THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 810 J.R.]

BETWEEN

P.F.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 28th May 2019

Introduction

1. This is the judicial review of a decision, made by the Minister for Justice and Equality ('the Minister') on 28 September 2016, to refuse the non-national applicant's request, made by letter dated 11 November 2015, for permission to reside in the State under s. 4 of the Immigration Act 2004, as amended ('the Act of 2004').

2. The application for judicial review was heard together with the application for leave to seek judicial review in what has come to be known as a telescoped hearing, presumably by analogy with the way in which the different concentric tubular parts of an old-fashioned nautical telescope can be collapsed together into a single section of tube. Although I have not been shown a copy, I understand that Mac Eochaidh J made an order directing such a hearing on 21st November 2016.

3. Under s. 5 (1) (e) of the Illegal Immigrants (Trafficking) Act 2000 ('the Act of 2000'), as inserted by s. 34(1) of Employment Permits (Amendment) Act 2014 (an open invitation to a charge of legislative obscurantism), a person can only challenge a refusal of residence permission under s. 4 of the Act of 2004 by application for judicial review and, under s. 5 (2) of the Act of 2000, can only obtain leave to do so by satisfying the court that there are substantial grounds for contending that the refusal ought to be quashed.

Procedural history

4. The applicant's statement of grounds, dated 24 October 2016, is grounded on an affidavit of the applicant, sworn the following day. The respondent filed a statement of opposition on 9 January 2016, grounded on an affidavit of Alan King, an assistant principal officer in the Minister's department, sworn on 5 January 2017. A solicitor in the Chief State Solicitor's Office ('CSSO') swore a further affidavit on behalf of the Minster on 25 May 2017, exhibiting certain inter partes correspondence and a policy document.

Background

5. The applicant is a national of Pakistan, born in 1981, who entered the State lawfully in 2006 with the benefit of a permission to reside and work here. That permission was renewed on several occasions until the last such permission, granted on 18 May 2011, expired on 18 September 2011. Despite the absence of any permission to remain from that date onwards, the applicant did not leave the State.

6. On 9 February 2012, in accordance with s. 3(3)(a) of the Immigration Act 1999, as amended ('the Act of 1999'), the Minister issued a notice informing the applicant of the proposal to make a deportation order against him on the ground that it would be conducive to the common good. The applicant made representations in response to that proposal on 13 and 28 June of that year. Having considered those representations, the Minister nonetheless made a deportation order against the applicant on 19 February 2013, pursuant to s. 3(1) of the Act of 1999.

7. On 19 April 2013, the applicant was arrested and detained on foot of that order for the purpose of deporting him. While in detention, the applicant applied for a declaration of entitlement to refugee status on 23 April 2013. By reference to that event, the Minister revoked the deportation order against the applicant on 13 May 2013.

8. The Refugee Applications Commissioner ('the Commissioner') recommended that the applicant should be refused a declaration of refugee status on 16 July 2013. The applicant appealed to the Refugee Appeals Tribunal ('the tribunal') on 21 August and the tribunal affirmed the decision of the Commissioner on 2 October 2014. On 22 October, the Minister issued a decision refusing to grant the applicant a declaration of refugee status.

9. The applicant applied for subsidiary protection on 5 November 2014. The Commissioner recommended, on 4 September 2015, that the applicant should not be granted a subsidiary protection entitlement declaration. The applicant appealed to the tribunal against that recommendation on 25 November 2015. That appeal has not yet been determined.

The application under s. 4 of the Act of 2004

10. Before lodging it, the applicant's solicitors wrote to the Irish Naturalisation and Immigration Service ('INIS') on 11 November 2015. The subject heading of that letter sets out the name and address of the applicant as their client, followed by the words: 'Application for Residence Pursuant to Section 4 of the Immigration Act 2004.'

11. After a brief introductory paragraph, it then states:

> 'We are writing to seek a residence permission in the State for our client pursuant to section 4 of the Immigration Act 2004, without prejudice to any existing or future applications of our client in respect of his immigration status in the State.'

12. The following section of the letter comprises a submission that, as an adult dependent member of the household of his Irish citizen brother, the applicant should be considered eligible for permission to reside in the State under the INIS *Policy Document on Non-EEA Family Reunification* (December 2013) ('the policy document').

13. The letter continues with a section headed 'Procedural Position & Relevant Law'. It states, in material part:

'Our client has a permission to reside in the State pursuant to Regulation 4 of [the European Union (Subsidiary Protection) Regulations 2013 ('the 2013 Protection Regulations'], and we believe that given that this is a permission which is outside the remit of the Refugee Act 1996, [it] is thus a permission which must be derived from the powers conferred by the Immigration Act 2004. In this respect our client already has a section 4 permission, and what is sought is a change of the conditions of that residence pursuant to s. 4(7), which are currently applicable to the existing permission under s. 4(6) by reference to the conditions established for the residence in the State of subsidiary protection applicants pursuant to [the 2013 Protection Regulations].

In any event, Regulation 4(7) of [the 2013 Protection Regulations], which restricts an applicant from working while their application is outstanding, is specifically disapplied by Regulation 4(9) where an applicant has a separate permission to reside in the State. In this regard, our client is seeking to have the family reunification policy document applied to his case so that he can have a residence permission distinct from the permission based upon his subsidiary protection claim, such that he might be permitted to work.'

Intervening events

14. The INIS wrote in reply on 15 December 2015, stating that it was not its policy to accept an application for change of status under s. 4(7) of the Act of 2004 from a person who was in the international protection system, and that, if the applicant's subsidiary protection application was not granted, the private and family life considerations he had raised would be dealt with in the context of his entitlement under s. 3(3)(b) of the Act of 1999 to make representations to be permitted to remain in the State in response to a deportation proposal.

15. Mr King avers that the Minister erred in writing to the applicant in those terms because, quite apart from any departmental policy not to consider an application in such circumstances, the applicant's situation did not come within the terms s. 4 of the Act of 2004, as a matter of law.

16. On 8 April 2016, the applicant sought judicial review of the decision contained in the INIS letter of 16 December 2015. Those proceedings were settled on 18 August 2016 on terms that included the withdrawal of that decision and a reconsideration of the applicant's request, although without any concession on the merits of the applicant's claims. Before that settlement was reached, the CSSO wrote on behalf of the Minister to the applicant's solicitors on 3 June 2016, setting out in some detail the Minister's view of the law and the jurisprudence on which it was based, specifically the judgments of the Supreme Court in the cases of *Sulaimon, Hussein* and *Bode*, and that of the High Court in *Dike* (for which full citations are provided later in this judgment). The applicant's solicitors responded tersely in a letter of 8 June 2016 that they did not agree with the Minister's position on the law.

The challenged decision

17. On 28 September 2016, the INIS wrote to the applicant's solicitors in the following terms:

'An examination of your client's case indicates that he arrived in the State on 16th June 2006. He was registered with the Garda National Immigration Bureau on 23rd June 2006 and was lawfully resident on Stamp 1 and Stamp 3 conditions until 18th September 2011. This office received your client's application on 11th November 2015. Therefore, at the time of his application, your client did not have permission to be in the State.

Because [the applicant] did not have permission to be in the State when the above-mentioned application was received, the question of amending or extending a permission does not arise. Accordingly, your client's case will not be dealt with under section 4 of the 2004 Immigration Act.

Against this background, your client's application for residence permission pursuant to section 4 of the Immigration Act 2004 is refused.'

The grounds of challenge

18. The applicant challenges that decision on the following grounds:

'a) The [Minister] has erred in law in [the decision] in refusing to consider the applicant's application for permission to be in the State under section 4 of the [Act of 2004]. The applicant will rely on the following particulars without prejudice to the general applicability of this ground:

i) The [Minister] did not fulfil her obligation to exercise the decision making power conferred by section 4 of the Immigration Act 2004 by failing to consider the substantive application for residence submitted by the applicant.

ii) The [Minister] had a power and/or duty to consider and if necessary weigh the fundamental family rights of the applicant and his Irish family herein and unlawfully failed to exercise that statutory power/duty.

iii) The proposal of the [Minister]is to the effect that a person who has an extant application for international protection is precluded from making an application for residency. This proposition is an error of law.

b) In [the decision], the Minister makes a finding that "…at the time of his application, your client did not have immigration permission to be in the State. Because [the applicant] did not have permission to be in the State when the above-mentioned application was received, the question of amending or extending a permission does not arise." This finding is an error of fact and law in circumstances in which the applicant held a "residence certificate" within the meaning of the Immigration Act 2004 pursuant to [Reg. 4(6) of the 2013 Protection Regulations] by reason of his application for subsidiary protection.

c) Insofar as the decision of the [Minister] has the necessary consequence that a consideration of constitutional and [European Convention on Human Rights ('ECHR')] family rights will not be considered outside of the deportation process, the decision is a disproportionate infringement of rights in circumstances where the making of representations under [s. 3 of the Act of 1999] would, if unsuccessful, result in the applicant having a life-long deportation order made in respect of

him, and preclude him from visiting with his Irish family in the State.'

The law

19. In s. 1 of the Act of 2004, the interpretation section, the term 'permission' is to be construed in accordance with s. 4, except where the context otherwise requires.

20. Section 4 of the Act of 2004 provides, in material part:

> '4.—(1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as "a permission").
>
> (2) A non-national coming by air or sea from a place outside the State shall, on arrival in the State, present himself or herself to an immigration officer and apply for a permission.
>
> …
>
> (7) A permission under this section may be renewed or varied by the Minister, or by an immigration officer on his or her behalf, on application therefor by the non-national concerned.'

21. Section 5 of the same Act states:

'5. - (1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given to him or her after such passing, by or on behalf of the Minister.

(2) A non-national who is in the State in contravention of *subsection* (1) is for all purposes unlawfully present in the State.

(3) This section does not apply to—

> *(a)* a person whose application for asylum under the Act of 1996 is under consideration by the Minister,
>
> *(b)* a refugee who is the holder of a declaration (within the meaning of that Act) which is in force,
>
> *(c)* a member of the family of a refugee to whom section 18(3)(a) of that Act applies, or
>
> *(d)* a programme refugee within the meaning of section 24 of that Act.'

22. Section 9, upon with the applicant relies in argument, provides, insofar as appears material to that argument:

> '9. - (1) *(a)* A register of non-nationals who have permission to be in the State shall be established and maintained by registration officers in such manner as the Minister may direct.
>
> (2) Subject to section *2(2*), a non-national shall comply with the following requirements as to registration:
>
> (a) *he or she shall, as soon as may be, furnish to the registration officer for the registration district in which he or she is resident, the particulars set out in the* Second Schedule*….*
>
> *…*
>
> (f) *he or she shall*—
>
> (i) … on registration obtain from the registration officer a registration certificate….'

23. Section 12, upon which the applicant also relies in argument, states, in the part material to that argument:

> (1) '12. - Every non-national present in the State (other than a non-national under the age of 16 years) shall produce on demand —
>
> …
>
> (b) in case he or she is registered or deemed to be registered under this Act, his or her registration certificate.'

24. Regulation 4 of the 2013 Protection Regulations provides in material part:

> '4. (1) Subject to the provisions of this Regulation, an applicant shall be entitled to remain in the State, until the date on which—
>
> (b) the Minister, …—
> (i) gives the applicant a subsidiary protection declaration under Regulation 20(1), or
>
> (ii) sends to the applicant a notice under Regulation 20(5).
>
> (2) Subject to paragraphs (4) and (5), the Commissioner shall give or cause to be given to an applicant a temporary residence certificate (in this Regulation referred to as "a certificate")….
>
> (3) A certificate shall remain the property of the Minister and the person to whom it is given shall surrender it to the

Commissioner when his or her entitlement to remain in the State under paragraph (1) has ceased.

…

(6) A certificate … shall be deemed to be a registration certificate for the purposes of section 12 of the Immigration Act 2004 and a person who is issued with a certificate … shall be deemed to have complied with section 9 of that Act.

(7) An applicant shall not— (a) leave or attempt to leave the State without the consent of the Minister, or (b) seek or enter employment or carry on any business, trade or profession during the period before the final determination of his or her application for a subsidiary protection declaration.

…

(9) Paragraph (7) shall apply only to an applicant who, but for the provisions of these Regulations, would not be entitled to remain in the State.'

Argument and analysis

i. did the applicant already have a form of residence permission when he applied?

25. The starting point for the argument contained in the applicant's written submissions of 17 November 2016 ('the applicant's leave submissions') is that he had 'a form of residence permission' under Reg. 4(1) of the 2013 Protection Regulations that, he appears to believe, entitled him to apply for a further or other residence permission under s. 4 of the Act of 2004.

26. Under Reg. 4(1), the applicant had an entitlement, rather than a permission, to remain in the State pending the resolution of his subsidiary protection application. Under Reg. 4(2), the Refugee Applications Commissioner was obliged to give him a temporary residence certificate on that basis. Under Reg. 4(6), a temporary residence certificate is deemed to be a registration certificate for the purposes of s. 12 of the Act of 2004 and a person who is issued with a certificate is deemed to have complied with the requirement upon a non-national to register under s. 9 of that Act. Section 9 of the Act of 2004 created a register of non-nationals who have permission to be in the State. Thus, the applicant argues, he has 'a form of residence permission' to be in the State.

27. In support of that argument in the applicant's leave submissions, he relies upon a passage from the judgment of Hardiman J (Murray J concurring) in *Sulaimon v Minister for Justice, Equality and Law Reform* [2012] IESC 63, (Unreported, Supreme Court, 21st December, 2012), holding that it is clear from the statutory scheme that, to register under s. 9 of the Act of 2004, a non-national must have permission to be in the State. As an aside, I note that that is the only context in which those submissions acknowledge or address the effect of that decision, ignoring its extensive treatment of the nature and scope of the s. 4 power to grant an entry or residence permission, which is the one that the applicant contends the Minister was obliged to exercise in his case.

28. Returning to the applicant's argument, the principal difficulty with it is that his entitlement to remain in the State pending the determination of his subsidiary protection application is not a permission to be in the State. The applicant is not registered under s. 9 of the Act of 2004. Rather, he has a temporary residence certificate, under Reg. 4(2) of the 2013 Protection Regulations that is deemed, under Regulation 4(6), to be a registration certificate, under s. 9 of the Act of 2004, solely for the purpose of s. 12 of the Act of 2004 and not, by necessary implication, for the purpose of s. 4 of that Act. The deeming provision of Reg. 4(6) is necessary precisely because the applicant does not have a permission to be in the State and is not registered under s. 9 of the Act of 2004.

ii. the nature and scope of a permission under s. 4(1) of the Act of 2004

29. The permission to land or be in the State that an immigration officer may give on behalf of the minister to a non-national under s. 4(1) of the Act of 2004 is quite distinct from the separate power of the Minister to grant permission to a non-national to reside in the State.

30. In *Sulaimon*, already cited, O'Donnell J (Denham CJ, Fennelly and Murray JJ concurring) explained (at para. 13 of his judgment) that the situation contemplated by s.4 is obviously that of an immigration officer at a frontier post, port or airport, who stamps a passport or other official identity document and, later (at para. 19) that the obvious focus of s. 4 is not to set some general template for all permissions granted, but rather to make provision for the decision of immigration officers at the point of entry to the State.

31. In a separate concurring judgment, Hardiman J (Murray J concurring) observed (at p. 36), in granting a power of an immigration officer to grant a permission on behalf of the Minister, s. 4(1) envisages a permission granted by an official at a seaport or airport and in no way trenches on the Minister's inherent statutory power to grant such permission.

32. In the subsequent case of *Hussein v Minister for Justice and Equality* [2015] 3 IR 423, the Supreme Court (per Hardiman J; Denham C.J., O'Donnell, McKechnie and Laffoy JJ concurring) (at 430-1), concluded that the grounds of refusal of permission to land or be in the State under s. 4(3) of the Act of 2004 are directed towards the position of a non-national applicant who is entering the State from a place outside the State, and that the matters to which an immigration officer must have regard under s. 4(10), in considering any appropriate conditions to attach to a permission to land or be in the State under s. 4(6) of that Act, necessarily arise at the time, or in advance, of the non-national's first legal entry into the State, adding further weight to the conclusion that the s. 4(1) power to grant permission to enter or be in the State is exercisable only at the time of entry and, subject to s. 4(5) addressed below, only at the point of entry to the State.

33. More recently, in *R.G. & Anor. v Minister for Justice and Equality* [2016] IEHC 733, (Unreported, High Court, 24 November, 2016), a judgment delivered shortly after the date of the applicant's leave submissions but several months before the telescoped hearing took place, O'Regan J concluded that s. 4(5) of the Act of 2004, which deals with the position of non-nationals arriving in the State otherwise than by sea or air, requires such persons to seek the necessary permission to land or be in the State under s. 4(1) at the time of their arrival in the State and not subsequently, reinforcing the conclusion that the section has no application to the position of persons who seek permission to be in the State at some point after their arrival.

34. In the applicant's leave submissions, no reference was made to any of those authorities and the court was invited instead to deduce from certain others that there is an unqualified power under s. 4 of the Act of 2004 to grant a residence permission to a non-national at any time and in broadly any circumstance.

35. The first of those other authorities is *Jamali v Minister for Justice, Equality and Law Reform* [2013] 1 IR 609, a decision of the High Court delivered on 24 January 2013, just over a month after the Supreme Court decided *Sulaimon*, in which Clark J stated (at 616):

> '[18] The very recent decision by the Supreme Court of *Sulaimon v. Minister for Justice* [2012] IESC 63, (Unreported, Supreme Court, 21st December, 2012) dealt with the issue whether the grant of leave to remain following a proposal to deport was a power exercised pursuant to s. 4 of the Immigration Act 2004 and in both of the judgments delivered by O'Donnell and Hardiman JJ., it was concluded that leave to remain is such a power.'

36. With appropriate deference, having regard to the relevant principles recognised by Parke J in *Irish Trust Bank Ltd. v Central Bank of Ireland* [1976-1977] ILRM 50 and reformulated by Clarke J in *Re Worldport Ireland Ltd* [2005] IEHC 189, (Unreported, High Court, 16th June, 2005), I have come to the conclusion that the statement contained in the passage just quoted is wrong in law in that it contains a clear error and that I should not follow it.

37. To explain why, it is necessary to consider the relevant analysis in the judgments of both O'Donnell and Hardiman JJ in *Sulaimon*.

38. In his judgment, O'Donnell J (Denham CJ; Fennelly and Murray JJ concurring) stated (at para. 15):

> 'It was clear not only from the theory but also from the text of the Act itself that a minister could separately grant permission and independently of the act of an immigration officer under s.4(1). This was clear from the terms of s.5 itself which spoke of "permission…by or on behalf of the Minister". That was to be contrasted with the formulation to be found in s.4 which referred to permission being granted by an immigration officer "on behalf of the Minister". Therefore the Act clearly contemplated at least two permissions, one granted by the Minister and another granted by or on his or her behalf by an immigration officer. Furthermore s.4(5)(d) dealt with the position of non-nationals entering the State other than by sea or air, and provided:
>
> > "A non-national to whom this subsection applies shall not remain in the State for longer than one month without the *permission of the Minister given in writing by him or her* or on his or her behalf by an immigration officer."
>
> Accordingly it follows that the Act contemplates a separate power in the Minister to grant this permission other than through the agency of the immigration officer. It is not necessary here to discuss the interesting question of whether that power is derived directly from the Executive power of the State or is now statutory since it is sufficient for present purposes that the Act at least clearly recognises the existence of a power in the Minister whatever its legal basis.'
>
> (emphasis in original)

39. And, at paras. 17 and 18, in material part:

> '17 … But all that s.5 requires is that a person be in the State with the permission of the Minister. Furthermore, it is clear that the word "permission" in s.5 did not have a special meaning derived from s.4 but rather was used in a more general and ordinary sense. Thus, in s.5 (which for the purposes of this case is the critical section since it is incorporated by reference in the definition of reckonable residence), it is provided that:
>
> "No non-national may be in a State other than in accordance with the terms of *any permission* given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister."
>
> Any permission given to the non-national prior to the coming into force of the Act could not comply with s.4 which did not at that time exist. Furthermore, the permission could not lose its status as such because the grantor did not have the prescience to grant it in accordance with the terms of an Act not yet passed. Accordingly counsel was forced to argue that the word permission had two different meanings not only in the same section, but in the same sentence.
>
> 18 It seems much simpler to conceive of the word having the same meaning in s.5 and that meaning being the ordinary natural meaning of the word. Section 1 does not require a special and artificial definition of the word. Rather, it merely provides, save where the context otherwise requires, that the word "permission" shall be construed in accordance with s.4. In my view this means no more than that any ministerial permission shall be of the same nature (rather than form) as the permission which is granted under s.4. This indeed is consistent with a broader view of the Act. The Act does not provide any details about the grant of a ministerial permission and does not set out any procedure for either an application for such permission or the manner in which [an] application is to be approached. It seems unlikely therefore that it would require precision as to the manner of the communication of any permission, particularly when that would be achieved only by indirect reference to construction in accordance with s.4. Furthermore even if (contrary to the view expressed above) the word "permission" is to be normally read in the Act as meaning either a permission under s.4(1) or in the same form, I would consider that for the reasons already discussed, in the case of a ministerial permission, the context does otherwise require and it should be given its ordinary and natural meaning.'
>
> (emphasis in original)

40. Similarly, Hardiman J (Murray J concurring) stated (at p. 36):

> 'Section 4 certainly creates a power in an immigration officer to grant a permission "on behalf of the Minister". To judge from the context and, most obviously, the shoulder note, ("*Permission to Land*") this envisages a permission granted by an official at a seaport or airport and in no way trenches on the Minister's inherent or statutory power to grant such permission. (I agree with Mr. Justice O'Donnell for the reasons which he gives, that regard may be had to the shoulder note). Indeed, this ministerial power is restated in s.4 and s.5. This empowering of an immigration officer in relation to permission to land, or to remain by no means divests the Minister of his own power to grant permission to remain himself, as his own Department's correspondence records him as doing, on 7th July 2005.
>
> The permission most directly in question here is the permission envisaged by s.5 without which a non-national's residence in the country would be "for all purposes" unlawful. This Section specifically envisages a permission given either "by" or "on behalf of" the Minister. It is stressing the obvious to say that, accordingly, a permission given by the Minister will prevent an applicant's presence in the country from being unlawful, but I feel obliged to stress that obvious fact because part at

least of the appellant's submissions seem to suggest that he does not, or did not, accept the point.'

41. In my judgment, the passages I have just quoted, considered in the context of the statutory scheme of the Act of 2004 as a whole, establish the following propositions:

(i) There is a general power vested in the Minister to grant a non-national permission to remain in the State, whether under s. 5 of the Act of 2004 or derived directly from the executive power of the State, quite apart from the specific powers contained in s. 4 of that Act.

(ii) There is a specific statutory power vested in an immigration officer on behalf of the Minister to grant a permission to land or be in the State to a non-national coming by air or sea from a place outside the State under s. 4(1) and (2) of the Act of 2004.

(iii) There is a specific statutory power vested in the Minister (or an immigration officer on behalf of the Minister) to grant permission to be in the State to a person arriving in the State other than by sea or air, under s. 4(5) of the Act of 2004.

(iv) There is a specific statutory power vested in the Minister or an immigration officer on behalf of the Minister under s. 4(7) of the Act of 2004 to renew or vary a permission already granted under that section of the Act.

42. As I read the decision in *Sulaimon*, the Minister was found on the facts of that case to have granted a permission under the general power to do so acknowledged in, or created by, s. 5 of Act of 2004 and not under s. 4. I can find nothing in that decision to suggest, much less establish, that the grant of leave to remain, following a proposal to deport, is a power exercised pursuant to s. 4 of the Act of 2004. It may be that the reference to s. 4, rather than s. 5, in the passage already quoted from the decision in *Jamali* was a mere typographical error. I certainly cannot accept that decision as authority for the proposition that s. 4 of the Act of 2004 confers a general or unqualified power on the Minister to grant a non-national permission to remain in the State.

43. In contending for that proposition, the applicant relies on two other decisions of the High Court, which predate the decision of the Supreme Court in *Sulaimon*. The first is *Saleem v Minister for Justice* [2011] 2 IR 386. That was a case in which an applicant had entered the State in 2001, with permission to work and reside here until his last work permit expired in 2009. In 2008, he had applied for 'long term residency' permission under a departmental scheme then in operation. The Minister refused that application in 2010. Leave was granted to challenge that decision. Early in his judgment rejecting that challenge, Cooke J sought to identify the legal basis for the grant of any permission under that scheme, stating (at 389):

'[4]…If one leaves aside the special arrangements applicable to migrant workers who are nationals of a Member State of the European Union or of a state in the European Economic Area, the arrangements governing an entitlement to enter or land in the State and to remain within the jurisdiction thereafter, derive in effect from ss. 4 and 5 of the Immigration Act. Section 5 of that Act provides that no non-national may be in the State other than in accordance with the terms of a permission given under the Act by or on behalf of the Minister, or given before the passing of that Act. Section 4 provides that an Immigration Officer may on behalf of the Minister give a non-national, either by means of a document or by placing a stamp on his or her passport, "an authorisation to land or be in the State". No general conditions are prescribed by s. 4 in relation to the grant of such permissions. Subsection (3), however, prescribes a series of circumstances in which an immigration officer on behalf of the Minister may refuse to give permission and subsection (6) provides that a permission can be given subject to such conditions as to duration of stay and engagement in employment, business or profession as may be thought fit. Accordingly, the combined effect of the stamping of the passport with permission to remain for a given duration with reference to the terms of a specific work permit, is that the non-EEA national has permission to be in the State for the purposes of s. 5 upon the conditions as to duration and engagement in a particular employment as are specified in the endorsement on the passport.

[5] It follows, accordingly, that in s. 4(1) of the Immigration Act , the Oireachtas has conferred on the Minister a discretion exercisable through his immigration officers to grant to non-nationals (that is, non-EEA nationals in present circumstances,) permission to land or remain in the State and to prescribe conditions for such permissions including those as to the length of stay and the employment, business or profession that might be engaged in.'

44. I do not read that passage as stating or implying that the exclusive basis upon which permission to land or be in the State can be granted is under s. 4(1) of the Act of 2004. Even if it were possible to read it in that way, any such statement would have been inconsistent with - and, hence, directly overruled by - the subsequent decision of the Supreme Court in *Sulaimon*.

45. The second is *O'Leary v Minister for* Justice [2012] IEHC 80, (Unreported, High Court (Cooke J), 24th February, 2012). The applicants in that case were a husband and wife who were Irish citizens and the elderly South African parents of the wife. The wife's parents had formerly held a permission to remain in the State, but were subsequently required to leave when it was not renewed. They later re-entered the State without permission, before seeking the renewal of their lapsed permission under s. 4(7) of the Act of 2004. The Minister refused that request and the Court quashed that refusal for reasons that are not relevant to the present case. The applicant relies on the dictum of Cooke J (at para. 6) that, since the wife's parents had no entitlement to demand to remain in the State, to do so they required the permission of the respondent under s. 4 of the Act of 2004, and the Oireachtas had 'conferred upon the respondent Minister the exclusive discretion in exercise of the sovereign competence of the State to decide whether they should be permitted to remain.'

46. Once again, to the extent that it can be suggested that this is authority for the proposition that the exclusive basis upon which the permission to be in the State can be granted is in exercise of the statutory powers conferred upon the Minister under s. 4 of the Act of 2004, it is *obiter dicta* because, as Cooke J later pointed out (at para. 24), the request in that case was dealt with as one for the renewal of a permission under s. 4(7) without reference to, or any consideration of, whether the Minister had a separate power to grant permission to be in the State, either under s. 5 of the Act of 2004 or in exercise of the sovereign power of the State. In so far as it may be argued that the relevant proposition forms part of the *ratio decidendi* of the decision, then it is plain that it has been directly overruled by the decision of the Supreme Court in *Sulaimon*.

47. Thus, applying the correct legal principles as I have identified them, it follows that the power of an immigration officer to grant a permission under s. 4(1) could have had no potential application to the applicant's position when his solicitors wrote to the INIS on 11 November 2015, seeking a residence permission on his behalf under s. 4. of the Act of 2004.

iii. the nature and scope of a permission under s. 4(7) of the Act of 2004

48. As noted above, s. 4(7) of the Act of 2004 allows the renewal or variation by either the Minister or an immigration officer on the Minister's behalf of a permission *under that section*. I have already held that the applicant did not have any extant form of residence permission to be in the State, as opposed to a legislative entitlement to remain in the State pending the determination of his subsidiary protection claim, under Reg. 4(1) of the 2013 Protection Regulations. But, even if that entitlement to remain could be properly characterised as a form of residence permission, it certainly could not be considered one granted under s. 4 of the Act of 2004. Thus, I find that the applicant had no entitlement to rely on s. 4(7) of the Act of 2004 when his solicitors wrote to the INIS on 11 November 2015, seeking a residence permission under s. 4 of the Act of 2004 on the basis of his existing entitlement to remain in the State under Reg. 4(1) of the 2013 Protection Regulations.

iv. an obligation to consider constitutional and ECHR rights in granting or withholding residence permission?

49. The applicant contends not merely that he was entitled to apply for residence permission under s. 4 of the Act of 2004 (although I have found he was not), but also that the Minister was obliged to have regard to his constitutional and ECHR rights in considering whether to grant or withhold it.

50. In advancing that argument, the applicant relies again on the decision of Cooke J in *O'Leary*, already cited, in this instance as authority for the proposition (at para. 47) that, in considering an application for permission to remain, the Minister must give adequate consideration to a proportionate balancing of the rights of the State in maintaining the integrity of the immigration laws as against the entitlement of any Irish citizen family members of the person concerned to invoke the protection of their family interests under Article 41 of the Constitution.

51. However, the judgment of Cooke J in *O'Leary* records (at para. 30) that in that case the Minister elected to consider the request of the wife's parents for permission to remain as one for the renewal of a permission under s. 4(7) of the Act of 2004. In *Bode (a minor) v Minister for Justice* [2008] 3 IR 663 (at 694-5), the Supreme Court confirmed that there is otherwise no free-standing right to make an application for permission to remain in the State by reference to asserted constitutional or convention rights, since the appropriate statutory scheme under which to consider such rights is that provided by the Act of 1999.

52. The facts in *Bode* and in the present case are thus quite different from those in *O'Leary* and in *Luximon v Minister for Justice and Equality* [2016] IECA 382, (Unreported, Court of Appeal (Finlay Geoghegan J; Peart and Hogan JJ concurring), 15th December, 2016), because the application in each of the latter cases was dealt with as one under s. 4(7) of the Act of 2004, as a concession to those applicants, whereas that in each of the former cases was not. The Minister cannot be compelled to make that concession to the present applicant. The relevant distinction is further elaborated upon by Faherty J in *Dike v Minister for Justice,* (Unreported, High Court, 23rd February, 2016) (at paras. 141-149), a decision that the CSSO on behalf of the Minister furnished a copy of to the applicant's solicitors under cover of a letter, dated 3 June 2016, but to which the applicant's legal representatives made no reference whatsoever, in the submission filed in support of their application *ex parte* for leave to seek judicial review.

53. The applicant submits that the failure to permit him to invoke any such rights as he may be able to assert prior to his entry into the deportation process is a disproportionate interference with those rights because of the 'lifelong' nature of a deportation order. But that argument wrongly disregards both the statutory entitlement under s. 3(11) of the Act of 1999 to apply for the revocation of a deportation order and the decision of the Supreme Court in *Sivsivadze v Minister for Justice* [2016] 2 IR 403, which addresses and rejects precisely that argument, i.e. that the indefinite period of exclusion from the State imposed by a deportation order made under s. 3(1) of the Act of 1999 is incompatible in principle with either the Constitution or the ECHR.

The introduction of new and different grounds

54. In the applicant's supplemental written submissions, dated 16 May 2017 and filed without the leave of the court ('the supplemental submissions'), his position in these proceedings has shifted in two significant respects.

55. First, those submissions attempt to introduce a new ground in the shape of a new argument that the Minister should have treated the applicant's request in November 2015 for permission to reside in the State under s. 4 of the Act of 2004 as one for the renewal of his former residence permission, expired since 2011, rather than as the one he had actually made for the variation of his current entitlement to remain under Reg. 4(1) of the 2013 Protection Regulations.

56. That ground cannot succeed for three reasons.

57. First, it is not pleaded in the applicant's statement of grounds and no application was brought to amend those grounds.

58. Second, it does not arise on the facts of this case; the Minister's decision cannot be quashed for failure to consider the application on a different basis than that on which it was advanced.

59. Third, it is doubtful that the argument could succeed as a matter of law. In both *Leng v Minister for Justice and Equality* [2015] IEHC 681, (Unreported, High Court (Humphreys J), 6th September, 2015) and *Dike*, already cited, the Court found that, where permission to be in the State has lapsed, the question of any further leave to remain falls to be considered in the context of the deportation process, rather than under s. 4(7) of the Act 2004. This has been the approach adopted in a number of other cases; see *Javed v Minister for Justice and Equality* [2014] IEHC 508, (Unreported, High Court (Barr J), 1st October, 2014) and *Onuawuchi v Minister for Justice and Equality* (Unreported, High Court (Faherty J), 19th May, 2017. Most notably, in *A.B. v Minister for Justice and Equality* [2016] IECA 48, (Unreported, Court of Appeal (Ryan P; Peart and Hogan JJ concurring), 26th February, 2016), the Court of Appeal explained:

> '44. The essential point is that there is not a halfway house status. There is no limbo position between being here by way of permission, and when that status ends, having a right to remain in suspended permission while a free-standing claim can be made. If a person is not here by permission or as of right such as an asylum seeker, they are prima facie unlawfully here and are subject to being expelled.
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> 45. This case is not about whether A.B. has rights, but rather whether she has a right to having a particular procedure prescribed by her in order to determine her rights and to insist on that procedure operating at a time when she has prima facie no right whatsoever to be here. This case falls to be decided by reference to A.B.'s entitlement, if any, to specify and insist upon the procedure of a discrete and advance consideration of her claim to be entitled to remain in the State. Apart from anything else in that regard, there is a serious problem because it would involve the Minister deciding on a separate and advance basis the very case that the Minister would have to address in performing the Minister's own statutory functions under s. 3 of the 1999 Act.

> 46. A.B.'s advisers are seeking to exercise control over the process of decision making involving A.B., whereas the reality is that the consideration of A.B.'s situation and whether she should be permitted to be in the State is part of the Executive function, properly exercisable by the Minister in accordance with law. In this case, the Minister is exercising the executive power of the State under Article 28.2 of the Constitution in accordance with law enacted by the Oireachtas.
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> 47. A foreign national who is given permission to come into the State by a visa issued by the Minister does not have the right to demand the following: "My permitted residence has come to an end. I now want the Minister to confirm my entitlement to be in the State while I continue to reside here and I want the Minister to engage in that consideration outside of and independently and in advance of any question of deportation". That is inconsistent with the Minister's function as part of the Executive. When a person is in the State unlawfully, the Minister is arguably obliged to consider making a deportation order, but that does not have to be decided in this case.
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> 48. A person is in the State either with permission or without permission. A person claiming asylum is in a special category that is protected by law in order to safeguard the person's position while the application is being considered. A non-refugee who comes to the State on a visa or a person who claims a right that arises otherwise or that comes into being by reason of the relationships that are developed during the time the person is in the State in accordance with a permission - any such person may ask for further permission and it is the Minister's function to decide whether or not to grant the permission. If the Minister decides not to, and gives reasonable notice to the entrant/applicant, then the person is, after the expiration of the notice period, not lawfully in the State, and under s. 5 of the 2004 Act the person is unlawfully present in the State. In those circumstances, it is incumbent on the Minister to consider deportation. The person does not have a right to be here thereafter, but they may be able to resist a deportation order on legal, Constitutional, Convention or humanitarian grounds. Such consideration, however, takes place in the context of a proposed deportation order and not otherwise. That happens because the Minister is operating the Executive function of the State in accordance with law enacted by the Oireachtas.
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> 49. If the Minister did have such capacity, that would give rise to precedential rulings that could be invoked in subsequent applications. This thought demonstrates the fallacy of the proposition that the Minister is obliged or can be required to give such a ruling. In fact, the Minister does not have to specify on what basis she is permitting a person to remain in the State. It may be that the Minister makes a decision based on a consideration of all the issues, including the humanitarian ones, and may or may not specify which ones have ultimately tipped the balance or whether it is the combined impact of all the considerations.
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> 50. Such proposed rulings in advance of any deportation consideration would create another layer of administration, not only for the Minister in preparing a mode of dealing with these claims and with all the necessary additional resources that would be deployed in dealing with those applications, but also for the courts which would have to cope with an influx of claims that arose upstream from the deportation order. In my judgment, that is contrary to the scheme of the legislative apparatus to deal with immigration and asylum claims. This consists now of a body of legislation and there is also a large number of cases decided by the Supreme Court and the High Court dealing with various aspects of the administration of this system. There is no justification for adding a new stage in the process.'

60. The applicant's second shift in position is the attempted introduction of a second new ground; specifically that the Minister should have considered his request for permission to reside in the State under s. 4 of the Act of 2004 as carrying with it an implied request that the Minister should go on to consider, in the alternative, the exercise of the more broad and general power - whether created by, or recognised under, s. 5 of that Act - to grant him permission to remain.

61. That argument too must fail for the same three reasons. First, the ground was not pleaded and no application was made to amend the statement of grounds. Second, the Minister's decision cannot be quashed for failure to consider an application on a basis that the Minister was not asked to consider. Third, as a matter of law, the Minister could have been under no obligation to consider a free standing request made on that basis, even if one had been made, as the decision of the Court of Appeal in A.B., already cited, plainly demonstrates.

Breach of the duty of utmost good faith and the discretion to refuse relief

62. The applicant's leave submissions, upon which he relied for the purpose of his *ex parte* application for leave to seek judicial review, do not refer to the Supreme Court's construction of ss. 4 and 5 of the Act of 2004 in either *Bode, Sulaimon* or *Hu*ssein, or the High Court's construction of those provisions in *Dike*. Those submissions cite *Sulaimon* solely for the purpose of placing reliance upon that portion of the judgment of Hardiman J that deals with the register of non-nationals with permission to be in the State created by s. 9 of the Act of 2004, in support of a strained (and, as I have found, unsustainable) argument that the applicant had a 'form of permission' to be in the State. The letter that the CSSO sent to the applicant's solicitors on 3 June 2016, citing each of those decisions and enclosing a copy of the decision in *Dike*, was omitted from as much of the *inter partes* correspondence as was exhibited to the grounding affidavit of the applicant, sworn on 25 October 2016.

63. In *Adams v DPP* [2001] 2 ILRM 401(at 416), Kelly J stated:

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

64. The applicant attempts to meet the Minister's objection to his conduct in this case by arguing, in effect, that the decisions concerned were irrelevant to the case he wished to make. However, as the Minister submits, the test of relevance on an *ex parte* application is one for the court, and not the applicant, to apply. It was perfectly open to the applicant to argue that the Supreme Court's construction of s. 4 of the Act of 2004 in *Sulaimon* was incorrect in law and that the construction of that provision by the High Court in cases such as *Saleem*, *O'Leary* or, indeed, *Jamali* should be preferred (albeit an argument that only the Supreme Court could resolve in the applicant's favour). Indeed, it is interesting to note that just such a position has been advocated in an academic context; see Casey, *Reading Between The Lines: The Search for the Legal Basis of Residency Permission Schemes for Non-Irish*

Nationals, 53(1) Ir. Jur. 162 (2015). But it was not open to the applicant in the course of an application *ex parte* to withhold from the court contrary - indeed, controlling - authority on the basis that he was silently holding in reserve an argument that it was somehow distinguishable from and, hence, irrelevant to his case.

65. For that reason, had the applicant established an entitlement to the relief he seeks in these proceedings (although he has not), it would have been necessary to exercise the court's discretion to refuse it, in order to protect the integrity of the judicial process.

Conclusion
66. The application is refused.