THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 647
[Record No. 2023/1116JR]

BETWEEN

EL

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms Justice Miriam O'Regan delivered on 12 November 2024

1. Introduction

1.1 The applicant is an Albanian national born on 1 July 1997 and came to Ireland in April 2017. On 19 June 2017 the applicant applied for international protection which was refused on 27 June 2019. Between the period of the application for international protection and the refusal thereof the applicant had permission to remain in Ireland pursuant to the provisions of s.16 of the International Protection Act 2015 ('section 16'). Following the refusal aforesaid a deportation order was made against the applicant on 31 July 2019.

1.2 In February 2022 the applicant applied for permission to remain in the State pursuant to the provisions of the Regularisation of Long Term Undocumented Migrants Scheme ('the

scheme'). The main strand of this scheme came into effect on 31 January 2022. According to the provisions thereof the eligibility requirement was that at the date of commencement of the scheme the applicant should be in the State for a period of at least four years without permission.

1.3 On 14 September 2022 the application was refused permission to remain and subsequently an appeal was lodged on 20 September 2022. The appeal decision of 29 June 2023 was to uphold the refusal of 14 September 2022.

1.4 On 6 November 2023 the applicant secured leave to seek to quash the appeal decision of 29 June 2023. The application is based on a statement of grounds of 5 October 2023.

1.5 It is noted that the intention of the scheme would only apply to unlawful migrants in the State for a continuous period of four years or more on 31 January 2022. The second strand opened on 7 February 2022 and this applies to people with extant claims for international protection awaiting a decision for two years or more as of 7 February 2022.

2. Grounds

2. The legal grounds relied on in the statement of grounds are said to be: -

2.1 The computation of the four year period was irrational. In this regard it is said that the applicant had by the relevant date been in the State and had no permission to remain when he applied under the scheme. However, the Minister discounted the period for which the applicant had s.16 permission to remain. In this regard the applicant states that there were two iterations involved in the relevant scheme and the applicant was ineligible under the

second strand. It is said that the Minister clearly took the view that in strand two the period for which a s.16 permission was available was not counted as lawful residence on the basis that otherwise the second stage would be futile. It is argued that having the s.16 permission as counting for lawful residence in the first strand but not the second strand is an irrational approach.

It is noted that there is no provision in the Scheme, nor does the applicant attempt to identify such a provision, to the effect s.16 permission is not a permission for the purpose of Strand 2 of the Scheme.

2.2 It is argued that no rights are bestowed on a person holding a s.16 permission (also referred to as a Temporary Residence Certificate ("TRC")). It is not sufficient as a reckonable period for the purpose of citizenship and it is further said that it is not a permission "in and of itself" allowing a person access the labour market. It is said to be simply a permission enabling the person to remain physically present in the State.

2.3 It is said that the applicant behaved in compliance with the laws of the State and therefore it is an illogical approach for the Minister to allow a person who has been illegal in the State and failing to engage with the authorities to be in an advantageous position relative to a person such as the applicant who engaged in an open manner. It is said the approach taken by the Minister results in an absurd outcome whereby unlawful behaviour is rewarded and people who engage with the State are punished or treated less favourably than the unlawful migrant.

There is no element of punishment suffered by the applicant under the scheme or by reason of being ineligible (para. 28 and 29 of the uncontroverted affidavit of Mary

Kelly of 11 June 2024).

2.4 It is said that the approach of the scheme is arbitrary and/or disproportionate and/or unlawfully discriminates without objective justification contrary to Article 40.1 of the Constitution. In this regard the comparator for the purposes of the discrimination claim is said to be a person who has been in the State for the same period of time but who did not seek international protection or engage with the State authorities in any way. It is said that this discrimination is arbitrary or capricious or otherwise not reasonably capable of supporting the selection or classification identified in the scheme when objectively viewed in the light of the social function involved. It is said that by excluding the applicant from the scheme without objective and reasonable relationship of proportionality between the means employed and the aim sought to be realised by the scheme is unreasonable and/or irrational and/or disproportionate.

2.5 It is said that the respondent fettered her discretion by failing in the decision to consider granting permission to the applicant notwithstanding that there had not been strict compliance with the terms of the scheme.

Applicant's Submissions.

3. Discretion

3.1 In written submissions the applicant argues, without evidence, that there is a large number of undocumented migrants in the State without permission some of whom engage in employment although do not have permission to do so. The scheme would grant permission to them and enable them to work lawfully together with affording them a Stamp 4 permission which ultimately would be a pathway to citizenship.

The applicant argues that the respondent has an executive discretion to grant permission to persons to remain in the State including in the context of an *ex gratia* scheme such as the within scheme. Reliance is placed on *Bode v Minister for Justice* [2008] 3 IR 663 and *Pok Sun & Shun v Ireland* [1986] ILRM 593.

3.2 The exclusion of s.16 permission holders in the scheme is said to be arbitrary. Although in *Bode* at para. 25 the Court indicated that the applicant still retained all rights under the formal procedures, it is said that this refers to s.3 of the Immigration Act 1999, however, the applicant seeks to distinguish his position from that in *Bode* on the basis that he is currently the subject of a deportation order. It is said that an application by the applicant to remain in the State under s.3(11) of the 1999 Act would be futile.

3.3 The applicant refers to *Dunne v Minister for the Environment Heritage & Local Government* [2006] IESE 49 to the effect that there is an implied constitutional limitation of jurisdiction on such a scheme as is currently engaged in that there must be reasonableness and regard to all relevant considerations and disregard to improper considerations as well as not acting irrationally.

Such principles were identified in the context of all decision-making which effect rights and duties (para. 23).

3.4 It is said that rewarding illegality over compliance is counterintuitive if not absurd although no attempt has been made to indicate the asserted impact of a scheme being counterintuitive.

3.5 The applicant accepts that the parameters of the scheme must be drawn by the Minister, however, the Minister is not at large and must be rational having regard to the stated purpose of the scheme and the intended beneficiaries. It is said that considering the s.16 permission as the Minister did results in the parameters of the scheme being irrational.

3.6 The applicant relies on *Chevathan v The Minister for Justice & Equality* [2021] IEHC 223. In that matter the couple, who both fell outside the parameters of the scheme, applied under a student scheme with different outcomes in respect of the exercise of a discretion with apparently no good reason offered as to why that occurred.

The relevant decision was quashed on the basis of a lack of reason. The suggestion that the Minister should exercise the contended for discretion was not accepted by the court as being present in any system constructed under the rule of law. The Applicant's contention that "the Minister should have exercised a contented-for discretion to dis-apply elements of the scheme even as the Minister was applying the scheme" is not present. "That would in effect be a lawless scenario".

4. Discrimination/Art 40.1

4.1 Reference is made by the applicant to the applicable test, dealing with an Article 40.1 of the constitutional claim set out at para. 188 by O'Malley J in *Donnelly v Minister for Social Protection* [2022] IESC 31 to the effect that Article 40.1 is a protection against discrimination based on arbitrary, capricious, or irrational considerations with the burden of proof resting on an applicant and in regard to such burden there is a presumption of constitutionality. Furthermore, because of the separation of powers the courts will accord deference to the Oireachtas in relation to legislation dealing with matters of social, fiscal, and

moral policy.

4.2 Where the discrimination is based on matters intrinsic to the human sense of self or particularly affects a group vulnerable to prejudice and stereotyping, particularly close scrutiny will be given to the legislation. However, where there is no such impact there is a lesser level of examination by the courts. In some cases the objectives, rationality and justification may be apparent on its face. However, in other cases evidence in support of a party's case may be required. If a statutory classification is arbitrary, capricious or irrational then it is not for a legitimate legislative purpose. The classification must be relevant to the legislative purpose and it will not be so if it is incapable of supporting that purpose.

4.3 In *O'Meara v Minister for Social Protection* [2024] IESC 1 it is said that the concept of equality requires (a) like cases to be treated alike and unlike cases unalike; and (b) "where a difference is made it is made and justified by reference to the manner in which the comparators are unalike" (see para. 14).

5. S.16 Permission

5.1 It is argued that while an asylum applicant does avail of s.16 permission he is not "documented" and therefore it is argued that the applicant comes within Clause 3.1 of the scheme to the effect that he was resident without a valid residence permission for the requisite time.

5.2 In relation to Clause 3.3 it is argued that same applies to people in ongoing asylum claims. In this regard it is argued that the exclusion in Clause 3.3 does not apply to the applicant because his asylum claim is not ongoing. This clause reads: -

"Persons whose applications for protection under the International Protection Act are under consideration hold temporary residence certificates and are not therefore undocumented and are not addressed in this policy document…".

5.3 Clause 4.9 provides that a category of persons excluded from consideration under the main strand include current TRC holders. The applicant argues that the applicant is not excluded under Clause 4.9 of the scheme which only excludes persons holding current s.16 permission to reside.

5.4 The applicant references the justification for the scheme namely as provided in Clause 3.1 of the scheme granting residence permission to alleviate the particular challenges faced by those who have been living in Ireland for a long period of time without a valid residence permission ("long term undocumented") and who face challenges in integrating into society and maintaining labour market mobility.

5.5 It is argued (notwithstanding the content of para. 25 of the affidavit of Mary Kelly) that persons in the asylum system do not have labour market access. It is said that para. 6(c) of the statement of opposition is incorrect when it says that s.16 holders have access to the labour market, social welfare, housing and other state supports, accordingly, the respondent is entitled to take account of the different position of an undocumented migrant to a s.16 holder.

5.6 The applicant refers to the provisions of s.16 of the 2015 Act and the limitations on a holder of such a certificate where the permission is not recorded on a passport or otherwise. It is argued that under s.246 of the Social Welfare Consolidation Act 2005 s.16 holders are not

regarded as being habitually resident in the State for the purposes of the Act. It is further argued that s.16 contains a prohibition on employment and it was not until the decision of the Supreme Court in *MH v Minister for Justice & Equality & Ors.* [2017] IESC 35 which judgment was delivered on 30 May 2017 that persons who have been in the asylum process for more than six months would be entitled to engage in work. This process was put in place in July 2018 and is argued to be separate and distinct from any entitlement under s.16 which clearly states that the holder is not permitted to engage in employment. It is argued that the entitlement to engage in work if in the asylum process for six months or more does not arise because of the s.16 permission.

6. Non-Pleaded Point

6.1 In submissions the applicant references the scheme known as Afghan Admissions Programme (AAP) and what is known as the Dublin 3 Regulations in support of his position as to what comprises lawful residence.

6.2 It is noted that these provisions are referenced notwithstanding that they do not appear at all in the statement of grounds and therefore no leave was granted in respect thereof.

6.3 Although this argument is not therefore before the Court it might be noted: -

(1) In relation to the AAP the applicant relies on the fact that in that scheme s.16 has been deemed not to count as lawful residence and this is said to be contradictory and inconsistent.

Rather, what the Minister said was that s.16 was not permission with minimum remaining duration of twelve months and/or renewable on 24 February 2022 there is no inconsistency.

(2) Insofar as Dublin 3 is concerned this is an EU Regulation for the purposes of determining which Member State is responsible under the Regulation to examine the application of a third country national or a stateless person for international protection.

In that scheme Article 2(1) provides that a residence document does not include visas or residence authorisations issued during the period required to determine the Member State responsible under the regulations.

The wording makes clear therefore that residence authorisation excluded is not a s.16 type permission available when an international protection application is pending but rather permission pending a determination of the correct Member State to deal with the international protection application.

6.4 Therefore no inconsistency arises.

7. Respondent's Submissions.

7 The respondent resists the applicant's application on the following grounds: -

(a) The respondent argues that the applicant's comparator is not appropriate. Under the scheme all persons not having accumulated four years undocumented residence in the period prior to the coming into force of the scheme are ineligible whether past IP applicants or unlawful migrants without any permission to be in the State.

(b) The applicant has not identified any jurisprudence or other authority for suggesting the Minister is not entitled to establish and apply a scheme with strict criteria, leaving over consideration of discretion for the normal channels outside such a scheme. It is said that the applicant has not demonstrated why the Minister

must in the context of the within scheme consider exercising a discretion in favour of the applicant who is ineligible under the scheme.

(c) It is said that the applicant is in a position to make an application for the exercise of ministerial discretion under s.3(11) of the 1999 Act and the applicant is not entitled to predict an outcome and rely on such prediction absent an application that is processed and has come to a conclusion.

(d) The respondent points to the fact that this is an *ex gratia* extra statutory scheme in exercise of the Minister's power to control exit and entry of foreigners in the State which has been held in *Bode* to represent a fundamental power of the State. Legal rights of parties are not considered under this scheme and any party who has been unsuccessful in the scheme is no worse off than before. Given the different legal category, status and rights of the holders of a s.16 certificate to those eligible under the scheme, the scheme is not arbitrary, capricious, or irrational.

(e) Since July 2018 the holder of a s.16 certificate who is awaiting for six months or more the outcome of an international protection application is entitled to access to the labour market. Such a facility is not available to undocumented migrants. It is because a person is awaiting a decision under the international protection legislation that enables that party to work if in the system for in excess of six months as opposed to based on any other reason and therefore although the wording of s.16 precludes access to the labour market subsequent variation of this position arises under different legislation applies to s.16 holders. Furthermore, a s.16 holder is entitled to material reception conditions, housing, food and associated benefits, a daily expense, an allowance for clothing and access to healthcare. A TRC holder therefore is entitled to various forms of State support

and does not face the same vulnerabilities as a person not having any valid legal status within the State.

The fact that other categories of resident holders might enjoy more benefits and freedoms than those enjoyed by a s.16 holder does amount to equating a s.16 holder with a party who has no valid right of residence or any access to State support.

(f) The respondent notes that the applicant accepts that it is for the Minister to draw up the parameters of a particular scheme. The Minister is not obliged to devise a scheme which would benefit the applicant.

(g) The respondent argues that the provisions of Clause 3.3 of the scheme are clear and suggests there is nothing in the language or in the clause to the effect that it is only parties who are currently awaiting a determination of their IP application who would be considered undocumented. Furthermore under the terms of Clause 4.9 of the scheme there is nothing to suggest that an expired TRC is not to be treated as having been a valid residence permission during the period of same – rather the provision is to the effect that a TRC is to be treated the same as any other valid permission to reside in Ireland.

(h) The respondent relies on *Bode* to support the proposition that an *ex gratia* scheme is valid where an unsuccessful applicant is in no worse off a position than that he was prior to the scheme and could still assert his rights and entitlements to remain in the State (for example under s.3(11) of the 1999 Act).

(i) The respondent points out that the two strands of the scheme have different objectives namely the first strand will benefit certain undocumented migrants who do not have access to the labour market, social welfare, or any other form of

support and are in a more vulnerable position as a consequence. The second strand is for the purpose of cutting down on accumulated undetermined IP applicants.

(j) The fact that the applicant perceives an unfairness in that an illegal migrant may well be successful under the scheme, however, although the within applicant engaged with the authorities, nevertheless he will not be successful, is entirely insufficient to establish irrationality given that there is an objective basis for the policy within the scheme namely offering a pathway for undocumented migrants who face particular risks and vulnerabilities unlike those such as TRC holders who enjoyed access to State supports. In these circumstances it is argued that there is nothing inherently unreasonable about the distinction. The benefit conferred is gratuitous and therefore no prejudice is suffered by the applicant by not qualifying.

(k) The respondent notes that the essence of the applicant's argument is not that the scheme should be struck down but rather same should be extended – the applicant is looking for a scheme tailored to meet his particular facts notwithstanding that he has no entitlement in law to the provision of such an *ex gratia* scheme.

(l) Insofar as the claim under Article 40-1 of the Constitution is concerned the respondent points to the fact that the scheme is not a law or enactment as discussed in *East Donegal Cooperative v Attorney General* [1970] IR 317 and *McGimpsey v Ireland* [1990] 1 IR 110. Furthermore no distinction is made against the applicant on the basis of any aspect of the human personality and the respondent in this regard relies on *Minister for Justice & Equality v O'Connor* [2017] IESC 21 when O'Donnell J stated that the essence of an equality claim is the sense of injustice that someone experiences when a person similarly situate is being treated differently and normally more favourably and in particular if the

circumstances are suggestive of a discriminatory ground related to a person's human personality. Furthermore, in this regard, the respondent argues that the recent Supreme Court authorities emphasised that time based differentiations as to when a person applies for a benefit, but not implicating any essential human attribute, are *prima facie* valid and lawful.

8. Oral Submissions

8 In oral submissions the applicant stated: -

(1) He was abandoning the argument based on the AAP scheme/Dublin 3 suggestion of inconsistency with regard to the asserted nature of the TRC.

(2) The applicant was otherwise relying on all written submissions.

(3) The applicant was seeking to establish that the scheme itself was irrational, arbitrary, and capricious because in strand one of the scheme a s.16 permission is deemed to be a valid permission whereas it is argued that a s.16 permission is not a valid permission in strand two.

(4) The applicant's central argument in oral submissions related to the response in the impugned decision to the applicant's written submissions of 20 September 2022 by the applicant's solicitor who sought the exercise of ministerial discretionary power to grant the applicant, under the scheme, in the particular circumstances of his case the benefit of the scheme. In this regard it is argued that the manner in which this portion of the applicant's appeal was dealt with was unlawful in circumstances where the response was: -

> "I am satisfied that there are no circumstances inherent in the applicant's case which would outweigh the Minister's interest in maintaining the integrity of

the scheme and its criteria and I do not propose to exercise the Minister's residual discretion in the applicant's case in this decision."

It is said that this is not an answer to the exercise of a discretion and amounts to classic fettering of discretion as it is said it is not a requirement of Irish law in securing the exercise of the Ministerial discretion to outweigh the integrity of a scheme.

The respondent resists this argument on the basis that there is no role for Ministerial discretion to be exercised in the context of the scheme and simply does not arise. In this regard the respondent relies on the grounding affidavit of Ms Kelly identifying at paras. 28 to 31 of that affidavit that a free standing application for the exercise of ministerial discretion is made to a separate unit within the Department of Justice and not within a given scheme.

Both parties rely on the judgment of Barrett J of 10 March 2021 in *Chevathyan v Minister for Justice & Equality* [2021] IEHC 223. In this regard the applicant relies on para. 5 of the judgment which records that the civil servant who dealt with one of the applicant's claims was acting at all times in the name of the Minister exercising a discretionary power and sent that applicant's case forward for consideration for the exercise of the Minister's freestanding discretionary power to allow that person to remain in Ireland.

The respondent relies on what is in effect an argument made by the applicant in the context of the proceedings that were before Barrett J to the effect that what was being claimed in the judicial review proceedings was that the applicant was asserting that the Minister should have exercised a contended for discretion to disapply elements of the scheme even as the Minister was applying the scheme. Barrett J held "the court does not consider such a discretion to present" which would in effect be

what was said to be a lawless scenario where a scheme would simultaneously be a scheme and not a scheme. In that matter the court identified that the difficulty for the Minister was as to how two cases which in all material respects were identical could be and were treated in such a manner as to arrive at diametrically opposite ends.

9. Decisions

9.1.1 It is clear from para. 8 of the judgment of Barrett J, referred to above, that it was the different treatment to the parties which was not explained, was the basis for quashing the decision and the applicant did not succeed on the discretion point.

9.1.2 In presenting the exercise of discretion argument the applicant refers initially to the submission made by the applicant's solicitor of 20 September 2022. In that submission it is argued that a temporary residence certificate issued under s.16 is not a permission to remain in the State for the purpose of registration with the Department of Justice, there is no permission stamp endorsed on the applicant's passport, there is no card that evidenced the applicant's legal residence in the State and the TRC would cease to take effect on the date the international protection application is refused. Based on the foregoing it was argued that the TRC was not equivalent to a permission to remain and should not be considered as a recognisable residency period in the State.

9.1.3 Following that submission the solicitor requested the exercise of ministerial discretionary power to grant the applicant an approval in his application taking into consideration that he has been residing in the State with no legal permission and he has been undocumented for four years since 19 June 2017 and therefore eligible to apply under the undocumented scheme and should be considered for the same. It is submitted that refusing

the applicant relief solely based on the s.16 permission results in the Minister failing to take into consideration all relevant facts and disregarding all irrelevant facts which is said to be unjust and unfair to the applicant. Thereafter a legal submission based on the matter of *Mishra v Minister for Justice* [1996] 1 IR 189 to the effect that: -

> "There is nothing which forbids the Minister upon whom the discretionary power under section 15 is conferred to guide the implementation of that discretion by means of a policy or set of rules. However, care must be taken to ensure that the application of this policy or rules does not disable the Minister from exercising her discretion in individual cases. In other words, the use of the policy or set of fixed rules must not fetter the discretion conferred by the Act".

9.1.4 Taking the applicant's claim at its height and assuming, without so finding, that there was a free standing (independent of the relevant scheme or other statutory provision identified) entitlement of the applicant to call upon the respondent, in the context of an ex-gratia non-statutory scheme, which does not apply to the applicant, and in respect of which no rights of the applicant are engaged, to exercise a discretion in favour of the applicant, in my view having regard to the grounds upon which the applicant sought the exercise of the ministerial discretion, namely the grounds amounted to a disagreement with the Minister as to the implications of the applicant holding a TRC permission, which in the events was the reason why the applicant failed in his application, there does not appear to me to be anything unlawful in the response of the decisionmaker and indeed such an argument is precisely the type of argument which Barrett J indicated would in effect amount to a lawless scenario. Such argument did amount in effect to an argument that the Minister should have exercised a contended for discretion to disapply elements of the scheme even as the Minister was applying the scheme and therefore the applicant was clearly arguing against maintaining the

integrity of the scheme and its criteria without more.

9.1.5 I am satisfied that the decision vis-à-vis discretion did not amount to a fettering of discretion given the only argument placed before the Minister to exercise discretion was effectively in the context of a scheme to disapply that scheme without identifying any further justification for doing so merely the disagreement of the applicant with the Minister's view of the implications of a s.16 permission.

9.2.1 The argument in respect of rationality of the scheme is based on what the applicant suggests is implicit from the policy.

9.2.2 When invited to address this argument in the light of the fact that strand one and strand two were targeting entirely separate groups of immigrants and had entirely separate objectives the applicant declined to do so. Furthermore the applicant's argument does not take into account the fact that in clause 3.9 of the second strand it is indicated that persons must not hold a residence permission apart from a TRC and such wording is not consistent with a TRC not being a residence permission as argued.

9.2.3 It seems to me in all of the circumstances this argument cannot succeed in establishing that the scheme, containing two strands each of which is addressed to separate groups of persons, with entirely separate objectives (namely in strand A alleviating the particular challenges faced by undocumented migrants and in strand two for the purpose of regularising the immigration status of international protection applicants awaiting a decision for two years or more). This argument has further been dealt with above when addressing the

statement of grounds and the written submissions.

9.3 In *Donnelly* aforesaid O'Malley J explained that law makers are entitled to make policy choices and must be entitled to distinguish between classes of persons. In the circumstances a pure equality challenge can only succeed if *inter alia* the scheme is grounded upon a constitutionally illegitimate consideration and thus draws an irrational distinction resulting in some people being treated as inferior for no justifiable reason: -

> *"The Constitution does not permit the court to determine that the plaintiff should be included simply because a more inclusive policy, assimilating more people sharing some relevant characteristic into the group would be fairer…".* (para. 195)

9.4 In considering rationality it is necessary to determine if there is discrimination grounded on a difference in social function and if so does it have a legitimate purpose relevant to the object of the legislation? Is it *"arbitrary, or capricious, or not reasonably capable, when objectively viewed in the light of the social functions involved, of supporting the selection or classification complained of?"* (para. 193).

In *AF & I v Minister for Justice* [2021] 3 IR 140 at pages 212/213 Dunne J stated:

> *"Ultimately, however, the fact that the legislation may be viewed as harsh when viewed through the prism of it's application to minors, it is at the end of the day a matter of policy for the legislature and it is not an issue for the courts."*

The above quotation supports a heavy onus on an applicant to demonstrate an absence of any rational justification underpinning differential treatment.

9.5 It is noteworthy that Clause 4.9 specifically refers to persons who hold *inter alia* a "current" TRC, however, clause 3.3 does not. It appears to me that Clause 3.3 as quoted

above merely identifies a factual status namely that while an international protection application is under consideration the person holds a temporary residence certificate and is therefore not undocumented. That statement clearly applies to people who have ongoing asylum claims and those of whom have had their asylum claims already determined, however until such determination held a temporary residence certificate. Furthermore, the applicant is clearly excluded under clause 3.2 and 4.9 (second bullet point).

9.6 It is clear that the Minister did not take a different view of s.16 permission in the two strands of the scheme and the Minister neither expressly nor by necessary implication considered the holder of a s.16 permission to be a valid permission in strand one and not a valid permission in strand two.

9.7 It is clear from the affidavit of Ms Kelly which is not countered that holders of a s.16 permission have an entitlement to reception conditions, food and associated benefits, an expense allowance, a financial allowance for clothing and access to healthcare (see para. 25 of Ms Kelly's affidavit of 11 July 2024). Rights are bestowed on the holder of a s.16 permission which although do not amount to similar rights to the holder of a stamp 4 permission or indeed a citizen, the fact that the rights conferred on a s.16 holder may not be as beneficial as other possible permissions does not make the s.16 permission either an undocumented resident or an immigrant with the same status as an undocumented resident with no rights or access to any state assistance. The fact that s.16 does not since July 2018 record the entitlement of an asylum applicant, post 6 months in the process, to engage in employment, does not alter that such entitlement is a benefit to asylum seekers not available to undocumented persons.

9.8 On refusal of his application under the scheme the applicant is in effect in no worse a position as he was in prior to his application.

9.9 The comparator suggested by the applicant is in fact invalid as the first strand of the scheme excludes all immigrants who have not been undocumented for a four year period prior to the commencement of the scheme.

9.10 As in *Bode* the Minister was entitled to introduce an *ex gratia* scheme which does not engage in legal rights of the parties but merely confers a gift or benefit to certain parties.

9.11 The applicant has not demonstrated that the scheme was arbitrary, capricious or irrational in all of the circumstances having regard to the objectives expressed in respect of strand one of the scheme and the fact that strand one and strand two are not contradictory vis-à-vis the status of a s.16 permission holder. The scheme therefore is neither arbitrary nor disproportionate.

9.12 Insofar as the applicant asserts that he is not excluded from the scheme either under clause 3.3 or clause 4.9 this argument is not valid with regard to either clause. The clause is not limited to current holders of TRCs but rather all holders and in this regard it is noteworthy that in clause 4.9 reference is made to "current" holders of a s.16 permission but no such wording ('current') is contained in clause 3.3.

9.13 The scheme does support the legitimate objective expressed in the main strand, and the discrimination, if any, is not arbitrary, capricious, irrational or otherwise not unreasonably

capable of supporting the selection/classification of the main strand of the scheme.

9.14 There is no evidence of discrimination based on a person's human personality or sense of self.

9.15 It is the applicant's choice to pursue or not a s.3(11) of the 1999 Act application, under which the Minister has a broad discretion (see para. 30 of the affidavit of Ms Kelly). This right which pre-dated his application under the scheme remains unaffected.

9.16 The Applicant's belief that the main strand of the scheme has an absurd result is expressed without reference to the justification for this strand apparent on the face of the scheme (clause 1 and 3.1).

9.17 It is manifest that the applicant was excluded from the main strand (clause 3.1, 3.2, 3.3 and 4.9 (second bullet point)).

9.18 I am satisfied that the respondents arguments set out at para. 8 hereof are valid.

9.19 In all of the circumstances the applicant has not discharged the onus on him to either quashing the decision made by the respondent in his application or otherwise demonstrating that strand one of the scheme is arbitrary, capricious or irrational or disproportionate and discriminates against the applicant.

9.20 Therefore the relief claimed in these proceedings is refused.

9.21 As this judgment is being delivered electronically, with regards to the issue of costs, as the respondent has been entirely successful, it is my provisional view that she should be entitled to her costs, to be adjudicated in default of agreement. As the parties have not had an opportunity to make submissions as to costs, I shall allow the parties the opportunity to make written submissions of not more than 1,000 words within 14 days of this judgment being delivered should they disagree with the order proposed. In default of such submissions being filed, the proposed order will be made.