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THE SUPREME COURT

[RECORD NO.: 70/2021]

O’Donnell C.J.

MacMenamin J.

O'Malley J.

Baker J.

Hogan J.

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000 (AS AMENDED), AND IN THE MATTER OF THE INTERNATIONAL PROTECTION ACT, 2015

BETWEEN:

A.S.A.

APPELLANT

AND

MINISTER FOR JUSTICE & EQUALITY

RESPONDENT

RULING delivered by Mr. Justice John MacMenamin dated the 2nd day of February, 2022

Summary

This is a ruling on an application brought by the appellant to introduce an argument not previously argued in the High Court. For reasons outlined in the body of this ruling, the Court will not accede to the application.

Introduction

1. On 15th October, 2021, a panel of this Court granted the applicant leave to appeal to this Court to argue that the High Court had erred in concluding that the International Protection Act, 2015 does not preclude an international protection officer, appointed by the respondent, from making a decision relating to permission to remain in the State, when the applicant had been refused in an application for asylum and subsidiary protection made under s.39(3) of the 2015 Act. The applicant submitted in the application for leave that, in her decision, Tara Burns J. in the High Court erred in finding that, by exercising the Minister’s “derived power” pursuant to s.49 of the 2015 Act, international protection officers are not conflicted in the duties or functions they are mandated to execute in their role as an independent officers pursuant to the 2015 Act ([2021] IEHC 276). The application and subsequent judgment were, therefore, based on an application of the doctrine of *vires*, known as the “*Carltona* principle” (*Carltona Ltd. v. Commissioner of Works* [1943] 2 All ER 560). The *Carltona* principle has been considered in many cases, most recently in this Court in *W.A.T. (a minor) v. Minister for Justice & Equality and Ors.* [2015] 2 ILRM 225, [2015] IESC 73). The grant of leave, therefore, identified the parameters for the appeal, based on the High Court judgment.

The Application

2. This ruling concerns an application brought later, on the 6th January, 2022, where the appellant sought an order also permitting him to argue on this appeal that, in circumstances where the International Protection Office does not exist as a statutory body or entity, the International Protection Office, without staff or other personnel, was incapable of meeting the definition of a “Determining Authority” for the purposes of Article 4.1 of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (“the Procedures Directive”).

Legislation

3. To understand the effect of the application, it is necessary to set out some of the legislative background.

4. The essential issues which arise in this application derive from the provisions of ss. 39 and 49(4) of the International Protection Act, 2015 (“the 2015 Act”). This introduced a single procedure for the consideration and determination of applications for international protection. Thus, whether for the purposes of an application under s.39(3) for asylum or subsidiary protection, or, under s.49(4) for leave to remain, there will be only one application, which is then considered and examined upon all the grounds upon which reliance is placed. Such consideration may not only include grounds advanced in respect of a claim for refugee status and for subsidiary protection, but, additionally, any application for leave and permission to remain under s.49(4) of the 2015 Act, which will be dealt with on the same papers as the application for international protection. All decisions, therefore, will be made on foot of one application made under the 2015 Act. But the decisions are different in nature. The criteria are, of course, quite distinct. Additionally, a decision in relation to an application for refugee status and/or subsidiary protection, involves compliance with E.U. law procedures and Directives. By contrast, the decision of the Minister to grant or refuse leave to remain is primarily a matter of national law.

5. In applying for asylum or subsidiary protection under s.39(3) of the 2015 Act, the appellant received a questionnaire, together with a booklet for applicants for international protection. This booklet is headed “*Irish National Immigration Service*” (“INIS”), beneath which is written “*International Protection Office*” (“IPO”).

The Procedure

6. The appellant completed the questionnaire on 7th January, 2019. The document was stamped as having been received by the IPO on the 14th January, 2019. The questionnaire stated that the information provided would be used for the purposes of examination and determination of the application for international protection (Refugee Status and Subsidiary Protection), and, in the event of refusal, consideration of whether the Minister should grant the applicant permission to remain in the State on other grounds.

7. For this application, the affidavit sworn on behalf of the appellant sets out, inter alia, that after submitting the questionnaire, the appellant subsequently received a report, pursuant to s.39 of the International Protection Act, 2015. This document was signed “*Mairead Leneghan International Protection Officer, International Protection Office*”. This was accompanied by a draft report to assist in the preparation of the s.39 report of the International Protection Act, 2015, which was signed “*Eamon Sanders, International Protection Office*”. An additional document was entitled “*Report pursuant to s.35(12) of the International Protection Act, 2015*”. The report communicated that the appellant was unsuccessful in his application for international protection.

8. Section 39 sets out detailed provisions regarding what is to be contained in a *report of examination of application*. It is to contain a recommendation of the international protection officer, and may include factual findings regarding the nature and evidential basis of the application, leading to a conclusion as to whether or not it should be granted. A report under the section is to be furnished to the Minister “as soon as practicable” after it is prepared (s.39(7)). The report contains case data, a claim summary and documentation, the legal basis for assessment, identification of nationality, findings on credibility, an analysis and determination of refugee status and subsidiary protection application, a summary, and thereafter a recommendation. But, as stated, the appellant was unsuccessful.

9. On 2nd March, 2020, the appellant was informed by letter from the IPO that an international protection officer, Mairead Leneghan, had decided that he should not be granted a refugee or subsidiary protection declaration. The letter also stated that the Minister, having considered the matters referred to in earlier sub-sections, and having considered the case under s.49 of the Act, had decided to refuse the applicant permission to remain in the State. The letter contained a statement of reasons.

Distinction between Section 39 and Section 49

10. There are fundamental differences between the procedures and questions necessary to determine an asylum/subsidiary protection issue under s.39, and an application for leave to remain based on humanitarian criteria. In determining an application under s.49, the question is not whether or not the appellant is entitled to asylum, or subsidiary protection, but, whether, having regard to an applicant’s family and personal circumstances, the right to respect for private and family life, any connection with the State, other humanitarian considerations, the character and conduct, and other criteria, including national security and the common good, such an applicant should be given permission to remain (cf. s.49(4) of the 2015 Act, and the judgment of this Court in *A.W.K. (Pakistan) v. Minister for Justice & Equality, Ireland and the Attorney General* [2020] IESC 10).

The Scope of the Judicial Review

11. In the instant proceedings, the appellant never challenged the decision made regarding asylum or subsidiary protection under s.39 of the Act. The judicial review which he initiated before the High Court on the 8th July, 2020 concerned *only* the procedure adopted in refusing him leave to remain under s.49(4) of the Act. By that time, more than 12 weeks or 84 days had elapsed since the decision sought to be impugned. In making its order granting leave for such judicial review, the High Court was prepared to extend the 28 days’ time limit provided for making judicial review applications, pursuant to O.84, R.21(3), Rules of the Superior Courts, 1986, and s.5 of the Illegal Immigrants (Trafficking) Act, 2000 (as amended). The order of the High Court (Rec. No. 2020/382JR) granted leave to the appellant to seek certiorari, by way of an application for judicial review to quash the decision to refuse the applicant “***permission to remain under s.49*** *of the International Protection Act, 2015, dated 19th February, 2020, and notified to the applicant by letter dated the 2nd March, 2020*”. (Emphasis added). The appellant also sought an order extending the time within which the application might be made. Leave was granted to seek judicial review without prejudice to any time issue.

Timeline

12. A timeline of the proceedings is set out in the affidavit of Ruari O’Donnell, solicitor of the Chief State Solicitor’s office, sworn in response to this application. It sets out that:-

(i) On 20th November, 2020, the case, together with the related case, (*M.K. v. Minister for Justice and Equality*, Rec. No. 2019/907 JR), were assigned a hearing date on the 11th and 12th March, 2021.

(ii) On 8th January, 2021, an unfiled copy of the statement of opposition was emailed to the appellant’s solicitors.

(iii) On 14th January, 2021, an unfiled but sworn copy of the affidavit of Padraic O’Carroll, together with exhibits, was emailed to the appellant’s solicitors.

(iv) On 2nd February, 2021, a filed copy of the affidavit of Padraic O’Carroll, together with exhibits, was emailed to the appellant’s solicitors.

(v) On 17th February, 2021, a letter to the appellant’s solicitors was emailed seeking the appellant’s legal submissions.

(vi) On 18th February, 2021, the appellant’s solicitors responded with a draft amended statement of grounds and legal submissions. The proposed amendment made the additional assertion that, in her operation of the system, the Minister had “impermissibly blurred” or “obscured” the distinction between her own functions, and those of the Chief International Protection Officer, and the International Protection Office established by the Minister.

(vii) Letter from the appellant’s solicitors dated the 19th February, 2021 seeking voluntary discovery and interrogatories.

(viii) Letter to the appellant’s solicitors dated 19th February, 2021 in response to the appellant’s proposed amended statement of grounds and a voluntary discovery request.

(ix) On the 22nd February, 2021, the matter was mentioned before Tara Burns J. in the High Court.

(x) On the 26th February, 2021, the issues of discovery and interrogatories came before Tara Burns J. The respondent consented to the amendment to the statement of grounds, indicating that she would deal with the questions posed by way of interrogatories in a replying affidavit, which would exhibit appendices to the draft guidance note. The respondent was directed to file and serve any amended opposition papers by close of business on the 9th March, 2021.

(xi) On the 1st March, 2021, an affidavit of Mary Trayers filing an amended statement of grounds and submissions was received from the appellant’s solicitors.

(xi) On the 8th March, 2021, the affidavit of Padraic O’Carroll with exhibits was emailed to the appellant’s solicitors.

(xiii) On the 9th March, 2021, an amended statement of opposition was served on the appellant’s solicitors.

(xiv) On the 10th March, 2021, the filed respondent’s submissions, a copy of the affidavit of Padraic O’Carroll, together with exhibits and the filed copy of the respondent’s amended statement of opposition were served on the appellant’s solicitors by email.

The original grounds on which judicial review was sought

13. In the original statement required to ground an application for judicial review, the legal grounds were as follows:-

“(i) In failing to make a decision under s.49(4) of the 2015 Act, the respondent failed to comply with the statutory duty imposed upon him by s.49(1) of the 2015 Act.

(ii) In circumstances where an international protection officer had purported to make a decision under s.49(4) of the 2015 Act, but was not vested with the statutory power to do so, the decision to refuse the applicant permission to remain was ultra vires, and void.

(iii) In purporting to direct the international protection officer to make a decision under s.49(4) of the 2015 Act, the respondent has acted ultra vires and **in the premises no valid decision has been made in respect of the applicant’s leave to remain application**.” (Emphasis added)

14. It should be noted, parenthetically, that on the 18th March, 2020, the applicant also submitted an appeal to the International Protection Appeals Tribunal, against the recommendation of the IPO to refuse him refugee status and subsidiary protection.

15. As already outlined, the appellant was granted leave to file an amended statement of grounds on the 26th February, 2021. It is clear that the original basis for the claim was that the International Protection Officer who had made the decision under s.49(4) of the 2015 Act had not been vested with the statutory power to do so, and therefore that the subsequent decision was *ultra vires*.

Amended Statement of Grounds

16. In the amended statement of grounds filed, where leave was granted on 26th February, 2021, the appellant sought alternative relief, to the effect that he should be granted a *declaration* that, in the implementation of the International Protection Act, 2015, the Minister had impermissibly blurred or obscured the intended distinction between her functions, and those of the CIPO (Chief International Protection Officer) and/or IPOs (International Protection Officers).

17. The basis of the new ground was, therefore, a plea that the functions of the Minister, on the one hand, and of the Chief International Protection Officer and International Protection Officers on the other, were intended by the 2015 Act to be separate and distinct, but that the manner in which the Minister had purported to implement the 2015 Act had blurred or obscured the intended separation and distinction. The relevant functions had become “mixed up”. Significantly, with regard to the elapse of time, it was claimed that this blurring was evident, *inter alia*, from the Minister’s evidence, and the documents exhibited by the Minister, including those in relation to the appointment of the Chief International Protection Officer, as well as the claim that the Minister’s case was that the two sets of functions were being carried out in the same office and, in some cases, it appeared, by the same person or persons. But nonetheless the issue remained essentially one of *vires*, albeit combined with a claim of factual error, pleaded as follows:-

“5. In circumstances where the decision to refuse the applicant’s permission to remain under s.49(4) of the 2015 Act is stated to have been made by an international protection officer as opposed to the Minister, the decision contains an error on the face of the record in that an international protection officer has no statutory jurisdiction to make a decision under the said section”.

18. That these essentially *Carltona* grounds were the basis of the case was confirmed by the interrogatories which were served by the appellant. These included questions as to whether there were legally binding rules that prevented an IPO case worker who had determined an application for international protection, from also determining an application for permission to remain. It must now be said that, *at that stage*, the evidential material gave a clear outline of the manner in which the Minister had chosen to operate the procedure, and that, in a given case, this could involve an overlap of personnel between consideration of a decision under s.39 of the Act, on the one hand, and decisions under s.49, on the other hand. All this was clear by 10th March, 2021.

Amended Statement of Opposition

19. In the amended statement of opposition, dated the 8th March, 2021, the respondent pleaded, *inter alia*, that the fact that civil servants from the International Protection Office had been appointed as international protection officers, and had been given certain powers and functions under the 2015 Act did not confine those officers to the “*exclusive performance of those functions to the exclusion of any other duties which the Minister may choose to allocate to them, whether as a matter of general administrative law, or pursuant to the terms of the 2015 Act*” (para. 6).

20. Of more direct relevance is what was pleaded at para. 9, and following. There, the Minister pleaded:-

“… 9. It is denied that the international protection office is a separate legal entity or statutory office whether in the manner as alleged or at all. It is further denied that the manner in which the respondent has implemented the 2015 Act has blurred or obscured the separation and distinction between her functions and those of the Chief International Protection Officer, and/or international protection officers, or that relevant functions have been mixed up, whether in the manner as alleged, or at all”.

21. She further pleaded:-

“… 10. The applicant has no standing and is not entitled to make any claim in relation to how applications were processed prior to the re-organisation which occurred in 2018, in circumstances where the decisions and recommendations made in relation to him were taken by different individuals acting in different capacities …”.

22. The Minister further contended:-

“… The decision to refuse the applicant permission to remain under s.49(4) of the 2015 Act is not stated to have been made by an International Protection Officer, as opposed to the Minister, whether in the manner as alleged, or at all. Furthermore, the decision does not contain an error on the face of the record, whether in the manner as alleged, or at all …”.

Submissions to the High Court

23. In written submissions made for the purposes of the High Court judicial review, the appellant identified the main headings of his challenge as:-

“(a) Has the respondent made a decision under s.49(4) of the International Protection Act, 2015?

(b) Does the decision dated the 19th February, 2020 contain an error on its face, such as to merit quashing the decision. (This related to the contention that the decision made by a Ms. Sarah Nugent stated, on its face, that she had made the decision as an IPO, as opposed to one acting as an agent of the Minister)?

(c) In the implementation of the International Protection Act, 2015, has the distinction between the Minister’s function, and those of the CIPO, and/or IPO’s/International Protection Office been or become impermissibly blurred?”

24. The submissions went on to address the legal context under E.U. law, making a case that the 2015 Act had been enacted to give further effect to a number of E.U. legislative instruments, including the Procedures Directive and Directive 2004/83/EC (“The Qualifications Directive”), that provided that decisions by determining authorities on *applications for* ***asylum*** (emphasised) were to be taken after appropriate examination. Thus, such decisions were to be taken by a body or entity independent from the Minister. Reference was also made to s.6(2) of the Refugee Act, 1996, which provided that previously, the Office of the Refugee Appeals Commissioner (“ORAC”), “*was to be independent of the exercise of his or her functions under the Act*”. The appellant referenced the case law of the Court of Justice of the European Union (“CJEU”). He submitted that the joined cases of *B* and *D* (C-57/09; C-101/09) were authority that there should be a distinction drawn between a determination of international protection, which is *governed by E.U. law*, and leave to remain, which is determined *under national law*. The appellant submitted that distinction “is clearly maintained under the 2015 Act” (para. 26 High Court submissions).

The High Court judgment

25. The appellant’s claim for judicial review was refused in a judgment delivered by the High Court (Ms. Justice Tara Burns), delivered on the 16th April, 2021 ([2021] IEHC 276). This judgment is now the subject of the substantive appeal before this Court. The observations which follow, and any quotations from the judgment, are directed *only* to setting out the parameters of the case as it was argued and decided in the High Court, and are not to be interpreted as expressing any view on the issues which arise in the substantive appeal listed before this Court for 22nd February next.

26. In the course of her judgment, Burns J. held that by exercising devolved powers pursuant to s.49 of the 2015 Act, international protection officers were not conflicted with the duties and functions they were mandated to execute in their roles as independent international protection officers pursuant to the 2015 Act. She held that their independence, pursuant to s. 74(4) of the 2015 Act, was in relation to their role as international protection officers determining “*a completely different issue (international protection) to the decision at issue pursuant to s.49 (permission to remain) …”.* She quoted McDermott J. in *M.L. v. Minister for Justice* [2017] IEHC 570, where he held:-

“[99] The court is not satisfied that a decision maker **in respect of subsidiary protection** lacks independence because they are at the same time vested with the decision in respect of deportation. The decision to deport is the final decision made in the immigration process. There is no requirement on a member state to establish a decision-making process which is independent of the first respondent. Different procedures apply amongst the European Union Member States. In some states provision is made for the Minister for Justice or his/her equivalent to act through their officials and I do not consider that of itself to be legally objectionable under domestic or European Union law.” (Emphasis added)

27. In that case, McDermott J. rejected the contention that the deportation decision maker must be a different individual from the international protection decision maker (paras. 96 - 97). Having quoted that passage, Burns J. later held, at para. 42 of her judgment:-

“Accordingly, I am of the view that the Carltona principle has not been displaced in this instance and that IPOs, acting in their separate role as officers of the Respondent, to that of an IPO in respect of which they have independence, can make decisions on behalf of the Respondent pursuant to s. 49 of the 2015 Act.”

28. The judge rejected the proposition that the manner in which the respondent had implemented the 2015 Act had become blurred or obscured. She held:-

“It is clear that the International Protection Office now operates on a divisional basis with separate divisions making international protection decisions; permissions to remain decisions and review of permission to remain decisions. … Accordingly, I do not accept that there is a lack of clarity regarding the roles which each division perform or that there has been a blurring of the distinction provided for in the 2015 Act.”

29. The High Court judge also rejected the proposition that there had been an error on the face of the record, in that the s.49 decision had been signed by an international protection officer, rather than a person acting for and on behalf of the respondent. She held that the factual position was that the statement of reasons regarding the s.49 decision was signed by “Sarah Nugent, Case Worker, International Protection Office”. Contrary to what was asserted by the applicant, she was not stated to be an International Protection Officer, and had not signed the statement of reasons as such.

30. In summary, therefore, the issue before the High Court, even after the amendment of the statement of grounds, was an issue of national law, that is, an adverse leave to remain decision, essentially based on an argument on *Carltona* principles.

31. That this was the case that the respondent had to meet was reflected in her written submissions to the High Court, which read, in part:-

“In summary, the issue which the applicant raises regarding the operation of the system is that the decision pursuant to s.49 is unlawfully made on behalf of the respondent by persons who also are appointed as IPO’s. The applicant accepts, having regard to the Carltona principle, that the s.49 decision can be made by an officer on behalf of the respondent, and does not have to be taken by the respondent herself. However, it is asserted that it is inappropriate that the decision be taken by an IPO, as this fails to respect the separate and distinct roles of an IPO determining an international protection claim, and the respondent, exercising the executive function of the State, permitting a person to remain in the State on humanitarian grounds. It is also asserted that the manner in which the 2015 Act is operated by the respondent has incorrectly blurred the distinction between international protection and permission to remain decisions. Finally, it is asserted that there is an error on the face of the s.49 decision”.

32. I pause to comment that, in *IX v. The Chief International Protection Officer & Anor.* [2020] IESC 44, this Court adverted to the fact that:-

“Leave to remain is a matter of domestic law and a matter for the discretion of the Executive, exercised in this case by the Minister, and the Act therefore constitutes the IPO as, also an officer of the Minister for the purposes of such an application.” (para. 59)

What is sought to be argued

33. I now turn to the present proceedings. In the course of case management, it emerged that the appellant wished to introduce a new argument in his appeal to this Court, and sought an order permitting him to argue, ‘*on this appeal, that in circumstances where the International Protection Office does not exist, an International Protection Officer, without staff or other personnel, is incapable of meeting the definition of a Determining Authority for the purposes of Article 4.1 of the Procedures Directives’*. The respondent opposed the application. The parties were invited to submit written and oral submissions to this Court, and what follows is a summary of their submissions.

Submissions to this Court

34. Counsel for the appellant referred this Court to *Lough Swilly Shellfish Growers Co-operative Society Ltd. & Atlanfish Ltd. v. Bradley & Ivers* [2013] 1 I.R. 227, where O’Donnell J. (as he then was) for this Court set out the general principles applicable in an application where “*a point is sought to be argued which was not advanced in the High Court though closely connected to points which were argued, and which would not have any implication for the evidence adduced in the High Court*” (para. 26).

35. In *Lough Swilly*, O’Donnell J. went on to describe the:-

“… spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in K.D. for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in Movie News); or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the Court nevertheless retained the power in appropriate cases to permit the argument to be made”. (para. 28)

36. I mention here that in KD, this Court declined to entertain a legal issue arising from the persuasive authority which had not been raised in the High Court (*KD (otherwise C) v. MC* [1985] I.R. 697). In KD, Finlay C.J. stated the fundamental principle that, “*save in the most exceptional circumstances,* [appellate courts] *should not hear and determine an issue which has not been tried and determined in the High Court. In that fundamental rule, there may be exceptions, but they must be clearly required in the interests of justice”* (p.701).

37. It should be noted that *Lough Swilly* proceeded as a *plenary hearing*. Simplified, the question then is whether the subject of the application was a different and new case concerning different legal provisions from that originally challenged, or whether it is merely an evolution or new formulation of an argument made in the High Court.

38. Counsel for the appellant also referred the Court to *Ennis v. AIB Plc.* [2021] IESC 12, a case relating to an application to argue new grounds in an appeal from a *summary judgment*. But, there, the effect of the order of this Court was to remit the consideration of the new issues to the High Court, thereby permitting the parties to adduce whatever evidence was deemed necessary, and allowing for any subsequent appeal. In the course of that judgment, reference was made to the decision in *Ambrose v. Shevlin* [2015] IESC 10, where Clarke J. (as he then was) emphasised that a case which would necessarily involve new evidence, and not simply a new legal argument, would place much greater weight on the side of the equation which lay against permitting a new point to be raised for the first time on appeal. There, the risk of real prejudice will be significant. Speaking in the context of that appeal, he held the prospects in such circumstances of a new trial would be difficult to avoid, and the need to encourage a party to bring forward its full case would carry more weight.

39. Counsel for the appellant also submitted that particular obligations arise when the court is required to interpret principles of domestic law in the light of E.U. law.

40. He relied on *Callaghan v. An Bord Pleanála* [2017] IESC 60, where Clarke J. observed that:-

“4.4 Where an Irish court is considering the proper interpretation of a statutory measure it may well take into account any constitutional principles which might impact on the proper construction of the legislation concerned. Indeed, it is fair to say that a court might very well be reluctant to disregard such constitutional questions of interpretation even if they were not specifically raised by the parties. A court, and in particular a court of final appeal, is, as a matter of national law, required to give a definitive interpretation of a legislative measure which comes into question in the course of proceedings properly before it. It could not be ruled out, therefore, that a court in such circumstances would be reluctant to give a construction to legislation without having regard to any constitutional issues which might impact on the proper construction of the measure concerned in accordance with East Donegal principles. This might well be so where there would be a real risk that the Court would give an incorrect interpretation of the legislation in question if it did not itself raise the constitutional construction issue. It must be recalled that the proper interpretation of legislation is objective and is not dependent, necessarily, on the arguments put forward by the parties.

By analogy it seems to me that it is at least arguable that an Irish court, in order to comply with the principle of conforming interpretation, would be required to have regard, even on its own motion, to provisions of Union law where those provisions might have an impact on the proper interpretation of national measures under consideration.”

41. Counsel also referred to *Friends of the Irish Environment Ltd. v. An Bord Pleanála* [2019] IESC 53, where this Court pointed out that *Callaghan* was authority for the proposition that the Court should not adopt an overly technical or narrow approach to determining the scope of the appeal. More importantly, in the context of the case, the decision was authority for the proposition that an appellant may be permitted to raise an E.U. law argument not made in the court below, if it is likely to be relevant to the proper construction of some relevant statutory provision or statutory framework.

42. This Court held that the appellant:-

“… should not be excluded from making an argument as to how those provisions are to be construed in light of Article 2(1) of the EIA Directive even if this results in the applicant being afforded some considerable latitude in light of its failure to pursue such an argument in the course of the High Court proceedings. In so deciding I am mindful of the supremacy of EU law and the risk that if the Court was to take an overly restrictive approach to the scope of the appeal, such a restriction could interfere with its obligation to ensure that the relevant statutory provisions are properly construed against the backdrop of EU law. The Supreme Court, as the final appellate court, could not allow itself be placed in a position where it might incorrectly construe a statute by reason only of the fact that in the court below the applicant had failed to argue the effect of European Union law on that construction”. (para. 29)

A Summary

43. Counsel’s submission may be summarised thus:-

• That, in the legal submissions filed in the High Court, the appellant had relied upon CJEU case law in support of the proposition that the distinction between international protection and domestic leave to remain was a requirement of E.U. law. See, the joined case of *B* and *D* (cited above) wherein the CJEU observed that “*in so far as national rules under a right of asylum is granted to persons excluded from refugee status within the meaning of Directive 2004/83 permit a clear distinction to be drawn between national protection and protection under the directive, they do not infringe the system established by that directive*.”.

• That this distinction was capable of being maintained under the 2015 Act.

• That the procedure for determination of permission to remain on behalf of the Minister, was wholly inconsistent with this independent role.

• That, in order to give full and proper effect to the Directives, the 2015 Act fell to be interpreted as precluding an international protection officer from acting on behalf of the Minister in exercise of the powers contained in s.49 of the Act.

• That, as the Act was ambiguous on this issue, s.5(1) of the Interpretation Act, 2005 provided a mechanism under national law to interpret the 2015 Act in this manner.

• That what the appellant was seeking to do was merely to advance arguments directed towards the construction of the statutory framework of the 2015 Act, in the manner advanced on behalf of the appellant in the High Court.

• That a position where an international protection officers might wear “two hats”, and engage without restriction in the process of determination of international protection and domestic leave to remain, such was inconsistent with their role as a “Determining Authorities” within the meaning of Article 4.1 of the Procedures Directive, which role requires formal separation from the role of the Minister in deciding whether to grant leave to remain, such that international protection officers are not involved in making decisions relating to permission to remain under domestic law;

• That, if it were to be shown that an international protection officer could not wear “two hats”, in the manner contended for, then the decision to reject the appellant’s application for permission to remain, which was made by an international protection officer, would be *ultra vires* and void.

• That, under the 1996 Act, ORAC had been designated as the determining authority at first instance, by virtue of Annex I of the Procedures Directive; and, at no stage, were members of ORAC responsible for making decisions on humanitarian leave to remain. The position here had been altered by how the procedures actually applied. On that basis, the appellant rejected the premise that nothing of significance had changed, having regard to the manner in which the 2015 Act was applied and practised by the Minister.

• That the interpretation of the Procedures Directive was a matter solely for the courts.

• That there was no indication that the Minister would be prejudiced. Additionally, it is submitted that the Minister’s contention that the matter might be considered in subsequent cases will simply delay matters.

Oral Arguments

44. In the course of oral argument, counsel rejected the proposition advanced by the Minister that, because he had never challenged the s.39 decision in his case, the appellant did not have standing to make the argument, and that, in carrying out the deportation process, the State would not be implementing E.U. law. He submitted that the Act of 2015 had one objective meaning, and it was for this Court to determine what that meaning was, which process might be influenced by E.U. instruments, such as the Procedures Directive and the Qualifications Directive. Counsel pointed out that an argument based on the Procedures Directive had been made in the High Court, but this was not directed to the question of s.39 of the Act. Referring then to *Lough Swilly*, counsel submitted that the argument which he sought to make was closely related to arguments already made in the High Court, where reference had been made to the Procedures Directive. It was not necessary for him to amend his proceedings. The application which he sought to make was consistent with the declaration which was part of the amended statement of grounds. The proposed declaration was to the effect that, in the implementation of the 2015 Act, the Minister had impermissibly blurred or obscured the intended distinction between her functions and those of the CIPO, and/or the IPOs.

45. Counsel rejected any proposition to the effect that he was making the case that the Act of 2015 should be actually dis-applied; rather, that the Act should be construed in compliance with the Procedures Directive, as a matter of statutory construction. He submitted that, if the international protection officer had incorrectly determined his case, it may be that he would not be entitled to *certiorari*, but could be granted a declaration. Counsel did not submit that the Act itself was wrong, but, rather, that the manner in which it was being applied did not accord with the provisions of the 2015 Act, properly interpreted. He submitted that, in *P.N.S. v. Minister for Justice & Equality* [2020] IESC 11, McKechnie J., speaking for this Court, had found that individual international protection officers were the determining authority; but it now appeared that the Minister had written to the E.U. Commission, to the effect that the determining authority was the International Protection *Office* – not officers. Thus, it may be that the judgment in *P.N.S.* had proceeded on an incorrect premise. But it might be even correct, if it suggested an international protection officer, without staff, was a determining authority. Counsel rejected any question that he was endeavouring to “bring down the system”. Rather, that the system should operate in accordance with how the Act of 2015 should be operated when properly construed. Counsel did not accept that it would be necessary, as the Minister suggested, to adduce further evidence as to how the Act was actually applied and operated.

Counsel for the Respondent

The parameters of the appeal

46. Counsel on behalf of the Minister correctly accepted that the appellant should be permitted to argue that interpretation of s.49(4) of the 2015 Act required a separation of roles, and insofar as he wanted to rely on E.U. law in interpreting the Act, this would not be an issue. But counsel for the Minister submitted that this was all that was necessary for the appellant to argue the *Carltona* point, but that he could not seek to go further, seeking any wider declaration. In essence, he submitted the *effect* of the appellant’s submission was a collateral challenge to the operation of the Act, based on the contention that it was operated in a manner contrary to E.U. law, in that it did not allow for a proper division of functions. At the core of the respondent’s argument, citing *Lough Swilly*, was the contention that this was not an “evolution or development” of argument made in the High Court, but rather a quite different one, the effect of which, if successful, might lead to an ill-defined destination, and the response to which would require the respondent adduce evidence in rebuttal.

Decision

47. I am coerced to the conclusion that counsel for the Minister is correct. No matter how carefully put, the substance of the application now seeks to mount a challenge the operation of s.39 of the Act by the Minister. The unavoidable conclusion is that what is being sought is, in reality, a systemic challenge to the manner in which the Minister is operating the 2015 Act. Unavoidably, that challenge operates not only to how s. 39 was operated in his case, but, it appears, how the section has operated in many cases. Put in strict terms, the applicant’s principal case must necessarily be to the effect that the decision made under s.39 of the Act, refusing the appellant asylum and subsidiary protection, was contrary to law. That fundamental point is not altered by the fact that the appellant also already sought to pursue declaratory relief. The effect of acceding to the application based on a systemic challenge would be to permit a collateral attack on the asylum/subsidiary decision concerning the appellant made under s.39, which made on 2nd March, 2020, now almost two years ago. But the appellant did not challenge the s.39 procedure at any time, even though he had been considered and assessed under that procedure.

48. This was not an instance where something new came to light, late in the day. From the time of the discovery and interrogatories (10th March, 2020) the appellant was on notice as to how the Act was being administered. The *effect* of permitting the appellant to argue the additional point would be to allow him to circumvent the provisions of s.5 of the Illegal Immigrants (Trafficking) Act, 2000 (as amended), which sets a strict 28-day time limit for the initiation of judicial review proceedings. Were the appellant to succeed in this new claim, the foreseeable consequence would be that the entire system would, at least, be thrown into uncertainty, even if the appellant contended that he was not challenging the provisions of s.39 of the Act. I am unable to conclude that this is simply a new formulation of an argument advanced in the High Court. It is not closely related to that argument. The position is, therefore, much closer to that in *KD (or C) v. MC* (cited above) where this Court declined to permit a new argument to be made on appeal which had not been made at first instance. There is the additional consideration that, unlike *Lough Swilly*, which concerned plenary proceedings, and *Ennis*, which concerned an appeal in summary proceedings, the application before the Court is in the nature of judicial review, where the will of the Oireachtas is shown by the strict 28 day time limit. What the appellant seeks to do is to argue a different case.

49. The evidence before the Court is that the Minister had set up an administrative system predicated on an interpretation of the Act permitting such a system. If the appellant had sought to run such a case in the High Court, it would have been necessary, at minimum, to amend the statement of opposition. But, in addition, it would have been very likely necessary to consider whether or not rebutting evidence would be required to demonstrate how the Act was actually being applied and operated. In his clear submissions, counsel for the appellant accepted that the consequence of acceding to the application might require the Court to revisit its recent decision in *P.N.S. v. Minister for Justice* (cited above).

50. The question raised is not simply about statutory interpretation, therefore, but, rather, it asks the Court to, effectively, carry out a full systemic review of the international protection system under the Procedures Directive. In the High Court there was no mention of the Procedures Directive in the context which is now under contemplation. Counsel for the respondent points out that though the International Protection Office was not created by statute, for practical purposes its existence was a fact which was known to the appellant, as shown by his submissions in the High Court, which referred to the fact that international protection officers did have a function in this regard. The issue was one of E.U. law. A consideration of *B* and *D* (cited above) in fact related to the Qualifications Directive, not the Procedures Directive. It should be noted that Ireland has not adopted Directive 2013/32/EU (Recital 58), nor Directive 2011/95 (Recital 50) (cf. *Michael and Emma v. Minister for Social Protection* [2020] 1 ILRM 1).

51. The application was forcefully argued on behalf of the appellant. But the relief which is being sought cannot be permitted. This would not be the application of a “sensible flexibility”, as contended in *Lough Swilly*, but, rather, to permit a new case, not advanced in the High Court, arguably requiring new further evidence, a new statement of grounds, a new statement of opposition, and involve a collateral challenge to a s.39 provision which was not challenged in the proceedings. Arguably, such a challenge should have been brought in plenary proceedings. When properly analysed, the *effect* of the argument made on behalf of the appellant would be a challenge, not to the decision made in relation to s.49(4), but, rather, in relation to s.39 of the 2015 Act, where the appellant never sought any relief, and would not be entitled to seek relief now, being long out of time, when the material issues were ascertained many months ago (*Shine v. Fitness to Practice Committee of the Medical Council* [2008] 1 I.R. 283).

52. The case considered by Burns J. was a matter of national law only. It did touch on the issue of whether or not a provision of national law could be interpreted having regard to E.U. law. But that was in relation to the decision which was actually under challenge, a measure of national law, where the appellant had been unsuccessful. Parties, including the respondent, have the right to have issues argued fully in the High Court. Issues may be re-argued on appeal to this Court, which is the final court of appeal. But it is only in exceptional circumstances that this Court will permit an issue to be argued that was not considered at first instance. To permit this new point to be ventilated in this Court would, effectively, run the risk of placing this Court in the position of a court of first instance, and could place the respondent in a situation where, as a matter of strong possibility, evidential issues as to the actual application and operation of the Act might well arise, which might appropriately be a matter to be considered in evidence, and cross-examination. As a matter of fact, were the appellant to succeed in obtaining a declaration, it would follow, as a matter of high probability, that he would succeed in challenging a provision of the Act which had not ever been challenged, and where the application was out of time by many months. But, not only that, he would, effectively, be permitted to argue what is a systemic challenge in this Court effectively rendering this Court as a court of first instance, when it is a court of exclusively appellate jurisdiction.

53. The application must, therefore, be refused.