



## **THE COURT OF APPEAL**

**Neutral Citation Number: [2021] IECA 99**

**Court of Appeal No.: 2019/401**

**High Court Record No.: 2014/735 JR**

**Faherty J.**

**Power J.**

**Murray J.**

### **IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000**

**BETWEEN:**

**HUI ZHU CHEN**

**APPLICANT/APPELLANT**

**- AND -**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**- AND -**

**THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION AND THE  
ATTORNEY GENERAL**

**NOTICE PARTIES**

**JUDGMENT of Ms. Justice Power and Mr. Justice Murray delivered on the 30<sup>th</sup> day of  
March 2021**

#### ***Facts***

1. The applicant, a citizen of the People's Republic of China, arrived in the State in November 2013 on foot of a visitor's visa. The visa allowed her to remain in the jurisdiction for ninety days. In order to obtain it she had to (and did) give an undertaking to return to China at the expiry of that period. On the ninetieth day, she submitted an application to the

respondent pursuant to s. 4(7) of the Immigration Act 2004 to remain in Ireland as a resident. She relied in that regard on asserted rights under Article 8 of the European Convention on Human Rights ('the Convention'), saying that the relationship between herself, her son, his partner, their child and a child of the partner was such as to require the respondent to undertake an assessment of her family rights in connection with her application. She alleges that she was entitled to require such an assessment and to remain in the State while it was conducted. The issue in this case is whether those contentions were well placed and, if so, whether the respondent failed to properly conduct such an assessment.

**2.** The applicant is a widow, her husband having passed away in 2007. Hui Zheng is her son, his partner is Lili Wang, their daughter is Yan Tong Zheng and Lili Wang's daughter is Belinda Wang. The chronology relevant to the proceedings is as follows:

- (i) Belinda Wang is a Hungarian national and was born on **July 5 2009**. Yan Tong was born on **August 25 2012** in Ireland.
- (ii) On **September 11 2013** Hui Zheng was granted permission to remain in the State on a Stamp 4 basis on account of his parentage of an Irish child. A similar permission issued to Lili Wang on **September 20 2013**. This was issued '*as an exceptional measure*' and having regard to all the circumstances particular to her case.
- (iii) In **late September 2013** the applicant applied for a visa in China to visit the State. It is common case that as a condition of that visa the applicant was required to undertake to leave the jurisdiction after ninety days, and that she gave such an undertaking.

- (iv) On **November 14 2013** the applicant arrived in the State, and was granted permission to land and to be in the State until **February 13 2014**. Upon arrival in the State the applicant resided in Dublin with the family of Hui Zheng, Lili Wang, Belinda Wang and Yan Tong Zheng.
- (v) At some point prior to **November 26 2013** the applicant was added to the health insurance policy issued to Hui Zheng and his family. The policy had a duration of one year.
- (vi) On **February 13 2014** the applicant, through her solicitor, applied to the respondent to vary the permission granted to her when she landed in the State so that she could remain in the jurisdiction as a person of independent means.

3. The applicant does not state when she formed the intention to seek to remain in the State beyond the date undertaken when her visa issued. Her affidavit gives the impression that her decision to do this was made at some point into her visit: she avers that in *‘the period after my arrival in the State we ... discussed my future and decided to explore whether it would be possible for me to remain in the State and to continue living with them and their children as a family’*.

#### ***The impugned decision***

4. The letter to the respondent from the applicant’s solicitors of February 13 2014 sought permission to reside on what were described in her solicitor’s letter as *‘Stamp 3 conditions’*. The letter recorded that since her arrival in Ireland the *‘natural love and affection which all members of’* her son’s family had for each other *‘has grown and deepened and together they now form a close, loving, stable and durable family unit’*. The letter recorded the wish of all

members of the family that the applicant be granted permission to remain in the State on Stamp 3 conditions so that they may continue to live together. The letter referred to Hui Zheng and Lili Wang as being in full time permanent employment, to the applicant owning two apartments in China and her intention, if granted permission to remain in the State, to let both apartments. It said that her son and Lili Wang hoped to purchase their own home and that if the applicant was granted permission to remain in the State it was her and her family's intention that the rental income from her properties would be used to help repay the mortgage. The correspondence recorded that she had '*substantial savings*' in China and that these would be applied towards a deposit for the purchase of a family home. It said that the applicant had cared for both children, that they accordingly had '*the advantage of the care and society of a grandparent as they grew up*'.

5. The letter (which noted that the children of Hui Zheng and Lili Wang were both citizens of the European Union) stated: -

*"In assessing this application we submit that the Minister must have regard to the State's obligations, by virtue of the provisions of both Article 40 and 41 of the Constitution and Article 8 of the European Convention on Human Rights, to protect and vindicate the personal, family and private lives of our client and the other members of the family unit. In our submissions, in the light of the guarantee contained in these provisions, it is entirely appropriate for the Minister to grant our client's application."*

6. This application was determined by the Minister, his decision being communicated to the applicant on 30 June 2014. The letter sent by the respondent to the applicant on that date recorded that following consideration of the individual circumstances in the case including all of the matters averred to in the application the position of the applicant did not warrant an

extension for a visitor permission. It stated that in the light of that, the application for an extension of visitor permission was refused. The applicant was requested to make arrangements to leave the State as her permission to remain expired on 13 February 2014.

7. Appended to the letter and referenced in it was a 'consideration document'. This recorded the submissions made in the applicant's application of 13 February and noted:

- (a) that the purpose of the applicant's journey was to visit the State, this being achieved when she was granted leave to land on 15 November 2013 and was given visitor permission until 13 February 2014;
- (b) in her visa application the applicant stated that the purpose of her trip to Ireland was a visit;
- (c) both the applicant and her reference in the State provided written undertakings to observe the conditions of the visa and leave the State on the expiration of her visitor permission; and
- (d) the applicant had already been granted the maximum time permitted to visitors to the State.

8. The consideration document recommended that the applicant's application for an extension of visitor permission be refused, stating in respect of the assertions of the applicant regarding her right to family life under Article 8 of the Convention: -

*"While the applicant has a right to respect for her family life under Article 8(1), this right has to be viewed in the context of the State's right to maintain control of its own borders and operate a regulated system for the control, processing and monitoring of non-EEA national persons in the State.*

*In addition, Article 8(2) of the ECHR sets out that the State can interfere with the person's right to respect for their private and family life in the interests of national security, public safety or the economic wellbeing 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.*

*This decision to refuse residence permission under Section 4(7) of the Immigration Act 2004 does not of itself involve any separation of the family unit. If the applicant makes representations under Section 3 of the Immigration Act 1999, which could potentially involve a separation of the family unit, then a detailed balancing exercise will be undertaken at that stage to ensure that the applicant's right to family life will be respected and any interference would be in line with limitations set out in Article 8(2) ECHR.*

*If this person believes that they meet the criteria for Non-EEA family reunification as set out in the policy document published on our website, [WWW.INIS.GOV.IE](http://WWW.INIS.GOV.IE), she can make an application for the appropriate visa from outside the State where her application will be considered."*

9. On 29 July 2014 the applicant's solicitors responded to the decision and consideration document expressing surprise at the contents of the letter and analysis enclosed with it. They stated that the analysis did not appear to engage in any meaningful way with the evidence presented and the submissions made in support of the application. They complained that the analysis recommended that their client's application be rejected for 'very general reasons' which bore little, if any, relation to the specific circumstances of their client's application. It

was further alleged that it was not lawful for the respondent to adopt a general policy of refusing applications for persons without reference to the particular circumstances of their applications or an analysis thereof made on the basis of objective criteria. The Minister was requested to consider again the application in the light of the submissions in that letter and those previously made. On 11 November 2014, that correspondence was responded to by the Minister. There, the following was stated:

*“Your client was refused residence as a person of independent means on 30 June 2014 as she is a visa required national and entered the State on a short-stay C visit visa. She was granted permission to visit the State and gave written undertakings to leave the State at the end of her visit. The C visit visa process is designed to facilitate short-term visits to the State and is not a route into longer term residents in this State. There is a process (D reside visa) available to visa required person seeking to reside in the State. Your client chose not to use the D visit process, however that process remains available to her should she wish to apply (from outside the State) to reside in the State. Use of the C visit visa process to circumvent the D reside visa process is an unacceptable abuse of the visa system.”*

**10.** The letter proceeded to observe that while the applicant had a right to respect for her family private life under Article 8(1) ECHR, that right had to be viewed in the context of the State’s right to maintain control of its own borders and to operate a regulated system for the control, processing and monitoring of non-EEA national persons in the State. It said that the State was therefore entitled to insist that the integrity of the ‘C’ visit visa programme was upheld, and the ‘D’ reside visa system not circumvented. The letter proceeded to record (as had been stated in the previous letter) that if the applicant wished to make representations under s. 3 of the Immigration Act, 1999 (which could potentially involve a forced removal from the

State) then a balancing exercise would be undertaken to ensure the applicant's right to family and private life would be respected and any interference would be in line with the limitations set out in Article 8(2).

**11.** On 9 October 2017 Humphreys J. granted the applicant leave to apply by way of judicial review for orders of certiorari quashing the decision of the respondent communicated to the applicant by letter dated 11 November 2014 and an order remitting the applicant's application to the respondent for consideration and determination in accordance with law.

***The applicant's claim***

**12.** While the statement of grounds has undergone a number of revisions, the essential basis for the relief claimed arises from the applicant's assertion that the decision of the respondent to refuse her application pursuant to s. 4(7) of the 2004 Act to vary the permission already given to her was made in breach of duty including statutory duty and in particular that imposed on the respondent by the provisions of s. 3 of the European Convention on Human Rights Act 2003. Specifically, it is contended that the respondent failed to consider the particular facts and circumstances of the applicant's application or to strike a fair balance between the competing interests and rights of the applicant and the community as a whole.

**13.** Thus, in her grounding affidavit, having recorded the facts as outlined above relating to her son, his partner, the latter's daughter and their daughter, the applicant averred that from the time she had arrived in the State she has lived as a family with her son and his partner and their children. She said that during that time the natural love and affection which they had for each other '*have grown and deepened*' and they formed a close, loving, stable and durable family unit. She explained that since her arrival in Ireland it had been a source of great joy and comfort



for her to have been living with her family, that since the death of her husband she had lived alone in China and as she got older this became more and more difficult. She averred that her son and his partner and especially their children had derived great joy from having her live with them and that she had been able to assist them by minding their children while they are at work. This, she averred, presented a financial saving and it greatly benefited the children to be cared for by a loving relative rather than a stranger. She also averred to the desire of her son and his partner to purchase a home of their own and to her intention to assist them financially to that end.

**14.** The Minister's response was, essentially, as set out in the decision letter and consideration document. The statement of opposition denied that the respondent had failed to consider the particular facts and circumstances of the applicant's application and to strike a fair balance between the alleged interests and alleged rights of the applicant and of the community as a whole. It is pleaded that the respondent had regard to the circumstances advanced.

**15.** The Minister further pleaded that the applicant had no entitlement to be in the State and the Court should decline to grant the relief sought on the basis of a breach of visitors' conditions and therefore an ongoing abuse of the immigration system of the State. The claim of the applicant that the respondent had fettered his discretion or adopted a fixed or inflexible policy was denied as was the allegation that he had refused to consider an application pursuant to s. 4(7) of the Act of 2004.

### ***The decision of the High Court***

**16.** Together with a number of other proceedings, this action was in abeyance pending the decision of the Supreme Court in *Luximon and Balchand v. Minister for Justice, Equality and Law Reform* [2018] IESC 24, [2018] 2 I.R. 542 (*'Luximon'*). When the matter came for hearing before the High Court (Barrett J.) the respondent contended that the Minister was under no obligation to undertake a detailed examination of Article 8 rights in circumstances where the applicant had arrived in the jurisdiction on foot of a short-term visitor's visa, that examination being undertaken at the stage of any deportation pursuant to s. 3 of the Immigration Act 1999. At the same time, however, the respondent contended that the Minister had considered the substance of the applicant's asserted rights under Article 8.

**17.** The trial judge delivered his judgment on 13 May 2019 ([2019] IEHC 310). Central to his decision were the provisions of s. 4(1) and 4(7) of the 2004 Act. The former provides as follows: -

*“(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”).”*

**18.** Section 4(7) is in the following terms: -

*“(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.”*

19. The trial judge noted that ‘C’ type visas facilitate short term visits to Ireland. They are not, he said, a route to long term residence. There is a separate ‘D’ visa for visa required persons seeking long term residence. Referring to s. 4(7) Barrett J. said: -

*“This wording contemplates renewal/variation of a granted visa, not the substitution/granting of some other class of visa. So the Minister, under s. 4(7), cannot properly acquiesce to Ms Chen’s application. To conclude otherwise would involve the court accepting that, through s. 4(7), the Oireachtas ended the decades-long understanding of short-term visas as facilitating brief visits to Ireland and transformed such visas into a first step (at a visitor’s election) towards long-term residence. Nothing in the 2004 Act suggests that s. 4(7) seeks/attains this transformative end.”*

20. He continued:

*“Ms Chen cannot force her way through the immigration system, submitting an application that is not contemplated by the statutory provision pursuant to which she purports to make it, and then complaining that there has not been due engagement with such points as she has raised in an application which did not fall properly to be brought. For her to have any prospect of succeeding before the Minister/this Court requires, in the first instance, that the form of application she made to the Minister be contemplated by the statutory provision pursuant to which that application was purportedly brought. Here it is not. Why the Minister engaged in any detail with Ms Chen’s application instead of politely refusing it on the simple but correct basis, as tendered in his submissions, that the application did not fall to brought (sic) under s. 4(7), is unclear. But that the Minister proceeded as he did does not endow him with a jurisdiction, or Ms Chen with a right, under s. 4(7), that he or she does not properly enjoy thereunder.”*

**21.** The underlying rationale of the trial judge’s decision – that the Minister did not have jurisdiction under s. 4(7) to vary a stamp previously issued – reflected neither the argument advanced by the applicant, nor that advanced by the respondent.

**22.** Following delivery of the High Court judgment, the applicant applied to Barrett J. for a certificate of leave to appeal. The respondent did not dispute the applicant’s application insofar as it was confined to whether the High Court erred in concluding that the respondent had no power in law under s. 4(7) to vary the stamp ‘C’ visitor permission to another form of immigration permission but instead sought a re-visiting of the judgment on the basis that this argument had not been advanced before the Court. The High Court refused the respondent’s application, and accordingly certified a single question of law of exceptional public importance pursuant to s. 5(6)(a) of the Illegal Immigrants (Trafficking) Act, 2000.

*‘Did the learned judge err in concluding that the Minister had no power under s.4(7) of the Immigration Act, 2004 (as amended) to vary the stamp C visa to another form of permission type?’*

***The decision in Luximon***

**23.** Central to the applicant’s case on the merits was the decision of the Supreme Court in *Luximon*. That case, it was submitted, imposed an obligation on the Minister to conduct an assessment of the impact of the decision upon the applicant’s family law rights prior to refusing her application to remain in the State. It seems clear that if *Luximon* does not impose such a requirement, this aspect of the applicant’s claim must fail.

**24.** *Luximon* involved claims brought by two citizens of Mauritius who arrived in the State in 2006 to avail of an administrative educational scheme established by the Minister. The scheme enabled students undertaking certain post-secondary level educational courses to engage in part time work. Essentially, it operated on the basis that they received what were termed ‘Stamp 2’ permissions, which were renewed annually. Ms. Luximon had worked part time in a dental practice for a number of years, and one of her daughters had been residing with her in the State since 2006 and was attending secondary school here. Mr. Balchand (the applicant in the separate proceedings heard with *Luximon*) having arrived in Ireland in 2006, had been joined by his partner. They subsequently married and had a child in 2009 who was in primary school.

**25.** Both applicants had, accordingly, established private, family and social connections in the State, and (save in one minor respect in the case of Ms. Luximon) both had complied fully with all requirements imposed on them by the authorities. They had been permitted to work in the State and had educated their children here. Their legal status was that of lawful long-duration residents whose continued presence in the State remained conditional upon periodic renewable permission granted by the respondent Minister or an immigration officer under s. 4(7) of the Immigration Act 2004 (see para. 14 of the judgment of MacMenamin J., with which all members of the Court agreed).

**26.** This scheme changed in 2011. The consequence was that in order to remain in the State the applicants had to obtain ‘Stamp 4’ permissions, which would have permitted long term residence. Their application for such permissions was refused. When refusing the applications, the Minister advised the applicants that they must leave the State at the expiry of a period fixed in those letters, unless they had obtained another form of immigration permission.

27. The issue in the case was whether the refusal of the Minister to grant the ‘Stamp 4’ permission was lawful. The Court concluded that it was not, for two essential reasons. The first was that the decisions of the Minister purported to direct the applicants to leave the jurisdiction when, it was held, the legislation did not empower him to do this. More importantly for present purposes, the Court held that in considering the applicants’ applications for permission under s. 4(7) of the 2004 Act, the respondent was (having regard to the obligations arising under the European Convention on Human Rights Act 2003) under a duty to assess whether the applicants’ rights to respect for private and family life under Article 8 of the Convention were capable of being engaged at a time when the applicant remained within the State.

28. Having reviewed a number of decisions of the European Court of Human Rights, to some of which we return in the next section of this judgment, MacMenamin J. concluded:

*‘even if, **prima facie intra vires**, the Minister’s “function” under s.4(7) should have been performed in accordance with the clear tenor of the ECtHR jurisprudence. The provision would fall to be interpreted in light of that jurisprudence. Thus, a consideration under s. 4(7) should have been carried out having regard to article 8 ECHR rights where necessary at the time of that assessment, and at a time when the applicants remained within the State. This was not done. The section was not, therefore, being applied, or operated, in a manner compliant with s. 3 of the 2003 Act.’<sup>1</sup>*

29. Several points should be made in relation to this conclusion. First, the Court made it clear that its view that the Minister was required to undertake an Article 8 assessment was based – and based exclusively – on the fact that the applicants in that case were long term

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<sup>1</sup> Emphasis is ours both here and throughout the judgment unless otherwise indicated.

residents who had in that capacity and while lawfully present in the jurisdiction, established links in the State. They were described by MacMenamin J. as persons who *‘had acquired many of the characteristics of long-term migrants, albeit subject to periodic renewal of their residency’* (para. 6). It was this characteristic that generated the entitlement to require an Article 8 assessment prior to refusal of their application.

**30.** Second, and following from this, the starting point in understanding the scope of the decision is that the Court clearly did not view its findings as having any relevance or application to the position of persons who had entered the State as short-term visitors. This is emphasised twice in the course of the judgment. At para. 6, MacMenamin J. said of the applicants in that case: -

*‘Their situations are, therefore, different from those concerning short-term visitors, or entrants engaging in temporary employment, or asylum seekers, who will generally not have established links in, or to, the State.’*

**31.** He re-iterated this in his conclusions (para. 87) :

*‘The applicants were not simply ‘visitors’, or short-term entrants to the State, or persons who had no entitlement to be here at all. These cases are very different from those other categories of persons. The factual basis of the applicants’ status required consideration of article 8 rights when the Minister was considering renewal or variation decisions concerning them.’*

**32.** It should be stressed in the light of these comments that one of the features of those cases was that the nature of the permissions granted to the applicants, and the terms on which and context in which those permissions were granted and were thereafter renewed from year to

year, was such that the applicants might, while lawfully residing here, establish such links and connections with the jurisdiction. This factor pointed to such an assessment being required before a material alteration to their status would be imposed.

**33.** The third feature of the case is the most obvious and the most important. The Court's conclusions that the applicants' cases presented circumstances in which the Minister was obliged to conduct an assessment at the point of making a renewal or variation decision was grounded exclusively on the reach of the jurisprudence of the European Court of Human Rights ('the Strasbourg Court'). The question of whether there was such an obligation thus falls to be addressed in the light of the precise nature and extent of the Article 8 right envisaged by the jurisprudence of that Court and, specifically, whether there is any version of that case law by which it could be said to extend to a person in the position of the applicant. By 'person in the position of the applicant' we should state we mean a person who has arrived in the State on a visitor's visa, who undertook to leave the State on the expiry of that visa on seeking it, and who determined to apply on the last day of that visa to remain as a long term resident on the basis of family law rights asserted to derive from her presence in the State over the preceding ninety days.

### ***The scope of the appeal***

**34.** Before considering the reach of the jurisprudence of the Strasbourg Court in the context of the facts in this case, an observation on the scope of the appeal is apposite. In the letter of 13 February 2014 (see para. 2 (vi) above) the applicant's solicitor referred to the State's obligations pursuant to the provisions of Article 40 and 41 of the Constitution as well as to Article 8 of the Convention. However, in the Order of the High Court dated 9 October 2017 granting leave to apply for judicial review, none of the reliefs in respect of which leave was



granted contain any reference to the applicant's constitutional rights. Damages were sought, specifically, pursuant to s. 3(2) of the European Convention on Human Rights Act, 2003. The re-amended Statement of Grounds dated 12 December 2018 on which the judicial review proceeded refers only to the Minister's refusal being in breach of duty, including, the duty imposed pursuant to s. 3 of the 2003 Act (see ground (e)). The applicant's submissions to the High Court confined the legal issues to a consideration of her Article 8 rights.

**35.** Before this Court, counsel for the applicant made occasional references to her client's family rights under *both* the Constitution and the Convention. Relying, for example, on *Gorry and Anor. v. Minister for Justice and Equality and A B M v. Minister for Justice and Equality* [2020] IESC 55 (at para. 209), mention was made of the Minister's obligation to assess and consider the applicant's constitutional rights. Apart from such an occasional reference, the discrete question of the applicant's constitutional rights - specifically, Article 40 or Article 41 - was not pursued during the appeal. The focus of the applicant's case was, undoubtedly and substantively, on Article 8 of the Convention and the alleged obligations which that provision imposes on the Minister when making a decision under s. 4(7) of the Act of 2004.

**36.** In these circumstances and in view of the scope of proceedings before the High Court, we consider that insofar as the Notice of Appeal refers to the trial judge's failure to consider the applicant's family and personal rights protected under the Constitution, such a claim is not properly before this Court. For that reason, this judgment considers only the claims made by the applicant in respect of Article 8 of the Convention.

### ***The reach of the case law of the European Court of Human Rights***

**37.** It appears to us difficult to sustain the contention that Strasbourg case law imposes upon the Minister an obligation to assess the Article 8 rights of a person in the position of the applicant (see para. 33) when making a decision under s. 4(7) of the Act of 2004. Cases that involve both immigration and family life, tend to fall into certain identifiable categories in the applications that are made to the Strasbourg Court.

**38.** First, there are those cases in which a State seeks to terminate the lawful residence of a settled migrant. The court approaches such a termination as an ‘interference’ with the right to respect for family life. It considers whether the State is under a *negative obligation* to refrain from interfering with the protected right. *Boultif v. Switzerland* (App. No. 54273/00) (2001) 33 E.H.R.R. 50 is a landmark case on point.

**39.** Second, there are those cases in which there is no ‘interference’ with the right to respect for family life because the State will have exercised its sovereign right to control immigration and will have refused permission to enter or reside within its territory. In these cases, the court will sometimes ask whether, notwithstanding the absence of an interference, the State has a *positive obligation* to allow the foreign national concerned to enter and reside for the purpose of exercising family life. *Tuquabo-Tekle v. the Netherlands* (App. No. 60665/00) [2006] 1 F.L.R. 798; [2005] 3 F.C.R. 649 and *Sen v. the Netherlands* (App. No. 31465/96) (2003) 36 E.H.R.R. 7 are examples of cases within this category. The applicants in each of these cases were lawfully resident in the Netherlands, but their children had remained in their country of origin and had been refused permission to join them.

**40.** Some argue that a third category of cases involving a ‘*hybrid*’ of negative and positive obligations exists.<sup>2</sup> These, it is contended, cannot be considered as purely positive obligation cases because the applicant will usually have lived, unlawfully, for a long time in the host state and, thus, realistically, a removal in such circumstances could be characterized as an ‘interference’. Here, the court, generally, considers it unnecessary to choose between negative or positive obligations because, in any event, a fair balance must be struck between the competing interests involved. An example of such a case is *Jeunesse v. the Netherlands* (App. no. 12738/10) (2015) 60 E.H.R.R. 17.

**41.** The Strasbourg Court has dealt with several cases in which the ‘host country’ operates broadly similar immigration procedures to those that exist in Ireland - procedures which require applications for long term residence to be made from outside the State. In *M.E. v. Sweden* (App. no. 71398/12) (Unreported, European Court of Human Rights, 8 April, 2015), for example, it was noted that the main rule in the relevant Swedish law (Aliens Act 2005, Chapter 5, Section 18) provides that an alien who seeks a residence permit in Sweden based on family ties must have applied for and been granted such a permit before entering the country. Similarly, in *Chandra and Others v. the Netherlands* (App. No. 53102/99) (Unreported, European Court of Human Rights, 13 May 2003) it was observed that, as a rule, anyone wishing to apply for a residence permit in the Netherlands must first apply from his or her country of origin for a provisional residence visa. Only after such a visa has been issued abroad, may a residence permit be granted (p. 4).

**42.** As noted above, the applicant was refused ‘*permission to remain*’ in the State having applied for a variation of her ‘C’ type visitor’s visa into a ‘D reside permit’. She was directed

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<sup>2</sup> See Klaassen, M., ‘*Between facts and norms: testing compliance with Article 8 ECHR in immigration cases*’ in *Netherlands Quarterly of Human Rights*, Vol 37, Issue 2, 2019.

towards the appropriate procedures to be followed should she wish to apply for long term residence. She was also advised that if she made representations under s. 3 of the Immigration Act 1999 then ‘*a detailed balancing exercising*’ would be undertaken ‘*at that stage*’ in order to ensure that her right to family life would be respected. The Minister’s approach, she asserts, constitutes a failure on the part of the State to respect her rights under Article 8 of the Convention because a comprehensive assessment of whether those asserted rights were ‘engaged’ had not been conducted. The question, therefore, that requires to be determined is whether the Minister was under a positive obligation to conduct as assessment at the time when the applicant’s request for a variation in her visa permission was refused.

**43.** In cases involving immigration and family life, the Strasburg Court, generally, begins its analysis by reiterating that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. It recognises that there may, in addition, be positive obligations inherent in effective ‘*respect*’ for family life. It considers that the boundaries between the State’s positive and negative obligations under Article 8 do not lend themselves to precise definition but that the applicable principles are, nonetheless, similar. Irrespective of whether a case is approached from the perspective of a negative or a positive obligation, regard must be had to the ‘fair balance’ that is required to be struck between the competing interests of the individual and those of the community and, in that context, the State enjoys a certain margin of appreciation. In such cases, the court invariably recalls that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territories. It also confirms that where immigration is concerned, Article 8 cannot be considered as imposing on a State a general obligation to respect the choice by married couples of the country of their residence and to authorise family reunion in its territory. To establish the scope of a State’s obligations, the facts of each individual case must be considered.

44. The Supreme Court in *Luximon* was satisfied that the Strasbourg Court had recognised that, in certain cases, a positive obligation could be imposed on the State to grant a right of residence to a foreign national. It acknowledged that such ‘residence’ cases may have been based on exceptional facts. Nevertheless, the ‘tenor’ of the jurisprudence, it held, may encompass situations such as those arising in *Luximon*. Before the Supreme Court the Minister had relied upon *Yildiz v. Austria* (App. No. 37295/97) (2003), 36 E.H.R.R. 32 and on *Maslov v. Austria* (App. No. 1638/03) (2008) 47 E.H.R.R. 20, [2009] I.N.L.R. 47 as supporting the contention that it was appropriate for an assessment of family life to be made ‘at the deportation stage’. MacMenamin J. recognised (at para. 65) that in *Yildiz* the Strasbourg Court had, indeed, accepted that on the facts before it the appropriate assessment would be determined in the light of the position ‘when the residence ban in question became final’. However, the judge was not convinced that the appellants in *Luximon* were obliged to await the making of a deportation order before having representations on their family life rights received and assessed. To oblige them to do so would have placed them in what might be described as a ‘Catch 22’ situation (see para. 55 below).

45. The Minister had also argued that *Abuhmaid v. Ukraine* (App. No. 31183/13) (Unreported, European Court of Human Rights, 12 January 2017) was authority for the proposition that the Strasbourg Court does not impose a positive obligation on the State to consider Article 8 rights where an applicant’s residence status is uncertain. MacMenamin J. considered *Abuhmaid* to be distinguishable because the Strasbourg Court had found that effective domestic remedies existed which enabled the Applicant to have his status in Ukraine determined with due regard to his private life interests and that he was entitled to remain in the Ukraine pending the determination of his application for asylum. Those facts were found to be very different from the facts in the *Luximon* appeals in which MacMenamin J. considered (at para. 71) that he could not conclude that a scheme where ‘eligibility’ to apply for

consideration ‘*would be predicated on illegality of an applicant’s status in the State could ever be Convention compliant*’.

**46.** There is a significant body of case law to show that applications under Article 8 and, indeed, Article 3 of the Convention, will be declared inadmissible by the Strasbourg Court if the expulsion of the foreign national concerned is not in the ‘*immediate contemplation*’ of the authorities and where an appropriate assessment will be available to that individual at a later stage in the domestic process (see paras. 64 and 65 below). For the reasons set out in the *Luximon* appeals (at para. 45) and based on the facts of those cases, a proposed deferral of the appellants’ assessment to the deportation stage was rejected because, *inter alia*, it would have entailed a change in the appellants’ status from one of lawfully settled residents to unlawfully present over-stayers. That cannot be said of the facts in this case. We will return to the relevant authorities later.

**47.** For now, suffice it to say that the Supreme Court took the view that notwithstanding the absence of an imminent expulsion order, there may exist a positive obligation under Article 8 when the State is considering an application in relation to the right of residence. In particular, the Grand Chamber’s judgment in *Jeunesse* was identified as a case in which the Strasbourg Court had addressed the right of an applicant to ‘*a residence permit*’ even in circumstances where she had been residing in the Netherlands without any legal entitlement to do so.

**48.** *Jeunesse* thus merits particular consideration. The applicant had been born and lived in Surinam, a former colony of the Netherlands. Both she and her partner had acquired Surinamese nationality in 1975 when Surinam gained its independence. Having exercised his right to travel to and apply for residence in the Netherlands, the applicant’s partner was granted Netherlands nationality in 1993. This entailed the renunciation of his Surinamese nationality.

In 1997, the applicant travelled to the Netherlands on a visitor's visa (valid for 45 days) and had, thereafter, remained with her partner and had married him. From the outset, she had made several unsuccessful attempts to regularise her status in the host State. By the time the Grand Chamber delivered its judgment in 2014, she had lived in the Netherlands for over almost two decades. Her husband and their three children were Dutch nationals.

**49.** At the outset, the Court noted the applicant's failure to obtain a provisional residence visa from abroad before seeking permanent residence rights in the Netherlands. It confirmed that States are under no obligation to allow foreign nationals to remain on their territory whilst awaiting the outcome of immigration proceedings. (See *Longa v. Netherlands* (App. No. 33917/12) (2013) 56 E.H.R.R. SE1).

**50.** In the Court's view, the applicant's stay in the Netherlands could not be equated with a lawful stay where an alien obtains permission to reside in the country and becomes a 'settled migrant'. Where settled migrants are concerned the Strasbourg Court will examine whether a withdrawal of a residence right is a justified interference under Article 8(2) and, in so doing, it will have regard to specific criteria to determine whether a fair balance has been struck between the grounds underlying the authorities' decision and the Article 8 rights of the individual concerned.<sup>3</sup>

**51.** The Court then recalled its well settled principle that confronting the authorities with family life as a *fait accompli* does not entail that those authorities are, as a result, under an obligation pursuant to Article 8 of the Convention to allow an applicant to settle. In this regard, persons in such situations, generally, have no entitlement to expect that a right of residence

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<sup>3</sup> See *Boultif v. Switzerland* (App. No. 54273/00) (2001) 33 E.H.R.R. 50; *Üner v. the Netherlands* (App. No. 46410/99) (2007) 45 E.H.R.R. 14; and *Maslov v. Austria* (App. No. 1638/03) (2008) 47 E.H.R.R. 20, [2009] I.N.L.R. 47.

will be conferred upon them.<sup>4</sup> Having confirmed (at para. 105) that the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country are ‘*not the same*’, the Court was satisfied that the criteria developed in its caselaw for assessing whether the withdrawal of a right of residence was compatible with Article 8 could not be transposed, automatically, to the situation of the applicant—a person who had never been lawfully present in the State. As there was no ‘*interference*’ by the State in *Jeunesse*, the Court considered that the question that fell to be examined was whether, having regard to all of the circumstances, the Netherlands authorities were, nevertheless, under a duty pursuant to Article 8 to grant the applicant a right of residence thus enabling her to exercise family life on their territory.

52. The Court reiterated that where immigration is concerned Article 8 cannot be considered to impose on a State a general obligation to authorise family reunification on its territory (para. 107). It held that 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. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of*

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<sup>4</sup> See, for example, *Chandra and Others v. the Netherlands* (App. No. 53102/99) (Unreported, European Court of Human Rights, 13 May 2003); *Benamar v. the Netherlands* (App. No. 43786/04) (2005) 41 E.H.R.R. 69, 41 E.H.R.R. SE45; *Priya v. Denmark* (App. No. 13594/03) (Unreported, European Court of Human Rights, 6 July 2006); and *Rodrigues da Silva and Hoogkamer v. the Netherlands* (App. No. 50435/99) (2007) 44 E.H.R.R. 34, para. 43.



*public order weighing in favour of exclusion (see Butt v. Norway, cited above, § 78)."*

**53.** Another important factor to be considered is whether family life was created at a time when the foreign national's immigration status was such that the persistence of family life within the host state was, from the outset, precarious. In such cases it is likely to be only '*in exceptional circumstances*' that the removal of the non-national family member would constitute a violation of Article 8.<sup>5</sup> Applying the foregoing principles, the Grand Chamber in *Jeunesse* examined whether there existed '*exceptional circumstances*' such that the removal of the applicant would be incompatible with Article 8 of the Convention.

**54.** In making its assessment, the Court had regard to several factors, the first and foremost of which was the fact that all members of the applicant's family, apart from herself, were Dutch nationals who had a right to enjoy their family life in the Netherlands. It noted that the applicant had, originally, held Netherlands nationality which she lost pursuant to a bilateral agreement between the Netherlands and the Republic of Surinam. In this regard, her position was not on a par with other potential immigrants who had never held Netherlands nationality. Another important feature of the case was the fact that Mrs Jeunesse had been living in the Netherlands for a long time. Her presence had been tolerated for many years during which she had made numerous applications to regularise her situation. She had no criminal record and her address was known to the authorities and they had failed to remove her. A third factor considered was the likelihood that the applicant and her family would experience a degree of hardship if they were forced to remove themselves to Surinam. Returning her to Surinam would, inevitably,

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<sup>5</sup>See *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (App. Nos. 9214/80; 9473/81; 9474/81) (1985) 7 E.H.R.R. 471, para. 68; *Mitchell v. the United Kingdom* (App. No. 40447/98) (Unreported, European Court of Human Rights, 24 November 1998); *Rodrigues da Silva v. the Netherlands* App. No. 50435/99) (2007) 44 E.H.R.R. 34; and *Butt v. Norway* (App. No. 47017/09) (Unreported, European Court of Human Rights, 4 December 2012).

have involved either the removal of her children to a country unknown to them or a constant rupture between them and their mother should they decide to remain. Finally, regard was had to the impact of the Netherlands' decision on the applicant's three young children. Whilst not decisive, their interests were to be afforded significant weight. The Court noted that the applicant, as mother and homemaker, was the primary and constant carer of her three children all of whom were deeply rooted in the Netherlands, a country of which, like their father, they were nationals.

**55.** Having reiterated and confirmed the Court's well-established principles on immigration and family life (see paras. 50-53 above), the Grand Chamber concluded that, viewed cumulatively, the above factors must be regarded as constituting exceptional circumstances. Accordingly, it found that in denying the applicant a right of residence a fair balance had not been struck between the competing interests involved such that the Dutch authorities had failed to secure respect for her right to family life.

**56.** Having reviewed *Jeunesse* (and *da Silva v. the Netherlands* App. No. 50435/99) (2007) 44 E.H.R.R. 34) on a State's positive obligations, MacMenamin J. in *Luximon* held (at para. 85) that the Minister's consideration under s. 4(7) should have been carried out having regard to Article 8 rights where necessary at the time of that assessment and whilst the applicants remained within the State (see para. 28 above). As this had not been done, the section was not applied **in that case** in a manner that was Convention compliant.

#### ***Application to the present case***

**57.** There is a stark and obvious contrast between the facts in *Luximon* (and *Jeunesse*) and the situation of the applicant in these proceedings. Unlike the applicant, the appellants in *Luximon* were lawfully settled migrants and the Minister's letter directing them to leave the

State was a clear interference with their established family life in Ireland. For this reason, even without the Grand Chamber's judgment in *Jeunesse*, the standard jurisprudence on the rights of lawfully settled migrants (such as set out in *Üner v. the Netherlands* (App. no. 46410/99) (2007) 45 E.H.R.R. 14 or *Boultif v. Switzerland* (App. No. 54273/00) (2001) 33 E.H.R.R. 50) would, in any event, have required an Article 8 assessment. What *Jeunesse* did was to recognise that there may be rare situations where it can be shown that, notwithstanding an applicant's unlawful presence in the State, there may exist '*exceptional circumstances*' where a removal would constitute a violation of Article 8 of the Convention.

**58.** Moreover, the Supreme Court in *Luximon* stressed, on several occasions, that its findings were based only on the facts of those cases (see paras. 6, 81 and 88). To deprive the appellants in *Luximon* of an Article 8 assessment would have placed them in a 'Catch 22' situation. They would either have had to leave the jurisdiction thereby creating an actual change in their family life status (potentially, in breach of their rights) **or** they would have had to refuse to comply with the Minister's letter thereby remaining, unlawfully, in the State and thus impairing their family life status and their chances of a successful application. They were in a 'no win' situation. In contrast to the situation in *Luximon*, the refusal to vary the applicant's visa and the direction that she should make arrangements to leave the State, entailed no change at all in her status. She had entered the State as a visitor. The entire basis on which she was given permission to enter the jurisdiction was that she would leave after a short period. On no version of those facts could it be said that she lawfully acquired a settled status. When her visiting permission expired, she was obliged to leave the State as she had undertaken to do on being granted permission to come to the jurisdiction in the first place. It was only in the very specific circumstances of *Luximon* that the Supreme Court concluded that the Minister should have performed his function under s. 4(7) of the Act of 2004 in accordance with the '*tenor*' of the

Strasbourg jurisprudence on settled migrants. The Minister's interference in their lawfully established family life warranted a considered justification based on 'serious reasons'.<sup>6</sup>

**59.** Even if the applicant's son were to be considered a settled migrant (and the grant of his residence permit just prior to her visit must, at least, raise a question in this regard), the extent of a State's obligation to admit *relatives* of persons residing there will vary according to the particular circumstances and to the general interest (see *Jeunesse* para. 105). It is only in 'exceptional circumstances' that a positive obligation will be imposed on the State to ensure that a fair balance is struck between the competing interests involved. There was nothing even remotely 'exceptional' about the applicant's case, and accordingly nothing to ground the claim that – exceptionally – as a precondition to refusing her application for a variation of her permission an Article 8 assessment had to be conducted. She was a visitor whose visa had expired, she entered on a basis fundamentally inconsistent with the acquisition of a long term settled status and she had never been 'resident' as such in the State.

**60.** The applicant's presence in the State after 14 November 2013 was, accordingly, not 'settled'. In this context, it is ambitious, to say the least, for her to argue that the case law of the European Court of Human Rights confers upon her the right to have an application for residence based on established 'family life' in Ireland assessed at the expiry of a 90-day visa granted on the basis that she would leave the jurisdiction at that time. With *Luximon* clearly distinguishable, we find no authority within the Strasbourg case law—whether under negative, positive or hybrid obligations on the part of the State—which supports her contention that the Minister was obliged to assess her Article 8 rights at the time when her application under s. 4(7) of the 2004 Act was refused.

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<sup>6</sup> On the requirement for 'serious reasons' see *Levakovic v. Denmark*, (App. No. 7841/14) (Unreported, European Court of Human Rights, 23 October 2018, para. 45).

**61.** Nor, indeed, does the applicant point to any case from the Strasbourg Court in which it was held that an assessment of an Article 8 claim must be undertaken by the State in respect of a person in the position of the applicant. The reasons for this must be considered self-evident. Leaving family members with whom one does not ordinarily reside cannot be said to constitute a ‘*rupture*’ in family life in the sense in which that phrase is used in the case law of the Strasbourg Court. On the contrary, it involves a return to habitual circumstances. Moreover, in immigration cases, there will be no ‘family life’ between parents and adult children unless they can demonstrate additional elements of dependence other than normal emotional ties.<sup>7</sup> ‘Ties’ in a contracting State of the kind thus envisaged by the case law are unlikely to be established on foot of a three-month visit. Such ties refer to that network of cultural, linguistic and social connections that arise from being embedded in a State by virtue of one’s history of residence therein and arising, *inter alia*, from professional, vocational or educational commitments. Insurmountable obstacles to family life ‘elsewhere’ are unlikely to exist when most of one’s family life has been established and enjoyed ‘elsewhere’. Even where an Article 8 assessment is required to be conducted in the face of an imminent expulsion, there is no obligation on the authorities to grant a right of residence where they have been confronted with family life as a *fait accompli*.

**62.** The applicant was denied her request for residence some twenty weeks after it was made. The Minister confirmed that the individual circumstances of her case had been considered as had all representations made on her behalf. His decision underscored that the purpose of her journey had been to visit the State and that she had undertaken to observe the conditions of the visa and to leave the State when that visa expired. He acknowledged her right to respect for

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<sup>7</sup> See *Kwakyie-Nti and Dufie v. the Netherlands* (App. No. 31519/96) (Unreported, European Court of Human Rights, 7 November 2000); *Slivenko v. Latvia* (App. No. 48321/99) (2004) 39 E.H.R.R. 24, para. 97; *A.S. v. Switzerland* (App. No. 39350/13) (2017) 65 H.E.R.R. 12, para. 49; and *Levakovic v. Denmark* (App. No. 7841/14) (Unreported, European Court of Human Rights, 23 October 2018) paras. 35 and 44.

family life under Article 8(1) and confirmed that this had to be considered in the context of the State's right to control its borders and to operate a regulated system for the control, processing and monitoring of non-EEA national persons in the State in line with the provisions of Article 8(2) of the Convention.

**63.** Importantly, the Minister's decision emphasised that a refusal of a residence permission under s. 4(7) of the Act of 2004 did not, of itself, involve any separation of the family unit. This, in our view, demonstrates that the issue of an '*interference*' in family life had been considered and, rightly, excluded at that stage of the process. It was clear from the terms of the refusal that any positive obligations that could arise under Article 8 would be addressed at a later stage. As noted by Ryan, P. in *AB & Others v. Minister for Justice, Equality & Ors* [2016] IECA 48 (albeit in a different context), an applicant does not '*possess the right to insist on a particular procedure*' or to impose on the Minister an obligation to consider her application and her circumstances in advance of those same circumstances being assessed in the context of a deportation proposal.

### ***The deferral of the Article 8 assessment***

**64.** Not only has there been no final decision on a proposal to deport the applicant, but she has been assured that '*a detailed balancing exercise*' will be conducted should she make representations in the context deportation proceedings. This, in our view, brings the case clearly within the parameters of the Strasbourg Court's jurisprudence on Article 37(1)(c) of the Convention. This provision empowers the court to strike out an application where the circumstances lead to the conclusion that it is no longer justified to continue with an examination thereof. Numerous applications have been struck out where the expulsion of a

foreign national was not in the immediate contemplation of the State authorities. This is so particularly where the person concerned will be afforded an opportunity to challenge an expulsion order before the national authorities and, if necessary, before the courts.<sup>8</sup>

**65.** *F.I. and Others v. the United Kingdom* (App. No. 8655/10) (Unreported, European Court of Human Rights, 15 March 2011) is an example of such a case. The applicant had entered the UK on a visitor's visa. Upon its expiry he over-stayed and, thereafter, remained, unlawfully, within the respondent State. He fathered several children, some of whom became the subject of care proceedings. When the UK authorities refused him permission to remain, he sought judicial review. This was denied before the High Court and on appeal. He was joined as a party to child care proceedings. When removal directions were issued, he made an application to the Strasbourg Court claiming that his removal would violate Article 8. Whereas, initially, an interim measure had been imposed restraining his removal, the Court, on further examination, struck the application out of the list on the basis that he would have available to him **at a future date** the possibility of challenging his removal. It stated that it had: -

*'no reason to doubt that all of the outstanding issues under Article 8 of the Convention will similarly be re-examined by the domestic authorities in a global assessment **at that stage** and that further domestic remedies, including a suspensive right of appeal, will be available to the applicants.'*

**66.** In challenging an expulsion based on an alleged interference with family life, '*. . . it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive*

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<sup>8</sup>See *F.I. and Others v. the United Kingdom* (App. No. 8655/10) (Unreported, European Court of Human Rights, 15 March, 2011); *Atayeva and Burmann v. Sweden* (App. No. 17471/11) (Unreported, European Court of Human Rights, 31 October, 2013) paras. 19-24; and *P.Z. and Others v. Sweden* (App. No. 68194/10) (Unreported, European Court of Human Rights, 18 December, 2012) paras. 14-17.

*effect*’ (*De Souza Ribeiro v. France* (App. No. 22689/07) (2014) 59 E.H.R.R. 10, para. 83). However, the applicant does have an effective possibility of having her asserted Article 8 rights assessed within the context of s. 3 of the 1999 Act. If, having regard to the timing of events in *F.I.*, the Strasbourg Court found that there was no justification for examining his Article 8 complaint (as the father of several children), then it is difficult to envisage what, in the instant appeal, could justify the applicant’s asserted entitlement to a full assessment of her Article 8 rights *at the time* when her application to vary her visa under s. 4(7) of the Act of 2004 was refused. This is all the more so in circumstances where she has been advised, expressly, by the Minister that if she were to make representations under s. 3 of the 1999 Act then a detailed examination of her case would be undertaken at that stage to ensure that her right to family life would be respected. There is no basis on which it could be said that a grandparent in the applicant’s position, having spent just 3 months in the State, should fare any better than the applicant father in *F.I.*

### ***Other relevant case law***

**67.** One issue that may be considered by the Strasbourg Court in the context of Article 8 claims is whether a foreign national has had effective access to procedures by which a residence permit may be obtained that would allow lawful residence in the respondent State. In *G.R. v. The Netherlands* (App. No. 22251/07) (Unreported, European Court of Human Rights, 10 January, 2012), for example, the Court took the view that the essential question was whether the applicant had effective access to the administrative procedure by which he might, ‘*subject to fulfilling the conditions prescribed by domestic law*’, obtain a residence permit which would allow him to reside lawfully with his family in the Netherlands (para. 43).

**68.** As already noted, the applicant was expressly apprised of the administrative procedure



(‘D reside visa’) which is available to her as a visa-required person should she seek to reside in the State. ‘[S]ubject to fulfilling the conditions prescribed by domestic law’, she may apply from her country of origin and the Minister accepts that he would be obliged to consider asserted family rights and circumstances ‘*in detail*’ if presented with such an application.<sup>9</sup> She is not entitled to stipulate the conditions prescribed by law, she must fulfil them. The applicant’s alleged entitlement to a full assessment of her Article 8 rights at the time of her choosing, namely, on foot of a failed application for a variation of her visa under s. 4(7) of the Act of 2004, is entirely misconceived.

**69.** Reinforcing the point that short term, visa-holding visitors are not entitled to claim a right of residence within a host state is the decision in *Chandra & Ors. v. The Netherlands* (App. No. 53102/ 99) (Unreported, European Court of Human Rights, 13 May 2003). The applicants in *Chandra* had entered the Netherlands on a holiday visa to visit their mother who had settled there some years previously. Their visa was valid for 90 days. During the course of their visit, they lodged a formal application for a residence permit in order to live with their mother. Their application was rejected. The Dutch Deputy Minister found that the decision did not entail a breach of Article 8 of the Convention since it did not prevent the applicants from continuing to exercise their family life as they had done prior to their arrival in the Netherlands. Moreover, the Deputy Minister informed the applicants that they were not allowed to await the outcome of their objection to his decision in the Netherlands. They filed a request with the Hague Regional Court for a provisional measure that would allow them to remain pending the proceedings on their objection. The Deputy Minister rejected their objection and an appeal to the Hague Regional Court was filed. The children amended their request for a provisional measure to include permission to remain in the Netherlands pending the outcome of the appeal.

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<sup>9</sup> See Submissions of the Respondent, paragraph 31.

The Regional Court rejected both the appeal and the request for a provisional measure. It saw no merits in the arguments that refusing the children residence would amount to a violation of Article 8. In this context it took into account the fact that the proceedings concerned ‘*a request for a first admission. . . rather than a refusal to extend existing residence*’ (p. 3). It also held that there were no objective obstacles to family life being exercised elsewhere.

70. In assessing their complaint, the Strasbourg Court confirmed that Article 8 does not impose upon a State a general obligation to respect immigrants’ choices regarding their preferred country of residence and to authorise family reunification within its territory. It noted that before entering the Netherlands, the applicants had lived all their lives in Indonesia and must, therefore, be deemed to have strong links with the linguistic and cultural environment of that country. Of particular note in the context of the present appeal were the following remarks of the Court: -

*“Although the Court appreciates that the applicants would now prefer to maintain and intensify their family life in the Netherlands, Article 8 . . . does not guarantee a right to choose the most suitable place to develop family life.*

*(. . . .)*

*The fact that the children have been staying with their mother in the Netherlands since 1997 does not impose a positive obligation on the State to allow the children to reside there since they entered the Netherlands only for visiting purposes. Having chosen not to apply for a provisional residence visa from Indonesia prior to travelling to the Netherlands, the applicants were not entitled to expect that, by confronting the Netherlands authorities with their presence in the country as a fait accompli, any right of residence would be conferred on them.*

*In these circumstances the respondent State cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.*

*It follows that the present case discloses no appearance of a violation of Article 8 of the Convention on its facts, and that it must be rejected as being manifestly ill-founded, pursuant to Article 35, §§ 3 and 4 of the Convention."*

71. Likewise, the applicant in these proceedings, having arrived in the State on a visitor's visa, is not entitled to insist on a full assessment of her Article 8 rights by confronting the Minister with her presence in the State and by asserting a 'family life' as a *fait accompli*. If she wishes to reside in the State, she is required to respect its immigration system and to return to the People's Republic of China in accordance with the undertaking she furnished. From there, she may apply for permission to reside in accordance with the procedures prescribed by law. She has no entitlement to dictate or to circumvent those procedures.

### ***'Engagement' of family life***

72. The Strasbourg Court's judgment in *Senchishak v. Finland* (App. No. 5049/12) (Unreported, European Court of Human Rights, 18 November 2014) cannot but reinforce the conclusions reached in this appeal. The applicant visited her adult daughter in Finland on a 30-day tourist visa. Ten days into her visit, she applied for a residence permit on the basis of family ties to her daughter. She had claimed that she could not endure separation from her daughter and that such separation would lead to her death through sickness or suicide. Her application was refused, and the refusal was upheld by the Courts. Under Finnish law she was

not deemed to be a family member (a spouse or a minor child) of a person living in Finland and, thus, had no entitlement to a residence permit.

**73.** The applicant complained to the Strasbourg Court that her removal to Russia by the Finnish Authorities would violate Article 8 of the Convention. The government argued that the impugned measure was in accordance with law and pursued the legitimate aim of public safety, economic wellbeing of the country, and the protection of the rights and freedoms of others. The applicant, it claimed, could not be considered a settled migrant and the impugned measure was necessary in a democratic society. The applicant argued that during the previous five years she had a close family relationship with her daughter and the family. In Russian culture, grandparents were considered as family members who needed protection and it was considered the child's responsibility to take care of the parent.

**74.** The Court noted that in the Convention case law relating to expulsion, the main emphasis had consistently been placed on the '*family life*' aspect, which had been interpreted as encompassing the effective '*family life*' established in the territory of a contracting State by aliens lawfully resident there, it being understood that '*family life*', in this sense, is normally limited to the core family (see *Slivenko v. Latvia* (App. No. 48321/99) (2004) 39 E.H.R.R. 24, para. 94). The Court further recalled that the Convention includes no right, as such, to establish one's family life in a particular country.<sup>10</sup> It reiterated the principle that: -

*“relationships between parents and adult children do not fall within the protective scope of Article 8 unless ‘additional factors of dependence, other than normal emotional ties,*

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<sup>10</sup>See, *inter alia*, *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (App. Nos. 9214/80; 9473/81; 9474/81) (1985) 7 E.H.R.R. 471, para. 68 and *Gül v. Switzerland* (App. No. 23218/94) (1996) 22 E.H.R.R. 93, para. 38.

*are shown to exist’ (see Emonet & Ors. v. Switzerland, No. 39051/03, para. 35, 13 December 2007; and, Mutatis Mutandis, Kwakye-Nti & Duffie v. The Netherlands (dec.) No. 31519/96, 7 November 2000). Therefore, the existence of “family life” cannot be relied on by applicants in relation to their elderly parents, adults who do not belong to the core family unless the latter have been shown to be dependent upon the members of their family (see Slivenko v. Latvia (G.C., cited above, para. 97).”*

**75.** The fact that the applicant had spent the previous five years in Finland did not, in the Court’s view, create a relationship between her and her daughter which amounted to ‘family life’ within the meaning of Article 8 of the Convention. Her presence during those five years had been unlawful and she must have been aware of her insecure situation created by her non-regularised status in Finland. As to the issue of dependence, even assuming that the applicant was dependent on outside help to cope with her daily life, that alone did not mean that she was dependent on her daughter or that care in Finland was the only option. The Court considered that she could be supported by her daughter, financially and otherwise, from Finland. Having regard to its case law, it concluded that no ‘*additional factors of dependence other than normal ties of affection*’ existed between the applicant and her daughter and that there was thus no ‘family life’ between them within the meaning of Article 8. The Court concluded that Article 8 was ‘**therefore not applicable in the instant case due to the lack of family life**’ and the complaint was rejected as incompatible *ratione materiae* with the provisions of the Convention.

**76.** It could be argued that the Court in *Senchishak* adopted a particularly restrictive approach to what constituted ‘family life’. There is, at least, some authority to support the contention that family life, within the meaning of Article 8, may be said to exist between grandparents and grandchildren where there are sufficiently close family ties between them (see *Lawlor v. United Kingdom* (App. No. 12763/87) Commission decision of 14 July 1998, Decisions and Reports

(DR) 57, p. 216). However, the Court's general jurisprudence is to the effect that, in normal circumstances, the relationship between grandparents and grandchildren is different in nature and degree than the relationship between parent and minor child and thus, by its very nature, generally calls '*for a lesser degree of protection*' (see *Kruškić v. Croatia*, (App. No. 10140/13) (Unreported, European Court of Human Rights, 25 November 2014). In *Kruškić*, the Court confirmed that the right to respect for family life of grandparents in relation to their grandchildren, primarily entails the right to maintain 'a normal grandparent/grandchild relationship' through contacts with them.

### ***Summary Conclusions***

77. The applicant's reliance on *Luximon* in support of her claim on how s. 4(7) of the 2004 Act must be interpreted, is entirely misconceived. The facts are altogether different. Section 4(7) was considered in *Luximon* in the context of long term, lawfully settled migrants with established links in the State asserting entitlements arising from their relationship with their similarly settled children and/or partners. The applicant, by contrast, arrived in this jurisdiction for a short term stay, that facility was extended to her on the express basis that she would leave the State upon expiry of the relevant period, it was acknowledged by her that she would comply with this requirement, and she asserts a family life *inter alia* in her capacity as grandparent. Since the expiry of the period fixed in her visa, her presence in the State has been unlawful. Interpreting the same provision in the context of this appeal, no basis whatsoever has been disclosed for the contention that the Minister was obliged, at the time of refusing the applicant's request under s. 4(7) of the Act of 2004, to conduct an assessment in order to establish whether her asserted Article 8 rights were 'engaged'. Her contention, in this regard, must accordingly fail.

78. Our finding in this regard is consistent with the findings of the Supreme Court in *Luximon*, and follows from that decision. Not only does the applicant fail to bring her claim within the ambit of Strasbourg case law as applied in *Luximon*, but, as a short-term visitor, hers is precisely the category of case which the Supreme Court distinguished from the case that was made in *Luximon*.

79. Referring to *Hussein v. The Minister for Justice* [2015] IESC 104, [2015] 3 I.R. 423, MacMenamin J. recalled (at para. 56) that the Minister's duty '*was to make a decision rationally and in accordance with the principles of natural justice*'. The Minister's power under s. 4(7) was not of a legislative nature '*but was a power to make a decision in an individual case and was an exercise of executive power*'. We are satisfied that the Minister has made a decision, rationally, and on the individual circumstances of the applicant's case. It was a decision he was entitled to make based on the facts as presented. When compared to *Luximon*, the decision in this case, '*arose in different circumstances*' which give rise '*to different considerations on different facts*' (*Luximon*, para. 57).

80. In *Luximon* the Supreme Court emphasised that the Minister was and is entitled to impose conditions on entry to the State. The terms '*renewal*' or '*variation*' in s. 4(7) must also imply that the Minister may, lawfully, determine that there is or has been non-compliance with conditions laid down and that, **where warranted**, he should not renew permission. MacMenamin J. confirmed (at para. 88) that the Minister is entitled to set limits on persons remaining in the State and that the scope of the judgment in *Luximon* '*must not be extended beyond its intent*'.

81. There is nothing on the facts of the instant case that is in any way and even remotely comparable to the facts in *Luximon* or in the cases of the Strasbourg Court upon which the

reasoning in *Luximon* was based. There was no obligation on the Minister to conduct a full assessment of the applicant's asserted Article 8 rights when her short-stay visa expired and her request for residence was made. To impose such an obligation upon the Minister would be to make the immigration system overly burdensome and, in effect, to render that system unworkable. In this regard we accept the respondent's submission that the applicant's approach, if condoned, would wholly undermine the process established, would lead to breaches of undertakings given and would render meaningless the consideration afforded to the visitor-visa applications.

**82.** The State is entitled to control, regulate and impose conditions upon those who enter its territory and who seek to remain therein. The applicant was not entitled to use the visitors' visa system to gain entry into the State and, thereafter, to breach her undertaking and to insist that her family life rights be assessed at a time of her election. To the extent that there is a positive obligation on the State to assess her asserted rights, such an obligation did not arise at the point in time contended for by the applicant. A detailed balancing exercise of the interests involved will be undertaken at a later stage if the applicant makes representations in the context of deportation proceedings. On the facts of this case, such an approach is entirely sufficient to discharge the State's obligations under Article 8 of the Convention.

***On the certified question of law and the non-remittal of the proceedings***

**83.** For the sake of completeness, two final matters require to be addressed. When this appeal was listed for hearing, the Court indicated that, in the first instance, it wished to be addressed on the jurisdictional issue that arose, namely, whether the Minister had the power under s. 4(7) of the Act of 2004 to vary the applicant's visa type—and, if the parties were agreed on that point, then on whether the matter should be remitted to the High Court for determination of the



substantive Article 8 claim. Subsequently, the parties were invited to address the Court on the merits of the applicant's claim under Article 8.

**84.** Both the appellant and respondent submitted that the Minister enjoys a power pursuant to s.4(7) of the Act of 2004 to vary a Stamp 'C' visitor permission to another form of immigration permission. For several reasons, we consider that the parties' submissions in this regard are correct.

**85.** First, there is nothing in the express wording of s. 4(7) to indicate any want of jurisdiction on the part of the Minister to amend or to vary an immigration permission when an application therefor is made. The provision is drafted unambiguously and in permissive terms—a permission '*may*' be renewed or varied on an application by a non-national being made. As Cooke J. observed (at para. 6) in *O'Leary and Others v the Minister for Justice, Equality and Law Reform* [2012] IEHC 80, the Oireachtas has conferred upon the respondent Minister the exclusive discretion in exercise of the sovereign competence of the State to decide whether foreign nationals should be permitted to remain.

**86.** Second, s. 4(7) of the Act of 2004 has been considered by the Superior Courts in several earlier cases without demur to the Minister's jurisdiction to vary one type of immigration permission for another. (See, for example, *O'Leary* and see also *Qingzhou Li and Huimin Wang v The Minister for Justice and Equality* [2015] IEHC 638). In no instance has there been a finding that the Minister lacked jurisdiction to vary or renew a visa permission under that provision. On the contrary, the Superior Courts have always proceeded on the understanding that such a power inheres in the Minister.

**87.** Moreover, in *Luximon*, the Supreme Court examined an application that had been made to the Minister pursuant to s. 4(7) of the 2004 Act. If it had considered that the Minister had

no power to renew or vary an immigration permission in the first place then, it seems to us, that the Supreme Court would have said so. It is clear from the judgment in the *Luximon* appeals, however, that the Supreme Court accepted the Minister's jurisdiction as a given and, having done so, concluded that in exercising such jurisdiction **in those cases** he was obliged to consider the appellants' family life rights at a time when they remained in the State.

**88.** In our view, the learned trial judge fell into error in concluding that the Minister had no power under s.4(7) of the Immigration Act, 2004 (as amended) to vary the stamp 'C' visa to another form of immigration permission. As a matter of law and contrary to the finding of the High Court judge, we are satisfied that the Minister does enjoy a jurisdiction under that provision to process an application to vary one type of visa permission to another. To ensure the integrity of the visa system, he refused, on the facts presented in this case, to accede to the applicant's request. He considered that a visitor's visa should not be used as a route into long term residence in the State. He was entitled to come to that view.

**89.** As to whether the substantive matter should be remitted to the High Court, the parties disagreed. The Court observes that only one question of law was certified by the High Court in this appeal. The applicant submits that this Court is not limited on appeal to the question so certified and, in this regard, refers the Court, *inter alia*, to the judgment of Clarke J. in *L.O'S. v. Minister for Health & Children* [2015] IESC 61. She also submits that the case on the substantive issue was argued, fully, before the High Court and that no new line of submission has been advanced for the first time on appeal. The respondent, on the other hand, submits that if the appeal on the jurisdictional issue is allowed, then the matter should be remitted to the High Court for a re-hearing of the substantive issue. That issue, it is claimed, should not be determined by this Court '*in the first instance*' as this would deprive both sides of an appeal or the possibility of an appeal.

90. For several reasons, we have come to the view that an order remitting the matter would not be appropriate in this case.

91. First, although the High Court certified only one question of law (the jurisdictional question), there is no legal impediment to this Court considering other issues of law that come within the ambit of this appeal. As Hardiman J. observed (at para. 22) in *The Minister for Justice, Equality and Law Reform v Connolly* [2014] 1 I.R. 720, an appellate court, once seized of an appeal, ‘*can decide any issue and make any order which the High Court decided or might have decided*’. It is, therefore, open to this Court to consider any point which arises in this appeal and is not confined to the particular point of law which was the subject of the High Court certificate.

92. Second, notwithstanding the trial judge’s fundamental error on the jurisdictional issue, the parties agree that that substantive Article 8 point, whilst not decided on its merits, was raised and argued, fully, by both sides in the proceedings before the High Court. The fact that the trial judge’s finding reflected neither the arguments pleaded nor advanced on the merits, does not detract from the fact that those arguments were canvassed and explored. Where arguments have been advanced on an issue that was raised in the court below, this Court has jurisdiction to determine that issue. In *A.A. v Medical Council* [2003] 4 I.R. 302 it was held by the Supreme Court (at p. 308) that ‘*. . . the court has jurisdiction to consider all the issues defined by the pleadings which were the subject of evidence or submissions in the High Court and the court is not automatically precluded in every cases from considering such an issue simply because it has not been the subject of a determination by the High Court Judge.*’ The point was underscored again by the Supreme Court in *McGowan v. The Labour Court* [2013] 3 I.R. 718 where it held that an appellate court may determine an issue that was fully argued before, but not determined by, the High Court, where the interests of justice so require.

**93.** Moreover, Order 86A, r. 2(1) RSC also expressly recognises that this Court ‘*may exercise or perform all the powers and duties of the court below*’ and ‘*may give any judgment and make any order which ought to have been given or made and may make any further or other order as the case requires*’.

**94.** Additionally, the question before this Court does not depend on the resolution of any issue of fact but is, fundamentally, a question of law. We are satisfied that both parties have already had an opportunity to argue their case, comprehensively, before the High Court. They both made submissions on the merits to the court below and they both enjoyed the same opportunity to do so before this Court. Thus, it cannot be said that a refusal to remit, in this instance, would deprive the unsuccessful party of its right to an appeal on the merits.

**95.** Finally, it seems to us that a remittal of proceedings would, inevitably, give rise to a further proliferation of the overall costs of these proceedings. It does not appear to be either in the interests of the parties or, indeed, the public interest, to generate such an escalation.

### ***Decision***

**96.** For the reasons set out above, we would answer the certified question of law as posed by the High Court in the affirmative. This Court finds that the learned judge erred in concluding that the Minister had no power under s. 4(7) of the Immigration Act, 2004 (as amended) to vary the stamp ‘C’ visa to another form of permission type.

**97.** In view of this finding, we would allow the appeal of both parties on this point and vacate the Order of the High Court.

**98.** On the substantive point which was not decided by the High Court, we find, on the facts of this appeal, that the Minister was entitled to apply s. 4(7) of the 2004 Act in the way that he did. There was no unlawful failure on his part to consider the applicant's asserted rights. He was entitled to reject the applicant's request to vary her visitor's visa and to require that any application for long term residence be made through the appropriate immigration procedures. In coming to his decision under s. 4(7) of the 2004 Act, and notwithstanding that he did, in fact, consider the applicant's individual circumstances, the Minister was not obliged to conduct an assessment of the applicant's asserted Article 8 rights at that stage. We are further satisfied that the Minister was entitled to find that the applicant's use of the visitors' visa process to circumvent the requisite procedures required to be followed by those seeking a long-stay residence permit, constituted an unacceptable abuse of the visa system. This is all the more so in circumstances where she had furnished an undertaking that she would leave the State upon the expiry of her visitor's visa.

**99.** Provisionally, we are of the view that because the respondent has succeeded on the substantive issue, he is entitled to an Order for costs against the applicant in respect of this appeal and in respect of the hearing before the High Court. In a situation where the applicant's case did not come remotely near the circumstances addressed in the authorities upon which she relied, we can see no basis on which she might avoid the usual rule as to costs in this Court and in the Court below. This, we should stress, is merely our provisional view. If the applicant wishes to argue for an alternative order in this regard, she may apply within fourteen days to the Office of the Court of Appeal to have the matter listed for a short hearing in relation to the costs.

**100.** As this judgment is being delivered, electronically, Faherty J. has indicated her agreement with the reasoning and conclusions reached in respect of this appeal.