

**THE HIGH COURT
JUDICIAL REVIEW**

[2019 No. 830 JR]

BETWEEN

M.R. (ALBANIA)

APPLICANT

AND

**THE MINISTER FOR JUSTICE AND EQUALITY, THE INTERNATIONAL PROTECTION
OFFICER, IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 17th day of August,
2020**

Introduction

1. Where, following the enactment of legislation, a Government Department has second thoughts about the desirability or wording of that legislation, the Department has a number of options. It can seek to amend or repeal the legislation before commencement. Alternatively, it can implement the legislation pending such amendment or repeal. Both of those options are totally unproblematic. Other options that, conversely, undermine the rule of law to a greater or lesser extent would be to leave the legislation uncommenced for an indefinite if not permanent period (which while possibly theoretically lawful on conventional jurisprudence, nonetheless undermines the integrity of the statute book), or to provide perfunctory implementation that would not pass legal muster, or to commence the legislation, but simply do nothing to implement it. The last is the least acceptable of the options, but unfortunately it's the one chosen by the Department of Justice and Equality here.

Facts

2. The applicant is an Albanian national born in 1988. He alleges that as a member of the Albanian Police in 2011-2013 he suffered targeting and abuse at the hands of criminals in Albania arising out of being associated with demolition of certain illegal buildings.
3. He says that on 17th August, 2013 there was an assassination attempt. A truck drove into him when he was on a motorbike, as a result of which he suffered severe physical injuries which are ongoing and which, at the time, left him in a coma for 22 days. He says that in January 2015 he received a further threat of harm.
4. The applicant arrived in the State on 21st January, 2016 shortly after the enactment of the International Protection Act 2015 on 30th December, 2015. He sought refugee status on the day of his arrival and in the s. 8 interview referred to his injuries. He completed a questionnaire on 2nd February, 2016.
5. In the meantime, correspondence and activity was ongoing in the Department in anticipation of the commencement of the 2015 Act. The relevant provision for present purposes is s. 23 of the Act which provides for medical assessment of applicants. The Department of Justice and Equality wrote to the Refugee Applications Commissioner asking when and how often it was envisaged that the provision of a panel of medical practitioners in s. 23 of the 2015 Act would be used and the Commissioner replied on

23rd May, 2016 that "[w]e would only see the panel being used by us in one scenario namely we might use (sic – presumably should be "use") them for medical examinations where applicants do not turn up for interviews and claim to be ill".

6. The Asylum Policy Division of the Department held a meeting on 5th April, 2016 and the minutes of that meeting under the heading "Action" stated that the division would follow up with HR to progress recruitment/sanctions and "progress matters re: panel member/medical practitioner fees". That was repeated on 17th May, 2016.
7. The minute of the meeting of 25th May, 2016 makes the obvious point that sanction from the Department of Public Expenditure and Reform would be required for medical practitioner fees and goes on to say that the division would conduct research in relation to the establishment of the panel. fees, an ad campaign, locations and other matters.
8. On 3rd June, 2016 the procurement strategy group of the Department sought information on whether there were any existing medical panels they could avail of. The reply was in the negative.
9. On 7th July, 2016 a similar request was made to the Legal Aid Board and a positive reply was furnished on the same day that "the Board does not have a panel, rather there are practitioners that will do reports for clients of the Board at the agreed Board rates". That was an encouraging response and the Department naturally enough then sought a list of those members. That promising process fizzled out for some reason which is not altogether clear to me.
10. A similar query was sent to the HSE on 21st June, 2016. A minute of 22nd June, 2016 said scoping work was well under way.
11. A minute of 11th August, 2016 says it was proposed to operate an *ad hoc* arrangement to begin with, and subject to demand a formal panel may be established. This gave rise to a document setting out a "proposed approach" that if the IPO decided to get a report, "a small panel will be set up for each case at the time". It wasn't possible to find an existing panel and it was considered that it didn't make sense to advertise for a panel that in most cases would not receive a single case a year. There was no obvious consideration as to whether this complied with the 2015 Act.
12. Meanwhile, the applicant completed his s. 11 interview on 23rd September, 2016. A section 13 report in relation to the applicant's case was completed on 30th November, 2016. The applicant was refused refugee status on 7th December, 2016. He submitted a notice of appeal to the Refugee Appeals Tribunal on 22nd December, 2016.
13. The 2015 Act was commenced on 31st December, 2016 and the applicant's case was returned to the IPO. The applicant was sent an international protection questionnaire on 6th February, 2017.
14. On 7th March, 2017 the applicant's solicitor wrote asking that due to medical, psychological and mental health issues, the applicant should not be compelled to provide

further information until an appropriate medical report was obtained under s. 23(1) of the 2015 Act.

15. On 11th April, 2017 the IPO replied stating that medical claims on file were not consistent with the position that they were of such gravity to prevent completion of a questionnaire and noted that the applicant had already provided a questionnaire. The IPO said that a consultant's report would be required setting out why the applicant was no longer in a position to furnish further information.
16. On 11th July, 2017 the applicant's solicitor submitted a freedom of information request which was replied to on 6th October, 2017. Also on 11th July, 2017 the applicant sought clarification of whether a panel had actually been established, but never got a clear answer – unhappily that lack of clarity was to continue right through to the last day of the hearing of the present proceedings. On 1st August, 2017 the applicant's solicitor repeated that request.
17. The IPO replied on 18th August, 2017 simply stating a willingness to progress the applicant's claim. Insofar as the applicant's solicitor had indicated difficulty, the IPO invited her to assist or to supply a medical report. There was no further correspondence then until the IPO wrote again on 22nd May, 2018.
18. On 19th June, 2018 the applicant's solicitors wrote in relation to a separate IPAT case asking whether a panel had been set up under s. 23. In response to that a HEO in INIS wrote to another official on 26th June, 2018 "*Do you know whether the panel was set up?*" A proposed response was sent back on 27th June, 2018 that "*If the IPO or IPAT requires the examination of the physical or psychological health of an applicant . . . the IPO or IPAT may request the Minister to establish a panel of medical practitioners*". Again, it doesn't seem to have been considered prior to this point whether this complied with the Act.
19. The first person in the system who pointed out the problem with this was Mr. Stephen Hayden of the Department who emailed a colleague on the same date underlining the word "*shall*" in s. 23 and saying that "*the Act presupposes that such a panel will already be in existence when/if the IPAT requires that an applicant is examined by a medical practitioner. The reply places responsibility for the establishment of such a panel on the IPO and IPAT and that is incorrect*". Mr. Patrick Murray of the Department said he agreed with those observations. I can only hope that my commendation of the professionalism of Mr. Hayden and Mr. Murray will be duly noted by their superiors and the Department's HR unit because only a limited number of people on the respondents' side of this *imbroglio* seem to have allowed themselves to point out difficult facts in the best traditions of public service, even if administratively inconvenient. If the clarity of their analysis had been properly taken on board, the Department could have been saved a great deal of problems, this case would never have happened and the rule of law would have been better served.

20. An obfuscatory reply was sent by another official later that day, in effect rewording the comment that the IPO/IPAT could request a panel. The later reply said that "*request*" was the wrong word to use, but that "*it was found that it was not practical to try to engage a standing panel of doctors and psychologists*", which is the same point in different language while giving the incorrect impression of a change in position. A further email was sent stating that the chair of IPAT would be requested to consider the matter.
21. The chair, Ms. Hilikka Becker, then replied on 29th June, 2018 making the very valid point that the Department's response that the panel would arise where the applicant claimed to be too ill to participate was not reflected in the legislation.
22. The IPO then notified the applicant in the present case on 2nd July, 2018 that he had failed to cooperate. Meanwhile Ms. Becker wrote again on 9th July, 2018 asking for clearer guidance as to the procedure. The Department replied on 13th July, 2018 stating its view that doctors would only be involved if the applicant was not participating as opposed to medico-legal issues arising in relation to the claim.
23. On 16th July, 2018 the applicant replied to the allegation of non-cooperation rejecting that assertion, and on 17th July, 2018 his solicitor made a further freedom of information request.
24. On 18th July, 2018 Ms. Becker wrote making the penetrating point which is really central to the present case that "*[i]t seems to me that s. 23 can only operate once the Minister has established the panel*".
25. On the same date, the Department replied to her in terms that even two years later sound coarse in their tone and reasoning, especially when addressed to an independent quasi-judicial office holder. An official stated: "*Dear Hilikka, I think you are completely missing the point if (sic – presumably should be "of") this provision . . . the amendment to this provision ensured that the State couldn't force someone to attend a specific doctor but must offer a choice of two locally. That, if ever used will constitute 'a panel' that's it, no more, no less. Regards*".
26. On 9th August, 2018 the IPO wrote to the Department stating that the non-cooperation letter in the present case "*probably should not have issued*" and that it was proposed to await a neurologist's report. The letter stated that a panel was not required at this stage, and if a panel was to be established there would have to be a procurement exercise.
27. On 13th August, 2018 the IPO wrote to the applicant's solicitor asking for a neurologist's report when available and indicating it would not proceed with the s. 38 process - inferentially withdrawing the allegation of non-cooperation (presumably it would have been unthinkable to expressly withdraw it as that might have been admitting to a mistake). On 1st May, 2019 the IPO wrote again seeking the neurologist's report and stated that otherwise the s. 38 process would proceed.

28. On 17th May, 2019 the applicant's solicitors replied enclosing a report of 8th February, 2019 and requesting that a personal interview be dispensed with under s. 35(8)(c). They never got a reply to that request. That is one of the issues in the present case.
29. On 1st October, 2019 the applicant's solicitor enclosed a completed questionnaire requesting consideration of the application of s. 23 and dispensing with attendance under s. 35(8)(c). Again on 25th October, 2019 the applicant's solicitor wrote asserting that an issue had arisen under s. 23 and demanding the establishment of a panel under s. 23(3).
30. On 4th November, 2019 the IPO stated that an interview would shortly be arranged. They never replied to the s. 35(8)(c) request, thereby impliedly rejecting it without reasons, and never replied to the request for information as to whether a panel had been established. That left the applicant with no option but to seek judicial review. The present proceedings were instituted on 22nd November, 2019, the primary reliefs sought being an order of *mandamus* requiring the establishment of a panel, with other declarations and injunctive relief also sought.
31. On 25th November, 2019 the proceedings were put on notice to the respondents. Leave was granted on 2nd December, 2019 and the respondents provided an undertaking not to progress the applicant's application which was continued in due course. The respondents did not comply with the time limits for opposition papers and had to seek a number of extensions of time, resulting in a series of adjournments including peremptory adjournment and ultimately the statement of opposition was filed on 16th June, 2020. I have now received helpful submissions from Mr. Michael Conlon S.C. (with Ms. Eve Bourached B.L.) for the applicant and from Mr. Karl Monahan B.L. for the respondents.

Section 23

32. Section 23 of the 2015 Act provides as follows: "*(1) Where, in the performance by the Minister or an international protection officer of his or her functions under this Act in relation to an applicant, a question arises regarding the physical or psychological health of the applicant, the Minister or international protection officer, as the case may be, may require the applicant to be examined, and a report in relation to the health of the applicant furnished, by a nominated registered medical practitioner chosen by the applicant. (2) Where, in the performance by the Tribunal of its functions under this Act in relation to an applicant, a question arises regarding the physical or psychological health of the applicant, the Tribunal may require the applicant to be examined, and a report in relation to the health of the applicant furnished, by a nominated registered medical practitioner chosen by the applicant. (3) The Minister shall establish a panel of registered medical practitioners who, in the opinion of the Minister, possess the qualifications and experience necessary for the performance of the functions of a nominated registered medical practitioner under this section. (4) In this section, "nominated registered medical practitioner" means a registered medical practitioner who is a member of the panel established under subsection (3).*"
33. This was partly inspired by art. 12(3) of the Asylum Procedures Directive 2005/85/EC relating to medical examination where an applicant is unable to attend an interview:

"When in doubt, Member States may require a medical or psychological certificate."

However, as correctly noted by Hughes & Hughes, *International Protection Act 2015: Annotated*, (Dublin, Clarus Press, 2019) at p. 227: "Section 23 is broader in its application ... and is not limited to the personal interview". The misunderstanding of the scope of the section is clear from the official correspondence. The recast procedures directive goes further with a requirement for medical examination with the applicant's consent out of public funds in connection with establishing evidence of past persecution or serious harm, although that does not apply to the State.

The State's failure to candidly state the factual position

34. The respondent's written submissions here begin optimistically in para. 1 with the assertion that *"the facts of the case are set out in the pleadings and affidavits filed on behalf of the parties"*. Unfortunately, that is not true. Paragraph 8 of the statement of opposition says only that *"any failure to establish a panel . . . cannot be said to have had any particular impact on the applicant's case"* but does not squarely admit that no panel was established. It is not appropriate that the respondents are unwilling to admit to a central factual proposition, especially coming after an obfuscatory failure to answer direct questions by the applicant before the proceedings were instituted. I was only told by the respondents unambiguously that there was no panel at the eleventh hour, on the final day of the hearing in the course of oral submissions on behalf of the respondents. Respondents in public law proceedings are *obliged* to put their cards on the table – that wasn't done here until very late in the day. Indeed independently of litigation, it is not in accordance with principles of good administration for a public law body to fail or refuse to answer a perfectly reasonable straight question from a person affected by the answer without reason to the contrary.

"Shall" means "shall"

35. Paragraph 5 of the statement of opposition contends that s. 23(3) is *"enabling and permissive and is not mandatory"*. Words would lose all meaning if that is correct. *"May"* sometimes means *"shall"*, if failure to exercise the option would breach legal rights or requirements, but *"shall"* means *"shall"* albeit sometimes in a directory sense.
36. *Gillen v. Commissioner of an Garda Síochána* [2012] IESC 3, [2012] 1 I.R. 574, dealt with a very different factual context. It was about doing something late, which was held to be contrary to a directory requirement, as opposed to not doing it at all. It is more to do with the workability of timescale and process, if there is slippage from statutory directions as opposed to breach of a clear statutory imperative. The distinction in *Gillen* is between mandatory obligations and directory obligations, not between mandatory obligations and permissive provisions. The respondents are wholly incorrect to assert that *"shall"* is permissive and enabling. As Mr. Conlon validly points out, even breach of a directory requirement could give rise to some relief, even if that is just a declaration.
37. *The State (Sheehan) v. The Government of Ireland* [1987] I.R. 550 also deals with a very different situation. That related to the non-commencement of s. 60(7) of the Civil Liability Act 1961, which states that *"This section shall come into operation on such day, not earlier than the 1st day of April, 1967, as may be fixed therefor by order made by the*

Government." So the wording of the section involves both "may" and "shall". It was the "may" that seemed to carry weight with Henchy J. (see para. 19 of his judgment).

38. Applying the logic of *Gillen*, the applicant has a clear and present entitlement to request to have the IPO consider the invocation of s. 23, and the clear intention of the legislation is that the IPO's consideration of whether to invoke s. 23 should be in the context of the prior existence of s. 23 panel. The absence of such a panel is not a matter of no consequence. It means the request can't be considered in the correct context and it means that a negative decision could not command confidence that the request had been properly considered. The level of justice and fair procedures demanded by the international protection process, especially since it implements EU law, would not be seen to have been achieved because a refusal of such a request could reasonably appear to have been influenced, consciously or unconsciously, by the lack of any panel, especially since a laborious procurement process would then have to be gone through.

Demand for consultant's report

39. It is a legally unsound approach where the legislature has provided parameters for the assessment of mental health of applicants for the IPO to have sought a consultant's report outside that process before deciding on the issue. That is to substitute a non-statutory mechanism for the statutory mechanism, doubly so where such substitution is to the disadvantage of an applicant because inferentially the applicant would have to pay for that consultant's report.

Failure to make decision on s. 35(8)(c) application

40. A similar logic applies in relation to the s. 35 application. It was not expressly replied to, was impliedly rejected without an express decision and no reasons were furnished. That is not an appropriate procedure even in the most conventional administrative law terms.

Standing

41. Paragraphs 6 and 7 of the statement of opposition contend that s. 23 is for the benefit of a defined class of persons which doesn't include the applicant because the IPO hasn't decided whether to exercise its discretion to activate the section or not. The respondents claim that "[t]he relevant class of persons are only those applicants in respect of whose health 'a question arises' this is a matter for the respondents".
42. First of all, that is meaningless on the facts here because the IPO sought a medical report. How then can it be said that no question as to the applicant's health has arisen? In any event, it fundamentally misses the point that the applicant can request consideration be given to the activation of s. 23, and has done so. He is entitled to lawful consideration of that request, hasn't got it, and won't get it until the consideration is given in the context of there being a panel to which he could be referred. That is the statutory scheme.
43. The respondent's reliance on *Cahill v. Sutton* [1980] I.R. 269 is totally misplaced. In any event, anticipated as opposed to actual harm can give standing: see *Mohan v. Ireland* [2019] IESC 18, [2019] 2 I.L.R.M. 1.

44. It is true that even if there was a panel the applicant might not be referred to it ultimately. On that basis the State argues that "*the applicant in this case has not suffered a loss as a result of the panel of registered medical practitioners not being established*", but that is misconceived. He has suffered a loss in the legal sense. He hasn't had a fair and lawful consideration of his request to be referred to the panel. It would require an unreal level of mental contortion for the IPO to say in effect "*we will ignore the non-existence of the panel and now give pure and pristine consideration to your request to be referred to the panel, entirely uninfluenced by the non-existence of that panel or by the laborious process and delay that would have to be undergone if your request were to be granted*".
45. The respondents rely on Gannon J.'s decision in *M.C. v. Legal Aid Board* [1991] 2 I.R. 43, where he held that an applicant had suffered no loss or established no probable imminent risk of harm where she faced nullity proceedings and the consequent extinction of any financial entitlements as a wife without any legal representation whatsoever. The prospect of such loss, in Gannon J.'s mind, wasn't "*any more than a speculative prediction*" (at p. 55). Such an attitude does not immediately commend itself as entirely self-evident; and even if one was inclined to agree with it or to think it would be followed today (which for what it's worth, I amn't), it is not a view that could plausibly be extended beyond the particular facts of that case.

Respondent's argument that no breach of rights arises

46. Paragraph 8 of the statement of opposition argues that had the panel been established, it didn't follow that the IPO would have had the applicant examined by a panel member. Again, that's true but misses the point – the applicant is entitled to a fair consideration of his request to be subjected to s. 23. That cannot be meaningfully achieved if no panel exists.

Contradictory simultaneous claims of delay and prematurity

47. Confoundingly, the respondents place themselves in the position of arguing that the proceedings are both premature and out of time. Paragraph 1 of the statement of opposition alleges prematurity (although does not say why); whereas paras. 13 and 14 accuse the applicant of delaying the claim; and para. 17 accuses him of being out of time and guilty of delay. These are not pleaded as alternative contentions, but are illogically simultaneously asserted without qualification. In *O'Connell v. Solas* [2017] IEHC 242, [2017] 4 JIC 2402 (Unreported, High Court, 24th April, 2017), I referred to this kind of respondent's logic as being a form of catch-22, and for the court to pander to it would be to render meaningless the right of access to the court. Strictly speaking contradictory claims that are not pleaded as alternatives should just be struck out, but in case I'm wrong about that I will deal with both of these claims separately.

Prematurity

48. The respondents do have one point going for them in that it is true that the general rule is that a process should be allowed to proceed rather than being prematurely cut off (see *per Murray J. in Habte v. Minister for Justice and Equality* [2020] IECA 22 (Unreported,

Court of Appeal, 5th February, 2020)). But there are of course exceptions. There are a number of reasons why the present case should be recognised as an exception.

- (i). The doctrine is partly based on the argument that one shouldn't challenge a first instance decision if an appeal provides a full remedy, but here the appeal can't provide a remedy if no panel exists because the IPAT can't properly consider the matter either.
 - (ii). Secondly, in a case where the rule of law is an issue and a statutory provision is not being implemented, the greater good is achieved by allowing a broader category of challenges. The present case is very different from routine cases where some complaint is made about an unfair procedure or error before a first instance decision-maker, but where an appeal provides a full remedy. The caselaw relied on by the respondents really has no analogy to situations like the present case;
 - (iii). The fact that the question here relates to the applicant's health and personal rights including under EU law is also relevant.
 - (iv). The complaint of prematurity is misconceived in the sense that the applicant shouldn't be compelled to attend an interview unless the IPO gives proper consideration to whether recourse should be had to s. 23 and that can only properly be done if the panel exists. To compel him to do so would potentially be adverse to both his legitimate health interests and to his protection application.
49. The respondents submit that there is a lack of evidence that the applicant is medically unable to be interviewed. That is not the issue. The applicant has raised sufficient grounds to give rise to an entitlement to have the IPO give due and proper consideration to whether s. 23 should be invoked. That can't be properly considered unless and until the panel is established. Lack of jurisdiction has been recognised as an exception to the normal rule regarding prematurity: see *e.g. X.Z. (Albania) v. The International Protection Appeals Tribunal* [2020] IEHC 97, [2020] 2 JIC 1002 (Unreported, High Court, 10th February, 2020) and *per* Murray J. in *Habte*, in particular paras. 98, 110, 113.

Delay

50. The complaint of delay in advancing the claim is misconceived. The complaint essentially is that the applicant was aware of responses to his freedom of information requests in 2018 that no panel had been established. Of course, that contradicts the fact that the respondents never actually squarely admitted that no panel had been established prior to the institution of the proceedings. Furthermore, the objection fundamentally misunderstands the nature of a continuing complaint and the injunctive nature of the application. It is perfectly appropriate for the applicant to try to avoid litigation by asking that the IPO hold off on a hearing until his requests had been dealt with. Only when confronted with an imminent hearing was it necessary for the applicant to seek to litigate. Alternatively, he could have submitted under protest and challenged the outcome by *certiorari*, and that contest would not have been out of time either, but the fact that he

could have done that doesn't mean that the possibility of taking proceedings before the interview is to be ruled out.

51. I accept the submission by Mr. Conlon that as put in written submissions "*where there is a continuing breach time does not start to run until the continuing act has ceased*", relying by analogy on *Somerville v. Scottish Ministers* [2007] 1 W.L.R. 2734. The logic of that position is essentially that each day on which a continuing wrong occurs is a fresh wrong, thus restarting time again. That logic seems impregnable. There is quite a volume of UK caselaw to the same effect cited in Michael Fordham (now Fordham J.)'s magisterial work, *Judicial Review Handbook*, 6th ed. (London, Hart Publishing, 2012) at pp. 302-303. In the context of the fact that an application for asylum is the invocation of an EU law process, to which the EU charter of right to an effective remedy applies, the most on-point case out of the perhaps dozen or so referred to by Fordham is *R (G) v. Secretary of State for Justice* [2010] EWHC 3407 (Admin) where Burton J. says at para. 11, "*I deal first with the question of a continuing breach. There is no doubt about the principle, particularly in European law but obviously extendable to Human Rights legislation, in many authorities that where there is a continuing obligation, a continuing state of affairs, which continue not to be put right by the Defendant, time does not run against a claimant at least until that state of affairs has come to an end.*"
52. Mr. Monahan endeavoured to suggest that the Irish rules were worded differently, but that is not so. The Civil Procedure Rules r. 54.5(1) (which are cited in this context in Fordham) provide that time runs from when "*the grounds to make the claim first arose*", as with O. 84.
53. Reliance is placed on *Duffy v. Road Safety Authority* [2015] IEHC 579 (Unreported, High Court, 21st September, 2015), where Noonan J. held the applicant was out of time, but that related to a very special situation. The applicant had been given a certificate of roadworthiness in July 2014, but contended that the duration of it was unlawful. The applicant didn't, however, challenge that duration until a further certificate was granted in February 2015. That case is certainly not authority for the general proposition that a continuing complaint has to be ventilated at the outset - it does not.
54. A general rule that one should challenge a continuing complaint when it first arises would create massive injustice. It would also nullify vast tranches of public law. For example, it would mean that an unconstitutional statute could only be challenged within three months. Such a position has never been suggested much less applied - on the contrary, the 3 month time-limit only applies to challenges to measures addressed to particular legal or natural persons. Measures addressed to persons generally or classes of persons generally in an ongoing way (like primary or secondary legislation, policy documents, or other general instruments) are not subject to time-limits. *Shell E & P Ireland Ltd. v. McGrath* [2013] IESC 1, [2013] 1 I.R. 247 relied on by the respondents has absolutely nothing to do with this. It is basically about the fact that a party cannot challenge a specific public law decision to which a time-limit applies by way of defence in other proceedings out of time. The cases on prohibition of criminal trials are specific to that

contest: see *e.g. M.P. v. DPP* [2015] IEHC 40 (Unreported, High Court, Kearns P., 30th January, 2015), although even there, there is quite some latitude allowed: see *C.C. v. Ireland* [2006] 4 I.R. 1.

Acquiescence

55. Paragraph 18 of the statement of opposition makes the misconceived allegation that the applicant has acquiesced in the process. Sure, he participated in the process, but participation does not equate to acquiescence. Acquiescence would be being aware of s. 23, not making any point about s. 23 in the hope of winning anyway and then crying foul once one gets an adverse decision and after the opportunity to allow the respondents to activate s. 23 had passed. Merely submitting a questionnaire is not acquiescence and nor does it impose any detriment, unjust or otherwise, on the respondents. Reliance was placed on *State (Conlon Construction Ltd) v. Cork County Council* (Unreported, High Court, Butler J., 31st July, 1975), but that is fundamentally different. There is no question here of tactical decisions being made where something is relied on and then repented of.

Non-cooperation

56. Paragraph 22 of the statement of opposition alleges that the applicant has acted unreasonably by not attending for interview. That begs the question as to whether the applicant was entitled to have his s. 23 application properly considered in the light of an already-established panel, so it adds nothing to the respondent's case.

Discretion

57. Paragraph 25 of the statement of opposition invites the court to exercise discretion to refuse the relief, but provides no basis to do so. That plea is a non-starter. No basis has been made out in any event for any discretion to be exercised against the applicant.

Order

58. Accordingly, the order I made on 31st July, 2020 was as follows:

- (i). an order of *mandamus* that the first-named respondent shall establish a panel under s. 23 of the International Protection Act 2015 on or before 1st December, 2020;
- (ii). a declaration that any steps by the second-named respondent to carry out an interview with the applicant pursuant to s. 35 of the International Protection Act 2015 without consideration of the exercise of its powers under s. 35(8)(c) would be unlawful and that the second-named respondent is required to give reasons for any refusal to exercise its powers under s. 35(8)(c);
- (iii). a stay on further processing of the applicant's application until 28 days following both of the following conditions being met:
 - (a). the second-named respondent has considered whether to exercise its power under s. 35(8)(c), made an express decision thereon and notified the applicant of that, and provided reasons;

- (b). a panel under s. 23 of the International Protection Act 2015 has been established, the second-named respondent has given due consideration to operating s. 23 in the applicant's case, has made an express decision thereon, has notified the applicant of that decision and has provided reasons; and
- (iv). liberty to apply regarding any refinements to the form of the order, with the matter to be listed on the 25th August, 2020.