

## THE HIGH COURT

## JUDICIAL REVIEW

[2013 No. 67 J.R.]

BETWEEN/

DANIBYE LUXIMON

AND

PRASHINA CHOOLUN (A MINOR SUING BY HER MOTHER AND NEXT FRIEND DANIBYE LUXIMON)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

**JUDGMENT of Mr. Justice Barr delivered on the 20th day of March, 2015**

1. This is an application for, *inter alia*, an order of *certiorari* quashing the decision of the respondent dated 5th November, 2012, refusing the first named applicant's application for a change of status/permission to remain in the State pursuant to s. 4(7) of the Immigration Act 2004; and for an order of *mandamus* compelling the respondent to reconsider the first named applicant's application for a change of status/permission to remain in the State pursuant to s. 4(7) of the Immigration Act 2004.

2. The applicant submits that the principal issue raised in these proceedings concerns the nature of the considerations that the Minister, or an immigration officer, is required to take into account in deciding whether to grant permission to land or to remain in the State. More specifically, the applicant states that the dispute between the parties centres on whether the Minister, or an immigration officer, is required to have regard to (i) the matters set out in s. 4(10); and (ii) an individual's personal and family rights under Article 40.3 and Article 41 of the Constitution and under Article 8 of the European Convention on Human Rights.

**Background**

3. The applicants are citizens of Mauritius and are mother and daughter. They have resided in the State for over seven years. The first named applicant arrived in the State in July 2006 for the purposes of pursuing a course of study; she was, accordingly, registered on stamp 2 conditions.

4. Under stamp 2 conditions, a person is permitted to remain in the State to pursue a course of studies on condition that the holder does not engage in any business or profession other than casual employment (defined as 20 hours per week during school term and up to 40 hours per week during school holidays) and does not remain later than a specified date. In addition, the person has no recourse to public funds unless otherwise provided.

5. She was joined in the State by her two minor daughters, including the second named applicant herein, who remains a minor and is in secondary school. The first named applicant has been continuously employed since her arrival in the State in the role of a dental practice co-ordinator.

6. The first named applicant's permission to reside in the State on student conditions expired in June 2012. New immigration rules in respect of full time non-EEA students were introduced on 1st January, 2011, which stipulated that non-EEA students could only reside in Ireland for a maximum period of seven years. Transitional arrangements were put in place by the respondent to allow students who wished to remain in the State beyond that seven-year maximum period to apply for a work permit to enable them to remain in the State. The first named applicant was afforded a brief extension of her permission to reside in the State by the Irish Naturalisation and Immigration Service to allow her to apply for a work permit. With the support of her employer, Dr Daragh Fagan, the first applicant submitted an application for a work permit, but the application was refused in or around August 2012 on the ground that her permission to reside in the State had expired.

7. In light of the fact that the applicant's work permit application had been refused due to the lack of permission to reside in the State, on 30th October, 2012, the applicants' solicitors made an application to the respondent for change of status/permission to reside in the State on stamp 4 conditions, pursuant to s. 4(7) of the Immigration Act 2004. A person on a stamp 4 permission is permitted to remain in Ireland until a specified date, and he or she may work without a work permit.

8. In their letter dated 30th October, 2012, and addressed to the General Immigration Division, INIS, 13-14 Burgh Quay, Dublin, the applicant enclosed extensive proofs in support of her application including: evidence of employment and the ongoing support of her employer; evidence of her self-sufficiency in terms of medical insurance and the fact that she was not reliant on social welfare; and letters from her daughter's secondary school. Because of its centrality to the present proceedings, it is necessary to set out this letter in full:

*Re: Our client – Ms. DanibyeLuximon, National of Mauritius*

*Application for permission to remain pursuant to s. 4(7) Immigration Act, 2004*

*Dear Sirs,*

*We refer to the above and confirm that we have been instructed by Ms. Luximon to apply on her behalf for a change in her immigration status so as to have her permission to remain regularised on 'stamp 4' conditions. Please see enclosed letter of consent and authority by way of confirmation, along with the following supporting documentation:*

*1. Letter of consent and authority dated 22nd October, 2012;*

2. Copy of Bio Data page of DaniybeLuximon's Mauritian Passport;
3. Copy Dental Practice Co-Ordination Certificate from Mauritius Institute of Health dated 23rd January, 1986;
4. Letter from Darragh Fagan Dental Surgery to INIS dated 25th September, 2012. Re: Green Card application for Ms.Luximon.
5. New Employment Permit Application from Darragh Fagan Dental Surgery for Ms.Luximon dated 24th September, 2012;
6. Letter from Darragh Fagan Dental Surgery to Ms.Luximon dated 8th September 2012. Re: Job Offer;
7. Letter from Darragh Fagan Dental Surgery to Ms.Luximon dated 24th February 2012. Re: Job Offer.
8. Letter from Darragh Fagan Dental Surgery to INIS dated 19th June 2012. Re: Green Card Extension.
9. Copy Pay Slips from Darragh Fagan Dental Surgery for Ms.Luximon – March 2012 to August 2012;
10. Copy Tax Clearance Certificate for Darragh Fagan dated 10th August, 2012;
11. Letter of reference from Emer Lawlor, Landlord, dated 10th August 2012;
12. Aviva Health Insurance Certificate (Expiry dated 28th March 2013) for Ms.Luximon;
13. Letter from Social Welfare, Marino, to INIS dated 18th October 2012;
14. Letters from St. Mary's Holy Faith Secondary School, Killester, dated 7th June and 30th April 2012;
15. Bank of Ireland Statements for Ms.Luximon, dated 4th October 2012, covering period from 3rd October 2011 to 3rd October 2012.

#### 1) Immigration History of our client

As you will note from your records our client Ms.Luximon, a Mauritian citizen, initially entered the State in 2006 for the purposes of pursuing a course of study. Accordingly she was registered on stamp 2 conditions. She was joined in the State by her two minor daughters, the youngest of whom, Prashina Choolun, remains a minor and is a first year student at St. Mary's Holy Faith Secondary School. Ms.Luximon instructs that the time her daughters joined her in the State, she informed the GNIB of their presence with her. Ms.Luximon is presently single and Prashina's father has no involvement with her and he resides with his family abroad.

Ms.Luximon has been continuously employed since her arrival in the State in the role of 'Dental Practice Co-Ordinator' in the dental practice of Mr Daragh Fagan, B. Dent.Sc. He has previously written to your department on behalf of our client and we enclose copy of his letter dated 18th September 2012, which sets out our client's unique and exceptional skillset which are invaluable to him in his practice:

"We diagnosed 6 cases of Oral cancer in the past twelve months, as part of the oral cancer awareness programme run by Ms.Luximon at my surgery. To put this in context, the two dental hospitals in Dublin and Cork diagnosed nine new cases of Oral Cancer on Oral cancer awareness day last September... Ms.Luximon has also established and operates an 'Export' division in my surgery, whereby we provide dental treatment to the crew and passengers of visiting cruise ships to Dublin port, this leads to job creation and contributes to the public finances... on a personal level she is entirely self-sufficient, and is not in receipt of any assistance or supplementary income from the State... it would be a great pity to lose the talents of someone so valuable. The community would be bereft of essential voluntary services and general health benefits".

Ms.Luximon has been endeavouring to resolve her immigration status for some time but with no avail. She instructs that when her permission to remain on students conditions expired in April of this year, she was afforded a brief extension so as to allow her to submit an application for an employment permit to the Department of Enterprise, Trade and Innovation. With the continued support of her employer she duly did so but this application was refused. Her permission to remain expired on 26th June last. Our client instructs that she has sought to have her permission to remain extended so as she could re-apply/appeal the employment permit application. This request was refused by the GNIB who directed her employer to write to them. As will be noted they duly wrote to them on the 25th September last but have received no response. It is in these circumstances that she is now respectfully requesting the permission of the Minister to reside in the State on 'stamp 4' conditions to allow her to avail of the employment opportunity now being offered by Mr Fagan.

#### 2. Article 8 ECHR Rights engaged

"Our client and her daughters have been resident in the State permanently since 2006. The family have a wide network of friends and are fully integrated into their local community. Ms.Luximon instructs that she is very happy in the State and that her daughter is thriving at school. She says her sole motivation is to continue to contribute to the local and family economy.

The European Court of Human Rights has noted that the protection of Article 8 of the European Convention on Human Rights both in its "family life" and "private life" applies to integrated aliens or long term residents of an EU Member State (see the case of *Uner v. Netherlands*). Clearly Article 8 of the ECHR is engaged by our client. For the Minister to refuse the within application to allow Ms.Luximon to reside lawfully in the State so as to provide for her minor daughter financially, would result in their Article 8 rights being irreparably infringed. We would respectfully submit that the Minister in his Article 8 assessment of this application ought to consider the best interests of the minor child, as per the guidance of the UK Supreme Court in *ZH Tanzania*."

#### 3. Conclusion

*Our client's immigration history in the last number of years has been exemplary. Whilst the present lapse of her permission to remain is regrettable, she has endeavoured to remedy this. It was never her intention to become illegally present in the State. It is acknowledged that the State has the right to control the entry, presence, and exit of foreign nationals, subject to the Constitution and international agreements. It is further acknowledged that the Minister must have regard to the common good. We would respectfully submit that the grant of temporary permission to remain on stamp 4 conditions to Ms. Luximon would be in accordance with the common good in this instance having regard to her children's best interests.*

*She has never been the subject of a proposal to deport and consequently has not been afforded the opportunity to make representations pursuant to section 3 of the Immigration Act 1999. We would most respectfully submit that the facts of Ms. Luximon's case are both unique and exceptional. It will be noted that our client and her daughter are not social welfare recipients and have no intention of becoming an undue burden on the public purse, they are entirely self-sufficient, and Ms. Luximon has the benefit of private medical insurance.*

*In light of the above, we submit that the Minister should exercise his discretion and grant our client residency in the State on Stamp 4 conditions.*

9. By decision dated 5th November, 2012, the respondent refused the application for change of status/permission to reside in the State on stamp 4 conditions pursuant to s. 4(7) of the Immigration Act 2004. The decision made no reference to the Article 8 rights of the applicants, nor did it make any reference to the second applicant herein. The letter was addressed to the applicant's solicitors, and stated as follows:

*Re. Your Client – Ms. DanibyeLuximon*

*Dear Sir/Madam,*

*I am directed by the Minister for Justice and Equality to refer to your client's application for a change of immigration permission to remain in the State. Having considered your client's case and the information provided, this Office does not authorise a change of immigration permission in your client's case.*

*An examination of your client's case indicates that your client arrived in Ireland on 20th July, 2006 and that she has been resident in Ireland since that date.*

*All non-EEA students resident in Ireland are subject to the student immigration rules set out under the 'New Immigration Regime for Full Time Non-EEA Students', which was published in September 2010 and has been in effect since 1 January 2011. These rules stipulate that non-EEA nationals may reside in Ireland as students, subject to the provisions of the new regime, for a maximum period of seven years.*

*In order to ensure a smooth transition from the old regime to the new, special transitional arrangements were provided for those students already in the State who were affected by the changes. These measures allowed students to complete any course of studies that they had begun before 1 January 2011.*

*A key transitional measure included a 'Timed Out' Student permission which entitled eligible students to a final 6 month non-renewable permission on Stamp 2. Eligible students were permitted to work full time (i.e. up to a maximum of 40 hours per week) during the 6 months concession period. During this six month concession students were permitted to apply for an employment permit or Green Card employment without being required to return to and to apply from their country of origin.*

*The 'Timed Out' student concession was further extended by three months from October 2011 for those students registered in Ireland up to 31 December 2005 who were not in a position to undertake a further course of studies as a result of the new regime. The purpose of these 'Timed Out' extensions was to facilitate students with an opportunity to secure an alternative immigration permission, namely an employment permit or a Green Card employment permit. Students who have not been able to avail of that opportunity will be required to leave the State.*

*In your client's case having arrived in Ireland in July, 2006 it is not possible to authorise an extension of your client's student permission to enable her pursue a further course of study as there will not be the requisite time available to do so. Similarly, based on the information you have provided, your client does not meet the criteria for consideration under the 2004 Student Probationary Extension.*

*An extension of student permission up to 19 December, 2012 is authorised in respect of your client to allow them to finalise their affairs in Ireland.*

*At the end of this period your client MUST leave the State unless they have secured another form of immigration permission, e.g. a work permit or green card. Upon leaving the State your client MUST provide this office with evidence of their departure (e.g. copy of Chinese re-entry stamp).*

*This evidence should be provided no later than 30 days after your client has left the State.*

*If the evidence of your client's departure from the State is not received by the due date it is the intention of this Office to issue a notification under the provision of Section 3(4) of the Immigration Act 1999 (notification to deport) in respect of him/her.*

*Your client must now bring this correspondence with them when reporting to the Registration Office to facilitate re-registration.*

*Yours faithfully,*

*Patrick Clancy*

*General Immigration Division*

10. It is this decision that is challenged in the proceedings herein. Before turning to consider the case presently before the court, it is helpful to set out in full the applicant's immigration history in the State:

? From 20th July, 2006, to 30th June 2009, the applicant was present in the State on a stamp 2 permission (an ordinary student permission) for the purposes of pursuing a Software Applications course.

? Between 30th June 2009 and 15th June 2010 the applicant had no immigration permission in the State.

? From 15th June, 2010, to 18th January, 2011, the applicant was present in the State on a stamp 2 permission (an ordinary student permission) for the purposes of pursuing a course in Information Processing.

? From 19th January, 2011, to 26th June, 2012, the applicant was present in the State on a stamp 2 permission (described as a vocational student permission) for the purposes of pursuing courses in Information Processing and an Advanced Diploma in Tourism Management (L5).

? From 13th November, 2012, to 19th December, 2012, the applicant was present in the State with the permission of the Minister, on foot of a general immigration letter from P. Clancy, to finalise her affairs in the State.

? From 23rd January, 2013, to 23rd May, 2013, the applicant was present in the State on a stamp one permission, granted on foot of a general immigration letter. This letter stated that the applicant was being granted permission to remain for four months in order "to enable an employer to apply for a Work Permit on her behalf."

11. By letters dated 9th May, 2013, and 21st June, 2013, the applicant applied for a further extension of her permission to remain in the state. In their letter of reply dated 26th June, 2013, the General Immigration Division stated that "[f]ollowing consideration of the individual circumstances of this case, including all the matters known to us, her position does not warrant a change in immigration status." This letter further stated:

*"You make reference to your client's current employment being in jeopardy. It appears your client is not a holder of a valid work permit nor does she have a pending application with the Department of Jobs, Enterprise and Innovation. As such, she is working illegally in the State."*

#### **The present proceedings**

12. By notice of motion dated 12th February, 2013, the applicant instituted the present proceedings challenging the respondent's decision to refuse her application for a change of status/permission to remain in the state pursuant to s. 4(7) of the Immigration Act 2004.

13. The applicant has described the Minister's position in these proceedings as "stark." In this regard, the applicant pointed out that at para. 7 of the Statement of Opposition, the Minister stated that she was not obliged to consider personal and family rights in the context of a s. 4(7) application, and that these matters are to be taken into consideration at the stage of expulsion from the State.

14. The applicant submitted that this is incorrect as a matter of law. The applicant submitted that the statutory discretion under s. 4 of the Immigration Act 2004 must be exercised in accordance with the provisions of s. 4 itself, the Constitution, and the European Convention on Human Rights ("the ECHR"). The applicants placed particular reliance on the judgments of McDermott J. in *Hussein v. Minister for Justice and Equality* [2014] IEHC 34, Cooke J. in *O'Leary v. Minister for Justice, Equality and Law Reform*, and Edwards J. in *Moylan v. Minister for Justice, Equality and Law Reform* [2009] IEHC 500, as well as case law of the European Court of Human Rights.

15. Counsel for the respondent rejected the applicant's characterisation of the central issue in this case; he submitted that the central issue is more nuanced than has been suggested by the applicant in circumstances where the individual concerned was given a specific, finite permission (i.e. a student visa) to enter and remain in the State, and that permission has come to an end.

#### **Grounds upon which relief is sought**

16. By order dated 18th February, 2013, McDermott J. granted the applicants leave to seek an order of *certiorari* quashing the decision of the respondent dated 5th November, 2012, refusing the first applicant's application for a change of status/permission to remain in the State pursuant to s. 4(7) of the Immigration Act 2004. The grounds upon which the applicants were granted leave to seek judicial review are as follows:

(i) The respondent's decision to reject the applicant's application for change of status/permission to reside on the basis of stamp 4 conditions pursuant to s. 4(7) of the Immigration Act 2004 is unlawful by reason of the failure to have any regard to the personal and/or family and/or private life rights of the first applicant pursuant to Article 40.3 and/or 41 of the Constitution and/or Article 8 of the European Convention on Human Rights.

(ii) The respondent's decision to reject the first applicant's application for change of status/permission to reside on the basis of stamp 4 conditions pursuant to s. 4(7) of the Immigration Act 2004 is unlawful by reason of the failure to have any regard to the personal and/or family and/or private life rights of the second applicant pursuant to Article 40.3 and/or 41 of the Constitution and/or Article 8 of the European Convention on Human Rights.

(iii) The respondent's decision to reject the first applicant's application for change of status/permission to reside on the basis of stamp 4 conditions pursuant to s. 4(7) of the Immigration Act 2004 is unlawful by reason of a material error of fact insofar as the decision-maker appears to have proceeded on the basis that the first applicant was a Chinese national in that the decision to refuse notes that the applicant must provide proof of her departure from the State by 19th December, 2012, "e.g. copy of Chinese re-entry stamp."

(iv) Further, or in the alternative, the respondent failed to comply with the principles of natural and constitutional justice and basic fairness of procedures. The policy of the respondent in respect of applications for change of status/permission to reside on the basis of stamp 4 conditions pursuant to s. 4(7) of the Immigration Act 2004 for timed out students is not published and the applicant is unaware of what sort of information or evidence might be sufficient to entitle her to a change of status/permission to reside on the basis of stamp 4 conditions pursuant to s. 4(7) of the Immigration Act 2004.

17. The applicants submitted that these grounds can be grouped under three separate headings, namely: (i) Obligation to consider Constitutional and/or Convention rights; (ii) breach of fair procedures and constitutional justice by the operation of an unpublished policy; and (iii) error of fact. I therefore propose to consider the issues raised in this case in the manner suggested by the applicants. Before turning to do so, however, it is necessary to set out the applicable law.

## **The Law**

### **The Immigration Act 2004**

18. Section 4 of the Immigration Act 2004 provides as follows:

*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.*

*(3) Subject to section 2 (2), an immigration officer may, on behalf of the Minister, refuse to give a permission to a person referred to in subsection (2) if the officer is satisfied—*

*(a) that the non-national is not in a position to support himself or herself and any accompanying dependants;*

*(b) that the non-national intends to take up employment in the State, but is not in possession of a valid employment permit (within the meaning of the Employment Permits Act 2003 );*

*(c) that the non-national suffers from a condition set out in the First Schedule;*

*(d) that the non-national has been convicted (whether in the State or elsewhere) of an offence that may be punished under the law of the place of conviction by imprisonment for a period of one year or by a more severe penalty;*

*(e) that the non-national, not being exempt, by virtue of an order under section 17 , from the requirement to have an Irish visa, is not the holder of a valid Irish visa;*

*(f) that the non-national is the subject of—*

*(i) a deportation order (within the meaning of the Act of 1999),*

*(ii) an exclusion order (within the meaning of that Act), or*

*(iii) a determination by the Minister that it is conducive to the public good that he or she remain outside the State;*

*(g) that the non-national is not in possession of a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality;*

*(h) that the non-national—*

*(i) intends to travel (whether immediately or not) to Great Britain or Northern Ireland, and*

*(ii) would not qualify for admission to Great Britain or Northern Ireland if he or she arrived there from a place other than the State;*

*(i) that the non-national, having arrived in the State in the course of employment as a seaman, has remained in the State without the leave of an immigration officer after the departure of the ship in which he or she so arrived;*

*(j) that the non-national's entry into, or presence in, the State could pose a threat to national security or be contrary to public policy;*

*(k) that there is reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national.*

*(4) An immigration officer who pursuant to subsection (3) refuses to give a permission to a non-national shall as soon as may be inform the non-national in writing of the grounds for the refusal.*

*(5) (a) An immigration officer may, on behalf of the Minister, examine a non-national arriving in the State otherwise than by sea or air (referred to subsequently in this subsection as "a non-national to whom this subsection applies") for the purpose of determining whether he or she should be given a permission and the provisions of subsections (3), (4) and (6) shall apply with any necessary modifications in the case of a person so examined as they apply in the case of a person coming by sea or air from a place outside the State.*

*(b) A non-national to whom this subsection applies and who is not exempt, by virtue of an order under section 17 , from the requirement to have an Irish visa shall have a valid Irish visa.*

*(c) A non-national to whom this subsection applies and who is arriving in the State to engage in employment, business or a profession in the State shall within 7 days of entering the State—*

*(i) report in person to the registration officer for the place in which he or she intends to reside,*

*(ii) produce to the officer a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality, and*

*(iii) furnish such information as the officer may reasonably require regarding the purpose of his or her arrival in the State.*

*(d) 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.*

*(6) An immigration officer may, on behalf of the Minister, by a notice in writing to a non-national, or an inscription placed on his or her passport or other equivalent document, attach to a permission under this section such conditions as to duration of stay and engagement in employment, business or a profession in the State as he or she may think fit, and may by such a notice or inscription at any time amend such conditions as aforesaid in such manner as he or she may think fit, and the non-national shall comply with any such conditions.*

*(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.*

*(8) A non-national, being a member of a class of persons declared by order under section 17 to require a transit visa to enter the State, shall have a valid transit visa.*

*(9) A non-national who contravenes subsection (2), paragraph (b), (c) or (d) of subsection (5) or subsection (6) or (8) is guilty of an offence.*

*(10) In performing his or her functions under subsection (6), an immigration officer shall have regard to all of the circumstances of the non-national concerned known to the officer or represented to the officer by him or her and, in particular, but without prejudice to the generality of the foregoing, to the following matters:*

*(a) the stated purpose of the proposed visit to the State,*

*(b) the intended duration of the stay in the State,*

*(c) any family relationships (whether of blood or through marriage) of him or her with persons in the State,*

*(d) his or her income, earning capacity and other financial resources,*

*(e) the financial needs, obligations and responsibilities which he or she has or is likely to have in the foreseeable future,*

*(f) whether he or she is likely to comply with any proposed conditions as to duration of stay and engagement in employment, business or profession in the State,*

*(g) any entitlements of him or her to enter the State under the Act of 1996 or the treaties governing the European Communities within the meaning of the European Communities Acts 1972 to 2003.*

## **The Immigration Act 1999**

19. The salient parts of s. 3 of the Immigration Act 1999 provide:

*(3) (a) Subject to subsection (5), where the Minister proposes to make a deportation order, he or she shall notify the person concerned in writing of his or her proposal and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that he or she understands.*

*(b) A person who has been notified of a proposal under paragraph (a) may, within 15 working days of the sending of the notification, make representations in writing to the Minister and the Minister shall—*

*(i) before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and*

*(ii) notify the person in writing of his or her decision and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that the person understands.*

*(4) A notification of a proposal of the Minister under subsection (3) shall include—*

*(a) a statement that the person concerned may make representations in writing to the Minister within 15 working days of the sending to him or her of the notification,*

*(b) a statement that the person may leave the State before the Minister decides the matter and shall require the person to so inform the Minister in writing and to furnish the Minister with information concerning his or her arrangements for leaving,*

*(c) a statement that the person may consent to the making of the deportation order within 15 working days of the sending to him or her of the notification and that the Minister shall thereupon arrange for the removal of the person from the State as soon as practicable, and*

(d) any other information which the Minister considers appropriate in the circumstances.

### **The European Convention on Human Rights Act 2003**

20. Section 2 of the ECHR Act applies to the interpretation of the laws in the following terms:

*"In interpreting and applying any statutory provision or rule of law, a court shall, in so far as possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."*

21. Section 3 of the 2003 Act, which is titled "Performance of certain functions in a manner compatible with Convention provisions", provides:

*"(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."*

22. In this regard, s. 1 of the European Convention on Human Rights Act 2003 defines "organ of the State" as follows:-

*"organ of the State" includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised;"*

### **Article 8 of the European Convention on Human Rights**

23. Article 8 of the ECHR provides:

*1 Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

### **The Constitution**

24. Article 40.3.1 of the Constitution provides:

*3 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*

25. Article 41 of the Constitution provides:

*1 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*

*2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.*

*2 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.*

*2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.*

*3 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.*

*2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –*

*i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,*

*ii. there is no reasonable prospect of a reconciliation between the spouses,*

*iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and*

*iv. any further conditions prescribed by law are complied with.*

*3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.*

## **I. Obligation to consider Constitutional and/or Convention rights**

## The Applicants' Submissions

26. The applicants' application for change of status was made to the Minister pursuant to s. 4(7) of the Immigration Act 2004. This application included submissions based on the applicants' personal rights, including their right to family and private life. The respondent's decision refusing the applicants' application makes no reference to these matters nor does it conduct any analysis of them. The respondent's position is set out as follows at para. 7 of the Statement of Opposition:

*"The respondent is not obliged to consider Article 8 rights and/or personal and/or private and/or family rights under either the European Convention on Human Rights and/or the Constitution at this stage in the process. These are matters to be taken into consideration at the stage of expulsion from the State. Clearly, the applicants do not fall into that category at this stage."*

27. Section 4 of the Immigration Act 2004 confers on the Minister a statutory discretion to renew or vary an immigration permission granted to a non-national in the State. The applicant submitted that, as a matter of first principles, the respondent is obliged to exercise her discretion in accordance with law, including the Constitution. The applicant argued that the respondent's contention that the Minister is not obliged to conduct an analysis of the constitutional rights of the applicants when exercising her discretion under s. 4(7) of the Immigration Act 2004 is fundamentally at variance with the long established principle in *East Donegal Co-operative Livestock Mart v. Attorney General* [1970] IR 317. In this regard, the applicant also cited the judgment of Henchy J. in *Lynch v. Cooney* [1982] IR 337.

28. The applicant submitted that the Minister's obligation to consider constitutional and/or Convention rights when exercising the discretion conferred by s. 4(7) of the Immigration Act 2004 has already been considered by the High Court in *O'Leary v. Minister for Justice* [2012] IEHC 80.

29. In that case, the first and second named applicants, the O'Learys, were husband and wife and Irish citizens. Mrs. O'Leary was originally from South Africa and became an Irish citizen following her marriage. The third and fourth applicants, the Lemieres, were Mrs. O'Leary's elderly father and mother, and nationals of South Africa. The O'Learys were settled residents in Ireland with two adult daughters. As the Lemieres advanced in age, they experienced increasing difficulties, both financially and in terms of health and personal security in South Africa. Over the years, they made frequent visits to their children in Ireland and in the United Kingdom.

30. As South African nationals, they did not require a visa to visit their daughter and son-in-law in Ireland. When they arrived for a visit in February 2009, they were given permission to enter and leave; this permission was subsequently extended, but they were eventually required to leave the State by 31st May, 2009. Following various exchanges with the Minister's officials, the Lemieres left and then returned to Ireland in June 2010, at which time they applied pursuant to s. 4(7) of the Immigration Act 2004 for extension of their permission to remain in Ireland with their daughter and her Irish family for the rest of their lives.

31. The Minister refused the application on a number of grounds, including on the basis that family rights derived from the Constitution and the ECHR were not engaged because the family had not been living together on a permanent basis.

32. The applicants in the present proceedings submitted that it is curious that in *O'Leary* the Minister appeared to accept constitutional and Convention rights required to be addressed in the context of s. 4(7), and that it was unclear why a different stance was adopted in this case.

33. The applicants in *O'Leary* subsequently instituted judicial review proceedings challenging the Minister's refusal to renew the permission pursuant to s. 4(7) of the 2004 Act, including on the basis that it was a disproportionate interference with their family rights under Article 41 of the Constitution and their right to private/family life pursuant to Article 8 of the ECHR. Cooke J. found for the applicants and quashed the decision of the Minister refusing the application pursuant to s. 4(7). The grounds on which he did so included, inter alia, the:-

*"inadequate consideration given to a proportionate balancing of the interests of the State in maintaining the integrity of the immigration laws as against the entitlement of the first and second named applicants to invoke the protection of their family interests under art. 41 of the Constitution."*

34. The decision of Cooke J. in *O'Leary* makes reference to an earlier decision of Edwards J. in *Moylan v. Minister for Justice* [2009] IEHC 500, which also concerned an application for renewal of immigration permission under s. 4(7) of the Immigration Act 2004, in respect of elderly parents. The applicants stated that in *Moylan*, both the Minister and the court seem to have proceeded on the basis that constitutional and Convention rights fell to be considered, although ultimately, on the facts of that case, Edwards J. held that dependency had not been established and thus family rights were not engaged. The applicants submitted that in both *Moylan* and *O'Leary* the applicants included Irish citizens and it was clear that the finding in *O'Leary*, in particular, related to the right to family life as guaranteed by Article 41.

35. The applicants submitted that although they are not Irish nationals, the provisions of the Constitution apply equally to them, at least insofar as the rights at issue in the present case are concerned. They submitted that the applicability of Article 41 to non-citizens was confirmed in *Saunders v. Mid-Western Health Board* (Unreported, High Court, 11th May 1987; Unreported, Supreme Court, 26th June, 1987). Furthermore, in *Re. Article 26 of the Constitution and the Illegal Immigrants Trafficking Bill* [2000] 2 IR 360, the Supreme Court, at p. 384 of the report, noted the submission by counsel assigned by the court that non-nationals were entitled to the unspecified personal rights guaranteed by Article 40.3.2 of the Constitution, and that counsel for the Attorney General were in general agreement in this regard.

36. The applicants submitted that the respondent's contention that there is no obligation to consider constitutional rights when exercising the discretion conferred by s. 4(7) is incompatible with these core principles of constitutional law: if the respondent closes her eyes to the rights engaged in such an application, how can the respondent, and ultimately the court, be satisfied that such decision is in accordance with her obligations under the constitution?

37. The applicants argued that it is important to note in this regard that their contention in this case is not that they have an absolute entitlement to reside in the State by reason of the constitutional, or indeed Convention, rights they may have acquired during the seven years they have resided here; rather, the applicants contend that the Minister must consider such rights in deciding whether to grant them a further permission to reside in the State. The applicants submitted that the Minister is required to apply a proportionality test.

38. The applicants made reference by analogy to the judgment of the Supreme Court in *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59. There the Supreme Court emphasised that the mere fact that a person does not have an automatic



entitlement to citizenship, does not preclude him from judicial review of a decision to refuse an application.

39. At the hearing of this case, the applicants placed heavy reliance on the judgment of McDermott J. in *Hussein v. Minister for Justice and Equality* [2014] IEHC 34, in which the learned judge had considered the provisions of s. 4 and, in the applicant's submission, had held that the Minister is obliged to take the matters set out in s. 4(10) into account when making a decision pursuant to s. 4(7).

40. The applicant in *Hussein* was a citizen of Bangladesh. He had been working in Ireland since February 2005 on the basis of "stamp 1 conditions". In March 2010, he applied, pursuant to s. 4 of the Immigration Act 2004, for "long term residence with exemption from work permit conditions." This permit would have allowed the applicant to reside and work in Ireland for five years and would have allowed him more flexibility in obtaining employment. As part of the application process, the applicant informed INIS that, in December 2010, he had been convicted of driving a motor car without insurance at Sligo District Court and was fined €300.

41. In November 2011, the applicant was informed that the Minister had refused his application for a s. 4 long term residency visa. He was informed that he had come to the adverse attention of An Garda Síochána, having been convicted of driving without insurance, and that this was the reason for the refusal of his application. The applicant made submissions to the Minister in respect of the driving offence, furnished the Minister with the relevant details, and submitted that it would be unduly harsh and disproportionate to make adverse character findings against the applicant, particularly since the offence was not of the most serious kind. INIS reviewed the issues, but did not change its decision.

42. Cooke J. granted the applicant leave to challenge the Minister's decision by way of judicial review on the grounds, *inter alia*, that the respondent unlawfully fettered his discretion by adopting an unreasonable and fixed policy of refusing long term permission to reside on stamp 4 conditions to eligible persons on the basis of convictions for relatively minor offences.

43. In the course of his judgment, McDermott J. gave detailed consideration to the "long term residency" scheme and to the relevant statutory provisions under the Immigration Act 2004. He quoted the following passages from the judgment of Cooke J. in *Saleem v. Minister for Justice, Equality and Law Reform* [2011] IEHC 55:-

*"6. The term "long term residency" is not one used in the Immigration Act 2004...but it appears to have its origin in what the respondent describes as an "administrative scheme". This appears to take the form of a notice published on the website of the Irish Naturalisation and Immigration Service giving information as to "applications from persons who have been legally resident in the state for a minimum of five years (i.e. sixty months) on work permits/work authorisations/working visa conditions".*

*7. Section 5 of the 2004 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". Section 4 does not prescribe any conditions for the grant of such a permission. Subsection (3) does, however, prescribe a series of circumstances in which an immigration officer, on behalf of the Minister, may refuse to give a permission and subs. (6) provides that a permission can be given subject to such conditions as to duration of stay, engagement in employment, business or profession as may be thought fit.*

*8. In effect, therefore, the Minister would appear to have a statutory discretion in granting permission to land or to be in the State and the "administrative scheme" thus published amounts in practice to a statement as to the circumstances and conditions in which the Minister is prepared to entertain and consider applications for the grant of permission to remain on the basis of a "stamp 4" endorsement which will be valid for a period of five years."*

44. McDermott J. noted that Cooke J. had considered the nature of the s. 4 scheme at para. 37 of his judgment in *Saleem*, where he stated:

*"37. In the first place, it is necessary to point out that a migrant worker does not have a "right" to a permission issued under s. 4 of the Act of 2004, for long term residency or to any period of continuing residency upon renewal of an existing permission. The grant of permission for continued presence in the State is a matter for the discretion of the respondent under that section (emphasis added). The effect of the publication of a particular scheme such as the Long Term Residency Scheme is, at most, to give rise to an expectation on the part of a migrant worker that an application made on foot of the scheme will be considered and either granted or rejected in accordance with the terms and conditions of the scheme. As already mentioned, it is undisputed that the primary condition in this Long Term Residency Scheme at all material times was that an applicant must have been legally resident for a minimum period of five years (or sixty months) on the basis of work permit conditions."*

45. McDermott J. rejected the analogy drawn by the respondent between the long term residency scheme and the IBC 05 scheme, which was considered by the Supreme Court in *Bode v. Minister for Justice, Equality and Law Reform* [2006] IESC 341. At para. 16 of his judgment, McDermott J. stated as follows:

*16. It is clear that the scheme has a number of similar aspects to that of the IBC05 Scheme. It has a number of conditions with which an applicant must comply. The applicant does not have a right to a decision in his/her favour. A negative decision did not change the applicant's status in the State. However, unlike the IBC05 Scheme, this scheme is not sui generis. It applies to a much broader category of persons. It was not introduced to address a particular unfairness to the persons affected by a unique event, in that case a constitutional amendment. It was not a scheme which was closed to applicants after a period of time. It is operated as part of the general scheme available to immigrant workers. A decision is made under s. 4 of the Immigration Act 2004, within clear administrative parameters laid down for reasons of policy which it is not for the court to question. However, a decision requires an assessment of the merits of certain aspects of the case, for example, whether the applicant is of "good character". It is not simply a box ticking exercise whereby the incontrovertible history of the applicant will result in a grant or refusal. An assessment has to be made of the applicant's character. A condition of "good character" is not a specific requirement for a grant of permission to be or remain in the State under section 4. Indeed, in respect of the IBC05 Scheme, no such requirement was made and all that was required as a condition of qualification was that the applicant undertake to obey the laws of the State and not become involved in criminal activity.*

46. McDermott J. went on to provide the following interpretation of the provisions of s. 4 of the Immigration Act 2004:

17. As noted by Cooke J. in *Saleem*, the grant of permission under the scheme is a matter for the exercise of discretion by the respondent under s. 4. Section 4(1) of the Immigration Act 2004, permits an immigration officer on behalf of the Minister to give a non-national permission to land or be in the State. Section 4(3) provides the grounds upon which permission may be refused. Section 4(6) provides that an immigration officer may, on behalf of the Minister, attach to a permission to land or remain "such conditions as to duration of stay and engagement in employment, business or a profession in the State as he or she may think fit". Section 4(7) provides for the renewal or variation of a permission "to be" in the State. Section 4(10) provides that in performing functions under subs. (6) an immigration officer shall have regard to all of the circumstances of the non-national concerned known to the officer or represented to the officer by him or her and, in particular, to the following relevant matters:-

"...

(b) the intended duration of the stay in the State,

(c) any family relationships...with persons in the State,

(d) his or her income, earning capacity and other financial resources,

(e) the financial needs, obligations and responsibilities which he...is likely to have in the foreseeable future,

(f) whether he is likely to comply with any proposed conditions as to duration of stay and engagement in employment, business or profession in the State..."

It is clear that in considering the facts of the case, all of these matters were obviously relevant and to be taken into account. The immigration officer is also entitled and required to have regard to "all of the circumstances of the non-national concerned known to the officer", and to consider all circumstances made known to him by the applicant. These circumstances clearly include convictions of the applicant. However, the decision is also subject to the provision that the permission (or its renewal under subs. (7)) may be refused under subs. (3) if the officer is satisfied that the non-national has been convicted (whether in the State or elsewhere) of an offence that may be punished under the law of the place of conviction by imprisonment for a period of one year or by a more severe penalty.

47. At para. 21 McDermott J. further stated:

21. It was made clear by Cooke J. in the *Saleem* case that the scheme for the granting of long stay residency under stamp 4 is operated under s. 4 of the Immigration Act 2004. The Minister exercises this discretion within the terms of the scheme. [...] I have no doubt that the Minister is entitled to construct a conditional scheme for particular classes of applicants as he had done in respect of the various stamp 0, stamp 1, stamp 2, 3 and 4 visas to be and remain in the State. However, in doing so the respondent must act within the framework of the statutory discretion conferred by section 4.

48. The applicants submitted that in *Hussein*, McDermott J. held that the Minister must exercise his discretion under s. 4 within the terms of the statute itself. The applicant submitted that the legislature has laid down in subs. 3 and subs. 10 criteria which are to be taken into account. The applicant stated that the Minister or the immigration officer has discretion but he is not at large; he must take into account the relevant considerations as prescribed by the Oireachtas.

49. Counsel for the applicant suggested that, in effect, the case presently before the court is the opposite side of the coin to the *Hussein* judgment – in *Hussein*, the Minister took into account an irrelevant consideration (the applicant's driving offence which, because it was not an offence that may be punished by imprisonment for a period of one year or by a more severe penalty, was not relevant, in accordance with s. 4(3)(d); here the Minister had failed to take into account relevant considerations, namely the applicants' family circumstances. The applicant submitted that the Minister is required, under subs. 10, to take the matters set out therein into account.

50. The applicants argued that subs. 10 is mandatory – "an immigration officer shall have regard to all of the circumstances of the non-national concerned" and, in particular, to the matters set out at paras. (a) to (g). The applicant contended that this is, moreover, a non-exhaustive list. The applicant stated that the matters set out in subs. 10 were specifically canvassed by the applicants in their letter of 30th October, 2012, including, *inter alia*, the applicants' Article 8 rights. The applicants submitted that they have a right to apply under s. 4(7) and to have their family rights considered.

51. The applicants suggested that if the court agrees that the criteria under s. 4(10) control the Minister's discretion under s. 4(7) then the case may be resolved on that narrow issue of statutory interpretation. Counsel suggested that these criteria control s. 4(6) and the other side of that coin is s. 4(7). The applicant suggested that the only possible argument that the State can make is one which would require the court to adopt an absurd interpretation.

52. The applicants referred to the architecture of s. 4. They submitted that it is possible to construct what they characterised as an absurd argument to the effect that whereas discretion under subs. 6 is controlled by subs. 10, the discretion under subs. 7 is not. Counsel for the applicant argued that it is only possible to make that argument because subs. 10 expressly refers to subs. 6, but that this argument was absurd. The applicants submitted that subs. 6 and 7 are organically linked and that the only distinction between the two is who initiates the process: under subs. 6 it is the immigration officer who initiates the process; under subs. 7, it is the non-national.

53. The applicants argued that if the technical interpretation is correct, then the legislature has left what they described as "a gaping hole" where the immigration officer is at large, and that this would be an absurd result; it would mean that when the immigration officer first comes to impose conditions, he must have regard to the criteria set out in subs. 10; but, if one adopts the interpretation as put forward by the respondent, then non-nationals could have conditions imposed under s. 4(7) which would have been unlawful in the first instance. The applicants submitted that the judgment of McDermott J. in *Hussein* goes even further: it indicates that the power conferred on the Minister under s. 4(7) is also controlled by s. 4(3).

54. The applicants referred the court to s. 5 of the Interpretation Act 2005 and submitted that this provision applies to s. 4 of the 2004 Act and that, accordingly, the court should find that it would be an absurd result to find that the Minister is at large under subs. 7, and that such an interpretation would be to disregard the will of the Oireachtas.

55. The applicants further submitted the Minister is obliged by law to have regard to rights guaranteed by the ECHR in the exercise of his discretion under s. 4(7) of the Immigration Act 2004. The primary source of this obligation, according to the applicants, arises from the European Convention on Human Rights Act 2003, and they made reference to the salient provisions of that Act.

56. The applicant submitted that the Minister's contention that there is no obligation to consider Convention rights when exercising the discretion conferred by s. 4(7) is incompatible with the obligations arising under the 2003 Act. The applicant stated that if the respondent closes her eyes to the Convention rights engaged in such an application, how can the respondent, and ultimately the court, be satisfied that such decision is in accordance with the Minister's obligations under the Convention?

57. The applicant submitted that the case law of the ECtHR concerning the right to respect for family and private life pursuant to Article 8 establishes beyond doubt that the provision applies to non-nationals and, furthermore, that such rights are engaged and require consideration in the context of applications for an immigration permission. The applicants argued that whilst many of the decisions of the ECtHR concerning the balancing exercise required in weighing the interests of the State in controlling immigration against the rights of settled immigrants who have established private and family life in a particular State arose at least in part in the context of removal (e.g. in *Uner v. The Netherlands* [2005] ECHR 464, and *Omorgie v. Norway* [2008] ECHR 261). The applicant submitted that the jurisprudence also extends to decisions to grant immigration permissions. Counsel for the applicant submitted that the European Court of Human Rights expressly recognised that the decision on an application for a residence permit fell within the scope of Article 8 in *Rodrigues da Silva v. The Netherlands* (2007) 44 EHRR 72, and they referred the court to para. 39 of the judgment.

58. The applicants submitted that similarly in *Tuqabo-Tekle v. Netherlands* (Application 60665/00), which concerned an application for a visa to allow family reunification to take place in the Netherlands, it was held at para. 42:

*42. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see Ahmut v. the Netherlands, judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, p. 2031, § 63).*

59. The applicants submitted that in the present case they made an application to the Minister for a change of immigration status pursuant to s. 4(7) of the Immigration Act 2004, which application was grounded, *inter alia*, on the extent of the private life built up by the applicants during their seven years residing in the State. The applicants argued that the Minister has failed or declined to assess these factors on the basis that his decision on the s. 4 application does not require an analysis of Article 8. It was submitted that, on the basis of the above *dicta* from *Rodrigues da Silva* and *Tuqabo-Tekle*, this position is untenable. The applicants submitted that the ECtHR made clear in *Rodrigues da Silva* that whilst a migrant does not have the right to choose the country of their residence, when deciding whether to grant residence to such person consideration must be given to a range of factors including "*the extent of the ties in the Contracting State*". The applicants submitted that in *Rodrigues da Silva*, the ECtHR ultimately quashed the refusal of a grant of residence permit on the basis that it was contrary to Article 8.

60. The applicants noted that the respondent, in her statement of opposition, asserted that the constitutional and Convention rights of the applicants do not fall to be considered "*at this stage in the process*" but rather that "*these are matters to be taken into consideration at the stage of expulsion from the State.*" The applicants submitted that this is no defence to the applicants' primary claim that such rights require to be determined in the context of the only application which has, to date, been considered by the Minister, namely the application pursuant to s. 4(7) of the Immigration Act 2004. In this regard, the applicants pointed out that no proposal to deport has been issued in respect of them and that, furthermore, the applicants have no power in respect of the commencement of that process, nor its duration.

61. The applicants submitted that they are entitled to a lawful decision in respect of their application pursuant to s. 4(7), including an assessment of their rights pursuant to the Constitution and the Convention which are engaged by that application. The applicants stated that there is no legal basis for the respondent's contention that the applicants' constitutional and Convention rights can be placed in abeyance or effectively ignored in the s. 4 decision on the basis that they will possibly, at some future point in time, be given consideration in the deportation order context. The applicants submitted that they should not be forced into the s. 3 deportation process in order to have their rights pursuant to the Constitution and the Convention considered.

62. The applicants submitted that the respondent's argument is inconsistent with the statutory architecture. The analogous case law in respect of asylum applications indicates that the deportation order procedure represents the tailpiece of the statutory process. The more detailed consideration of an individual's circumstances will have taken place in the context of the application for refugee status. The applicants submitted that the Minister, under s. 3 of the Immigration Act 1999, is exercising a more limited role. The position was described as follows by Hardiman J. in *F.P. v. Minister for Justice* [2002] 1 IR 164 at 173-74:

*"In the circumstances of this case, the respondent was bound to have regard to the matters set out in s. 3(6) of the Act of 1999. In my view he was also clearly entitled to take into account the reason for the proposal to make a deportation order, i.e. that the applicants were in each case failed asylum seekers. If the reason for the proposal had been a different one, he would have been entitled to take that into account as well. He was obliged specifically to consider the common good and considerations of public policy. In my view he was entitled to identify, as an aspect of these things, the maintenance of the integrity of the asylum and immigration systems. The applicants had been entitled, in each case, to apply for asylum and to remain in Ireland while awaiting a decision on this application. Once it was held that they were not entitled to asylum, their position in the State naturally falls to be considered afresh, at the respondent's discretion. There was no other legal basis on which they could then be entitled to remain in the State other than as a result of a consideration of s. 3(6) of the Act of 1999. In my view, having regard to the nature of the matters set out at sub-para. (a) to (h) of that subsection, the decision could be aptly described as relating to whether there are personal or other factors which, notwithstanding the ineligibility for asylum, would render it unduly harsh or inhumane to proceed to deportation. This must be judged on assessment of the relevant factors as, having considered the representations of the person in question, they appear to the respondent. These factors must be considered in the context of the requirements of the common good, public policy, and where it arises, national security.*

*To put this another way, each of the applicants was, at the time of making representations, a person without title to remain in the State. This fact constrains the nature of the decision to be made. The legislative scheme is that such a person may be deported. If this were not so, such persons would be enabled in effect to bypass the normal system of*

*application for entry into the country, made from outside. There is no reason of policy why they should be enabled to bypass this system simply on the basis that they had made an application for asylum which had failed, or might even have been found "manifestly unfounded".*

63. The applicants submitted that this point was reiterated in the majority judgments of the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701. In particular, the applicants submitted that the majority drew a distinction between: (i) the Minister's decision to refuse humanitarian leave pursuant to s. 3 of the Immigration Act 1999; and (ii) the Minister's determination as to whether the prohibition on refolement was observed. The majority upheld the first aspect of the Minister's decision. Fennelly J., at para. 455 of his judgment, expressly cited F.P. and held as follows:

*"[455] I am satisfied that the second and more general aspect of the decision falls within the principle of the decision of this court in F.P. v. Minister for Justice [2002] 1 I.R. 164. The reasons given for the decision of the first respondent in that case, which are quoted in the preceding paragraph, were verbatim the same as in the present case. Insofar as the general reasons are concerned, it seems to me clear that the decision in F.P. v. Minister for Justice should be followed. There is no ground for making any distinction between the two cases. In that case, as in this, the applicant had sought recognition as a refugee through the two stages of the asylum system and had been refused and had been informed that she had no continuing right to remain in the State."*

64. The applicants submitted that these principles apply, by analogy, to the decision-making process under s. 4 of the Immigration Act 2004; and that, accordingly, the appropriate stage for the assessment of an applicant's personal and family rights is in the context of the decision to grant or vary the permission to land or remain in the State, i.e. at the time of the exercise of the statutory discretion under s. 4(7) of the Immigration Act 2004.

65. The applicants submitted that it is not sufficient to postpone consideration of these matters until the final stage of the immigration process, i.e. the deportation order process. This is because the refusal of permission under s. 4 of the Immigration Act 2004 constitutes one of the contingencies which triggers the jurisdiction to make a deportation order under s. 3 of the Immigration Act 1999 (s. 3(2)(g) of the 1999 Act). The applicants submitted that if the State's argument is followed through to its logical conclusion, then an individual could find himself in a catch-22 situation whereby his personal and family rights would not be considered in the exercise of the statutory discretion under s. 4 of the Immigration Act 2004, but the fact of his having been refused leave to land or to remain would be a mark against him in the subsequent deportation order process and thus it would be too late to attempt to raise these matters at that stage.

66. The applicants submitted that the Minister's reliance on the decision of the Supreme Court in *Bode & Ors. v. Minister for Justice* [2008] 3 IR 663, in support of her contention that the applicants' constitutional and/or Convention rights do not have to be considered until the deportation stage pursuant to s. 3 of the Immigration Act 1999 is misplaced. The applicants stated that *Bode* concerned the very different issue of the Minister's obligation to consider constitutional and Convention rights when deciding whether to grant permission to parents of citizen children under the IBC/05 scheme.

67. The applicants submitted that in *Bode*, the High Court quashed the Minister's refusal of the applicants' applications under the IBC/05 scheme on the basis, *inter alia*, of a breach of Article 40.3 of the Constitution and Article 8 of the ECHR. The Minister appealed, submitting that the scheme was an administrative scheme in respect of which the respondent enjoyed absolute discretion and that a consideration of the rights of the Irish citizen child and the foreign national parent under the Constitution and/or the ECHR, did not arise under the scheme.

68. The Supreme Court allowed the appeal, holding that the scheme was an exercise of executive power by the respondent which did not purport to address, nor did it address, any constitutional or Convention rights, and further that the decision to refuse an IBC/05 application did not alter the applicant's status in the State. The applicants referred the court to the decision of Denham J, with which Murray CJ, and Fennelly, Kearns, and Finnegan JJ. concurred, where she stated:

*"22. Executive power*

*60 In this case one of the fundamental powers of a state arises for consideration. In every state, of whatever model, the State has the power to control the entry, the residency, and the exit of foreign nationals. This power is an aspect of the executive power to protect the integrity of the State. It has long been recognised that in Ireland this executive power is exercised by the Minister on behalf of the State. This was described by Costello J. in Pok Sun Shun v. Ireland [1986] I.L.R.M. 593 at p. 599 as:-*

*"In relation to the permission to remain in the State, it seems to me that the State, through its Ministry for Justice, must have very wide powers in the interest of the common good to control aliens, their entry into the State, their departure and their activities within the State."*

*61 The special role of the State in the control of foreign nationals was described by Gannon J. in Osheku v. Ireland [1986] I.R. 733 at p. 746. He stated at p.746:-*

*"That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concord maintained with other nations in accordance with the objectives declared in the preamble to the Constitution."*

*62 I would affirm and adopt this description. While steps taken by a state are often restrictive of the movement of foreign nationals, the State may also exercise its powers so as to take actions in a particular situation where it has been determined that the common good is served by giving benefits of residency to a category of foreign nationals - as a gift, in effect. The inherent power of the State includes the power to establish an ex gratia scheme of this nature. Such an arrangement is distinct from circumstances where legal rights of individuals may fall to be considered and determined.*

*63 Exercising such power, in light of the unique circumstances in Ireland in 2005, in addition to the specific statutory procedures, a special administrative scheme, the IBC 05 scheme, was introduced by the Minister. The Minister obtained Government approval. It was a generous scheme, for those who came within its criteria. It was an example of the State*

*exercising its discretion to allow specific foreign nationals to reside in Ireland. Yet, the foreign nationals still retained all rights under the formal procedures.*

*64 The IBC 05 scheme was administered by the IBC 05 unit in the Department of Justice, Equality and Law Reform. It was a sui generis scheme. Under this scheme leave to reside was granted on general principles.*

*65 The scheme was introduced by the Minister, exercising the executive power of the State, to address in an administrative and generous manner a unique situation which had occurred in relation to a significant number of foreign nationals within the State. However, those who did not succeed on their application under this scheme remained in the same situation as they had been prior to their application. They were still entitled to have the Minister consider the constitutional and convention rights of all relevant persons.*

*66 The scheme enabled a fast, executive decision, giving a benefit to very many people. However, a negative decision in the IBC 05 scheme did not affect any substantive claim for permission to remain in the State. In other words, an adverse decision to an applicant under the IBC 05 scheme left the applicant in no worse position than he or she was prior to the application as no decision had been made on any substantive rights."*

69. The applicants submitted that the decision in Bode is not applicable in the present case for two core reasons. First, it was submitted that in Bode the court was considering the exercise of the Minister's executive powers in respect of a non-statutory scheme, and determined that there was no requirement to have regard to constitutional or Convention rights in this particular context. This, the applicants submitted, is fundamentally different from the exercise of a statutory power which must be in accordance with the Constitution (*East Donegal Co-operative Livestock Mart v. Attorney General* [1970] IR 317) and the European Convention on Human Rights (per sections 1 and 2 of the ECHR Act 2003).

70. Secondly, it was submitted that the Supreme Court's decision in Bode was premised in part on the basis that a decision to refuse an application under the IBC/05 scheme did not alter the applicants' status in the State. The applicants stated that this is clearly not the position in the present case; the decision to refuse the application in the present case afforded the applicants a brief extension to December 2012 of their permission to be in the State in order to finalise their affairs after which time it expressly stated that they would be required to leave the State and produce evidence of their departure. The applicants submitted that the Minister's refusal of their s. 4(7) application therefore clearly altered their status in the State. Furthermore, it was submitted that had the applicants complied with this direction from the respondent, they would have left the State without ever having had the benefit of a decision on their constitutional and/or Convention rights.

#### **The Respondent's Submissions**

71. The respondent, in reply, emphasised the long line of authority in which the State's control over the immigration system was recognised. He made reference to the decision of Murray J. in *A.O. & D.L. v. Minister for Justice Equality and Law Reform* [2003] IESC 3, where the learned judge stated:-

*"...it is an inherent and fundamental right of the State to control and regulate immigration. Its right, and even its duty to do so, arises in the interests of the common good which includes the maintaining of true social order within its territory and concord in its relations with other nations. These principles, must in my view, be considered well established in the light of the foregoing case law and in particular having regard to the decision of this court in The Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 I.R. 360. That the control and regulation of immigration by the Government, through powers conferred on the respondent, is in the interests of the common good of the nation cannot in my view be gainsaid and it is universally so accepted in sovereign democratic states."*

72. Murray J.'s observations were not novel, but were in fact part of a long line of authority recognising the State's control over its immigration system. The dictum of Costello J. in *Pok Sun Shum v. Ireland* [1986] ILRM 593, where he held that the State must have very wide power to control aliens, was cited by Keane C.J. in *Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360. The learned Chief Justice then stated:

*"For this reason, in the sphere of immigration, its restriction or regulation, the non-national or alien constitutes a discrete category of persons whose entry, presence or expulsion from the State may be the subject of legislative and administrative measures which would not and in many of its aspects, could not, be applied to its citizens."*

73. Having made reference to sections 4(1) and 4(7) of the 2004 Act, the respondent submitted that the Minister for Justice and Equality has near absolute discretion in matters arising under section 4(7).

74. The respondent stated that the consequence of a refusal to extend permission under s. 4(7) of the Immigration Act, 2004 is that the person is obliged to leave the jurisdiction of the State. If they do so then that is in compliance with the terms of their immigration permission. If they fail to do so, then they are deemed to be illegally within the State and the provisions of s. 3 of the Immigration Act, 1999 (as amended) become relevant. In other words, they are sent a letter indicating that they can voluntarily leave the jurisdiction or, alternatively, that it is proposed to make a Deportation Order against them. In the latter case, the affected person will be given an opportunity to make representations to the Minister within a period of 15 days.

75. At that stage, once the 15 days have elapsed, and the affected person has not voluntarily left the jurisdiction, the Minister and his departmental officials are obliged to have regard to Article 8 of the European Convention on Human Rights. This obligation arises whether or not representations have been made. The central issue in the instant case is whether or not the respondent must have regard to Article 8 before the 15 day letter is sent. The respondent submitted that there is no obligation to have regard to Article 8 at that stage of the process.

76. The respondent submitted that the first named applicant (and by extension the second named applicant) has been present in the State since 2006 on a specific permission, with specific criteria. In that regard, the respondent relied, by analogy, on *Bode & Ors. v. Minister for Justice* [2008] 3 IR 663. That case concerned the administration by the Minister of an administrative scheme known as the IBC05 scheme. This scheme had been set up to regularise the position of the parents of Irish citizen children who were from outside the jurisdiction. The applicant in *Bode* alleged that, in refusing persons under the IBC05 Scheme, constitutional and Convention rights had to be considered in the context of the scheme. Denham J. held as follows:

*"I am satisfied that the scheme was an exercise of executive power by the Minister. It did not purport to address, nor did it address, Constitutional or Convention Rights. It was a scheme with clear criteria. On the face of the document, the criteria were applied to the Second Named Applicant and he failed to meet the criteria. As the IBC05 Scheme did not*

*address Constitution or Convention Rights, applicants who were not successful were left in exactly the same position as they had been prior to their application. There was no interference with any Constitutional or Convention rights. Consequently, it was an error on behalf of the High Court to consider the application of the scheme as an arena for decision making on Constitutional or Convention rights...."*

77. Denham J. went on to point out that the Minister is required to consider constitutional and Convention rights in the context of s.3 of the Immigration Act, 1999. She stated: "*The Section 3 process (of the Immigration Act, 1999) is sufficiently wide ranging for the Minister to exercise his duty to consider the constitutional and Convention rights of the applicants.*"

78. The respondent submitted that a similar approach applies in the instant case. The First Named Applicant has always had a particular type of permission to remain in the State, that of a student, and it has always been for a specific purpose (i.e. to pursue a course of study). Once that purpose no longer exists, the permission lapses and a person in the First Named Applicant's position is obliged to leave the State. It should be noted that the conditions imposed on a person on a student permission considerably limit their activities in the State. For example, a student is permitted to work only 20 hours per week during term time, and 40 hours per week during the holidays. Notably, time spent in the State on a student permission is not reckonable when calculating the time period of residence in the State for the purposes of naturalisation.

79. The respondent stated that the letter of 5th November 2012 sets out very clearly the reasons why the application to change status was refused, and the respondent submitted that the decision complied with the requirements of the Supreme Court's decision in *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59.

80. The respondent submitted that the first named applicant was seeking a significant benefit from the respondent (i.e. permission to reside in the State on Stamp 4 permission, which would give her the right to work and reside in the State on what would be essentially an unconditional basis without having to attend any course of study). The respondent submitted that this was a right to which she was simply not entitled and the respondent was entitled to exercise his discretion widely (see *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701.)

81. The respondent stated that regard should also be had to the reasons why the first named applicant was refused a work permit by the Department of Jobs, Enterprise and Innovation. She did not come within the highly skilled requirements of the Employment Permits Act, 2006 and, more importantly in the context of immigration law, she had already worked without an employment permit. The first named applicant has never challenged these findings of the Department of Jobs, Enterprise and Innovation.

82. The respondent submitted that while the applicants are entitled to assert Article 8 rights, these are qualified rights at this stage in the process, and the State is not interfering with the rights asserted. In the context of immigration law, interference with Article 8 rights usually arises when the State proposes to expel a person or refuses them admission to the State. In a case involving s. 4 (7), there is no immediate risk of expulsion, nor is there a refusal of admission to the State – the applicants are already here.

83. The respondent made reference to *Fu v. Secretary of State for the Home Department* [2010] EWHC 2292. That case concerned an application for leave to remain in the UK, which application had not been properly completed and where the Secretary of State had a residual discretion to accept the application anyway. Mitting J. held as follows:

*"Nor, on the facts of this case, is any Convention Article engaged, as it clearly was in Forrester's case. All that has happened is that the Secretary of State's officials have performed the duty imposed upon them by rules approved by Parliament, and rejected a non-compliant application. To hold on those facts that they were not entitled to do that would, in my judgment significantly undermine what is intended to be a simple scheme leaving little room for the exercise of discretion when mandatory requirements are not fulfilled"*

84. In relation to the decision in *Forrester*, Mitting J. stated: "*It meant that to make an application which the Secretary of State would be required to entertain under the Immigration Rules, she and her two children had to leave the United Kingdom, return to Jamaica and make an out of country application. Consequently her and her children's Article 8 rights were engaged*". The respondent pointed out that in the instant case the First Named Applicant has been given several opportunities to regularise her position without having to leave the State.

85. The respondent submitted that the case law upon which the applicants seek to rely in support of Constitutional and/or Convention rights concern the expulsion of family members and a consequent separation of families. That is not the position in the instant case. The respondent stated that if the Minister were considering the applicants' position under a possible expulsion decision pursuant to s. 3 of the Immigration Act 1999 (as amended), then it goes without saying that these rights would have to be considered.

86. With regard to the assertion that the applicants' constitutional rights were required to be considered, the respondent submitted that it is notable that no such rights were asserted in the application of 30th October, 2012. The respondent stated that the Minister's decision cannot, therefore, be impugned on the basis of a failure by the Minister to consider a submission that was not made.

87. In reply to the applicants reference to para. 16 of the decision of McDermott J. in *Hussein*, where the learned judge distinguished *Bode* from the long term residency scheme, the respondent submitted that the court should not rely on *Hussein* because, firstly, this court did not have jurisdiction to examine the statutory architecture, since McDermott J. did not grant leave on that point, and that *Hussein*, accordingly, was of no assistance to this court; and secondly, that, in any case, *Hussein* was wrongly decided insofar as McDermott J. had misinterpreted s. 4 of the Immigration Act 2004. The respondent further submitted that McDermott J.'s remarks in relation to s. 4(10) were *obiter*.

88. The respondent referred the court to the clear terms of s. 4(10), and submitted that the express terms of this subsection make it clear that it applies only to subs. 6, and not subs. 7. The respondent further submitted that it is clear that the matters set out at (a) to (g) are matters to be taken into account at the point of entry into the State, which is what subs. 6 provides for. The immigration officer is to look at the purpose of the proposed visit, whether the immigrant has family members in the State, and whether that person is likely to comply with the conditions imposed. Subsection 7, however, clearly provides for in-country applications for a renewal or variation of an immigration permission; the matters set out in subs. 10 are, in the respondent's submission, not relevant to an in-country application for a renewal or a variation of a permission under subs. 7.

89. The respondent submitted that, contrary to what the applicant has submitted, there is no absurdity here. The respondent thus concluded that McDermott J. erred in law in his construction of s. 4 in *Hussein* and, accordingly, this court was urged not to follow

that decision.

90. As regards the applicants' submissions in respect of ECHR rights, the respondent submitted that an application pursuant to s. 4(7) does not require the consideration of Convention rights. The respondent submitted that the ECHR has made it clear that Article 8 rights are only engaged in exceptional circumstances and that a breach of Article 8 would be most unusual where the person concerned did not have settled immigration status and did not have family members in the State. In this case the respondent submitted that there is no "anchor citizen", i.e. an Irish citizen resident in Ireland in respect of whom non-EEA applicants were asserting family ties and a corresponding right to reside in Ireland with their Irish citizen relative. In the present case, however, the respondent submitted that there is no anchor citizen – both Ms. Luximon and her daughter do not have settled immigration status in the State and nor are they, in the context of s. 4(7), being told that they have to leave the State. Consequently, in the respondent's submission, Article 8 rights are not engaged.

91. The respondent referred to the decision of the ECtHR in *da Silva*. The respondent submitted that in that case the applicant was a Brazilian woman in the Netherlands, whose daughter was a Dutch national. The respondent stated that it is clear from the court's decision that a failure by the Dutch state to provide the applicant with a residence permit would result in her having to leave the Netherlands. Counsel for the respondent asserted that this is clearly a point of exit case, i.e. a case in which the applicant was at risk of being forced to leave the State. The respondent submitted that Ms. Luximon was given an extension of time until May 2013 – there was, therefore, no risk of her being forced to leave the State in the event of a negative s. 4(7) decision.

92. The respondent referred the court to paras. 38 to 42 of the judgment of the ECtHR in *da Silva*, and pointed out that there was a risk of the applicant and her daughter being separated in circumstances where the applicant's application for a residence permit was refused and where she would, consequently, be required to leave the Netherlands. The respondent submitted that the facts and law in *da Silva* are entirely different from those in the present case, and that *da Silva* cannot be used as authority for the proposition that the Minister is obliged to consider human rights under s. 4(7). The respondent stated that it is clear that the Article 8 rights only required to be considered at the stage of expulsion from the State, namely the s. 3 deportation stage.

93. The respondent then turned to consider the ECtHR's decision in *Tuquabo Tekle*. In that case the applicant wanted to be joined by her 15 year old daughter in the Netherlands. The mother had been separated from her daughter for many years before the ECHR delivered its decision. The respondent opened paras. 41 to 44 of the ECtHR's judgment to the court, and argued that *Tuquabo Tekle* could be distinguished from the circumstances pertaining in the present case.

94. In this regard, the respondent submitted that in the present case there was no application from outside the State to be reunified with a settled immigrant in the State. The respondent further submitted that *Tuquabo Tekle* related to a point of entry decision, whereas Ms. Luximon's s. 4(7) application is an in-country application. The respondent thus concluded that *Tuquabo Tekle* cannot be authority for the proposition that the State is obliged to consider human rights in the context of a change of residence permit application.

95. The respondent submitted that the applicant had misconstrued the judgments of the High Court in *Moylan* and in *O'Leary*. The respondent stated that those cases did not deal with the necessity in the first place for the Minister to consider asserted rights under the Constitution or the Convention.

96. The respondent stated that the judgment of Cooke J. in *O'Leary* dealt with two basic issues: first, the adequacy of reasons provided by the Minister in the long term residency application; and secondly, the nature of the family unit under Article 41. The respondent submitted that the question as to the requirement to consider Convention or constitutional rights was not considered by Cooke J., and nor did such rights require to be considered. The respondent stated that in *O'Leary*, there are what are often referred to as "anchor citizens" – and the approach taken by Cooke J. was to look at the case from the perspective of Mrs. O'Leary, an Irish citizen, and not from the perspective of the Lemieres. The respondent pointed out that the Luximons are not citizens and that there are no "anchor citizens" in the case presently before the court. The respondent stated that the *O'Leary* judgment was predicated on Mrs. O'Leary's moral obligations. The respondent submitted that the Article 41 rights of citizens are not, and cannot be, coextensive with the Article 41 rights of non-nationals.

97. The respondent submitted that there was no doubt that the Lemieres had no entitlement to remain in the State. Counsel pointed out that the rights of the family are not absolute and will not preclude the State from deporting people in appropriate circumstances. The respondent referred to para. 7 of the judgment, where Cooke J. stated:

*7. The crucial primary issue raised by ground 1) in this application, however, does not concern any entitlement on the part of the Lemieres to enter and remain, but is directed at the constitutional entitlement of Mrs. O'Leary as an Irish citizen to require that she be permitted to look after her father and mother within the State as members of her "family".*

98. The respondent submitted that this passage is directed at the constitutional entitlement of Mrs O'Leary, as an Irish citizen, to have her Article 41 rights considered.

99. The respondent then referred to para. 8, where Cooke J. stated:

*8. It is important to make a preliminary remark. As is invariably emphasised in judgments of the High Court in judicial review, its jurisdiction is confined to the examination of the legality of the decision or measure sought to be impugned and particularly of the legality of the process by which it has been made. It is not directed at the merits of the measure or the question as to whether the decision was the right or wrong decision. This remains the jurisdictional position of the High Court, even where the reasonableness (including the proportionality) of the conclusion reached in an impugned decision is at issue. In that regard, in the circumstances which arise in the present case as sympathetically summarised by Hogan J. in the leave judgment, it is important not to confuse the legal issue as to the reasonableness or proportionality of the decision with subjective considerations of empathy or compassion. The Oireachtas has entrusted to the Minister the function of exercising judgment in matters of empathy and compassion where humanitarian considerations arise in the grant or refusal of a visa to enter or permission to reside. The Minister dispenses the State's compassion towards non-EU nationals: the jurisdiction of the Court is confined to ensuring that he does so within the terms of the discretionary power that the Oireachtas has conferred.*

100. The respondent stated that this was a preliminary remark and was directed towards examining the legality of the decision or the process by which the decision was made; it was not directed at the merits.

101. The respondent then proceeded to open para. 18 of the judgment, where Cooke J. held:

*"18. It is clear to the Court, accordingly, that the O'Leary family is not precluded from asserting that Mr. and Mrs. Lemiere are members of their "family" and that they have a stateable entitlement to seek permission to discharge the moral obligations which they feel they owe to them and to do so on the basis of Article 41 of the Constitution. The central issue in this case, therefore, is whether the reasons given by the Minister for refusing to permit them to do so constitute a lawful exercise of the Minister's discretion under s. 4 of the Immigration Act 2004, or whether, on the other hand, the decision is vitiated by illegality in that it is unreasonable, disproportionate or inadequately explained having regard to the basis upon which the permission was sought."*

102. The respondent submitted that the central issue was whether the reasons given by the Minister for refusing the applicant's permission was lawful, not whether there was a requirement to consider Article 8 or Article 41 rights in the context of a s. 4(7) application for a change of permission by non-EEA nationals. The case was to do with the adequacy of reasoning given to a family with an anchor citizen, Mrs O'Leary, who claimed to have Article 41 rights.

103. The respondent submitted that the ratio of the judgment of Cooke J. in *O'Leary* was set out at para. 40 of the judgment as follows:

*40. In the judgment of the Court these two principal considerations, namely the erroneous view that the legislation could not accommodate the type of permission which the applicant sought combined with the unjustified attribution of improper motive and lack of good faith to the applicants, are sufficient grounds to warrant the quashing of the decision of the 29th July, 2010, and require that the application be given fresh consideration. As indicated in this judgment, the Court considers that the conclusion reached in the memorandum of the 27th July, 2010, as to the reasons justifying rejection of the application is unsound in law, because the decision-maker appears to have been influenced by the two factors immediately referred to above, combined with an excessively narrow view of the extent of the family relationship entitled to potential consideration under Article 41 of the Constitution. While it is correct in law to say that the rights of the family protected by that Article are not absolute and that there is no absolute right on the part of an Irish citizen to have a non national family member reside in the State, it nevertheless remains the position in law, in the view of the Court, that adult citizens and their own citizen children are entitled to rely upon that Article when seeking the State's intervention by the grant of permission which will enable them to discharge a moral obligation towards non national family members, including in particular, grandparents who have need of their support and care.*

104. Counsel for the respondent submitted that the *O'Leary* decision was very different to the case presently before the court, because in *O'Leary* there was an "anchor" citizen. The respondent asserted that *O'Leary* was to do with adequacy of reasons, bad faith, improper motive, etc., none of which apply to the instant case where the State is saying that there is no obligation to consider Article 8 or Article 41 rights in the s. 4(7) process.

105. In relation to the judgment of Edwards J. in *Moylan*, the respondent submitted that there were anchor citizens in that case. The first named applicant, Mrs. Moylan, was a Chinese woman who had married an Irish citizen, and was a naturalised Irish citizen. The fifth named applicant was Mrs. Moylan's Chinese citizen mother. The Minister refused to allow the fifth named applicant to continue living with her family in Ireland, and there was no reference to Article 41 or Article 8 rights in the Minister's decision. The respondent submitted that the issues dealt with in this case concerned reverse discrimination (where an EU national would have been treated more favourably) and dependency. Edwards J. concluded that Article 8 rights were not engaged, in circumstances where dependency was not established. Counsel for the respondent submitted that the same principle applies in the instant case.

106. The respondent concluded that *O'Leary* and *Moylan* were of no assistance whatever to the applicants because the facts in those cases were entirely different and there were no "anchor" citizens. The respondent asserted that in *O'Leary*, the definition of family and the adequacy of the reasons provided was at issue; while in *Moylan*, no family rights were engaged, either under Article 41 or Article 8. The respondent stated that the applicant had not cited any case law in support of her assertion that she had Article 41 or Article 8 rights.

107. The respondent submitted that it was not accepted that the constitutional rights asserted on behalf of the applicants were coextensive with those enjoyed by citizens. In this regard, the respondent referred the court to the Supreme Court decisions in *In the matter of Article 26 of the Constitution and in the matter of ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill*, 1999 [2000] 2 IR 360 and *Nottinghamshire County Council v B.* [2011] IESC 48. The respondent submitted that it was not accepted that the applicants had family rights under Article 41 which required to be considered in the context of a s. 4(7) change of permission application. The respondent further stated that the Minister cannot be obliged to consider the constitutional rights asserted in these proceedings in circumstances where such rights were not asserted in the applicant's application of 30th October, 2012. The respondent pointed out that while Article 8 rights were raised in this application, there was no reference whatever to Article 41 rights.

108. The respondent submitted that s. 3 of the 1999 Act was the correct forum for the consideration of those rights and in this regard he referred the court to the judgment of Murray CJ in *Meadows*, where the learned Chief Justice held as follows at paras. 79-80:

*[79] Accordingly, before making a deportation order the first respondent is required to consider in the circumstances of each particular case whether there are grounds under s. 5 which prevent him making a deportation order. In cases where there is no claim or factual material put forward to suggest that a deportation order would expose the deportee to any of the risks referred to in s. 5 then no issue as regards refolement arises and the decision of the first respondent with regard to s. 5 considerations is a mere formality and the rationale of the decision will be self-evident.*

*[80] On the other hand if such material has been presented to him by or on behalf of the proposed deportee, as the case here, the first respondent must specifically address that issue and form an opinion. Views or conclusions on such issues may have already been arrived at by officers who considered a proposed deportee's application for asylum, at the initial or appeal stages, and their conclusions or views may be before the first respondent but it remains at this stage for the first respondent and the first respondent alone in the light of all the material before him to form an opinion in accordance with s. 5 as to the nature or extent of the risk, if any, to which a proposed deportee might be exposed. This position is underscored by the fact that s. 3 envisages that a proposed deportee be given an opportunity to make submissions directly to the first respondent on his proposal to make a deportation order at that stage. The fact that certain decisions have been made by officers at an earlier stage in the course of the application for refugee status does not absolve him from making that decision himself.*



109. The respondent accepted, with reference to the applicant's reliance on the decision of the Supreme Court in Mallak, that non-nationals do have some constitutional rights, including the right to fair procedures.

#### **Decision**

110. Section 4(7) of the Immigration Act 2004 confers a statutory discretion on the Minister for Justice to renew or vary an immigration permission granted to a non-national in the State. The applicant has submitted that the Minister, in exercising the discretion conferred upon her by this section, must do so in accordance with law. To this end, the applicant submitted that when making a decision pursuant to s. 4(7) the Minister must have regard to: (i) the matters set out in s. 4(10) of the Act; and (ii) the applicant's constitutional and/or Convention rights. The respondent has submitted, in reply, that the Minister is not obliged to consider the matters set out in s. 4(10) when determining a s. 4(7) application; nor is she obliged to consider any constitutional or Convention rights that an applicant may have when exercising her discretion under s. 4(7). The respondent stated that the appropriate place for the consideration of those rights is in the deportation process pursuant to s. 3 of the Immigration Act 1999.

#### **Hussein v. Minister for Justice and Equality [2014] IEHC 34**

111. As a preliminary point, counsel for the respondent urged this court not to examine the statutory architecture, and to disregard the decision of McDermott J. in *Hussein*. The respondent submitted that leave had not been granted to consider this case from a statutory interpretation perspective, and that the court should refrain from going beyond the grounds upon which leave was granted. In this regard, reference was made to *L.R. and Anor. v. Minister for Justice, Equality and Law Reform & Anor.* [2002] 1 IR 260, and *A.B. v. Refugee Appeals Tribunal & Anor.* [2011] IEHC 412. In *L.R. and Anor. v. Minister for Justice, Equality and Law Reform & Anor.* [2002] 1 IR 260, McKechnie J. held as follows at para. 9 of his judgment:-

*"9. It seems to me that the point truly in issue in the present application is not as such covered in or by any of the decisions above mentioned. Undoubtedly it is the case that there stands before me an application to amend the statement of grounds. Undoubtedly it is sought to specify either different or additional grounds and thus at first sight might be thought to come within O. 84, r. 23(2). However, a crucial difference is in the nature of the grounds sought to be included. No question arises as to whether those grounds are "new grounds", as mentioned by Costello P. in McCormack v. Garda Síochána Complaints Board [1997] 2 I.R. 489. In fact these are very much original grounds because they were expressly included in the original statement grounding the application. It is not, as it were, as if what is sought to be included was not covered by and therefore not within the statement of March, 2000. In this case the very opposite is the position. All of the grounds sought to be re-introduced were in the documentation when the leave application was moved. Therefore, these grounds were, I must assume urged upon the court as being appropriate grounds upon which permission should issue to proceed with this action. However, having heard the application and based on the resulting order, it is clear, in an affirmative sense, that leave was granted only to seek the orders sought at paras. D(1) to D(4) and then only on the grounds contained in para. E(vii)(a) and (b), and none other. By not granting leave on these other grounds one must conclude that the application, made on behalf of the applicants was therefore refused by the High Court Judge who granted the leave order. This being the situation, it seems to me that in the same proceedings and on identical grounds, another judge of the High Court does not have jurisdiction to effectively overrule an earlier order of the same court. Such authority or power does not in my view exist. The only court which could, but was not invited to do so, would be the Supreme Court. It is not now I feel possible for this court to reinsert or reinstate grounds which previously a judge of this court refused to grant leave on."*

112. Similarly in *A.B. v. Refugee Appeals Tribunal & Anor.* [2011] IEHC 412, Cooke J. held:

*"21. ...The jurisdiction of this Court is limited by the terms of the ground for which leave has been granted and the function of the Court in this substantive hearing of the judicial review application is to decide whether that ground has been made out. It must do so upon the basis of its own appraisal of the illegality alleged in the context of the challenged decision when construed as a whole.*

*22. Counsel for the applicant urges the Court to take into consideration the fact that leave had originally been sought in respect of a number of grounds including a ground directed at the alleged error of law by the Tribunal member in finding that the applicant had fled prosecution rather than persecution. He argues that leave was not granted in respect of those grounds because of the manner in which Hogan J. interpreted the first part of the analysis namely, that the Tribunal member had implicitly found the applicant to be entitled to refugee status.*

*23. This Court, however, cannot take into consideration grounds in respect of which leave has not been granted."*

113. I am of the view that considering the statutory architecture of s. 4 of the Immigration Act 2004, would be to go beyond the grounds upon which leave was granted in this case. The relevant ground upon which leave was granted is in the following terms:

*The respondent's decision to reject the applicant's application for change of status/permission to reside on the basis of stamp 4 conditions pursuant to s. 4(7) of the Immigration Act 2004 is unlawful by reason of the failure to have any regard to the personal and/or family and/or private life rights of the first applicant pursuant to Article 40.3 and/or 41 of the Constitution and/or Article 8 of the European Convention on Human Rights.*

114. This ground clearly makes no reference to the statutory architecture of s. 4 of the Immigration Act 2004; instead, its focus is on whether constitutional and Convention rights are required to be taken into account by the decision maker when determining a s. 4(7) application. In light of the decision of McKechnie J. in *L.R.*, and that of Cooke J. in *A.B.*, it is clear that my jurisdiction is constrained by the terms of the grounds upon which leave was granted.

115. Accordingly, for these reasons, the court declines to consider the applicant's submissions on the statutory interpretation of s. 4.

#### **ECHR and Constitutional Rights**

116. The central question which the court must address in this case is whether the Minister or an immigration officer acting on her behalf, when making a decision in respect of a s. 4(7) application, is obliged to consider any rights the applicant may have under the Constitution and/or the Convention.

117. In addressing this issue, the court is mindful of the fact that the State has extensive powers to control immigration and, in this regard, I have noted the decisions of the Supreme Court in *F.P. v. Minister for Justice* [2002] 1 IR 164; *A.O. & D.L. v. Minister for Justice Equality and Law Reform* [2003] IESC 3; and *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3; and of the High Court in *Pok Sun Shun v. Ireland* [1986] I.L.R.M. 593.

118. I now turn to consider the relevant case law and legislative provisions, which were helpfully opened to the court by counsel in the course of their submissions.

119. The decision of Edwards J. in *Moylan* concerned an application for renewal of immigration permission under s. 4(7) of the Immigration Act 2004, in respect of the Chinese citizen mother of an Irish citizen. Edwards J. found that dependency between the Chinese citizen mother and her Irish citizen daughter had not been established, and that Article 41 and/or Article 8 rights were not, consequently, engaged.

120. The learned judge further held that in circumstances where there was no *prima facie* evidence that Article 41 and/or Article 8 rights had been engaged, substantial grounds did not exist for arguing that the Minister had failed to exercise his discretion lawfully and judicially by not taking those rights into account in his decision.

121. It seems to me, therefore, that Edwards J. was of the view that had such rights been engaged in the s. 4 process, there would have been a corresponding obligation on the Minister to consider those rights when making his decision under s. 4(7), notwithstanding the existence of the deportation order process under s. 3 of the Immigration Act 1999 and the fact that constitutional and Convention rights will be considered by the Minister in that context.

122. Similarly, in *O'Leary*, Cooke J. was of the view that there was an obligation on the Minister to have regard to Article 41 and Article 8 rights in the context of a s. 4(7) application. While I accept counsel for the respondent's argument that Cooke J. considered the case from the perspective of the Irish "anchor" citizen, who was the daughter of the non-EEA national applicant, it seems to me that the essential point to be taken from that case, for present purposes, is that there is an obligation to consider Article 41 and/or Article 8 rights in the context of a s. 4(7) application where those rights are engaged, rather than leaving the consideration of any such rights until the s. 3 deportation stage. The s. 4(7) decision was capable of engaging family rights, and *O'Leary* offers an example of family rights being taken into consideration at the s. 4(7) stage.

123. The court is fortified in its view that the Minister is obliged to have regard to any rights the applicant may have under the Constitution and/or the Convention when making a determination pursuant to s. 4(7), by reference to the salient provisions of the European Convention on Human Rights Act 2003, and to the judgments of the Supreme Court in *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* [1970] IR 317 and in *Lynch v. Cooney* [1982] IR 337.

124. Section 2 of the ECHR Act provides that:

*"In interpreting and applying any statutory provision or rule of law, a court shall, in so far as possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."*

125. Section 3(1) of the ECHR Act provides:

*"3.—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."*

126. Section 1 of the ECHR Act defines an organ of the State in the following terms:

*"organ of the State" includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised;"*

127. It is clear that the Minister, or an immigration officer acting on her behalf, is performing functions as an organ of the State, and is, therefore, under an obligation to exercise his power in conformity with the Convention.

128. As regards the Minister's obligation to have regard to constitutional rights, the following passage from the decision of Walsh J. in *East Donegal Co-op* is instructive:

*"An Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both may appear to be open but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt. It must be added, of course, that interpretation or construction of an Act or any provision thereof in conformity with the Constitution cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas. In seeking to reach an interpretation or construction in accordance with the Constitution, a statutory provision which is clear and unambiguous cannot be given an opposite meaning. At the same time, however, the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts."*

129. Similarly, in his judgment in *Lynch v. Cooney* [1982] IR 337, Henchy J. stated:-

*It is to be presumed that, when it conferred the power, Parliament intended the power to be exercised only in a manner that would be in conformity with the Constitution and within the limitations of the power as they are to be gathered from the statutory scheme or design. This means, amongst other things, not only that the power must be exercised in good faith but that the opinion or other subjective conclusion set as a precondition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful — such as by misinterpreting the law, or by misapplying it through taking into consideration irrelevant matters of fact, or through ignoring relevant matters. Otherwise, the exercise of the power will be held to be invalid for being ultra vires.*

130. The court is, however, mindful that the question as to whether non-citizens are capable of enjoying family rights under the Constitution appears, as yet, to be undecided. In *Nottinghamshire County Council v. B & Anor.* [2011] IESC 48, O'Donnell J. held as follows at para. 84 of his judgment:-

"84. The issue of whether some or all of the constitutional provisions are limited to citizens was first raised almost 50 years ago in *State (Nicolaou) v An Bord Uachtála* [1966] IR 567 and was debated in that case over nine days in the High Court, and eleven days in the Supreme Court without definitive resolution. It has not been resolved since, albeit that a *modus vivendi* appears to have been arrived at in which non citizens have been permitted to invoke some provisions of the Constitution that while it is accepted that some aspects of the Constitution essentially related to voting and representational matter are nevertheless properly limited to citizens. It has not however been possible to articulate any unifying theory. It follows, that the related and even more complex question as to whether and if so how, a person can assert that the act of travelling to Ireland can give rise to constitutional rights or claims, has not been addressed yet. However, the requirement that issues are determined in cases which are the subject of a real dispute which requires resolution, and the necessity and desirability that any such issues should be the subject of comprehensive argument both in the High Court and Supreme Court, means that it is neither necessary, nor possible to seek to resolve the issue here. If the issue is to arise in any future case, it will be necessary to consider carefully the constitutional text, many more decisions than were cited in this case, and a number of different fact situations including questions as to the significance of citizenship, residence, or fleeting presence in the jurisdiction. It may be that regard might usefully be had to the provisions of Article 40.1 of the Constitution which does not appear to have figured significantly in the decisions or commentary to date. Whether that provision or any other provision is of any assistance, is a matter which may however properly await a case in which the issue is squarely addressed, and where it requires determination."

131. Nevertheless, although there appears to be some debate as to whether non-citizens can assert rights under Article 41, it seems to me that it does not necessarily follow that there can be no obligation on the Minister to have regard to any constitutional rights that an applicant may have, in the circumstances of a particular case, when determining a s. 4(7) application. In my view, if it is established that an applicant has constitutional rights which are engaged by the s. 4(7) decision, then those rights must be considered by the Minister.

132. That non-citizens are capable of enjoying rights under the ECHR is not, however, in doubt. In this regard the applicants relied, in the main, on two decisions of the European Court of Human Rights: *Rodrigues da Silva v. The Netherlands* (2007) 44 EHRR 72, and *Tuquabo-Tekle v. Netherlands* (Application 60665/00), in support of their proposition that ECHR rights fall to be considered in the s. 4(7) process.

133. In *Rodrigues da Silva v. The Netherlands* (2007) 44 EHRR 72, the applicant was a national of Brazil who was illegally resident in the Netherlands since 1994. She had a child, Rachel, the second applicant, with her Dutch national partner, Mr. Hoogkamer. Rachel was a Dutch national.

134. In August 1997, the first named applicant applied for a residence permit which would allow her to reside in the Netherlands in order to live with her daughter, or to have access to her. This application was rejected in January 1998. The applicant appealed against this decision but the Minister of Justice dismissed the appeal. He held that the interests of the economic well-being of the country outweighed the interests of the first applicant. This decision ultimately ended up before the Supreme Court, which dismissed the appeal in October 2000. Despite having received a letter in July 1999 from the local police informing her that she had to leave the Netherlands within two weeks, the first named applicant remained in the Netherlands, where she continued to work illegally.

135. In their submissions to the ECtHR, the applicants stated that the refusal to grant the first applicant a residence permit constituted a breach of their right to respect for their family life protected by Article 8. In reply, the government, *inter alia*, stressed that the family life relied upon by the applicants had developed while the first applicant was living in the Netherlands illegally.

136. The court commenced its assessment of the case by observing that there could be no doubt that there was family life within the meaning of Article 8 of the Convention between the first applicant and her daughter, Rachel, the second applicant. The court stated that the question that fell to be examined was whether the Netherlands authorities were under a duty to allow the first applicant to reside in the Netherlands, thus enabling the applicants to maintain and develop family life in their territory.

137. In its analysis the court held, at para. 39:

"Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *Gül v. Switzerland*, 19 February 1996, § 38, Reports 1996-I)."

138. In setting out the matters to which consideration should be given by the national authorities when assessing whether the State is obliged to allow immigrants to reside on the basis of Article 8 rights, the court observed:

"Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see *Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November 1998, and *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999)."

139. The court then turned to assess the circumstances of the applicants in the case before it, and found as follows at para. 42 of the judgment:

"The Court further notes that, from a very young age, Rachael has been raised jointly by the first applicant and her paternal grandparents, with her father playing a less prominent role. She spends three to four days a week with her mother (see paragraphs 16 and 22 above), and, as confirmed by her grandparents (see paragraph 22 above), has very close ties with her. The refusal of a residence permit and the expulsion of the first applicant to Brazil would in effect break those ties as it would be impossible for them to maintain regular contact. This would be all the more serious given that Rachael was only three years old at the time of the final decision and needed to remain in contact with her mother (see *Berrehab*, cited above, § 29)."

140. The Court ultimately concluded, at para. 44:

"In view of the far-reaching consequences which an expulsion would have on the responsibilities which the first applicant

*has as a mother, as well as on her family life with her young daughter, and taking into account that it is clearly in Rachael's best interests for the first applicant to stay in the Netherlands, the Court considers that in the particular circumstances of the case the economic well-being of the country does not outweigh the applicants' rights under Article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of Rachael's birth. Indeed, by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism.*

*The Court concludes that a fair balance was not struck between the different interests at stake and that, accordingly, there has been a violation of Article 8 of the Convention."*

141. The respondent has submitted that *da Silva* is a point of exit case, i.e. a case in which the applicant was about to be expelled from the State, and that that was why her Article 8 rights were engaged; whereas, in the case presently before the court, the applicants have simply applied for and been refused a stamp 4 permission by way of an application pursuant to s. 4(7) of the 2004 Act. The respondent submitted that, accordingly, *da Silva* is authority for the proposition that Article 8 rights fall to be considered at the point of expulsion from the State, which, in Ireland, is in the s. 3 deportation process.

142. The applicants rejected this characterisation of *da Silva* and have submitted that it involved an in-country application for a residence permit – in other words, a similar application to that which Ms. Luximon made to the Minister under s. 4(7).

143. I am of the view that the holding of the ECtHR in *da Silva* indicates that in circumstances where the refusal of a residence permit would lead to the expulsion of an applicant from the State, and would affect an applicant's private and family life, Article 8 rights are capable of being engaged. As the ECtHR noted, it was the refusal of the residence permit and the expulsion of the applicant from the State that would impact on the applicant's family rights.

144. In this case, the letter of 5th November, 2012, refusing the applicant's application for a stamp 4 permission pursuant to s. 4(7), included the following statement:

*"An extension of student permission up to 19 December, 2012 is authorised in respect of your client to allow them to finalise their affairs in Ireland.*

*At the end of this period your client MUST leave the State unless they have secured another form of immigration permission, e.g. a work permit or green card. Upon leaving the State your client MUST provide this office with evidence of their departure (e.g. copy of Chinese re-entry stamp).*

*This evidence should be provided no later than 30 days after your client has left the State.*

*If the evidence of your client's departure from the State is not received by the due date it is the intention of this Office to issue a notification under the provision of Section 3(4) of the Immigration Act 1999 (notification to deport) in respect of him/her."*

145. It is therefore clear that the effect of the refusal of this applicant's s. 4(7) application is that her period of lawful residence in the State was to be brought to an end, and that she was legally obliged to leave the State by 19th December, 2012, unless she secured another permission. Although this period was subsequently extended, it is nevertheless clear that, as a result of the respondent's refusal of the applicant's s. 4(7) application, she was under a legal obligation to leave the State by the specified date; failure to do so would mean that she would be illegally present in the State and could be the subject of a proposal to deport pursuant to s. 3(4) of the Immigration Act 1999.

146. I accept that in some cases, the refusal of a s. 4(7) application will not have this effect. For example, in *Hussein*, the refusal of the applicant's s. 4(7) application did not in any way affect the applicant's entitlement to remain in the State on the terms of the visa granted to him up to that point and, indeed, his working visa was renewed from time to time. That is clearly not the case here: Ms. Luximon and her daughter were not entitled to remain in the State beyond the date specified in the letter refusing her s. 4(7) application. Moreover, her application to the Department of Jobs, Enterprise and Innovation for a green card was refused in a decision dated 22nd January, 2013, on the grounds, *inter alia*, that:

*"It appears from the information submitted that the proposed employee's current immigration status precludes them from entering full-time employment in the State. Accordingly, the issue of an employment permit cannot be considered in this case."*

147. In the circumstances, therefore, it seems to me that the practical effect of the refusal of Ms. Luximon's s. 4(7) application is analogous to the effect of the refusal of the residence permit to the applicant in *da Silva*, i.e. she will be required to leave the State. Accordingly, I am of opinion that *da Silva* is authority for the proposition that Article 8 rights are capable of being engaged in the context of a s. 4(7) application and that the Minister, or an immigration officer acting on her behalf, is obliged to consider and have regard to Convention rights when deciding a s. 4(7) application. I am, moreover, of the view, in light of *da Silva*, and in light of the fact that the refusal of Ms. Luximon's s. 4(7) application means that she and her daughter are obliged to leave the State by a specified date, that their Article 8 rights are engaged and require consideration.

148. The applicants also placed reliance on the decision of the ECtHR in *Tuquabo-Tekle*, which was a case concerning an application for family reunification. The applicant, Goi Tuquabo-Tekle, who was legally resident in the Netherlands, applied for a provisional residence visa on behalf of her fifteen year old daughter, Mehret, who was living in Eritrea, to join her in the Netherlands; Mrs. Tuquabo-Tekle and her daughter had been separated for many years. The applicant's request for a residence visa was rejected by the Minister of Foreign Affairs, and the applicants argued that this decision breached their Article 8 rights.

149. In considering the case before it, the ECtHR noted that it was not in dispute between the parties that there was family life within the meaning of Article 8(1) of the Convention between Mrs Tuquabo-Tekle and her daughter, Mehret. The court observed that what divided the parties was the question whether or not Article 8 imposed on the respondent State a positive obligation to allow Mehret to reside in the Netherlands.

150. In his submissions, counsel for Ms. Luximon placed particular reliance on para. 42 of ECtHR's decision, where it held:

*"42. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However,*

*the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see Ahmut v. the Netherlands, judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, p. 2031, § 63)."*

151. The ECtHR concluded that the respondent State had failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other, and that there had, accordingly, been a violation of Article 8 of the Convention.

152. I accept the respondent's submission that *Tuquabo Tekle* is a family reunification case and that it is distinguishable on its facts from the case presently before the court, for the following reasons. Unlike in *Tuquabo Tekle*, there was in the present case no application from outside the State to be reunified with a settled immigrant in the State; *Tuquabo Tekle* related to a point of entry decision, i.e. whether the applicant's daughter should be granted a residence permit to come and live with her mother in the Netherlands, whereas Ms. Luximon's s. 4(7) application was an in-country application for a change of immigration status to a stamp 4 permission. Accordingly, *Tuquabo Tekle* does not appear to assist the applicant's submission that Article 8 rights are engaged by a s. 4(7) decision.

153. Nevertheless, it seems to me that the comments of the ECtHR at para. 42 of its judgment in *Tuquabo Tekle* support the applicant's submission that, if engaged, Convention rights require to be considered in the context of a s. 4(7) application. The ECtHR held that while the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. It seems to me that unless the Minister gives appropriate consideration to Convention rights of the applicant that are engaged at the s. 4(7) stage, the Minister will not have discharged her obligation to strike a fair balance between the competing interests of the applicant on the one hand, and of the community on the other.

154. I am therefore of the view that where a s. 4(7) determination engages the Convention rights of an applicant – and, in light of *da Silva*, I have concluded that Article 8 rights are engaged in the circumstances of this case – those rights require to be considered; it is not sufficient that they will subsequently be considered in the deportation process.

155. The respondent relied on the decision of the High Court of England and Wales in *Fu v. Secretary of State for the Home Department* [2010] EWHC 2922 (Admin) in support of her submission that Article 8 rights are not engaged in the context of an application for a residence permission. The case concerned the rejection of the applicant's application for leave to remain as invalid, on the grounds that the photographs he had enclosed for the purposes of the application did not comply with the mandatory requirements specified in the application form. The applicant argued that because his application had substantially complied with the relevant immigration rules, his application was capable of being valid and should have been treated as such. Mitting J. found that, on the facts of the case before him, no Convention Article was engaged, as had happened in *Forrister v. Secretary of State for the Home Department* [2008] EWHC 2307 (Admin). He held that all that had happened was that the Secretary of State's officials had performed the duty imposed upon them by the rules approved by parliament, and rejected a non-compliant application.

156. In assessing the applicant's submissions in relation to *Forrister*, Mitting J. stated as follows at para. 15 of his judgment:

*It is a requirement of paragraph 284(1) of the Immigration Rules that when an application for leave to remain is made, the applicant has subsisting leave to remain. When the claimant made her second application she did not have leave to remain. Accordingly, her second application, though accompanied by a cheque which was met, was rejected under paragraph 284(1) of the Immigration Rules. That had a highly significant and adverse consequence for her. It meant that to make an application which the Secretary of State would be required to entertain under the Immigration Rules, she and her two children had to leave the United Kingdom, return to Jamaica and make an out-of-country application. Consequently, her and her children's Article 8 rights were engaged."*

157. The impugned decision in *Forrister* was the Secretary of State's rejection of the applicant's application for leave to remain in the United Kingdom. The decision, dated 11th April, 2008, stated as follows:

*"You have no right to stay in the UK so are liable to be removed. You must leave the UK as soon as possible. If you do not leave voluntarily you may be prosecuted for an offence under the Immigration Act 1971, the penalty for which is a fine of up to £2,500 and or up to 6 months' imprisonment and you will also be liable for removal from the UK."*

158. Sullivan J. stated at paras. 8-9 of his judgment:

*"The defendant's acknowledgment of service makes the point that there has been no formal removal direction and in consequence there has been no formal Article 8 claim. That is to elevate form over substance. I have set out the terms of the letter of 11 April 2008. Unless the threat is an empty one, it is the probable, if not the inevitable, consequence of that letter that removal directions to Jamaica will be issued so that, at not inconsiderable public expense, the claimant and her daughter will be removed to Jamaica."*

*[...] Thus the practical consequence of the decision of 11 April 2008 will be that the claimant and her daughter will be removed from this country at considerable public expense to go to Jamaica purely, as far as one can see, for the purpose of requiring them then, at their own expense, to make an application to rejoin the claimant's husband. They will then have to travel back to this country, pursuant to the leave that it is expected will be granted, at their own expense. One would have thought that anyone standing back and looking at this case would have concluded that such a decision was manifestly disproportionate and unreasonable."*

159. Sullivan J. accordingly quashed the decision of 11th April, 2008.

160. The terms of the letter of 11th April, 2008, are comparable to the terms of the decision impugned in the present proceedings, dated 5th November, 2012, where the applicant was informed that she "MUST leave the State" by the date specified in the decision. Accordingly, it seems to me that the judgment in *Forrister* supports my view that the decision of 5th November, 2012, is capable of engaging the applicant's Article 8 rights since it refused the applicant's application for a stamp 4 permission pursuant to s. 4(7) and required the applicant and her daughter to leave the State by the date specified.

161. The respondent placed particular reliance on the decision of the Supreme Court in *Bode* in support of her contention that there is

no obligation on the Minister to consider constitutional or Convention rights when making a s. 4(7) decision; and that the appropriate place to do so is under s. 3 of the Immigration Act 1999. The court accepts the respondent's submission that, in *Bode*, the Supreme Court was considering the exercise of the Minister's executive powers in respect of a non-statutory scheme, the IBC 05 scheme, and determined that there was no requirement to have regard to constitutional or Convention rights in that particular context.

162. The applicants submitted, and I accept, that this is fundamentally different from the exercise of a statutory power, which must be done in accordance with the Constitution and the Convention.

163. Secondly, I accept that the applicant's submission that *Bode* was not applicable to the present case because it was premised in part on the basis that a decision to refuse an application under the IBC 05 scheme did not alter the applicants' status in the State. The applicants argued that this is clearly not the position in the present case. The applicants submitted that the Minister's decision in this case to refuse the application afforded the applicants a brief extension, to December 2012, of their permission to be in the State, in order to finalise their affairs, after which time it expressly stated that they would be required to leave the State and produce evidence of their departure. The applicants thus submitted that the Minister's refusal in respect of their s. 4 application clearly altered their status in the State. Furthermore, the applicants contended that, had they complied with this direction from the Minister, they would have left the State without ever having had the benefit of a decision on their constitutional and/or Convention rights. I am satisfied that the applicants' submissions in this regard are correct.

164. The court is cognisant of the fact that since this case was argued, I delivered judgment in *Javed v. Minister for Justice and Equality & Ors* [2014] IEHC 508. That case concerned a challenge to the constitutionality and the compatibility with the Convention of s. 3 of the Immigration Act 1999. The applicant had sought to change her immigration status pursuant to s. 4(7) of the 2004 Act. Her application was refused and the Minister subsequently issued her with a proposal to deport. The applicant was given the usual three options pursuant to s. 3(4) of the 1999 Act: make representations; leave the State voluntarily; or consent to the making of a deportation order. Ms. Javed wished to make representations; however, if she elected to do so, and was unsuccessful, she would immediately be the subject of a deportation order – she would not be afforded a period of time, or a gap, in which to leave the State voluntarily following the rejection of representations, and before the imposition of a deportation order.

165. The applicant argued that the lack of a gap between the rejection of representations on the one hand, and the making of a deportation order on the other, constituted an unlawful impediment on the applicant's right to make representations to the Minister, because, in order to make representations, she had to risk a deportation order being made against her. I accepted, in light of the Supreme Court's judgment in *Dellway Investments Ltd. v. NAMA* [2011] 4 IR 1, that a person in the s. 3 process was someone whose rights or interests would be affected by the Minister's decision and that such a person, accordingly, had a constitutional right to fair procedures, which included the right to make representations.

166. However, in light of the Supreme Court's judgment in *Bode*, I found that the s. 3 process was adequate to vindicate the applicant's rights, and that s. 3 was therefore constitutional and compatible with the Convention. *Javed* did not, however, raise any question as to whether the Minister was obliged to consider the applicant's rights under s. 4(7) – the question before the court was simply whether the lack of a gap between the rejection of the applicant's representations, and the imposition of a deportation order under s. 3, rendered s. 3 unconstitutional and incompatible with the Convention. *Javed*, therefore, has no effect on my judgment in the present case.

167. While the court has accepted in *Javed* that the s. 3 process is adequate to vindicate the constitutional and/or Convention rights of a person who is in the deportation order process, the court cannot accept that the fact that any constitutional or Convention rights an applicant may have will be considered in the s. 3 process absolves the Minister of any obligation to consider such rights at the s. 4(7) stage. The reasons for this are as follows.

168. First, an applicant under s. 4(7) might never enter the s. 3 process: this is because in order to enter this process, the applicant must place herself in a position of illegality in the State, and must elect to make representations with the attendant risk that, should they be unsuccessful, she will be subject to a deportation order, which would place a lifelong ban on the applicant re-entering the State, and could also affect her ability to travel to other states.

169. Secondly, the applicants themselves have no control over their entry into the s. 3 process, or its initiation; that is entirely a matter in the control of the Minister.

170. Thirdly, it would, it seems to me, be a curious situation if, in order for an applicant to have any constitutional and/or Convention rights that she may have considered by the Minister in the context of a s. 4(7) application, the applicant would have to breach the State's immigration laws by remaining illegally in the State beyond the end of her permission; this would be a particularly odd result in circumstances where s. 4(6) of the same Act specifically provides that the non-national must comply with the conditions imposed by the Minister or immigration officer. In other words, if the respondent is correct, then in order to have constitutional or Convention rights considered, the applicant must ignore a condition as to duration of stay and breach the State's immigration laws by remaining illegally in the State. It would mean that applicants who were at all times anxious to be compliant with the immigration laws of the State would leave the State within the timeframe set out in the letter refusing their s. 4(7) application, without ever having had their constitutional or Convention rights considered. It seems to me that that cannot be right.

171. Finally, the jurisprudence of the ECtHR reviewed above shows that, firstly, the Article 8 rights of an applicant are capable of being engaged in circumstances where the refusal of a residence permit would require an applicant to leave the state and would thereby affect the applicant's private and family life; and secondly, when the Convention rights of an applicant are engaged, the Minister is obliged to strike a fair balance between the competing interests of the individual applicant and of the community as a whole. In order to fulfil this obligation, it seems to me that the Minister must have regard to ECHR rights in the context of a s. 4(7) application.

172. For these reasons, the court is of the view that the respondent's contention that the Minister need not consider any constitutional or Convention rights of an applicant which are engaged under s. 4(7) but can do so, after a s. 4(7) application has been refused, and the applicant has remained illegally in the State and has entered the deportation order process, is flawed. It seems to me that although s. 3 of the 1999 Act is adequate to vindicate and protect constitutional and Convention rights, this does not, and cannot, absolve the Minister, or an immigration officer acting on her behalf, of her obligation to have regard to those rights when exercising her discretion under s. 4(7) of the 2004 Act.

173. In conclusion, having considered the relevant authorities, and the submissions so ably made by counsel for both sides, the court is satisfied that there is an obligation on the Minister, when considering an application pursuant to s. 4(7) of the Immigration Act 2004, to have regard to any constitutional and/or Convention rights of an applicant that are engaged by the decision. Moreover, the

court would observe that once the Minister has taken into account the relevant considerations, the weight to be attached to each of them is properly a matter for the Minister in her discretion, subject to the principle of proportionality.

## II. Unpublished policy

174. Leave was also granted on the ground that the respondent failed to comply with the principles of natural and constitutional justice and basic fairness of procedures by reason of the operation by the respondent of an unpublished policy in respect of applications from timed out students for change of status/permission to reside on the basis of stamp 4 conditions pursuant to s. 4(7) of the Immigration Act 2004. The applicant argued that they were thus unaware of what sort of information or evidence might have been sufficient to entitle her to a change of status/permission to reside on the basis of stamp 4 conditions pursuant to s. 4(7) of the Immigration Act 2004. The applicant advanced a number of grounds including family circumstances and ties with the local community in support of her application. The applicants submitted that the decision maker appeared to have taken the view that these matters were irrelevant, and that the respondent has not produced any record to show that these matters were considered. The applicants stated that this raises the question as to what precisely it is that an individual could say that might lead to a favourable outcome.

175. The applicants referred the court to the decision of the Supreme Court of the United Kingdom in *Walumba Lumba v. Secretary of State for the Home Department* [2011] UKSC 12, where the court considered the lawfulness of the detention of the appellants pursuant to an unpublished policy. At the outset of his judgment, Lord Dyson noted, at para. 20 of his judgment, that the Secretary of State “*rightly accepts as correct*” the proposition that a policy “*should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations.*” The applicants submitted that there is thus a public law requirement that a policy be published in order to afford a person who is affected by that policy the right to make submissions in respect of the policy which is to be applied in his or her own case.

176. The applicants submitted that the requirement to publish a policy is clearly linked to the right of persons affected by that policy to make representations in respect of the application of that policy to their particular circumstances. In *Walumba Lumba*, Lord Dyson further held:

*“The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see In re Findlay [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations to it.”*

177. The applicant submitted that in *R. v. Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at p. 1132C, Sedley LJ accepted that there were “*cogent objections to the operation of undisclosed policies affecting individuals’ entitlements or expectations*”.

178. The applicants submitted that the need for guidelines to inform the existence of Ministerial discretion in the Irish context was recently addressed by Clark J. in *Mohamed v. Minister for Justice, Equality and Law Reform* [2013] IEHC 68, a case which concerned the manner in which the Minister assesses an application for refugee family reunification pursuant to s. 18 of the Refugee Act 1996. Clark J. stated as follows at paras. 25-28 of her judgment:

*25. The Minister’s agents must have a benchmark or standard by which the determination on dependency is made. Without such standard the determination must be considered arbitrary. If there are no guidelines for applicants, perhaps it can be assumed that the Minister himself has no guidelines. Converting remittances in dollars into euros and dividing the total sum by the number of claimed dependents to establish the value to each person cannot, by any measure, have any relevance to the buying power of the money in the hands of the recipients. The Court must therefore ask itself what the Minister is looking for when he seeks details of how a family member is dependent on the refugee and evidence of such dependency. As dependency is always a matter of fact which differs according to circumstances, it ought to be possible for the Minister to request the Commissioner to determine objectively and with a reasonable degree of precision, how much is required to maintain a person in a named and well recognized IDP camp in a very poor part of Somalia. The Commissioner is the statutory investigator with regard to the domestic circumstances of the person who is the subject of the application and his agents should be in a position to provide those answers. If that investigation were conducted, then the Minister would have an objective measurement. There is no evidence of any such measurement in this case.*

*26. As was found both by Hogan J. in R.X. and by Cooke J. in Hassan Sheikh Ali, the concept of “dependency” in s. 18(4) of the Refugee Act 1996 is a question of fact. As Cooke J. held, the question is whether the person is “reliant for subsistence on the means and support of the refugee.” This Court further held in its recent judgment in Ducale v. The Minister [2013] IEHC 25, “There is nothing in that definition to suggest that dependency is measured by the size and frequency of financial contributions nor is it suggested that the dependency is confined merely to economic reliance on those financial contributions.” Economic dependency may of course be a key factor in assessing dependency, but the Minister must not measure economic dependency on Irish standards.*

*27. As previously noted, insofar as economic dependency is concerned, the Court considers that the Minister must identify some objective yardstick by which dependency can be assessed. It is quite simply insufficient to speculate or to apply Irish norms as to the cost and standard of living in the family members’ place of residence. As the Court held in Ducale, “financial dependency must be seen as a flexible state of affairs which is not necessarily determined by the size of a contribution but rather on its effect in the context of the specific country of residence and personal circumstances of the person in receipt of the contribution. Much must depend on what the contribution provides when received in the hands of the recipient.” A finding of a lack of dependency cannot be sustained in the absence of objective information setting out a rational basis for that finding.*

*28. As no such objective yardstick was identified in this case, the Court is satisfied that the decision of 9th January 2012 ought to be quashed and the matter remitted to the Minister for fresh consideration. It is not for this Court to set down guidelines as to the exercise of Ministerial discretion under s. 18(4) but a system must, sooner rather than later, stop the haemorrhage of scarce resources in defending flawed FRU decisions and instead ensure that vulnerable refugees do not endlessly pursue futile applications thus depleting their own financial and emotional reserves. If refugees were better informed on what constitutes dependency and what conditions are de facto applied to family reunification applications, their attentions might be better directed towards obtaining language skills, training, qualifications, work experience and ultimately employment in Ireland before applying again for family reunification.*

179. The affidavit of Ian Kelleher sworn on 12th November, 2013, on behalf of the respondent, sets out a number of documents in

relation to the new immigration regime for full-time non-EEA students as of January 2011. However, the applicants submitted that none of these documents appear to address the policy applied by the respondent in respect of an application by such persons for change of status pursuant to s. 4(7) of the Immigration Act 2004. The applicants submitted that this materially affected their ability to know the criteria, which would be borne in mind by the Minister in determining their application and thus deprived them of the ability to make relevant representations in relation to it.

180. The respondent, in reply, stated that it was untrue to say that the respondent operated an unpublished policy in respect of applications to change permission pursuant to s. 4(7). Counsel for the respondent submitted that for the duration of the applicants' residence in the State, the Department's policy changed and the various permissions afforded to students were consolidated.

181. The respondent submitted that it is important to note that, as averred to in Mr. Kelleher's principal affidavit, sworn on 12th November, 2013, the forthcoming changes were published well in advance and, more significantly in this case, the first named applicant was given several opportunities to regularise her position, even after the institution of proceedings. The respondent stated that the criteria to be met by a person in the first named applicant's position were clearly set out in the various documents exhibited in Mr Kelleher's principal affidavit. Further, the respondent stated that the law has progressed since the Supreme Court heard *Gonescu and Ors. v. Minister for Justice and Ors.* [2003] IESC 49 in July 2003, and that the first named applicant and her daughter were not obliged to leave the State to change their status.

182. The respondent submitted that there is a duty on a person in the first named applicant's position to keep herself apprised of potential changes to immigration law. The respondent said that it is well established that an applicant is not a passive participant in the process. The respondent pointed out that the first named applicant has held herself out to be a highly skilled professional whose special skills are vitally important to the success of her employer's dental practice. She claims to have studied full time in the same college for over seven years; the respondent submitted that it is not an unreasonable burden for such a person to keep herself abreast of immigration developments which are pertinent to her.

183. The respondent submitted that prior to 2011, there was no codified set of documents in relation to non-EEA students. The 2011 scheme has put in place a clear set of rules so that students would know what they were entitled to do and for how long they were entitled to remain in the State. The total amount of time a non-EEA student with no other basis to be in the State could remain here was for seven years. The 2011 scheme also introduced a three-year limit for persons engaged in English language and non-degree programmes.

184. This scheme provided for a pathway to obtaining an employment permit or green card. An employment permit is a work permit for jobs where the salary is in excess of €30,000 per annum. A green card is a specific category for highly skilled applicants with jobs where the salary is in excess of €60,000 per annum; workers in this category are entitled to be joined by their family.

185. Under the 2011 codification, once a student has spent either three or seven years in the State, depending on the type of course they had studied, they would have to leave the State, unless they obtained another permission.

186. The respondent stated that there are five conditions applicable to non-EEA national students in the State: (i) their period in the State is not reckonable for the purposes of naturalisation; (ii) they are not entitled to social welfare benefits; (iii) generally speaking, there is no provision for family reunification; (iv) they are permitted to work for a maximum of twenty hours per week during term time, and forty hours per week during vacations; and (v) students from non-EEA countries must also have private health insurance. The respondent submitted that this is a clear scheme in terms of entitlements, and in terms of the obligation on non-EEA students to leave the State.

187. Counsel for the respondent argued that the case law cited by the applicants is not relevant in the instant case in circumstances where the respondent's policies for students in the first named applicant's position were widely published, and where the first named applicant has been given several opportunities to regularise her position.

188. The first named applicant accepted that she does not have a right to stamp 4 permission. Counsel for the applicant stated that the application submitted to the Minister was not one made pursuant to the student scheme for the very reason that the applicant could have not have obtained stamp 4 permission under that scheme. The applicants submitted that their criticism of the published policy is that it does not enlighten the applicant as to how s. 4(7) operates in respect of timed out students; the applicants stated that they do not know what criteria the Minister applies to a s. 4(7) application from persons in the applicant's particular circumstances.

189. The respondent submitted that the scheme applied to Ms. Luximon in the following way. She first registered to study in Ireland as a student in July 2006. She pursued a series of NFQ level 5 or level 6 courses, i.e. language and non-degree level. What this means was that when 1st January, 2011, came and the new regime came into force, Ms. Luximon was in the category of timed out students because she had been in Ireland for in excess of three years, which was the permission that applied to her as a language and non-degree programme student.

190. Ms. Luximon was therefore classified as a timed out language and non-degree programme student when her student permission expired on 18th January, 2011. At that point, counsel for the respondent submitted that she had three options: (i) apply for a six month extension as a timed out student; (ii) enrol on a degree programme, so long as she stayed within the seven year overall time limit for non-EEA students; or (iii) apply for a further year on a UK accredited vocational course. Ms. Luximon availed of the third option: she enrolled on an advanced diploma in tourism management course, to begin on 26th June, 2011, and end a year later.

191. On 9th September, 2011, she was granted permission to complete this course; this was a one year, non-renewable permission. Her course would end in June 2012, at which point Ms. Luximon could either leave the State or enrol on a degree programme. Because she had arrived in the State on 20th July 2006, her seven year overall limit was to be reached in July 2013. Therefore, Ms. Luximon would have to complete any degree course that she enrolled on within a period of one year from June 2012.

192. Ms. Luximon did not enrol on a degree programme or leave the State: instead, she applied for change of status from stamp 2 to stamp 4 on 30th October, 2012. This application was refused on 5th November, 2012, and it is this decision which is impugned in the present proceedings, namely, the refusal of permission to change status pursuant to s. 4(7) of the Immigration Act 2004.

193. In the meantime, Ms. Luximon applied to the Department of Jobs, Enterprise and Innovation for a green card; her solicitors informed the Department of Justice of this on 12th December, 2012. The Department of Justice granted the applicant a further extension of permission to remain in the State to allow her a final opportunity to obtain a green card or employment permit and to regularise her status in the State. The Department of Justice granted the applicant an extension until 23rd January, 2013; this was a



stamp 1 permission.

194. Counsel for the respondent submitted that the Department of Justice afforded Ms. Luximon every opportunity to regularise her status in the State. The respondent stated that there was no suggestion in these proceedings that Ms. Luximon was unaware of the rules. Counsel stated that she knew the rules; she applied pursuant to those rules; and she specifically elected for the third of the three options. The respondent stated that if she had been unclear about any aspect of this process, there was an email facility via which she could make inquiries to the Department. The respondent averred that there have been more than 7,000 queries made via the email facility, but no such query was received from Ms. Luximon.

195. The respondent submitted that, in essence, what the court is being urged to do is to accept that the Department of Justice should have granted her a change of status to a stamp 4 permission on the basis of family rights in the State. Counsel for the respondent suggested that this seemed to be predicated simply on the length of stay which, he submitted, was a disturbing proposition in terms of the operation of the immigration code; in other words, if an immigrant could get stamp 4 purely on the basis of length of stay in the State regardless of academic ability or achievements or the requirements of the labour market, this would wholly undermine the student scheme. The respondent submitted that it is a *sui generis* scheme and it allows for people to come to Ireland who would not otherwise qualify.

196. In determining this issue, it is helpful to recall the ground upon which the applicants were granted relief to challenge what they characterise as the unpublished policy. It is as follows:

*"The respondent failed to comply with the principles of natural and constitutional justice and basic fairness of procedures. The policy of the respondent in respect of applications for change of status/permission to reside on the basis on stamp 4 conditions pursuant to s. 4(7) of the Immigration Act 2004 for timed out students is not published and the applicant is unaware of what sort of information or evidence might be sufficient to entitle her to a change of status/permission to reside on the basis of stamp 4 conditions pursuant to s. 4(7) of the Immigration Act 2004."*

197. It seems to me that the applicants and respondent were rather at cross purposes as regards the question of whether the policy of the Minister in respect of applications by timed out students for change of immigration status to stamp 4, pursuant to s. 4(7) of the Immigration Act 2004, has been published. The respondent made lengthy submissions on the student scheme and voluminous material in respect of the guidelines applicable to these schemes was submitted for the court's consideration.

198. However, it seems to me that while the Minister has undoubtedly published detailed guidelines for non-EEA students who wish to avail of various options under the non-EEA student scheme, there does not appear to be any guidance published as to what criteria the Minister will take into account when considering an application pursuant to s. 4(7) for a change to a stamp 4 permission from someone in Ms. Luximon's position, i.e. a "timed out" non-EEA student who held a stamp 2 permission.

199. Accordingly, I am of the view that the Minister failed to comply with the principles of natural and constitutional justice, and basic fairness of procedures, in failing to publish the criteria that will be taken into account by the Minister, or an immigration officer acting on her behalf, when determining an application from a timed out non-EEA student for a change of immigration permission to a stamp 4 permission pursuant to s. 4(7) of the Immigration Act 2004.

#### **Error of fact**

200. Leave was granted to seek judicial review on the basis that the respondent's decision to refuse the applicants' application pursuant to s. 4(7) of the Immigration Act 2004 was unlawful by reason of a material error of fact insofar as the decision-maker appears to have proceeded on the basis that the first applicant was a Chinese national. In this regard, the applicant submitted that the decision to refuse states that the applicant must provide proof of her departure from the State by 19th December, 2012, "eg copy of Chinese re-entry stamp." The applicant is, in fact, a Mauritian national.

201. The applicants referred the court to the judgment of Peart J. in *R.K.S. v. Refugee Appeals Tribunal* [2004] IEHC 436, where the learned judge held:

*"A factual error of sufficient importance will often have the capacity to at least cast some doubt upon the integrity of the decision making process, and in those circumstances, this Court's function is to intervene, and if necessary on a substantive hearing, to provide redress."*

202. The applicants submitted that, more generally, the very fact that the decision-maker did not properly identify the applicant's country of origin tends to support the complaint made that there was no consideration of the individual circumstances of the applicants.

203. In reply, the respondent accepted that the letter of 5th November, 2012, does contain a reference to a "Chinese" re-entry stamp and an averment in that regard is to be found at para. 12 of Barbara McKelvey's affidavit, sworn on 12th November, 2013. However, the respondent submitted that there is no evidence that the decision maker did not know the applicants' nationality and the error of fact is not of the type which could vitiate an otherwise valid decision.

204. In his judgment in *S.N. v. Refugee Appeals Tribunal & Ors.* [2013] IEHC 282, Mac Eochaidh J. was confronted with a situation where the RAT had, on at least thirteen occasions, used the word "*Kumgiki*" instead of the word "*Mungiki*" to describe the tribe/gang which was the source of the applicant's problems. The applicant submitted that this constituted an error on the face of the record and/or an error of fact sufficient to vitiate the decision. Mac Eochaidh J., having reviewed the relevant authorities, held as follows at paras. 18-20 of his decision:

*18. Having regard to the approach in these three cases some simple propositions are evident: firstly, an error of fact where the facts are not in dispute is susceptible to judicial review; secondly, error of fact in a judgment arising from disputed facts will rarely attract judicial review remedies, save if the error is one that no reasonable decision maker could have made; thirdly, an error of fact whether within or in excess of jurisdiction will not attract a remedy where the error had no material effect on the outcome.*

*19. I have difficulty in characterising the mistake in this case as a mistake of fact. It is much closer to a typographical error than to an error of fact, much less an error as to a material fact. The parties agree that the Tribunal Member erred in the name of the tribe. The error is susceptible to judicial review as the name of tribe was never in dispute. The issue for the court on such a straightforward matter is whether that simple error had a material effect on the outcome. I am willing to assume that the error is an error of fact, but whatever its nature, the error had no effect on the*

*decision.*

*20. For those reasons, I dismiss the applicant's complaint that the error as to the name of the tribe vitiated the decision.*

205. Similarly, it seems to me that the error made in this case, namely the reference to a Chinese as opposed to a Mauritian re-entry stamp, is more in the nature of a typographical error than a material error of fact. Moreover, the applicants have not established that this error had a material effect on the outcome in this case. Accordingly, I reject the applicant's submission that the erroneous reference to a Chinese re-entry stamp in the Minister's letter of 5th November, 2012, renders her decision unlawful.

### **Conclusion**

206. The applicants in this case are entitled to an order of *certiorari* in respect of the Minister's decision dated 5th November, 2012, on the grounds that the respondent failed to take into account relevant considerations when making her decision in respect of the applicants' s. 4(7) application, namely, any rights the applicants may have pursuant to the Constitution and/or the Convention which are engaged by the decision; and secondly, because the Minister failed in her obligation to publish the policy in relation to the criteria that will be taken into account by the Minister or an immigration officer when making a determination in respect of a s. 4(7) application from a timed out non-EEA student for a change of immigration permission from stamp 2 to stamp 4 permission.

207. I therefore make an order quashing the decision of the respondent dated 5th November, 2012, and remit the matter for fresh consideration. The court does not consider it necessary in the circumstances to make an order of mandamus.