



THE COURT OF APPEAL
CIVIL

Record No.: 2021/57

Murray J.

Neutral Citation No: [2022] IECA 141

Donnelly J.

Ní Raifeartaigh J.

BETWEEN/

H.K. (WESTERN SAHARA)

APPELLANT

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered (*via* electronic delivery) the 24th day of June, 2022

Introduction

1. This appeal addresses two separate aspects of the decision-making process by which the appellant was refused permission to remain (“PTR”) in the State following a review pursuant to s. 49(7) of the International Protection Act 2015 (“the 2015 Act”) by the Minister for Justice and Equality (“the Minister”). The first aspect raises matters of procedure which have relevance to a large number of pending judicial review proceedings concerning applications for international protection and, more particularly, for PTR. This issue depends on the effect, if any, of a late Addendum to a s. 35 personal (or protection) interview Report on the PTR Review (under s. 49(7)). The second aspect concerns how the humanitarian considerations under s. 49(3) and the *refoulement* provisions under s. 50 of the 2015 Act were dealt with in the s. 49(7) PTR Review.

Background

2. The appellant is a national of Western Sahara. He left his home country in 2011. He was then 14 years of age. He entered the State on the 24th June, 2015 and applied for asylum here on that date on the grounds that he was in fear of persecution due to his political opposition to Morocco's control of large parts of Western Sahara. He spent the intervening years in other EU countries including a long period of homelessness in Italy where he was arrested for minor drugs and shoplifting offences. After his first application for asylum in this jurisdiction he left the State and was refused asylum in another jurisdiction. He re-entered the system in this State and, ultimately, his application for refugee status was refused as was his application for subsidiary protection and for PTR.

3. The above is a short sketch of the background. A more detailed description of the procedural history of his claims for a refugee declaration and for subsidiary protection is required. It is appropriate to interweave the relevant legal provisions which form the basis of this appeal while describing the procedural history. Of note is that the 2015 Act introduced a streamlined process for deciding on refugee status, subsidiary international protection and PTR matters. This contrasts with the previous bifurcated (perhaps more properly trifurcated) process. Prior to that entering into that more detailed description, it may be helpful to refer to a brief chronology of relevant events.

A timeline

<u>24 June 2015</u>	Appellant enters State and applies for asylum.
<u>10 May 2016</u>	ORAC issue s. 13 report refusing asylum application.
<u>29 June 2018</u>	Appellant interviewed by IPO leading to original s. 35 Report.

<u>18 July 2018</u>	Section 39 recommendation/report.
<u>19 July 2018</u>	Decision on initial s. 49(3) PTR.
<u>25 July 2018</u>	Letter to appellant notifying him of decisions and providing copy of s. 39 recommendation, s. 49 decision and s. 35 Report.
<u>14 January 2019</u>	<i>IX (NY) v. CIPO</i> [2019] IEHC 21 judgment of High Court (Barrett J.).
<u>23 January 2019</u>	IPAT decision plus letter notifying appellant.
<u>16 May 2019</u>	Addendum “ <i>Matters to be considered for PTR review arising from Section 35 Interview record</i> ”.
<u>8 July 2019</u>	PTR Review.
<u>11 July 2019</u>	Letter to appellant stating Minister refusing international protection under s.47(5) and enclosing PTR Review and Addendum.
<u>2 August 2019</u>	Deportation order made.
<u>16 August 2019</u>	Letter in relation to deportation order plus deportation order of 2 nd August 2019.
<u>8 October 2019</u>	Leave to apply for judicial review – challenging PTR Review, <i>refoulement</i> and deportation order.
<u>13 December 2019</u>	First statement of opposition delivered pleading collateral attack.
<u>2 June 2020</u>	On consent amendment to statement of grounds to challenge Addendum <i>i.e.</i> grounds e(1) (iii) to (v) added.
<u>8 July 2020</u>	Appellant seeks to amend the claim to challenge the s. 35 Report and “ <i>any other ensuing decision ... including the section 39 Report and the</i>

initial s.49(4) PTR decision". Amendment allowed without prejudice to the Minister's entitlement to object at the trial of the judicial review.

The processing of the appellant's claims

4. The appellant completed an asylum questionnaire and was interviewed by the Office of the Refugee Applications Commission ("ORAC") pursuant to s. 11 of the Refugee Act, 1996. ORAC issued its report on the 10th May, 2016. This was compiled pursuant to s. 13 of the same Act. It recommended that the appellant ought to be refused a declaration of refugee status. It is not necessary to deal with the ground for refusal.

5. The appellant then appealed this decision to the Refugee Appeals Tribunal ("the RAT") on the 6th September, 2016. On the 1st July, 2017, before his appeal was processed, the appellant left the State. He was arrested upon his return to the State through Dublin Airport as he was travelling on a false passport. He also indicated that he had travelled to other jurisdictions, including Iceland, where he was refused his application for asylum. He re-engaged with the asylum process.

6. In light of the entry into force of the 2015 Act, the appellant was provided with a questionnaire pursuant to that Act. He submitted the questionnaire in December 2017 seeking international protection. Thereafter all procedures and decisions were taken pursuant to the 2015 Act.

7. Section 34 of the 2015 Act provides that an international protection officer ("IPO") shall examine each application for international protection,

"for the purpose of deciding whether to recommend, under s. 39(2)(b), that—

a) the applicant should be given a refugee declaration,

b) the applicant should not be given a refugee declaration but should be given a subsidiary protection declaration, or

c) that the applicant should be given neither a refugee declaration or a subsidiary protection declaration.”

8. As part of the s. 34 examination, the IPO, *per* s. 35, “*shall cause the applicant to be interviewed*”. During this interview, an applicant is afforded an opportunity to explain the basis of their application for international protection. This applicant was interviewed by a member of the legal panel contracted by the Minister; this person is not an IPO. This procedure is carried out in reliance on s. 76 of the 2015 Act whereby the Minister may enter into contracts for services for suitably qualified persons to assist in the performance of her functions. A member of the legal panel is authorised to perform any of the functions of an IPO save for the making of a recommendation under s. 39(3) of the 2015 Act. Thus, a recommendation under s. 39(3) is an exclusive function of an IPO.

9. A s. 39(3) recommendation is that:

“(a) the applicant should be given a refugee declaration,

(b) the applicant should not be given a refugee declaration but should be given a subsidiary protection declaration, or

(c) the applicant should be given neither a refugee declaration or a subsidiary protection declaration.”

10. In the present case, a Report, the personal interview Report (or protection interview Report), was prepared pursuant to s. 35(12) of the 2015 Act (“the s. 35 Report”). Section 35(13) provides that the s. 35 Report “*shall comprise two parts –*

(a) one of which shall include anything that is, in the opinion of the international protection officer, relevant to the application, and

(b) the other of which shall include anything that is, in the opinion of the international protection officer, relevant to the Minister’s decision under section 48 or 49, in the event that the section concerned were to apply to the applicant.”

As stated by Hughes and Byrne in *International Protection Act, 2015 Annotated* (1st Edn., Clarus Press, 2020), it is arguable that the purpose of s. 35(13)(b) is “*to ensure that, in circumstances where an applicant, in the course of the s 35 personal interview, raises matters that would be relevant to a decision by the Minister under s 48 or s 49 (...), such matters can be recorded in the [s. 35] report, notwithstanding that the personal interview is, by virtue of s 35(1), part of the examination procedure referred to in s 34, which procedure relates to the application for international protection, specifically the determination of what recommendation should be made in respect of the application...*”.

11. On the 18th July, 2018, the two responsible IPOs, Ms. OM and Mr. SF, made a recommendation under s. 39(3)(c) of the 2015 Act and signed a report under s. 39 of the 2015 Act. This acknowledged that ORAC had previously recommended that the appellant not be granted a declaration of refugee status and recommended that the appellant should not be granted a subsidiary protection declaration. On the 19th July, 2018, the two IPOs, Mr. SF and Ms. OM, signed a report for the purposes of s. 49(3) and (4) of the 2015 Act which considered *inter alia* the possible application of the prohibition against *refoulement*. Mr. SF decided, on behalf of the Minister, not to give the appellant PTR in the State and recorded his decision thereon. While Mr. SF is an IPO, he was acting, for the purposes of the s. 49 PTR decision, in his capacity as an officer of the Minister under the authority of the Minister.

12. The s. 35 Report that was compiled on the 29th June, 2018 did not comprise those two parts referred to at s. 35(13). This was not an unusual omission in respect of those reports at the time. The absence of the second part was challenged by another applicant in the case of *IX (NY) v. CIPO* (judgment cited as *IX v. CIPO* [2019] IEHC 21 and it will be referred to hereinafter as *IX (NY) v. CIPO*), which concerned the s. 49(4) decision. Barrett J., in considering the omissions, said of the provisions of s. 39(13) that “*the Oireachtas, having elected to confer the protection just described, could fairly be taken to have intended that an*

ensuing s.48/s.49 process would be viewed as fundamentally flawed where it was preceded by a deprivation of that protection.”

13. Subsequent to the decision of the High Court in *IX (NY) v. CIPO*, the Minister sought to comply with s. 35(13)(b) by creating an additional document on the 16th May, 2019 entitled “*Matters to be considered for PTR review arising from Section 35 interview record (to be read with and as part of the Section 35 report(s) dated 29/06/18)*”. The “PTR review” is a reference to the PTR Review that is carried out under s. 49 of the 2015 Act. That document of the 16th May, 2019 (the Addendum) purported to cover the requirement of s. 35(13)(b). The document was completed by a Ms. YD, an IPO. Ms. YD, while an IPO, was not one of those who had signed the s. 39 report, had not prepared the s. 35 Report of the 29th June, 2018, and was not the person who carried out the s. 35 interview of the appellant. Ms. YD read the s. 35 Report and compiled the additional document (hereinafter the “Addendum”) which set out the material and information from the interview which in her opinion would be relevant to the Minister’s decision under s. 49 of the 2015 Act, as required under s. 35(13)(b). She noted that questions 14, 15, 22, 59 and 60 were relevant to the consideration of the PTR under s. 49.

14. Prior to the creation of the Addendum, the appellant appealed the IPO’s decision refusing him international protection to the Immigration Protection Appeals Tribunal (“IPAT”). On the 22nd January, 2019, IPAT affirmed the decision of the IPO.

15. In the course of his application for a declaration for refugee status, the appellant had also submitted information in support of his application for PTR pursuant to s. 49(2). Section 49(1) of the 2015 Act provides that “[w]here a recommendation referred to in s. 39(3)(c) is made in respect of an application, the Minister shall consider, in accordance with this section, whether to give the applicant concerned a permission under this section to remain in the State....”. For the purposes of considering this permission, the Minister shall have regard to

the information submitted by the applicant. This information is set out in s. 49(6) of the 2015 Act which provides:

“(6) *An applicant—*

(a) may, at any stage prior to the preparation of the report under section 39(1) in relation to his or her application, submit information that would, in the event that subsection (1) applies to the applicant, be relevant to the Minister’s decision under this section, and

(b) shall, where he or she becomes aware, during the period between the making of his or her application and the preparation of such report, of a change of circumstances that would be relevant to the Minister’s decision under this section inform the Minister, forthwith, of that change.”

16. The Minister shall also have regard to any relevant information presented by the applicant in his or her application for international protection, including any statement made by him at his preliminary interview and personal interview. While the legislation states that it is the Minister who determines the PTR application, as is usual the Minister can delegate this function. In the present case, one of the people who had acted as an IPO was authorised by the Minister to carry out this function. Mr. SF, acting on behalf of the Minister, refused to give the appellant PTR under s. 49(4)(b) of the 2015 Act.

17. In Mr. SF’s decision dated the 19th July, 2018, he said with respect to humanitarian considerations, that the s. 39 Report “*found that the applicant was not credible or at risk of persecution or serious harm in Western Sahara*” and that there is “*nothing to suggest that the applicant should not be returned to Western Sahara.*” The decision also had regard to the representations made by the appellant regarding the prohibition of *refoulement* wherein the appellant claimed that he will be imprisoned by the Moroccan authorities if returned to Western Sahara. The Minister again found that material elements of the appellant’s claim in the s. 39

report were not credible and relied on country of origin information from the US Department of State Human Rights Reports, 2017.

18. Since the Minister refused the appellant PTR under s. 49(4)(b) and IPAT affirmed the IPO's recommendation under s. 39(3)(c) refusing the appellant international protection, the Minister is obliged under s. 49(7), where further information is received from an applicant pursuant to s. 49(9), to review her decision in respect of the appellant ("the Review"). The Supreme Court in the case of *AWK (Pakistan) v. Minister for Justice and Equality* [2020] IESC 10 stated that the process is not automatic and only becomes mandatory on receipt by the Minister of the information provided for in s. 49(9). Subsection 49(9) provides that an applicant for the purposes of a s. 49(7) review:

- “(a) *may submit information that would have been relevant to the making of a decision under paragraph (b) of subsection (4) had it been in the possession of the Minister when making such decision, and*
- (b) *shall, where he or she becomes aware of a change of circumstances that would have been relevant to the making of a decision under subsection (4)(b) had it been in the possession of the Minister when making such decision, inform the Minister, forthwith, of that change.”*

19. On the 29th January, 2019 the appellant's solicitors made further representations to support his application which included, *inter alia*, a s. 49 review form, solicitor's representations, character references, and a medico-legal report. The Minister is required, pursuant to s. 49(3)(b), to “*have regard to the applicant's family and personal circumstances and his ... right to respect or his or her private and family life, having due regard to ... [inter alia] humanitarian considerations*”.

20. Mr. EF was assigned to the s. 49(7) review on behalf of the Minister. Mr. EF considered the appellant's file including the s. 35 Report and the Addendum compiled by Ms. YD on the

16th May, 2019. Mr. EF reviewed the s. 49(3) decision of the 19th July, 2018 and prepared a document entitled “*Review under Section 49(7) of the International Protection Act, 2015*”. The result of this Review dated the 8th July, 2019, was to refuse the appellant PTR. The Review noted under the heading “*Section 49(3)(b) – Humanitarian Considerations*”, that the medico-legal report stated that the appellant presented with “*physical signs and findings that are fully in keeping with his account with typical findings for both innocent injuries and scars attributed to maltreatment.*” The medico-legal report stated that his psychological features are “*indicative of a traumatic past where maltreatment has played a major part.*” The Review found that there was insufficient evidence of a real risk that, if removed, the appellant would be “*exposed to a serious, rapid and irreversible decline in their state of health resulting in intense suffering or a significant reduction in life expectancy*” and determined that his medical condition “*does not reach the threshold of a violation of Article 3 and therefore no further consideration of Article 3 is required.*” The Review noted that Article 8 of the European Convention on Human Rights (“ECHR”) includes the impact of both mental and physical health of the appellant, but that the circumstances around his alleged attack when living in Western Sahara had not been accepted in the international protection context. Mr. EF determined that he had submitted “*insufficient evidence to engage Article 8 on the basis of his mental and physical health. Therefore, there is no interference with respect to his private life on the basis of his medical grounds.*”

21. In relation to the appellant’s representations in support of prohibition of *refoulement* under s. 50 of the 2015 Act, Mr EF found that these “*were previously made and considered in the applicant’s 1st instance Section 49 decision dated 19/07/2018.*”

22. Mr. EF recommended that the appellant should be refused PTR. A deportation order was subsequently issued under s. 51 of the 2015 Act.

Application for judicial review

23. The appellant then brought judicial review proceedings in which he sought orders of *certiorari* of the Review made under s. 49(7) of the 2015 Act and the deportation order. Leave was granted on the 8th October, 2019 on grounds pertaining to the manner in which the Minister conducted the Review and the reasons she gave for it. He also claimed at ground e(1) that the Review was invalid because the first instance PTR decision under s. 49(4) of the Act (which itself had not been challenged) was invalid because the s. 35 Report (which was not challenged) was flawed, not being divided into two parts as provided for by s. 35(13) of the 2015 Act. He relied on the decision of Barrett J. in *IX (NY) v. CIPO* above but, unlike the facts in that case, the apparently flawed s. 35 Report was at a remove from the challenge. In this case, unlike *IX (NY) v. CIPO*, the initial statement of claim challenged the Review and not the s. 49(4) decision.

24. In her statement of opposition, the Minister objected, *inter alia*, to this ground on the basis that it was a clear collateral attack on the s. 39 recommendation, the first instance PTR Decision, and the s. 35 Report, which had all been made long before the Review was challenged. The appellant subsequently sought leave to amend his statement of grounds to include new grounds of challenge to the Review based on the use of the Addendum. The Minister did not oppose those amendments which were granted.

25. After the Minister made further submissions repeating the claim that this was a collateral attack on the first instance PTR decision, the appellant sought a further amendment of his statement of grounds. This sought to add the additional relief of an order of *certiorari* quashing the s. 35 Report as completed by the Addendum, and any other ensuing decision, including the s. 39 report and the s. 49(4) report.

26. The High Court permitted the amendment without prejudice to the entitlement of the Minister to raise any matter at the hearing of the judicial review that might have been raised in opposition to the application for the amendment. This ultimately required the trial judge, when dealing with the substantive judicial review proceedings, to address the issue of whether the

appellant should be permitted to amend his statement of grounds and, also, to address the Minister's objection to these amendments on the ground that no formal application was brought seeking the necessary extension of time for the grant of leave to seek the additional relief in paragraph d(1)(b) of the appellant's statement of grounds. The substantive judgment is considered below.

Judgment of the High Court

The s. 35 Report and its Addendum

27. The trial judge found that the s. 35 Report could be supplemented by an Addendum prepared by a different IPO at a later time after a s. 49(4) PTR decision had been made. The trial judge found at para. 18 that:

“[i]n light of what is required to be addressed pursuant to s. 35(13) of the 2015 Act, which relates to a previously recorded written interview conducted by the interviewer, it seems to me that an addendum can clearly be made at a later stage to the s. 35 report to reflect the necessary requirements of s. 35(13)(a) and (b).”

The trial judge found that as s. 35(13) involves the IPO's assessment of matters referred to in the s. 35 Report which are relevant to the issue of whether the appellant should be granted PTR, it can only be compiled after the compilation of the written interview.

28. The High Court found that, pursuant to s. 76(2) of the 2015 Act, this exercise can be conducted by an IPO other than the one who made the s. 39(3) recommendation.

29. The trial judge also found that while s. 35(13)(a) had not formally been complied with before the s. 39 report came into existence, this was of no consequence as the s. 35(13)(a) matters were in any event addressed by the s. 39 report.

30. The trial judge noted that *IX (NY) v. CIPO* can be distinguished on the facts because this appellant did not challenge the s. 49(4) decision on the grounds that it did not comply with

s. 35(13)(b) of the 2015 Act. The appellant received the decision on the 25th July, 2018, yet the application to quash the decision was only made on the 8th July, 2020. Further, the trial judge held that matters had moved on from the s. 49(4) decision, with the Minister having determined a s. 49(7) Review.

31. Although she had regard to the judgment of Barrett J. and indeed the *dicta* of the Supreme Court in *ASS v. Minister for Justice and Equality* (Unreported, Supreme Court, 8th December, 2020), the trial judge was of the view that the failure of the s. 35 Report to comply with s. 35(13)(b) of the 2015 Act should not result in quashing the s. 49(4) decision. The trial judge stated at para. 30 that:

“Whilst it may be helpful that an IPO identify what parts of an applicant’s s. 35 interview are relevant to the s. 49(4) decision, this has no binding effect as the IPO determining the s. 49(4) issue on behalf of the Minister is obliged to have regard to any relevant information contained in the s. 35 interview.”

The trial judge held that that IPO must come to her own conclusions regarding relevant information contained in the s. 35 Report and *“is not required to consider only the relevant information identified by another IPO pursuant to the s. 35(13)(b) process.”* The trial judge did not find any prejudice to the appellant in this regard.

Delay in judicial review challenge

32. The trial judge held that even if she was incorrect in her analysis relating to either the s. 35 or the s. 39 reports or the s. 49(4) decision, she would not permit the appellant to amend his proceedings in the light of the excessive delay in seeking to challenge these decisions. The trial judge noted that the appellant became aware on the 25th July, 2018 of the situation regarding the s. 35 Report and did not seek to challenge it, or the s. 39 report or the s. 49(4) decision, until the 8th July, 2020. She found that the appellant did not provide an explanation for this delay in challenging those matters.

The s. 49(7) Review

33. The trial judge, in referring to her decision regarding the right to add an Addendum to a s. 35 Report dealing with matters under s. 35(13)(b) of the 2015 Act even where the issues were dealt with by a different IPO, said that “*the s. 49(7) review decision is a legally valid decision.*” She stated that the Review was based on a series of underlying decisions which she said were valid regardless of the initial failure to comply with s. 35(13) of the 2015 Act.

Other grounds of challenge to the s.49(7) Review

34. In relation to the appellant’s other grounds of challenge to the s. 49(7) Review, the trial judge noted that the representations submitted for the s. 49(7) Review by the appellant’s solicitor, the medico-legal report, photographs, letters of reference, and his s. 49 review form, were submitted and considered at the time of the s. 49(4) decision. The trial judge relied on *GK v. Minister for Justice and Equality* [2002] 2 IR 418 to the effect that if a person is claiming that a decision-making authority has, contrary to an express statement, ignored representations it has received, he/she “*must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case.*” The trial judge noted that the s. 49(7) Review had expressly referred to the representations and noted that they were considered.

35. The trial judge found that the Minister was entitled to consider that Article 3 ECHR was not engaged based on the medical evidence and that it was open to the Minister to make the findings that she did.

36. The judge had regard to *DE v. Minister for Justice and Equality* [2018] IESC 16 which considered the principles in respect of humanitarian leave to remain. The trial judge found that “*having considered whether Article 3 was engaged and having considered Article 8, the Respondent then considered humanitarian considerations*” and determined there was “*nothing to suggest that the appellant should not be returned to Western Sahara.*” The appellant argued that the wider humanitarian considerations were not considered by the Minister. The trial judge

held that “*the terms of the decision clearly reflect a consideration of Article 3, then Article 8, and then humanitarian considerations.*”

37. The trial judge found that the appellant’s history of neglect, life in Europe from a young age, mental make-up as referred to by the Spiritan Asylum Services Ltd (“Spirasi”), and Post-Traumatic Stress Disorder (“PTSD”) diagnosis, was already considered from the representations made for the s. 49(4) application and the Minister had “*appropriately indicated that he would not be considering representations previously made.*” She held that the Minister clearly considered the Spirasi information under humanitarian considerations “*as is clear from the ordering of [the] report*” and observed that it was notable that no evidence was put forward by the appellant to the effect that he was presently attending treatment for PTSD symptoms or that he would be unable to access same in Western Sahara.

Refoulement

38. In relation to the appellant’s argument that the Minister did not have proper regard to his opposition to Moroccan rule in Western Sahara when making a decision on *refoulement* in particular, the objection of the appellant to obtaining the necessary travel or identity documents from Morocco, the trial judge held that:

“*[a]rranging travel documentation is not what is at issue for the Respondent in determining a s. 49(7) review, nor is the Applicant’s attitude to that travel documentation. The Respondent instead is concerned with whether, in this instance, the Applicant, a failed asylum seeker, would be subjected to inhuman or degrading treatment or punishment.*”

The trial judge held that the appellant did not make any submissions in relation to *refoulement* in his request for review. She held that it was open to the Minister to arrive at the opinion that repatriating him did not offend against the prohibition of *refoulement*.

Alleged lack of reasons

39. The trial judge found that no ground of challenge arose in respect of the alleged lack of reasons, as she held that sufficiently detailed reasons were given, particularly having regard to the fact that very little additional information was put before the Minister for the purpose of the review. The trial judge held that the rationale was clear: “*nothing new had been put forward which, in the Minister’s opinion, warranted a change in the decision not to grant permission to remain.*”

Certificate of Appeal

40. The trial judge gave leave to appeal the decision of the High Court and certified four questions for determination by this Court.

- A) Is a report of interview under s. 35 of the 2015 Act, which consists of a complete transcript of what was said at the interview, invalid because it does not comply with s. 35 (13)(b) of the Act at the time of issuance of the s. 35 Report?
- B) Is so, does the later addition of the s. 35(13)(b) portion by way of an addendum remedy such a deficiency?
- C) If so, may an IPO other than the IPO who made the s. 39(3)(c) recommendation prepare the said addendum in relation to the s. 35(13)(b) section?
- D) If the answer to A above is yes but the answer to B and/or C is no, is a decision not to grant PTR on a review under s. 49(7) of the Act invalid because of the deficiency in the s. 35 Report, in the absence of any prejudice to the appellant?

Issues on appeal

41. The appellant put forward eleven grounds of appeal in his Notice of Appeal. At hearing, the issues before this Court were netted down to four broad grounds:

- a. that the trial judge erred in failing to allow the amendments to the statement of grounds and/or an extension of time;
- b. that the trial judge erred in finding that the s. 35 Report was not void or voidable;
- c. that the trial judge erred in failing to properly evaluate humanitarian considerations under s. 49(3)(b) of the 2015 Act; and,
- d. that the trial judge erred in finding that the Minister had given a proper assessment of *non-refoulement* under s. 50(2) of the 2015 Act and provided adequate reasons therefrom.

A broad overview of the submissions of the parties

42. The appellant submitted that the core issue in this appeal is the integrity of the s. 35 Report and the consequences of the failings associated therewith as identified by Barrett J. in *IX (NY) v. CIPO*. The appellant seeks an order of *certiorari* quashing the Review and refers to the lack of reasons provided in the humanitarian considerations and the s. 50 *refoulement* decision. The appellant acknowledged that there were issues in relation to the amendment application being sought at a late stage of the proceedings which then required the trial judge to deal with the amendment application at the substantive hearing, but the appellant submitted that while this Court may find this to be an unsatisfactory way of pleading the case, the core issue identified above requires this Court to grant the reliefs sought by the appellant.

43. The Minister strongly contested the granting of the reliefs sought by the appellant on the basis that the appellant is out of time to bring the judicial review proceedings and has failed to satisfy the requirements provided for in the legislation that there is a good and sufficient reason to extend time for seeking leave to apply for judicial review. The Minister also contested that there was any ground on which the s. 49(7) PTR Review could be quashed.

Extension of time for seeking leave to apply for judicial review and the amendment application

44. The time period for challenging a s. 39 recommendation, a first instance PTR decision under s. 49(4) and a decision of IPAT is 28 days from the date of notification of each respective measure (in accordance with s. 5(2) of the Illegal Immigrants (Trafficking) Act, 2000 as amended by s. 34 of the Employment Permits (Amendments) Act, 2014 and s. 79 of the 2015 Act). The time period is three months for challenging the s. 35 Report pursuant to the provisions of Order 84, r. 21(1) of the Rules of the Superior Courts, 1986 (as amended) (“RSC”). The s. 35 Report, s. 39 recommendation/report and s. 49(4) PTR decision were furnished to the appellant by letter of the 25th July, 2018. The IPAT decision was notified by letter of the 23rd January, 2019.

45. Leave was granted on the 8th October, 2019 to the appellant to challenge the Review pursuant to s. 49(7), the deportation order of the 2nd August, 2019, and the *refoulement* decision. The appellant did so on the basis that the underlying initial s. 49(3) decision was invalid because the s. 35 Report did not comply with s. 35(13)(b) of the 2015 Act. The original statement of opposition by the Minister was filed in December 2019. At that stage, the Minister argued that it was a collateral attack on a previous decision that was unchallenged. The Minister submitted that the application to amend the statement of grounds was only made in July 2020. It was only at that stage that the appellant sought to challenge the s. 35 Report, the s. 39 report and recommendation of the IPO, and the s.49(4) PTR decision of the Minister. Therefore, the Minister submitted that taking the 8th July, 2020 as the date of the amendment application, the appellant required the following extensions of time:

<u>Section 35 Report</u>	20 months
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<u>Section 39 report</u>	22 months
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Section 49(4) decision 22 months

IPAT decision 16 months

46. What is striking about this, according to the Minister, is that no reasons have been provided nor explanation given as to why there is such a delay. The Minister submitted it was only at the oral hearing of the appeal that the reason of inadvertence of the appellant's legal team was raised as a cause of the delay; no explanation was provided in the High Court. Further, no such explanation was sworn on affidavit by the appellant. The Minister submitted that this is despite the fact that s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 (as amended) specifically mandates that, if challenging a PTR decision, a recommendation of an IPO, or an IPAT decision, then this must be done within 28 days of being notified of these decisions, unless the court extends time for "*good and sufficient reason*", and there are substantial grounds for the decision to be quashed.

47. The Minister submitted that the s. 35 Report is slightly different. Section 5 of the 2000 Act does not apply to it. Therefore, the Minister said, it was necessary for the appellant to obtain an extension of time pursuant to Order 84, r. 21(3) RSC. Here, the Minister submitted, the onus is even higher on the appellant. Not only does one have to show "*good and sufficient reason*", but also that the circumstances surrounding the failure to challenge within time were either outside of the applicant's control or were not anticipated by the applicant. The Minister submitted that the appellant failed to satisfy these requirements. The Minister submitted that the case law supported the proposition that an applicant must seek an extension of time where they are seeking to amend their pleadings in a judicial review proceeding.

48. The appellant submitted that when the case was first lodged, the initial statement of grounds did refer to the *IX (NY) v. CIPPO* case albeit the reliefs sought were amended. The appellant submitted that he was within time to challenge the Addendum as it was within the three-month time period provided by statute. The appellant submitted that it is his position that

the Addendum, having been compiled after the s. 35 Report, gave the s. 35 Report full legal effect and the date of such legal effect was the date upon which he received the Addendum. The appellant submitted that in terms of seeking an extension of time, the appellant proceeded with the internal procedure rather than bringing judicial review proceedings at the point of discovering the Addendum. He submitted that there is generally a permitted degree of forgiveness in such circumstances. This is the reason put forward, while not an affidavit, for seeking an extension of time and indeed, the appellant conceded that there was an element of inadvertence on the part of the lawyers. It is the case, as conceded by the appellant, that counsel and solicitors were aware, at the time the initial statement of grounds was drafted and the application moved, that there was an Addendum in existence but that only the s. 49(7) Review was challenged.

49. The appellant submitted that the Minister's argument that the Addendum to the s. 35 Report can cure any non-compliance with s. 35(13)(b) is incorrect. The appellant submitted that, prior to a certain date, the s. 35 Report was invalid. The Minister made the Addendum on the 16th May, 2019, but the appellant did not receive it until the 11th July, 2019 when the appellant received the negative s. 49(7) Review. The appellant submitted that, by that stage, the *IX (NY) v. CIPO* decision had been given by the High Court on the 14th January, 2019. The Addendum was compiled by the IPO and the appellant had no knowledge of this.

50. The Minister submitted that she will suffer prejudice if the amendment were allowed, and referred to the affidavit of Mr. O'Carroll, a civil servant in the International Protection Office in which he stated that if the strategy of the appellant is successful then it would have serious implications for the efficient working of the protection and immigration system, and that:

“it is highly likely that other applicants who were refused permission to remain in the State on foot of section 35 reports that were in the format considered by Barrett

J. in N.Y. will seek a similar amendment and/or extension of time to belatedly challenge the Section 35 Report and decisions made in relation to their applications under the 2015 Act long after they are made.”

51. Furthermore, the Minister made the submission that the appellant’s claim is an impermissible collateral attack on the Review. The Minister relied on *PNS (Cameroon) v. Minister for Justice and Equality* [2020] IESC 11 (paras. 43-4 and 66), *XX v. Minister for Justice and Equality* [2019] IESC 59 (para. 33) and *DE (an infant) v. Minister for Justice and Equality (No. 3)* [2017] IEHC 409 (para. 35). The Minister referred to ground e(1)(i) where the appellant claims that the Review is “*vitiated*” because the s. 49(4) decision was unlawful as the appellant had not received a report of his interview before the decision refusing PTR was made. The Minister submitted that the appellant in its next ground, (e)(1)(ii), is an attempt to “*piggy-back*” on the *IX (NY) v. CIPO* decision, which, unlike the present case, concerned a s. 49(3) decision, not a s. 49(7) Review.

52. The appellant submitted that while it is well established that an applicant must challenge an immigration decision within the relevant statutory timeframes and cannot normally launch a collateral attack on earlier decisions, this applies where the challenge is to the substance of the impugned decision, unlike this case where the infirmity is jurisdictional. The appellant submitted that the Minister’s proposed fix to remedy the problem identified in *IX (NY) v. CIPO* cannot retrospectively save the PTR process from the series of flaws leading to the Review. The appellant submitted that the s. 49(1) PTR process can only be initiated following a s. 39(3)(c) recommendation. It follows therefore, that if there is a fundamental flaw in the s. 35 Report, then a proper s. 39(3)(c) recommendation cannot be reached and the s. 49 process cannot be triggered. While not challenged by the appellant at the time, the s. 35 Report continues to be relied on in subsequent decisions despite the Minister’s awareness of the invalidity.

Decision

53. The case of *Muresan v. Minister for Justice and Equality and Law Reform* 2003 WJSC-HC 9156 (“*Muresan*”), upon which the Minister relied, is highly relevant. That case concerned a challenge to a deportation order. The applicant in that case sought to amend the judicial review to add challenges to the antecedent decisions that led to the deportation order. In *Muresan*, like the present case, the applicant was out of time. Finlay Geoghegan J. agreed with Kelly J. in *Ní Eilí v. Environmental Protection Agency* [1997] 2 ILRM 458, in holding:

“Applying that reasoning to the provisions of s. 5 of the Act of 2000, notwithstanding the discretion conferred by Ord. 84 r. 20(3), it appears to me that where an applicant seeks leave to amend an application for leave to apply for judicial review by adding new reliefs which either seek to challenge a different decision to that already challenged or which may amount to a new cause of action in respect of a decision already challenged, that the applicant is in effect making a new application albeit by way of amendment to an existing application and therefore must satisfy the court that there is good and sufficient reason for extending the period within which the application shall be made in accordance with sub-s. (2)(a) of s. 5 of the Act of 2000.

I have also concluded that the same principle applies to an application to amend the grounds relied upon to challenge a decision in respect of which a claim of invalidity is already made, where the new grounds in substance amount to a new cause of action challenging the validity of the decision.”

54. That the above reflects the law is without doubt. On a number of occasions, the Supreme Court has approved the principle. In *Copymoore Limited v. Commissioner of Public Works in Ireland* [2014] 2 IR 786 (“*Copymoore*”) the Supreme Court cited with approval from the earlier judgment of Fennelly J. in *Keegan v. Garda Síochána Ombudsman Commission*

[2012] 2 IR 570. In *Copymoore*, the Supreme Court, referring to the public procurement process at issue there, held that any amendment to a statement of grounds in a judicial review had to take into account the public interest in the swift disposal of such litigation. An exception to this strict time limit would only be allowed for good reason. The Court held that in demonstrating good reason there had to be an explanation of the delay and a justifiable excuse offered. Referring to *Keegan v. Garda Síochána Ombudsman Commission*, the Supreme Court held that the standard for permitting an exemption was not to be more exacting than would be the case for a late application, but an amendment might be viewed more favourably where it did not involve a significant enlargement of the applicant's case. With reference to that decision, Charleton J. in *Copymoore*, said at p. 790:

“As Fennelly J points out at p. 581, however, such limits are mitigated by the power of the courts to permit an application outside the permitted time ‘provided the court is persuaded that there is good reason for the delay and that no other party is adversely or unfairly prejudiced.’”

55. I agree with the Minister's submission that the correct approach to the time limit issue is to be found in the following *dicta* of Charleton J. in *Copymoore* at para. 11:

“In various statutory provisions, and through secondary legislation, strict time limits have been laid down for the commencement of various kinds of cases where the swift determination of these is regarded as involving a particular public interest. Thus, in planning matters, in cases concerning failed applications from refugee status and in public procurement, to take a few examples, shorter and strict time limits are involved than those generally applicable for judicial review of administrative and quasi judicial decisions. Where a case is commenced within time on a particular ground but it is sought to add a new ground outside the terms of the statutory limit for commencing the proceedings, it is not available to an applicant to argue an amendment simply on the

basis that the case began on time. The approach of a court deciding such an application should look to the original time limit as set in legislation, whether those time limits are strict or may be extended, whether an amendment is permitted expressly or by necessary statutory implication, and what level of excuse is needed to justify the addition of a new ground outside time.”

56. As the High Court judge pointed out, no explanation at all was ever proffered by this appellant regarding the delay in seeking to challenge the s. 35 Report itself and the decisions other than the PTR Review which he initially challenged. This was so even in circumstances where the Minister filed submissions pointing out and relying on this failure. Inadvertence has been offered as an explanation at the oral appeal hearing, but this is both far too late and an inadequate excuse in all the circumstances in this case, as can be seen from the detailed background to the proceedings set out above.

57. Counsel on behalf of the appellant relied on two primary reasons as to why he ought to be permitted to challenge those decisions. Counsel submitted that, in an application to amend proceedings, it was the interests of justice and the protection of the applicant’s right of access to court that were of paramount importance. Counsel relied on the decision in *Keegan v. Garda Síochána Ombudsman Commission* as well as the more recent decision in *O’S v. Residential Institutions Redress Board* [2018] IESC 61. In the latter case, the Supreme Court extended time pursuant to Order 84, r. 21 RSC, and held that one of the factors that the court may consider is the underlying merits of the application. The Supreme Court also noted that there were no absolutes in the exercise of discretion. The appellant’s second contention was that the failure to comply with the requirements set out by the legislature for a s. 35 Report was a matter which went to jurisdiction and had a knock-on effect throughout the entire process.

58. The appellant’s submissions unfortunately do not address the most fundamental issue of all: an explanation for the delay in applying which is required for the establishment of good

reason by an applicant who has delayed. Even in *Keegan v. Garda Síochána Ombudsman Commission*, Fennelly J. expressly stated that “[n]one of this is to take away from the fact that an application for an amendment of his grounds for judicial review must explain his failure to include the proposed new ground in his original application.” The Supreme Court (Finlay Geoghegan J.) in *O’S v. Residential Institutions Redress Board* also stated with respect to Order 84 that:

“[i]t clearly requires an applicant to satisfy the Court of the reasons for which the application was not brought both within the time specified in the rule and also during any subsequent period up to the date upon which the application for leave was brought. It also requires the Court to consider whether the reasons proffered by an applicant objectively explain and justify the failure to apply within the time specified and any subsequent period prior to the application and are sufficient to justify the court exercising its discretion to extend time.”

While the appellant in *O’S v. Residential Institutions Redress Board* gave reasons for the delay, it must also be recognised that an important factor in reaching the overall decision in that case was that the appellant in those proceedings had an unanswerable challenge if the extension of time was granted; it was accepted by the respondent that the *only* issue in the case was whether time should be extended and that if it was the appellant would have to obtain the relief he claimed. That exceptional feature will rarely present, and certainly does not arise in the present case; the appellant’s challenge herein does not have that same level of certainty as to ultimate success as there is no appellate court decision on this issue. Importantly however, the appellant does not even reach that consideration because he has failed to put before the High Court material capable of satisfying a court as to good reason for the delay in bringing proceedings.

59. The appellant submitted that the onus was not on him to justify the failure to seek the extension of time required in which to challenge the s. 35 Report and the other decisions. That

submission must be seen against the backdrop that all of the other decisions, save for the s. 35 Report, are decisions subject to the strict statutory time limits of 28 days set out in s. 5 of the Illegal Immigrants (Trafficking) Act, 2000, (as amended) for challenging them by way of judicial review. Accepting as I do that the appellant only knew of the Addendum when he received the Review on the 11th July, 2019, there is still no explanation for why it was not until July 2020 that the application was made to challenge these other matters. It must also be said that the appellant knew since July 2018 of the omission of those requirements set out in s. 35(13)(b) from the s. 35 Report but that he did not challenge the Report at that time.

60. The argument that this is a matter that goes to jurisdiction and therefore the strict time limits do not apply, is not sustainable. Many, if not most, challenges by way of judicial review are jurisdictional challenges of some type. Statutory time limits apply to all challenges and cannot be wished away merely because a challenge is jurisdictional or somehow fundamental to a subsequent decision that is being challenged. It is particularly important to recall that the s. 39 decision and the s. 49(4) PTR decision are individually subject to the 28-day limit set out in the Illegal Immigrants (Trafficking) Act, 2000, as amended. They are statutorily recognised as standalone decisions which must be challenged in their own right. It is not possible to bypass those statutory requirements simply because either these decisions, or the act or omission upon which the subsequent decision relied, were fundamental to some later decision in the entire process. That is not permitted by the clear wording of the statutory provisions. The fact that a matter is fundamental however might be a factor in the consideration of whether there is good reason to extend the time limit, but a court will only reach that point where an applicant has put forward reasons for the failure to bring the application within time and otherwise explaining any subsequent delay.

61. I do not accept that the application of these strict time limits to the appellant has affected his access to court or is a breach of his right to an effective remedy. The time limit provisions

are not absolute and permit of an extension of time. Respect for access to the court and to the right of an effective remedy is built in to the time limits. In this case, the appellant had not provided to the High Court, or this Court on appeal, any basis for holding that the requirements stipulated before an extension of time can be granted, have been met.

62. In those circumstances, it is unnecessary to consider the issue of prejudice to the Minister in extending time, and it is sufficient to note that the Minister placed evidence before the High Court of serious adverse implications that the Minister contends an extension would have for the efficient working of the protection and immigration system.

63. While this addresses the appellant's challenge to the s. 39 recommendation and the s. 49(4) decision based upon the statutory time limit, I am of the view that the same decision must be reached in relation to the challenge to the s. 35 Report itself. While such a challenge is not covered by s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 (as amended), the provisions of Order 84, r. 21 RSC, which require a challenge to be made within three months, clearly apply. The same findings that I have made with respect to the statutory time limits also apply here. The appellant has not adduced any evidence as to why there was a delay in challenging the Report. This is particularly egregious since the s. 35 Report was available to the appellant at an early stage. Moreover, given that the appellant did not challenge within time the subsequent decisions taken on the basis of the s. 35 Report, and that he is now out of time for those challenges, to extend time would amount to an impermissible collateral attack on those decisions. The appellant is out of time within which to challenge the s. 35 Report.

The challenge to the s. 49(7) Review based upon the s. 35 Report and the subsequent Addendum

64. The major focus of the appellant's initial statement of grounds in his judicial review was on the s. 49(7) Review based upon the failure of the s. 35 Report to comply with s.

35(13)(b), the decision in *IX (NY) v. CIPO*, the fact that the Addendum was added without notice to him prior to the s. 49(7) Review, and alleged failures of process with regard to the compilation of the Addendum by another IPO after the first was *functus officio*.

65. The starting point for these challenges is that the s. 35 Report must be accepted as valid. This is the inevitable conclusion of the rejection of the application to amend the statement of grounds to include a challenge to the said Report. That has consequences for the challenge brought to the s. 49(7) Review based upon the ground that the Review was defective because of the alleged flaws in the s. 35 Report. Any challenge to the s. 49(7) Review based upon any perceived inadequacies in the s. 35 Report amounts to an impermissible collateral attack on the s. 35 Report. This includes the challenge based upon the failure to comply with s. 35(13)(b) and reliance upon the decision in *IX (NY) v. CIPO*.

66. In so far as there is a challenge based upon the Addendum, this is an argument that turns primarily on the claim that there were flaws in that process. The appellant disagreed with the High Court's finding that there was an absence of prejudice and/or a waiver in respect of the Addendum. The High Court dismissed the appellant's argument that an otherwise valid s. 39 report could be quashed for non-compliance with s. 35(13) as he had made no argument that there was any non-compliance with s. 39(2) which requires a s. 39 report to refer to the matters raised by an applicant. The appellant submitted that this is in fact not the case. The appellant referred to s. 39(2)(a) which sets out that a s. 39 report shall:

“(a) *refer to the matters relevant to the application which are—*

- (i) *raised by the applicant in his or her application, preliminary interview or personal interview or at any time before the conclusion of the examination, and*
- (ii) *other matters the international protection officer considers appropriate.”*

That submission must be rejected as the s. 39 report/recommendation is valid as there has been no successful challenge to it by the appellant as he was out of time for such a challenge.

67. Apart from raising issues of the fundamental importance of the s. 35 Report in the process which have already been rejected for the reasons set out above, the appellant submitted that the failure to notify him of the Addendum prior to the decision of the Minister amounted to a breach of fair procedures. The appellant submitted that it is not merely “*helpful*”, to use the words of the trial judge, for the IPO to identify the information relevant to the s. 49(4) decision, but rather, it is mandatory in accordance with the section.

68. The appellant submitted that the Oireachtas included this express provision for a reason and that the prejudice is found in the procedural flaw *simpliciter*. The appellant submitted that the Addendum was made outside the statutory scheme, was unilateral, and was made without notice to the appellant. It was not furnished to the appellant until after the Review had been made. The appellant submitted that while the Addendum contained information which was already contained within the flawed s. 35 Report (the Addendum referred to the answers to particular questions), the appellant was not advised of those particular facts to which the Minister’s attention would be drawn and this, it was submitted by the appellant, offends the principle of *audi alteram partem*.

69. The Minister submitted that there is no actual prejudice alleged by the appellant; there is merely a theoretical argument as to prejudice. She submitted that the procedure adopted when making the decision meets the requirements of s. 35(13)(b) and *IX (NY) v. CIPO*. Furthermore, the Minister submitted that there is no obligation to inform a person potentially affected by a decision, of information of which he is already aware, especially where he had provided the information himself at interview. The Minister relied on *Idiakheua v. Minister for Justice and Anor* [2005] IEHC 150; *Ezeani v. Minister for Justice and Equality* [2011] IESC

23; *MA v. RAT* [2015] IEHC 528; *CNK v. Minister for Justice and Equality* [2016] IEHC 424; *CM (Zimbabwe) v. CIPO* [2018] IEHC 410 to that effect.

70. The Addendum in this case drew the Minister’s attention to five specific and identified questions that the IPO considered “*relevant as to whether the applicant ought to be given a permission to remain under section 49 of the 2015 Act.*” All of these questions and answers were known to the appellant. He has not identified anything of substance in the course of these proceedings to demonstrate prejudice from his failure to have sight of the view of this particular IPO; he relied upon the statutory importance of the need to have this recommendation contained within the Report.

71. The essence of *audi alteram partem* is that both sides have an opportunity to be heard in respect of their arguments before a decision-maker. It is well recognised as a fundamental requirement of fair procedures. This Addendum was simply the addition of an IPO’s indication of what may be relevant to a consideration of the leave to remain issue. If the statutory requirement had been met, it would have been material that was available in an original s. 35 Report that was available to the Minister when she made her initial decision as to leave to remain under s. 49(4) of the 2015 Act.

72. If the appellant is correct in his argument that he was entitled to this Addendum prior to the Review, then it would also seem to follow that he would be entitled to have sight of the s. 35 Report prior to any decision being made by the Minister on the s. 49(4) initial PTR decision. This Court was informed that this was not the current practice. If such a practice existed, it would certainly considerably delay the decision-making process as no doubt it would open up the possibility of further submissions on the opinion of the IPO, as well as the possibility of judicial review. That is not the reason, however, I do not consider it a requirement that the Report be made available. Instead, it is obvious that the opinion of the IPO is merely drawing attention to what is already in the Report and identifying what is relevant. It is the

decision-maker's responsibility ultimately to decide on what is relevant. That is the important matter. An applicant for international protection has already been given the opportunity to highlight matters of relevance and to engage in the process. The statutory provision regarding the inclusion of these matters, does not take away from the responsibilities of the decision-maker. The Addendum itself is not of sufficient substance to be relevant to the decision-making process which an applicant participates in and is entitled to challenge. In the first place, an applicant may challenge by way of s. 49(7) Review anything untoward in the IPO's recommendation. Moreover, the opportunity exists in the present case for a review if there had been anything untoward in the IPO's recommendation, but that review would be by way of judicial review instead of an application to the Minister. It is striking that nothing of substance or even of relevance to the decision of the Minister on review has been relied upon by the appellant in his challenge to the Addendum. In other words, this particular appellant has suffered no prejudice and would have had an opportunity for judicial review if anything untoward had occurred as a result of the contents of the Addendum.

73. The appellant also made the argument that the decision of the Supreme Court in *AWK (Pakistan) v. Minister for Justice and Equality*, which is discussed in more detail below, supported his contention that the entire process must be fair and that he ought to have been entitled to the Addendum prior to the Review; he would have had that information if it had been contained in the s. 35 Report initially. That submission does not take into account that for the reasons set out above the s. 49(4) procedure is fair in circumstances where an application does not have sight of the s. 35 Report. In so far as it is a plea that this procedure is unfair because the appellant did not receive something to which other applicants are entitled (a complete s. 35 Report prior to the Review), there is a failure to engage in the substance of that argument. The appellant never really identifies precisely why it is unfair. Indeed, his failure to challenge the s. 35 Report immediately on receipt of it (and with knowledge of the decision

in *IX (NY) v. CIPO*) leads me to draw the inference that the absence of the matters set out in s. 35(13)(b) did not raise any real issues of concern about the absence of fair procedures. I therefore reject that submission.

74. I reject the challenge based upon the late addition of the Addendum to the s. 35 Report after the s. 49(4) decision but prior to the Review without notice to the appellant. His rights have not been violated and in particular there has been no breach of fair procedures on the basis of *audi alteram partem* or otherwise.

The non-section 35 grounds of challenge to the Review

75. The appellant challenged two separate aspects of the Review. The first was that humanitarian considerations were unduly restricted by the decision-maker in the Review, and the second concerned a failure to address a specific factual issue as to the principle of *non-refoulement* as set out in s. 50 of the 2015 Act. A failure in the giving of reasons in addressing these issues was part of the grounds of challenge.

The nature of a s. 49(7) Review

76. The relevant legislative provisions of s. 49(2), s. 49(6) and s. 49(7) have been set out/referred to above. The nature of an application under s. 49(7) was considered by the Supreme Court in the case of *AWK (Pakistan) v. Minister for Justice and Equality*. The issue in that case was whether the Minister's decision to refuse PTR, taken on review, should be regarded as a decision within s. 49(4) of the 2015 Act and thereby subject to the time limits set out in s. 5 of the Illegal Immigrants (Trafficking) Act, 2000, as amended. The latter provision expressly referred to a decision under s. 49(4) but made no express reference to a decision on review under s. 49(7) of the 2015 Act.

77. In delivering judgment for the Supreme Court, McKechnie J. described the s. 49(7) review as follows:

“Subsection (4) deals with a decision to either grant permission to remain or to refuse permission to remain. No other provision has the same effect. No review could be conducted in the absence of a subs (4) decision. When a review concludes with a negative decision, what remains? It is of course the original decision made under s. 49(4)(b) of the Act.

There can be only one decision on whether to grant permission to remain or to refuse it. In an appeal situation, the applicant must activate a review by invoking subs (9), which he does by submitting the information therein provided for. That must be done ‘within such a period following receipt by him or her under section 46(6) of the decision of the Tribunal as may be prescribed under subsection (10)’. ... Consequently, there can be only one review. It therefore seems to me that there cannot be other than one application to remain and one refusal decision on that application.”

78. Section 49(3) provides that:

“In deciding whether to give an applicant a permission, the Minister shall have regard to the applicant’s family and personal circumstances and his or her right to respect for his or her private and family life, having due regard to—

- (a) the nature of the applicant’s connection with the State, if any,*
- (b) humanitarian considerations,*
- (c) the character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions),*
- (d) considerations of national security and public order, and*
- (e) any other considerations of the common good.”*

79. The Minister referred to the earlier High Court decision of Humphreys J. in *RA (Pakistan) v. Minister for Justice and Equality* [2019] IEHC 319 at para. 17 in which he stated:

“[n]onetheless, the point remains that this is a review decision. The original decision referred more extensively to all of these points and by definition the review decision must be read in conjunction with it. Nonetheless the Minister in the impugned decision at p.2 of 10 specifically refers to all of the factors required by s.49(3).”

The Minister also relied upon the *dicta* of Humphreys J. in *SO (Nigeria) v. Minister for Justice and Equality* [2019] IEHC 573 where he approved the submissions of the respondent Minister that *“the legal form of this review will not be the same as the original decision, if only for one obvious reason: it is explicitly stated to constitute a review of it. As with any review, it assumes the fact of there having been a decision in the first place and proceeds from that basis. Accordingly, it is not necessary to make every finding afresh, and conclusions arrived at in the previous decision may be adopted whole, or revisited only to the extent it is necessary.”*

80. As the s. 49(7) Review is one that is only triggered by an application for review, the observations of the High Court judges in *RA (Pakistan) v. Minister for Justice and Equality* and *SO (Nigeria) v. Minister for Justice and Equality* are correct and ought to be applied in considering a challenge to the Minister’s Review.

The issue concerning humanitarian considerations under s.49(3)

81. The Supreme Court (O’Donnell J.) had made a general observation in *DE v. Minister for Justice and Equality* [2018] IESC 16 that humanitarian considerations were neither limited to, or defined by, the necessarily high threshold for consideration of breaches of Article 3 ECHR, which was the Article at issue in that case. In that case it was said, with respect to the previous statutory regime, that the Minister retains an important discretion under the relevant legislation to grant leave to remain on general humanitarian grounds. The Supreme Court said that discretion exists over and above a case where a legal entitlement can be established.

82. In the present case, the Minister submitted that she was bound under the Constitution and the ECHR to consider matters concerning bodily integrity and also issues of family and

personal life and that the section reflected these obligations. Counsel for the Minister, when queried about this in the appeal, was in agreement with the appellant that humanitarian issues to be considered were *wider* than issues which amounted to a breach of rights under Article 3 and Article 8 of the Convention. The Minister strenuously contested however that there had been any such breach.

83. The appellant relied on *RA (Pakistan) v. Minister for Justice and Equality* for the proposition that:

“Section 49 of the 2015 Act is somewhat wider than art. 8 of the ECHR, although there is an overlap. Section 49(3) covers ‘the applicant’s family and personal circumstances and his or her right to respect for his or her private and family life’ whereas art. 8(1) of the ECHR provides for ‘the right to respect for his private and family life, his home and correspondence’.”

The Minister did not disagree with that analysis. She submitted however that she had an executive power to grant a PTR on a wider basis which would include humanitarian considerations. Counsel for the appellant observed that there was little disagreement between the parties as to the principles at issue save for the submission that the power was legislative in nature given the provisions of s. 49(3) of the 2015 Act.

84. On the facts of this case, it is not necessary to identify whether the power is an executive one or a legislative one particularly as the Minister accepts that, in so far as personal and family life is concerned, s. 49(3) does go further than having to establish a breach of Article 8 ECHR rights to respect for personal and family life.

85. The appellant submitted that the Minister did not consider properly humanitarian issues and set too high a bar by only considering them in relation to Article 3 and 8 ECHR. The appellant submitted that the Minister conflated humanitarian considerations with ECHR rights, which is an incorrect test, and with *refoulement* issues. He also submitted that the Minister

also unlawfully deferred consideration to the s. 50 stage (*refoulement*) because she stated: “[T]he humanitarian consideration of these submissions is noted here and this issue is also considered later in this report in respect of the prohibition of *refoulement*.” *Refoulement* issues will be dealt with later in this judgment.

86. Of particular note in the s. 49(7) Review is the consideration given to a report from a doctor at Spirasi. This was a report prepared for the purposes of the appeal to IPAT; it had therefore not been previously considered at the s. 49(4) decision stage. The Spirasi doctor assessed that the appellant was suffering from PTSD. While the appellant had shown great resilience, specialised therapy was recommended. The doctor in essence found that he had underplayed the difficulties of his time as a teenager in Europe. The doctor also found that he presented with physical signs and findings that are fully in keeping with his account, with typical findings for both “*innocent*” injuries and scars attributed to maltreatment.

87. The appellant set the Review in motion by completing a s. 49 review form. That form included no further information apart from another character reference from an Irish citizen who knew him for a year. The solicitor’s letter of the 29th January, 2019 submitted “*in respect of the applicant’s permission to remain review pursuant to s.49(9)(a) and s.49(9)(b)*” that he “*has now been living in the State for almost four years now and has become integrated into Irish society.*” The submission also referred to the appellant’s intention to register for a course with an Education and Training Board and that he had signed up to volunteer and is awaiting placement. The previous submissions made in the context of the PTR were resubmitted and the letter stated the submissions “*should be assessed in light of the changes in circumstances.*” Under the heading of humanitarian considerations, the original submissions had referred to his well-founded fear of persecution and his fear of harm if returned. They also referred to his presence in Europe since 2011 and his lack of family support, as well as the fact that he is experiencing stability for the first time in his life. It also said that he is generally of good

health, though the precarious nature of his status in the State does cause him worry and associated symptoms of stress.

88. The Review under s. 49(7) made a number of findings. The most relevant of these was that he was being assessed as a failed asylum seeker as the IPO found that he was not in need of international protection for the reasons claimed or any other reason. The decision expressly stated that the representations submitted along with the solicitor's letter of the 29th January, 2019 had previously been considered and would not be reconsidered in the Review. The Review then stated that all representations and correspondence "*received from or on behalf of the applicant relating to the permission to remain and permission to remain (review) have been considered in the context of drafting this report, including the Section 35 interview report/record and Matter to be considered for PTR review arising from Section 35 Interview record*".

89. Express reference was made to the matters to which the Review must have regard pursuant to s. 49(3). Under "*Section 49(3)(b) - Humanitarian Considerations*", the Spirasi report was considered. The Review did not accept that there were substantial grounds for believing that there was a real risk that the appellant would be exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or a significant reduction in life expectancy. The Review rejected that his medical conditions reached the threshold of a violation of Article 3 ECHR. The Review also rejected that, in relation to his medical matters, he had submitted sufficient evidence to engage Article 8 ECHR on the basis of his mental and physical health. The Review then stated: "*[h]aving considered the humanitarian information on file in this case, there is nothing to suggest that the applicant should not be returned to Western Sahara.*" The Review then considered Article 8 ECHR personal and family rights separately in respect of other matters not concerning his health.

90. In the context of the above facts and legal principles, counsel for the appellant submitted that the reviewer ought to have had regard to the previous legal submissions. This was a situation where new material was being put before the reviewer in the form of the Spirasi report and this report could only be considered in context. In effect, counsel submitted that due to that new material, the previous decision had to be reviewed. It was particularly important that the Spirasi report was an objective assessment of what the appellant was saying about his situation, including his personal circumstances, particularly with regard to the fact that he was significantly settled here. Counsel submitted that matters such as his links to the State were not dealt with under humanitarian issues; the only matters considered were Article 3 and Article 8 ECHR.

91. In response, the Minister submitted that, in the absence of evidence to the contrary, the assumption is that a party charged with a statutory duty has complied with it, relying on *R v. Inland Revenue Commissioners* [1991] 2 AC 283 and *MN (Malawi) v. Minister for Justice and Equality* [2019] IEHC 489. The Minister relied on the *dicta* of Hardiman J. in *GK v. Minister for Justice and Equality* [2002] 2 IR 418 where he stated at p. 427:

“a person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case.”

92. The Minister submitted that the appellant’s representations in respect of humanitarian considerations were sparse. In the medical report prepared for the protection application, most of the scars had innocuous explanations. The one on his head, allegedly attributed to a blow from the police, was accepted by the doctor as being typical of such an injury. The Minister submitted that the reality is that the appellant had no medical condition which raised any real issue for consideration in the context of a decision on his PTR and it was never suggested that

he had a condition which could not be adequately treated in Western Sahara. The Smithfield Law Centre on the 29th June, 2018 stated that he was “*general (sic) of good health, though the precarious nature of his status in the state does cause him worry and associated symptoms of stress.*”

93. The Minister submitted that she was fully entitled to consider the possible application of Article 3 in the context of s. 49(3)(b) of the 2015 Act, and that the Minister had considered the possible application of Article 8 and clearly distinguished it from the application of Article 3 ECHR.

94. In relation to the Minister allegedly deferring consideration of humanitarian considerations under the heading of the prohibition of *refoulement* and that she failed to do so, the Minister submitted that this is an error and that there is no such statement in the s. 49(7) decision.

Decision

95. The analysis of this issue must start with the nature of the s. 49(7) decision. It is a review of the original decision and is dependent upon an application being made for a review, where information that may have been relevant to the earlier decision is submitted and where there is a change of circumstances. The Minister’s refusal to reconsider the previous submissions must be seen in that light. Those older submissions were neither new information nor a change in circumstances; by definition they did not address the Spirasi report and neither did they relate to new information or circumstances. It was those older submissions that the Minister was refusing to reconsider, and it is clear from the entirety of the report that the submissions specifically referred to in the solicitor’s letter of the 29th January, 2019 were considered.

96. The appellant correctly submitted however that the new information, the Spirasi report, had to be viewed in context; the context being the overall review of the earlier decision. The

fact that it was so considered is however confirmed, as the decision-maker expressly stated that the previous representations and correspondence were being considered (including the original PTR decision). While on first viewing it may appear that there is a tension between those two matters *i.e.* refusing to reconsider the previous submissions and taking them into consideration for the purposes of the Review, I do not think that is so. The bald resubmission of previous submissions indicated a desire on the part of the appellant to have the entirety of the decision reconsidered; but that is not the nature of the Review. On the other hand, it is correct to say that the new information may shed light on, or give support to, previous submissions that were made and it is in that context that they are to be considered in reaching the determination based upon the new information or change in circumstances.

97. The appellant's main submission is posited upon a claim that there was a failure to apply any consideration to the humanitarian aspects of his case; instead there was simply a consideration of Article 3 and Article 8 ECHR matters. The High Court judge found that there was a consideration of Article 3 and Article 8 ECHR *and* humanitarian issues. Undoubtedly, she was correct with regard to Article 3 and Article 8 ECHR issues, but it is necessary to look closely at the manner in which the reference to humanitarian issues is recorded.

98. The Minister is correct in her submissions that there is a presumption that she has complied with her duty. A court is entitled to examine the evidence, whether that is direct or inferential, for the purpose of assessing whether that duty has been complied with. That entails a close examination of the Review.

99. The Review took into account that the appellant was a failed asylum seeker and thus that he was not in need of international protection for any reason. Under the heading "*Section 49(3) (b) - Humanitarian Considerations*", the Review specifically addressed Article 3 ECHR in the context of the Spirasi report; that required addressing his real risk of serious, rapid health decline if returned. That was something that could not have been addressed in the earlier

decision and was addressed here. This was followed by a consideration of Article 8 ECHR under that part of the Review. The Review noted that Article 8 could include physical and mental health issues, but concluded that Article 8 was not engaged on medical grounds. It should be noted that there was a separate consideration of Article 8 on private right grounds (in a separate section of the report) and it was rejected that the potential interference will have consequences of such gravity as potentially to engage the operation of Article 8(1) ECHR. As nothing new was submitted about his family life, there was no reconsideration.

100. The main point of contention is that having expressly considered Article 3 and Article 8 ECHR, the Review then stated the following: “[h]aving considered the humanitarian information on file in this case, there is nothing to suggest that the applicant should not be returned to Western Sahara.” That must also be considered in the context of the “Section 49(3) findings” that “[w]hile noting and carefully considering the submissions received regarding the applicant’s private and family life and the degree of interference that may occur should the applicant be refused permission to remain, it is found that a decision to refuse permission to remain does not constitute a breach of the applicant’s rights. All of the applicant’s family and personal circumstances, including those related to the applicant’s right to respect for family and private life, have been considered in this review, and it is not considered that the applicant should be granted permission to remain in the State.”

101. In light of all of the foregoing, I have come to the conclusion that the appellant must succeed in this ground of appeal. I do so for the reasons set out in the following paragraphs.

102. There was no real disagreement in the present case that humanitarian considerations extend beyond considerations of whether Article 3 and Article 8 ECHR would be breached by refusing PTR. The Supreme Court in *DE v. Minister for Justice and Equality* unequivocally stated this as regards Article 3 ECHR and referred to the Minister’s discretion. There is even greater force to that requirement regarding personal and family life by virtue of the language

used in s. 49(3). I agree with the *dicta* of Humphreys J. in *RA (Pakistan) v. Minister for Justice and Equality* set out at para. 83 above that s. 49(3) is somewhat wider than Article 8 although there is an overlap. Therefore, while Article 3 ECHR must be addressed as part of the humanitarian considerations, the Minister's considerations go further and there is a less onerous test. Similarly, as regards family and private life, Article 8 ECHR rights must be considered, but the humanitarian considerations go further than that and reach into all aspects of private and family life. Thus, there does not have to be an interference with private and family life that would engage Article 8(1) ECHR rights, but there must be a consideration of personal and family rights in the overall context of the grant or refusal of PTR.

103. While the trial judge held that the Review had referred to humanitarian considerations and the Minister further submitted that there was no evidence that the Review had not considered the humanitarian context, I do not accept that this is a sufficient answer to the issue that has been raised. The issue is whether the full extent of the humanitarian issues had been dealt with in the Review and not just whether humanitarian issues had been addressed in the consideration of whether there had been a breach of rights under the Constitution or ECHR. The reference to the humanitarian issues in the Review can only be read in the context of what went before. It is important to note that this issue was being dealt with under the heading “*Section 49(3)(b) - Humanitarian Considerations*”. The methodology employed in the Review is very deliberate and indeed it can be said to the credit of the decision-maker that he was particularly conscientious in how he went about his task.

104. The decision-maker clearly understood that the Spirasi report was a vital aspect of the humanitarian considerations and refers to it in the context of Article 3 ECHR firstly and reaches the conclusion that the medical condition does not reach the threshold of a violation thereof. The Review carefully explains that Article 8 ECHR may also be engaged by virtue of mental and physical health and reaches the conclusion that the matters in the report are insufficient to

engage Article 8 matters on the basis of his mental and physical health. It says there is therefore no interference with respect to his private life on the basis of his medical grounds. The next line (and start of a new paragraph) is in the nature of a conclusion when it says that “[h]aving considered the humanitarian information on file....”. It is an inescapable corollary of the obligation to give reasons for an administrative decision that the question of whether the decision-maker has complied with his or her statutory remit must be determined by reference to the reasons that are actually offered in the determination. In my view, the manner in which the decision-maker has framed his conclusions can only be interpreted as meaning that the conclusion in relation to the humanitarian considerations was directed, and directed only, to the matters referred to in the preceding paragraphs; that is in the assessment of how they affected Article 3 and Article 8 ECHR *rights* but not to a separate consideration of purely humanitarian concerns which did not reach the level of *rights*. Overall, the Review gives no indication that the reviewer considered and applied the legal requirement that humanitarian considerations must go further than considerations of whether Article 8 ECHR rights in particular had been violated. At no point were matters concerning the appellant’s private and family interests expressly treated as possible considerations of a humanitarian nature. That means there was no apparent consideration of his mental health, which, although not reaching the standard of a breach of his rights if deported, could amount to a humanitarian ground on which he could or ought to be granted PTR.

105. The solicitor’s letter of the 29th January, 2019, although sparse in content, had made reference to the appellant’s integration into Irish society and his intentions. These were not referred in the humanitarian section of the Review but only in that section of the Review which dealt with Article 8 ECHR *rights*. The overall impression from the Review is that humanitarian considerations were only addressed with respect to whether there was a *breach* of Article 3 and Article 8 ECHR *rights*, and that the decision-maker concluded that *because* there had been no

violation of these rights, there were no relevant and applicable humanitarian considerations. I do not accept the Minister's contention that the separate reference under the heading "*Section 49(3) findings*" which was apparently a final conclusion under the section, to the fact that "[a]ll of the applicant's family and personal circumstances, including those related to the applicant's right to respect for family and private life" is evidence that these matters were considered. On the contrary, that is preceded by a reference to a "*breach of the applicant's rights*" whereas humanitarian considerations go further than the issue of whether an applicant's rights would be breached.

106. While the submissions from the appellant's solicitor in the present case were less than optimal, humanitarian considerations were raised. The Spirasi report was rightly considered by the reviewer under the heading of humanitarian considerations but only in so far as a breach of rights was concerned. As I have explained, the section required him to go further. Therefore, the Minister's submission that there was no real medical issue, referencing the appellant's earlier s. 49(3) submissions that he was of "*general (sic) good health though the precarious nature of his status in the state does cause him worry and associated symptoms of stress*", was no longer relevant in the context of the Spirasi report. That report had raised concerns about the appellant's psychological status in which "*he carries definite effects of trauma*" but "*what proportion is due to abuse and the situation in his home country is hard to determine, because, as he says 'I was very young' and so much has happened since.*" The report recommends "*specialist psychotherapy for his social isolation and his post-traumatic problems.*" Not only was there an onus on the Minister, through the Review, to deal with the Spirasi report in so far as Article 8 ECHR rights were concerned, but there was an obligation on her to acknowledge and address that the report raised humanitarian considerations which went beyond whether the appellant's Article 8 ECHR rights had been interfered with. The failure to indicate clearly and unequivocally in the Review that these issues had been correctly addressed and considered is,

in the particular circumstances of the present case, a failure to adequately explain the reason for refusing review based upon humanitarian considerations.

107. In reaching those conclusions, I have avoided addressing the issue of whether humanitarian considerations which do not reach the level of Article 3 considerations must be addressed. I do not do so because there is still some dispute as to whether that is a purely executive function or a legislative requirement under s. 49(3)(b). I would observe however that there are likely to be few cases where issues of a medical nature which do not reach the threshold of Article 3 would not be relevant to the private and/or family life of an applicant. Therefore, it is highly likely that in most if not all cases, the issue of mental and physical health of an applicant will require to be considered under the humanitarian considerations in s. 49(3)(b) even if they do not reach the threshold of a breach of Article 8 ECHR rights.

108. The fact that submissions were not raised directly on the Spirasi report did not relieve the Minister of that obligation in circumstances where the s. 49(7) Review was the first time that the report was addressed by the Minister. The decision-maker recognised the obligation to address the Spirasi report, but unfortunately, did not address it in a manner which made it clear that humanitarian matters raised therein which did not reach the threshold of Article 3 or Article 8 ECHR had been specifically addressed by him. The stability aspect of his life had clearly been raised by the solicitor in the s. 49(7) Review letter, in that she referred to his life and integration into the State over the period of four years. The Spirasi report had to be considered in the context of that submission as to whether those humanitarian considerations relating to a young man who had left his home country alone at the age of 14 years were sufficient to cause her to recommend a PTR. Of course, the reviewer might reasonably have considered that they were insufficient, but the problem is that there is no evidence that they were considered other than through the prism of whether they reached the threshold of a breach of rights.

Lack of reasons in the prohibition of refoulement consideration pursuant to section 50

109. The appellant also submitted that the Minister unlawfully deferred consideration to the s. 50 *refoulement* stage because the s. 49(3) decision stated that “[t]he humanitarian considerations of these submissions is noted here and this issue is also considered later in this report in respect of the prohibition of refoulement.” The appellant submitted that in fact, his medical condition was not considered under section 50.

110. The appellant submitted that there was a duty to give reasons for the s. 49(7) Review and the prohibition of *refoulement* consideration. Although the appellant acknowledged that this is a review, he submitted that it was not the intention of the Oireachtas that a review would simply utilise the reasons given in the first instance and it was not consistent with fair procedures.

111. At the oral hearing of this appeal, the appellant submitted with respect to the reasoning of the Review that it was somewhat generic. The appellant concentrated his submissions on the failure of the reviewer to have regard to his fears concerning what may happen to him on return because of his unwillingness to accept Moroccan nationality. The High Court found that “[a]rranging travel documentation is not what is at issue for the Respondent in determining a s. 49(7) review, nor is the Applicant’s attitude to that travel documentation. The [Minister] instead is concerned with whether, in this instance, the Applicant, a failed asylum seeker, would be subjected to inhuman or degrading treatment or punishment.”

112. The appellant submitted that the refusal to accept Moroccan nationality is precisely at issue in the *refoulement* context and is a factor which could expose him to inhuman or degrading treatment or punishment. The appellant submitted that his position in so far as he is an asylum seeker who refuses to accept Moroccan identity, and the dangers arising therefrom, goes to the heart of his claim, and this was not considered properly and no reasons were cited.

113. The appellant relied on *PBN v. Minister for Justice and Equality* [2016] IEHC 316 where Faherty J. noted that:

“[t]he salient issue is whether, based on the analysis of the information in the report, the conclusions reached by the Minister, namely the class of returnees likely to be arrested, detained or otherwise mistreated upon arrival in the DRC, and that the applicant’s status as a failed asylum seeker of itself would not lead to arrest, detention, mistreatment or worse, are within the bounds of rationality, bearing in mind the Meadows test as to how the rationality of a decision such as the present has to be assessed.”

114. The appellant relied on *FN v. Minister for Justice, Equality and Law Reform* [2009] 1 IR 88 at para. 45 where Charleton J. emphasised that in considering a *refoulement* claim, the Minister must first consider if “*the claim made is the same in substance*” as that which had failed in the asylum process. If not, the Minister must “*consider it fairly*”.

115. In considering the Freedom of Movement section in the US Department of State’s 2018 Country Reports on Human Rights Practices – Western Sahara, the appellant submitted that the Minister failed to have regard to the portion of the same report which states that “*[t]he government of Morocco encouraged the return of Sahrawi refugees from abroad if they acknowledged the government’s authority over Western Sahara. These refugees wishing to return must obtain the appropriate travel or identity documents at a Moroccan consulate abroad, often in Mauritania.*” The appellant submitted that the IPAT found the appellant’s narrative of political beliefs to be “*inconsistent and vague*” yet, the appellant submitted, his political opposition was obvious from his international protection file.

116. The Minister submitted that as the request for the s. 49 Review did not make any submission in relation to *refoulement*, the appellant is not entitled to criticise the manner in which the decision-maker addressed the issue: *MN (Malawi) v. Minister for Justice and*

Equality (No. 2) [2019] IEHC 560 at para. 6. Furthermore, the Minister submitted, in the s. 49(7) Review, the decision-maker noted at p. 8 that the representations made concerning *refoulement* had previously been made and considered for the purposes of the decision of the 19th July, 2018. The country of origin information did not indicate that the prohibition of *refoulement* applied. The Minister referred to the affidavit of Mr. EF, the decision-maker, where he stated that:

“Having considered all of the circumstances of the case and the said country information, I concluded that, since the [appellant’s] protection claim was not well-founded, he was not at risk of persecution or serious harm on the basis he had alleged, and that the country report did not indicate that he would be in danger on any other basis if returned to Western Sahara.”

117. The Minister submitted that she is entitled to have regard to and may adopt the reasoning and conclusions of the protection decision-makers. The Minister referred to *FP v. Minister for Justice, Equality and Law Reform* [2002] 1 IR 164; *Baby O v. Minister for Justice, Equality and Law Reform* [2002] 2 IR 169; *OO (an infant) v. Minister for Justice and Equality* [2015] IESC 26 and *MN (Malawi) v. Minister for Justice and Equality*. The Minister submitted that in *YY v. Minister for Justice and Equality* [2017] IESC 61, the Supreme Court held that if the Minister intends to depart from a finding of the protection decision-maker, he should provide clear reasons for so doing.

118. The reliance by the appellant on the quote of the US State Department Report omits the beginning of the paragraph upon which the appellant relied. That paragraph commenced:

“The government continued to make travel documents available to Sahrawis, and there were no reports cases of authorities preventing Sahrawis from traveling”.

The Minister submitted that the report does not say that the Moroccan government will not permit the return of the failed protection applicants who do not acknowledge its authority over Western Sahara.

Decision

119. The provisions of s. 50 were considered by the Minister initially and were rejected by her at the outset. The application under s. 49(7) for a review did not also include a request for a review of the s. 50 decision. No submissions were made at any stage in respect of the principle of *non-refoulement*. The decision in *MN (Malawi) v. The Minister for Justice and Equality (No. 2)* is apposite and I agree with Humphreys J. when he said at para. 6:

“[t]he final difficulty for the applicant is that this is well-trodden ground and that there is no uncertainty in the law requiring appellate clarification. The Supreme Court has pronounced on the question of the level of reasons required in such circumstances on a number of occasions, notably in Baby O. v. Minister for Justice and Equality [2002] IESC 44 [2002] 2 I.R. 169 at 183 per Keane C.J. and subsequently in Meadows v. Minister for Justice and Equality [2010] IESC 3 [2010] 2 I.R. 701 at 731 per Murray C.J. Even assuming in favour of the applicant that Meadows adopts a somewhat more high-watermark approach to the need for reasons than Baby O. in this respect, what is clear is that if an applicant fails to make any relevant submission, the decision in such circumstance is one of form and the rationale does not need to be expressly set out. If an applicant does make particular submissions, then naturally the reasons provided must be such as to enable the rationale for the decision to be discernible. Under those circumstances, there is nothing in the way of uncertainty that requires further clarification. Points already clarified by appellate courts do not require unending re-clarification.”

120. In considering the appellant's case, the Minister had to be satisfied that the principle of *non-refoulement*, as set out in s. 50(1), was not breached. The appellant's claim of persecution on relevant grounds and that he was at risk of serious harm if returned, had already been examined and rejected by the IPO in the s. 39 report and by the IPAT. Those claims were also rejected on behalf of the Minister in the initial s.49(4) decision. The country of origin information was referred to and was considered by the relevant decision-makers. At no point was this specific issue raised before the Minister. In those circumstances, it was not necessary to give reasons in respect of a particular submission that was not raised, but to confine oneself to a determination that s. 50 was not breached.

121. In so far as the argument is now made that the particular issue with regard to the fact that the appellant does not acknowledge the government of Morocco and that his fear in relation to his return had not been acknowledged, in my view, in the absence of submissions on this aspect, this ground of challenge amounts in reality to an attempt to challenge the decision in a substantive manner. To engage with this aspect of the appellant's claim would require the Court to address issues of relevancy and respective weight of his claim in light of the clear findings of the various decision-makers who dealt with the entirety of the appellant's claims for refugee status and subsidiary protection, as well as the *refoulement* issue. This is not a situation where it could be said that a clear and obvious potential violation of the principle of *non-refoulement* had not been addressed by the Minister. On the contrary, the Minister had expressly considered all the matters before her, including the country of origin information. That information did not say that the Moroccan government will not permit the return of a failed protection applicant who do not acknowledge its authority over Western Sahara. There is therefore no basis on which it can be said that the findings are irrational (as claimed in the statement of grounds) on the basis of a failure to give reasons for the decision.

122. I therefore reject the appellant's appeal on this ground.

Conclusion

123. Those claims of the appellant which are based on a direct challenge to the validity of the s. 35 Report, the s. 39 recommendation and the s. 49(4) decision, were made by way of an application for an amendment to the statement of grounds. They were brought significantly out of time and no good (or any) reason was put before the High Court as to why an extension of time should be brought. The High Court judge was correct in holding that these claims were time barred.

124. The appellant claimed that the s. 49(7) Review was tainted by the failure to have a s. 35 Report that was complete in accordance with the provisions of s. 39(13)(b). This was a collateral attack on the s. 35 Report and cannot be entertained by the Court where he was out of time to challenge the said Report.

125. The fact that the Addendum was considered by the Minister under the s. 49(7) procedure without the appellant having sight of that Addendum was not, on the facts of this case, a breach of *audi alteram partem* or any other fair procedure. The appellant never demonstrated, what, if any, prejudice he had suffered in relation to the Addendum.

126. An analysis of the s. 49(7) Review reveals that the reviewer did not address humanitarian considerations that did not reach the standard of a breach of Article 3 and Article 8 ECHR rights. The appellant is entitled to an Order of *certiorari* of the s.49(7) Review on that ground.

127. The Minister addressed the principle of *non-refoulement* as set out in s. 50 of the Act sufficiently in the s.49(7) Review.

128. If the parties do not notify the Registrar that they have agreed on the terms of an order for costs within 14 days of the date of delivery of this judgment, the Registrar will contact the parties to arrange a suitable date for hearing of any application with regard to costs.

As this judgment is being delivered electronically, my colleagues Murray and Ní Raifeartaigh JJ. have authorised me to indicate their agreement with it and the orders proposed.