the particular circumstances of this case, why the applicant's solicitor should not be ordered to repay to the applicant the costs which the applicant would be ordered to pay to the Minister.

164. Counsel for the applicant then applied for an adjournment on the unattractive basis that, while he was willing to concede the costs issue as it affected his client the applicant, he wanted his absent leader in the case to have an opportunity to address the court on any question of costs capable of affecting his instructing solicitor, adding that he had received no instructions in that regard.

165. I ruled that I was not prepared to further adjourn the matter on that basis, since it must have been obvious to the applicant's legal representatives that, once the proceedings were dismissed, as in the circumstances they must have anticipated they would be, the ancillary issue of costs must inevitably arise and the potential exercise of the jurisdiction under O. 99, r. 7 must inexorably form part of the consideration of that issue. I therefore invited counsel for the applicant to make any submissions he might wish on behalf of his instructing solicitor concerning the application of that rule.

166. Counsel for the applicant responded that there were no submissions that he wished to make on the issue of costs and that he was in the court's hands. To his credit, he acknowledged that the application for leave to Barrett J on 16 March 2016, by then more than two years previously, had been misconceived in law and that his instructing solicitor's two consecutive applications to come off record had not been dealt with as efficiently as they should have been, for which errors he apologised to the court. Beyond that, he indicated that he had nothing more to say.

167. I informed the parties that, before determining the issue of costs, I was anxious to consider matters carefully and that I would therefore list that aspect of the proceedings for judgment in two weeks' time on 23 November 2017. In the meantime, I ordered that the motion to come off record brought by the applicant's solicitor be struck out and that the proceedings be dismissed on the application brought by the Minister. I should also have ordered that the applicant's extension of time application be struck out and will now do so.

168. In yet another manifestation of the procedural confusion that has bedevilled these proceedings from the outset, I received written submissions from the applicant's solicitor on the issue of wasted costs on 17 November 2017, despite the fact that argument had concluded and judgment had been reserved over a week previously. Anxious to avoid any possible injustice, I therefore refrained from delivering a ruling on 23 November 2017 and instead, having invited counsel for each of the parties to address me on that further unsatisfactory development, adjourned the proceedings once more to 7 December 2017 to enable the parties to make any final submissions they might wish. The Minister provided a written submission setting out her position and I once again reserved my decision on that date.

The issue of wasted costs

169. Order 99, r. 7 of the RSC confers a power on the court - in any case where it appears that, by reason of some misconduct or default on the part of a solicitor acting for a person, costs have been improperly or without reasonable cause incurred by that person or that costs properly incurred by that person have nevertheless proved fruitless to him or her - to call on that solicitor to show cause why those costs should not be disallowed between the solicitor and his client and also, if the circumstances of the case require, to show why the solicitor should not repay any costs which the client may have been ordered to pay any other person, and then to make whatever order is just on those issues.

170. The leading case on the jurisdiction to make a wasted costs order under O. 99, r. 7 of the RSC is *Kennedy v Killeen Corrugated Products Ltd*. [2007] 2 IR 561. In that decision of the High Court, Finnegan P conducted a review of the authorities and concluded that the power of the court to make an order under that rule depends upon the solicitor being guilty of misconduct in the sense of a breach of his duty to the court or at least of gross negligence in relation to his duty to the court.

171. In the High Court case of *O.J. v Refugee Applications Commissioner* [2010] 3 IR 637, Cooke J considered the effect of O. 99, r. 7 stating (at 643):

> 'It is clear that this rule is directed primarily at the relationship between a solicitor and his own client against whom an order for costs has been made and with disallowing his reimbursement of improperly incurred costs by his client and with ordering him to repay to any client any such costs which the client has been ordered to pay to a third party.'

172. Cooke J went on to express his agreement with the identification of the test for the application of the rule by Finnegan P in *Kennedy v Killeen Corrugated Products Ltd.*, already cited, before continuing (at 644) in a passage worth setting out at length:

> '[22]… It is clearly, however, a jurisdiction which should be exercised sparingly and only in clear cases where it is necessary to do so in order to do justice between the parties. That is a particularly important consideration in litigation of the present kind where the administration of justice and the standing of the asylum process requires that legal representation is available to those claiming asylum and that experienced and competent practitioners should be willing to undertake that difficult work.
>
> [23] It is obvious, therefore, that the court should be cautious not to allow a sense of dismay at the way in which a particular case has been brought or conducted to lead to a situation in which the issue of costs, which is in any event a precarious one in such cases, should impose an added burden of uncertainty upon practitioners.

> [24] The first duty of legal practitioners is, of course, to ensure that the legitimate interest of their clients are secured in exercising their right of access to the courts. In asylum cases their duty is to see that throughout the asylum process appropriate steps are taken to ensure that an application for asylum receives full and fair consideration and results in a lawful determination of that claim. Practitioners have also, however, a duty to the court to ensure that the right of access to the court is not abused by vexatious, wasteful or speculative litigation. There is no obligation to pursue litigation at all costs simply because it is possible to do so, especially when it has no purpose other than that of prolonging the process and postponing a final determination of the asylum application.
>
> [25] Whenever the court has good reason to conclude that there has been a failure to discharge this latter duty such that proceedings have been unnecessarily commenced or wastefully continued, it should be made clear that recourse will be had to O. 99, r. 7 in order to protect the integrity and effective operation of the asylum process in the interests of the proper administration of justice and of the interests of those genuinely in need of protection and whose determination is likely to be delayed by abuses of process in other cases.'

173. This approach was expressly endorsed by Laffoy J in the Supreme Court in *P.O. v Minister for Justice* [2015] IR 164 (at 189-191), an appeal in which a similar order was made. In the same case, Charleton J pointed out (at 222-3) that, while strong advocacy is to be admired, floating points that dissolve on first consideration is a misuse of court time and of the costs necessary in answering them. Charleton J went on to state that the application at issue in that appeal was of such lack of merit that the necessary response, 'as a matter of simple fairness', was that such costs as had been expended by the Minister in responding to it must be deemed costs thrown away by the appellants, which their solicitors must be ordered to pay.

174. The legal representatives for the applicant in this case now acknowledge, as in my view they must, that the application for leave to bring these proceedings was brought in breach of statute (s. 5 of the Act of 2000) and that the Court to which that application was made *ex parte* was misled by omission on the applicable law.

175. Further, having considered the substantive grounds of challenge raised to the lawfulness of the removal order against the applicant on the law as it stands applied to the evidence that has been presented and, in particular, the Minister's uncontroverted evidence that the applicant was provided with a written statement of reasons for the making of that removal order under cover of a letter dated 10 June 2015, I am satisfied that, on the merits, this was a judicial review proceeding that ought not to have been brought and which could never have succeeded.

176. Either of the propositions set out over the two preceding paragraphs is more than sufficient to establish gross negligence in the commencement of these proceedings. I am conscious that in *Kennedy*, already cited, Finnegan P noted (at 568) that, while acting on the advice of counsel does not justify a breach of a solicitor's duty to the court, it will, in general, be an answer to a charge of negligence, I conclude that this is not in the general run of such cases. The strict time-limit for challenging any one of a wide range of immigration and asylum decisions is not recondite information known only to certain specialist advocates at the Bar – it is a statutory time-limit. Further, I do not accept that the applicant's solicitor can be heard to say that, in the discharge of her duty of care, she was entitled to defer to the advice of the counsel she had instructed, when that counsel was still in pupillage at the material time. Nor do I accept that the applicant's solicitor could defer to counsel on the merits of the application in relation to those questions of fact that were plainly covered by her duty of inquiry and duty of candour as the applicant's solicitor.

177. For reasons that will be shortly evident, I express no view on whether the commencement and conduct of the proceedings by the applicant's legal representatives (that is to say, the applicant's solicitor and junior counsel) amounted to the litigation of a claim bereft of merit as a tactic or strategy to frustrate the lawful enforcement of the removal order against the applicant. That would amount to professional misconduct.

178. I am however satisfied that there has been a clear default in the duty owed by legal practitioners to the court in commencing and continuing these proceedings, just as Cooke J was in respect of the equivalent duty owed to the court by the legal practitioners in the case of *O.J.,* already cited. Accordingly, I propose to make the same order as Cooke J did in that case for the same reason. The Minister is entitled to an order for his costs on foot of the basic rule that costs follow the event. That order will be made against the applicant. In those circumstances, would it be just that the applicant should shoulder that liability towards the Minister? If he is unable to discharge that liability, is it just that the Minister (and, by extension, the people of Ireland) should be required to bear the resulting loss when it ought not to have arisen? In my view, the answer to each of those questions must be 'no.'

179. For all of the reasons I have already set out, this is not a case in which it is possible to take the same benign view as that adopted by Cooke J on the particular facts that arose in *Idris v Legal Aid Board* [2009] IEHC 596, (Unreported, High Court, 10th December, 2009) *i.e.* that the relevant conduct of the applicant's solicitor was a misjudgement that may have been attributable to the advice of counsel rather than gross negligence or, worse, serious misconduct on her part.

Conclusion

180. I will therefore award the costs of the proceedings to the Minister as against the applicant and further order, pursuant to O. 99, r. 7, that the solicitor for the applicant indemnify him in respect of the amount of those costs when agreed with the Minister (or taxed in default of agreement) by bearing them personally.

181. Regrettably, the matter cannot end there. The court must protect the integrity of its own processes.

182. In the exercise of its inherent jurisdiction to govern its own procedure, the High Court of England and Wales has developed a formal procedure in seeking to ensure that lawyers in cases of this kind conduct themselves according to proper standards of behaviour; see *Hamid*, already cited. That procedure was described by Green J for the Divisional Court of the High Court of England and Wales in *Sathivel*, already cited, in the following terms (at para. 2):

> 'When a Judge concludes that a lawyer has acted improperly that may be recorded in a court order. The papers are then referred to the High Court Judge having responsibility for this jurisdiction. A "Show Cause" letter may then be sent to the lawyers concerned who are invited to respond addressing the matters of concern raised in the Show Cause letter. If the judge in charge considers the response to be inadequate the case may be referred to the Divisional Court. In the event that the Court finds that the conduct in question falls below proper standards the Court can admonish a practitioner. Alternatively, the Court can refer the file to the relevant regulatory authority, usually the Solicitors Regulation Authority ('SRA'), for further investigation and if appropriate the imposition of sanctions. The Court is aware that in relation to previous references to the SRA solicitors have been struck off the roll.'

183. No such structured approach has yet been developed here. Perhaps, the time has come to do so. In the meantime, I must

address the issues that have arisen in this case through the exercise of the inherent jurisdiction of the court to protect its own process from abuse and, should it prove appropriate and necessary, through the exercise of the power conferred on the court under O. 99, r. 7 of the RSC to disallow the costs of these proceedings as between the applicant's solicitor and the applicant.

184. To assist it in seeking to hold to account the lawyers whose conduct of litigation in accordance with minimum professional and ethical standards was in issue in *Sathivel*, the Divisional Court sought information in that case as to the level of fees demanded by the solicitors concerned. That course of action appears to me to be appropriate in this case also and I direct the applicant's solicitor to furnish the court, through the registrar, within 14 days of the date of this judgment with all documentation on her file touching upon or concerning the fee arrangements between her firm and the applicant.

185. Further, I require the applicant's solicitor and the junior counsel who was instructed to act on behalf of the applicant to show cause why each should not be found by the Court to have conducted these proceedings in breach of proper standards of professional behaviour and in breach of the duty that each of them owes to the Court.

186. In particular, I invite the applicant's solicitor and junior counsel to respond to the following specific matters of concern:

> (i) What steps did the applicant's solicitor take to obtain instructions from him and to make any necessary inquiries of the immigration authorities on or after 2 March 2016, that being the date upon which her office received his letter notifying her that his anticipated release date was 17 March 2016 and that he was seeking her representation vis a vis those authorities?
>
> (ii) How was it that the applicant's solicitor only became aware of the removal order against the applicant on 16 March 2016? How did she become aware of it? Who provided her with a copy of it?
>
> (iii) Does the applicant's solicitor accept, as the records exhibited by Assistant Governor Shally appear to establish, that the applicant telephoned her office on 21 separate occasions between 1 February 2016 and 16 March 2016 and that three video-link conferences took place between the applicant at Castlerea Prison and her office on 25 February, 4 March and 11 March 2016?
>
> (iv) Is it the position of the applicant's solicitor that she did not, and could not reasonably have, become aware of the existence of the removal order against the applicant prior to the morning of 16 March 2016 and that she did not, and could not reasonably have, become aware of the Minister's written reasons for making it at any time prior to the application that she caused to be made to Barrett J just after 3 p.m. on that date? If so, what is the basis for that position, bearing in mind the duty of inquiry? Is it the position of the applicant's solicitor that she did not make, and could not reasonably have made, inquiry of the Department prior to 11.18 a.m. on the 16 March 2016 and could not reasonably have alerted it to her intention to make an application *ex parte* to this Court if she did not receive a response to that inquiry within hours? If so, what is the basis for that position, bearing in mind the duty of candour?
>
> (v) Is it the position of the applicant's solicitor that, in accordance with the powerful duty of candour when making an *ex parte* application to ensure that the court is made fully aware of any limitations of the evidence placed before it, she properly set out on affidavit the steps she had taken to seek out and obtain the full background documents and facts? If it is the case that no attempt was made to seek the relevant documents and information from the Department prior to the faxing of a letter at 11.18 a.m. that morning, was the court ever directly apprised of that obvious limitation on the evidence that was being placed before it at 3 p.m.?
>
> (vi) Is it the position of solicitor and junior counsel for the applicant that it was appropriate merely to incorporate the applicant's allegations of professional misconduct against his former solicitor in an affidavit to be sworn by the applicant, without first giving that solicitor an opportunity to accept or rebut them, both as an aspect of the duty of inquiry and as a matter of professional ethics?
>
> (vii) Is it the position of solicitor and junior counsel for the applicant that each had the necessary professional competence and experience to advise the applicant on his position under domestic and EU immigration law and, in particular, to advise him on the lawfulness of the removal order against him, bearing in mind the evident failure to properly open or summarise the relevant provisions of the Citizens' Rights Directive and the Regulations in the application made to Barrett J?
>
> (viii) Is it the position of solicitor and junior counsel for the applicant that each had the necessary professional competence and experience to advise the applicant on the prospects of a successful application for judicial review of the removal order against him, bearing in mind the failure to open or engage with the provisions of s. 5 of the Act of 2000 in the application made to Barrett J?
>
> (ix) Why did junior counsel for the applicant accept instructions to advise on those matters and to represent the applicant in an *ex parte* application to the High Court while still in his devilling year (or pupillage) as a barrister?
>
> (x) Why did the solicitor for the applicant instruct a junior counsel who was still in his devilling year (or pupillage) to advise on those matters and to represent the applicant in an *ex parte* application to the High Court?

187. I direct that any response that the applicant's solicitor or junior counsel wish to make to any or all of these questions must, in the first instance, be provided in writing to the registrar within 14 days of the date of this judgment.

188. I will hear the parties and, in particular, the applicant's solicitor and junior counsel on the date to be fixed to hear any submissions that the applicant's solicitor and junior counsel may afterwards wish to make on the issues of professional conduct that have arisen and any submissions that the applicant's solicitor may wish to make on whether it is appropriate to make a further order pursuant to O. 99, r. 7 disallowing the costs of the proceedings as between her firm and the applicant.