



THE SUPREME COURT

S:AP:IE:2019:000228

Clarke C.J.
MacMenamin J.
Dunne J.
O'Malley J.
Baker J.

Between/

Ivan Seredych

Applicant/Respondent

- And -

The Minister for Justice And Equality

Respondent/Appellant

Judgment of Ms Justice Marie Baker delivered the 13 day of October 2020

1. The net question in this appeal is whether the Minister is obliged to revoke a deportation order or otherwise facilitate a person to enter the State when that person has been granted consent to make a subsequent application for international protection under s. 22 of the International Protection Act 2015 (“the 2015 Act”), the making of which requires his or her presence in the State.
2. It is an appeal by the Minister for Justice and Equality (“the Minister”) pursuant to Article 34.5.4^o of the Constitution from the order of Humphreys J. made on 2 December 2019 for the reasons set out in a written judgment *Seredych v. Minister for Justice and Equality* (No.

3) [2019] IEHC 730, quashing the decision of the Minister of 4 April 2019 refusing to revoke the deportation order made against the respondent.

The factual and legal background

3. The respondent, a citizen of Ukraine, arrived in the State in May 2001 with his then wife, who was not an EU national. Their son was born in the State in June 2001. He had previously made an unsuccessful application for refugee status but the couple received permission to remain in the State. That permission was renewed from time to time, and the most recent one expired in June 2016.

4. The respondent separated from his wife and commenced a relationship with a naturalized Irish citizen. They married in September 2015, shortly after the birth of their first child and now have three children.

5. On 18 November 2015, the respondent was convicted of sexual assault under s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, upheld on appeal to the Court of Appeal: *The People (DPP) v. Seredych* [2016] IECA 415.

6. On 20 May 2016, solicitors for the respondent applied to renew his permission to remain due to soon expire. The Minister refused renewal on 5 September 2016 and a deportation order under the Immigration Act 1999 was made on 8 February 2018.

7. The challenge to the deportation order was rejected by the High Court on 22 March 2018: *Seredych v. Minister for Justice and Equality* [2018] IEHC 187. The respondent left the State on 24 April 2018 in compliance with the deportation order, and now resides in Ukraine, his country of nationality.

8. Before the respondent left the State, his solicitors applied for him to be readmitted to the protection process under s. 22 of the 2015 Act. On 15 February 2018, a recommendation under s. 22(5) was made by the international protection officer that the Minister refuse to consent to the application and an appeal was lodged under s. 22(8) of the 2015 Act on 27 February 2018.

Almost one year later, on 11 February 2019, the International Protection Appeals Tribunal (“IPAT”) set aside the recommendation made by the international protection officer under s. 22(5) of the 2015 Act.

9. That had the effect by reason of s. 22(13)(b) of the 2015 Act, that the Minister was obliged to consent to the respondent making a subsequent application for international protection, and the Minister did so by letter of 26 February 2019 and required him to attend for interview within 10 days.

10. On 21 February 2019, presumably in anticipation of the consent of the Minister, the solicitors for the respondent wrote seeking confirmation that the deportation order “stands revoked”. The Minister treated the letter as an application to revoke the deportation order and refused on 27 March 2019.

11. The respondent also sought to obtain a visa, but this was rejected on 25 April 2019 on the basis that there was a deportation order in place.

The judgment of the High Court

12. Judicial review by way of *certiorari* of the refusal of the Minister to revoke the deportation order pursuant to his power under s. 3(11) of the 1999 Act was granted by Humphreys J. on the basis that the respondent had, by reason of the decision of IPAT and the giving by the Minister of consent to make a subsequent application, an implicit right to enter and remain in the State to pursue his application for international protection, and that the failure of the Minister to revoke the deportation order amounted to an unlawful frustration of the statutory purpose.

The submissions of the appellant

13. The appellant submits that the proper interpretation of the 2015 Act must have regard to the fact that in national, international and EU law the right to make an application for international protection is confined to those who are in the requested state, or at its frontiers,

and that, as the respondent had left the State he can have no right to re-enter to process the application.

14. It is argued that the principle of frustration relied on by the trial judge has no force in public law in this jurisdiction save and insofar as there exists an obligation not to disregard the clear terms of an Act, the common law principle cannot create *ad hoc* remedies for perceived lacunae.

15. Finally, as the practical consequence of the order of Humphreys J. is that an entry visa was to be issued, it is argued that the trial judge erred as there exists no right to compel the revocation of a deportation order under national or EU law, and that the order made in the High Court fails to recognise that the right to grant or refuse a visa is quintessentially a matter for the executive.

The submissions of the respondent

16. The respondent submits that he is to be permitted to enter the State to have determined the fresh application for protection he has been given consent to make and to complete the process.

17. It is argued that the Minister cannot lawfully act in a manner that has the practical effect of obstructing the exercise of the right to make the subsequent application, the making of which has been sanctioned by the Minister himself, and that this arises in the light of established principles from *East Donegal Co-Operative v. Attorney General* [1970] IR 317, as developed thereafter.

18. The arguments will be set out in more detail below.

The questions in the appeal

19. Leave to appeal was granted [2020] IESCDET 43, on the questions of law concerning the interpretation of the powers contained in s. 3(11) of the 1999 Act and the interplay between the power to revoke a deportation order under that section and the grant of consent to make a

subsequent application for international protection under s. 22 of the 2015 Act; whether the principles of frustration relied on by the trial judge exist in Irish law and, if so, whether they apply to the circumstances of this case.

20. Following case management hearings, the core questions identified in the appeal are:

- (a) Was the trial judge correct in interpreting the International Protection Act 2015 solely in accordance with Irish law? If so, having regard to the interplay between ss. 2, 15, 16 and 22 of the International Protection Act 2015 and section 3(11) of the Immigration Act 1999 as amended, was the Minister required to revoke the deportation order as a matter of Irish law?
- (b) If necessary, having regard to the answer to question 1, do Articles 32 and 39 of the Procedures Directive require a Member State to readmit into its territory an applicant who is granted permission to make a re-application for protection, and who was present in that territory when he or she applied for permission to reapply but has left the territory before the determination of that application in compliance with a deportation order validly made by the relevant authority of the member state?
- (c) If the answer to question 1 is yes, and if the Court considers it necessary to consider, is the Minister thereby obliged to grant a visa to the respondent to facilitate his entry to the State?
- (d) If the Court regards it as appropriate and necessary to decide, is the respondent barred from any entitlement to relief on discretionary grounds?

Presence in the State is required

21. It is fundamental to the difficulty presenting in this appeal that a person may seek international protection only when he or she is at the frontier of, or in, the State. This is apparent from s. 15 of the 2015 Act, which provides, in its material parts, as follows:

“15(1) Subject to sections 21 and 22 , a person who has attained the age of 18 years and who is at the frontier of the State or who is in the State (whether lawfully or unlawfully) may make an application for international protection—

(a) on his or her own behalf, or

(b) on behalf of another person who has not attained the age of 18 years and who is at the frontier of the State or who is in the State (whether lawfully or unlawfully), where the person who has attained the age of 18 years is taking responsibility for the care and protection of the person who has not attained the age of 18 years.

(2) Subject to subsections (3) and (4), an application for international protection shall be made in person and shall be made to the Minister.”

22. The applicant therefore cannot be an “applicant” in the meaning of the Act, as s. 2(1) defines an applicant as a person who “has made an application for international protection in accordance with section 15”.

23. Further, a subsequent application is to be made in person and therefore requires physical presence in the State, conditions the respondent could not satisfy.

24. Provisions exist to afford a right to remain to a person who has made an application for international protection. A person who is present at the frontiers of the State, and who from there makes an application for international protection, is by section 16 of the 2015 Act to be given permission to enter and remain in the State for the purpose of permitting an examination of that application:

“16(1) An applicant shall be given, by or on behalf of the Minister, a permission that operates to allow the applicant to enter and remain or, as the case may be, to remain in the State for the sole purpose of the examination of his or her application, including any appeal to the Tribunal in relation to the application.”

25. The respondent is not within the territory of the State nor has he presented at its frontiers seeking protection, and he is accordingly not a refugee in the sense in which that term is used in international treaties or in domestic law, and therefore, he is not entitled to seek international protection unless steps are taken to either revoke the deportation order or otherwise permit him to enter. He cannot therefore make the application in person as required by s. 15 and cannot therefore be characterised as an applicant for the purposes of section 15, nor avail of the right to enter and remain in the State pending the determination of his application. He claims however that the right is implicit from the fact that he was given permission to make a subsequent application for protection.

26. The Minister argues that there is no stand-alone right to enter other than to a person who presents at the frontiers of the State and from there makes an application for international protection.

27. As will be seen presently, this limitation on the right to enter is also found in EU and international law, and is consistent with the Refugee Convention and the general requirement found in international law that a refugee is a person who is outside the place of his or her nationality, and who cannot for reason of a well-founded fear of being persecuted avail himself of the protection of his own place of nationality.

28. There is nowhere found a freestanding right to be given a visa or other means to enter a state lawfully for the purposes of making an application for international protection

The making of a subsequent application

29. A person who has been refused international protection may not make a further application without the consent of the Minister. Section 22 contains a general prohibition against the making of the subsequent application but modifies that by permitting the making of a subsequent application with the consent of the Minister:

“22(1) A person shall not make a subsequent application without the consent of the Minister, given under this section.”

30. The balance of section 22 sets out the procedures to be followed by an applicant seeking such consent. The application is processed through an international protection officer (“IPO”) who makes a recommendation under s. 22(4) based on an assessment of whether new factors have arisen, if there exist factors which the person was unable to present in a previous application, or if the previous application was withdrawn for unavoidable reasons.

31. A decision of an international protection officer to recommend refusal may be appealed to the tribunal (“IPAT”) pursuant to s. 22(8).

32. Section 22(13) provides that if IPAT sets aside a recommendation to refuse, then the Minister “shall give his or her consent to the making of a subsequent application by the person concerned”. The role of the Minister imports no discretion and was analysed by McKechnie J. in *P.N.S. v. The Minister for Justice & Equality* [2020] IESC 11: The Minister must give consent, save in exceptional circumstances where the security of the State is thought to be at risk, and the decision-making power is vested in the IPO and on appeal in IPAT:

“I do not see the Minister’s involvement as conferring upon him any power or authority to make substantive decisions which affect the applicant. His role is I think as the learned trial judge said, purely a formulistic one, which is to implement the determination of either the IPO or IPAT, as the case may be.” (at para. 85)

33. As the respondent succeeded in his appeal to IPAT, the Minister was required, as a matter of statute, to give his consent to the making of a subsequent application by him.

The language of the Act

34. From the plain language of section 22(1), the Minister does no more than consent to the making of a subsequent application and does so on the recommendation of IPO or IPAT. The

Minister's consent is to the making of a subsequent application, but it is not the commencement of or a part of that application. It is a condition precedent to the commencement of the new consideration by the relevant body of the application on protection.

35. The trial judge expressed the view that a process to seek international protection is commenced by the making of the recommendation and the giving of consent by the Minister is only a step in that process which the Minister may not frustrate.

36. The first observation to be made is that on a plain reading of section 22(1) the application is one for leave to be permitted to reapply to enter the protection process. The trial judge treated the application for leave to make a subsequent application as the commencement of a process which was not complete, and which continues until the application for protection itself is determined. There is nothing in the language in section 22 which supports that interpretation, and as will appear below the process established by the Act of 2015 is consistent with EU law, and indeed no argument is made that the relevant Directive was not properly transposed.

37. Some interpretative support is found in subsection 22 (16) which provides that a second or subsequent application made without the consent of the Minister is to be terminated:

“22(16) Where a subsequent application is purported to have been made under section 15 and the Minister has not given his or her consent under this section to the making of the application—

(a) any examination of the application shall be terminated, and

(b) the report referred to in section 39 shall not be prepared.”

38. That provision suggests that the giving of consent by the Minister does not mean that a person has thereby acquired the status of being an applicant for international protection. An

applicant for subsequent protection made without consent loses that status. He does not gain that status by obtaining consent. That is the scheme of the Act.

39. Some support for treating the application for leave to re-enter the protection process as a self-contained step is found in the decision of this court in *P.N.S. v. The Minister for Justice & Equality* where it was held that while an applicant for leave is entitled to remain in the State pending the determination at first instance by IPO of his application under section 22, that applicant was not entitled to remain in the State pending an appeal to IPAT. There the Court was concerned with the interpretation of article 7(1) of the Procedures Directive which gives an applicant a right to remain pending “a decision at first instance”. That judgment does not offer any further assistance with regard to the quite different question that arises in the present case, but it does show an approach to the sequential process where the Court was prepared to treat the application to IPO for a recommendation as separate from an appeal of that decision. One might therefore extrapolate it, although I accept that the argument does not take one far towards a solution, that still less could be said that the making of a subsequent application for protection is a continuation of the process commenced by the application for leave.

40. The trial judge approached the matter as if the giving of consent by the Minister for the making of a subsequent application of itself, and on a plain reading of s. 22(1), is part of a process which the Minister could not lawfully interrupt or frustrate. In my view the process of applying to make a subsequent application is distinct from the substantive application for international protection, which is decided on the merits. The requirement to obtain consent to re-enter the protection process is a filtering mechanism to prevent a person abusing the system by the making of a series of identical applications. But it also provides protection to a person who finds himself or herself in new circumstances, or who was unable to fully present the case for protection when it was first made. The opportunity to re-enter the protection process stems from the Procedures Directive, but its provisions expressly permit filtering of applicants in the

manner provided in domestic legislation. The Procedures directive will be considered more fully later in this judgment.

41. I consider that the trial judge wrongly saw the process as a unitary and not sequential process, and in that context treated the Minister as interrupting a process in a way that was inconsistent with the Minister's own statutory role in that process. I am unable to read section 22 in that way. As will appear below, the Procedures Directive supports this interpretation.

42. The consent accordingly does not commence the application for international protection but "entitles" the making of a subsequent application. Armed with the consent a person may then commence the process. By giving consent the Minister removes one hurdle, but he does not thereby remove the gateway obligation in section 15 of the Act that an applicant for protection must be present in the state or at its frontiers. The Minister cannot take steps to prevent the application to re-enter the process but that does not in my view mean a person armed with the consent under s. 22(1) can be said to be an "applicant" for the purposes of the Act.

43. Section 22 could have been otherwise framed. It might, but does not, for example have provided that a person who makes a second or subsequent application must thereafter obtain the sanction of the Minister to continue the process. Instead it makes consent a condition precedent to the commencement of an application for protection. It does not constitute the commencement of that process or avoid the requirement that an applicant meet other statutory preconditions such as presence in the State or at its frontiers.

44. But this appeal also requires a consideration of whether a plain reading of the Act must give way to a broad approach from international immigration law that imputes an obligation on the part of the Minister to take steps necessary to facilitate the making of an application to re-enter the protection process, whether that be to revoke the deportation order and grant the respondent a visa or some other means by which he can lawfully enter the State.

45. That question involves an analysis of the operation of immigration law in the context of international instruments.

The Procedures and Qualification Directives and the Refugee Convention

46. The Act of 2015 restates and modifies certain aspects of the law relating to the entry into, and presence in, the State of persons in need of international protection. It is stated to give further effect to Council Directive 2001/55/EC, Council Directive 2004/83/EC (the Qualification Directive) and to Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, O.J. L/326, 13.12.2005 (“the Procedures Directive”), and to the UN Convention Relating to the Status of Refugees of 1951 and the Protocol thereto done in New York on 31 January 1967 (“the Refugee Convention”). The Directives are part of the establishment of a common system for the determination of applications for international protection based on the Refugee Convention and apply to all applications for asylum made in the Member States.

47. The process in Irish legislation is consistent with the Qualification Directive and the Procedures Directive both now recast, but which in their original form continue to apply in Ireland by reason of the State’s taking part in only some of the Schengen *acquis*.

48. Article 2(c) of the Qualification Directive defines a refugee as:

“a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country [...].”

49. The Procedures Directive adopts this definition which in turn derives from Article 1 of the Refugee Convention and is in terms broadly similar to those found in the Irish Act. Article 3.1 of the Procedures Directive expressly restricts its application to those who apply either from within the territory or at the border of the receiving Member State:

“This Directive shall apply to all applications for asylum made in the territory, including at the border or in the transit zones of the Member States, and to the withdrawal of refugee status.”

50. There is no reason from the Directives why domestic law cannot require an applicant to make application in person, as Article 6.1 of the Procedures Directive provides:

“Member States may require that applications for asylum be made in person and/or at a designated place.”

51. Once application is made, Article 7.1 of the Procedures Directive provides that an applicant is to be allowed to remain until the application has been determined:

“1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.

2. Member States can make an exception only where, in accordance with Articles 32 and 34, a subsequent application will not be further examined [...]”

52. This is reflected in the provisions of s. 15 of the Act.

53. The respondent relies on article 7 as establishing an obligation on Member States to positively take steps to permit a person to enter the state. At best the respondent must rely on an implication from article 7 or from the Directive as a whole, as no express positive obligation to permit entry is found either in the Procedures Directive or Qualifications Directive.

54. The Court of Appeal for England and Wales in *R. (AB) v. Secretary of State for the Home Department* [2018] EWCA Civ 383, held that article 7 of the Procedures Directive implicitly excludes any right to enter, or re-enter, a Member State for the purposes of making an application for asylum.

55. At paragraph 29 of the judgement by the Court of Appeal for England and Wales in *R (on the Application of AB the Secretary of State for the home Department 2018 AC Civ 383* [2018] Imm AR 1015, Leggatt J noted the following:

“There is also nothing in the Procedures Directive which obliges Member States to readmit to its territory an applicant who chooses to leave the member state while his or her application is pending. Notably, article 7 confers a right to remain in the member state until a decision has been made on the application but not the right of entry or re-entry on an applicant who was not in the member state.”

56. I respectfully adopt that analysis.

57. Article 32 of the Procedures Directive has been largely transposed into Irish law by s. 22 of the 2015 Act.

58. Article 32.1 makes provision for the making of a second or subsequent application by a person who has been refused protection or whose application was withdrawn:

“1. Where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, that Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.

59. The article provides for a screening or preliminary examination of subsequent applications as to whether new elements or findings justify the grant of leave. Again, this is reflected in the process in domestic legislation by which IPO, and IPAT on appeal, make a recommendation to the Minister who then formally grants leave to apply under s. 22.

60. Article 32.4 provides as follows:

“If, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II.”

61. Chapter II provides a number of procedural protections to an applicant, including the right to remain in the Member State until the determining authority has made a decision, the right to an appropriate assessment or examination of the application, and the right to an interpreter, to a personal interview (article 11), and to legal representation (article 15)

62. Each of those guarantees relate to the applicant for protection. If a person cannot, by reason, for example, of not being present in the State, be regarded for the purpose of the Directive as a refugee or applicant for protection those guarantees do not operate.

63. While the Procedures Directive does identify, in article 39.3, that an applicant has a right to remain to process an application, there is no express right to enter the State for the purposes of making an application, save where the person is at its frontiers. This Court has held in *P.N.S. v. The Minister for Justice & Equality* that the right to remain is limited and does not extend to a right to remain pending an appeal to IPAT.

64. If a person does not have a right to remain pending the outcome of an appeal, still less could such a person have a right to return to the State to do so.

65. While in a suitable case, an injunction may lie to restrain removal on the basis of cogent evidence of risk, even pending an appeal to IPAT against a decision under s. 22(5) of the 2015 Act, that right does not extend to a right to return to the State. But the respondent has never made an argument that he would be subject to risk of harm and did not seek injunctive relief.

66. The High Court distinguished the decision of this Court in *Y. Y. v. Minister for Justice and Equality* [2017] IESC 61, [2018] 1 ILRM 109, on the basis that once consent was given

the application had commenced and Humphreys J. said the same process should be permitted to conclude.

67. The respondent argues that the decision of this Court in *Y. Y. v. Minister for Justice* may be distinguished, in that no argument is made here that the Minister had failed to comply with a binding legal obligation to accept the findings of the then Refugee Appeals Tribunal. It is argued that the factual nexus in the present case leads to the contrary conclusion: IPAT has made a decision that is binding on the Minister, and unlike in *Y. Y. v. Minister for Justice*, the international protection procedure has not concluded. That was the conclusion to which the trial judge came, he having found that to allow the respondent to return to the State to pursue the re-application is a necessary part of that same process already commenced.

68. The obligation to facilitate entry for the sole purpose of making an application for protection is not found expressly in any international instrument and cannot be implied from the general principles of immigration law, which oblige a state to afford protection, and *ipso facto* the right to make application for protection, to those who come to its frontiers or enter within that state seeking shelter. That is far from creating a positive obligation to open the borders of the state to permit entry to those who wish to enter to seek that protection.

69. The House of Lords considered the extent of obligations imposed on a state under the Refugee Convention and whether an application for asylum made by a person outside the UK ought to be considered in its decision in *R (European Roma Rights) v. Prague Immigration Officer* 2004 UK HL 55, 2005 2 AC 1, where it held that while the Convention did prohibit a contracting state from returning a person to a territory where he or she is threatened with persecution, it does not impose an obligation on contracting states to afford entry to persons claiming refugee status. Lord Bingham was prepared to accept that while the principle was not embodied in the Refugee Convention there may be a customary international law principle that entitles a person who applies for asylum at the frontier of a state to enter the state for the

purposes of making application for protection (para. 26). Section 15 of the Irish Act expressly grants that right to a person when that person applies for protection at frontiers of the state.

70. The question was recently considered again in *R (on the Application of AB the Secretary of State for the Home Department)* where Leggatt LJ stated the proposition at paragraph 23 as follows:

“The obligations imposed by the Convention - and in particular the key prohibition against refoulement - of their very nature apply only to persons who are within the territory (brackets or at least the control) of the contracting state, and there is no obligation on a contracting state to admit asylum seekers to its territory. It makes no difference in that regard but the person who wishes to seek asylum has never entered the territory of the contracting state in the first place or has entered its territory and then voluntarily left. In neither case does the principle that a refugee cannot be forcibly returned to a place where he faces persecution afford him any assistance.”

71. I find this analysis persuasive.

72. These decisions offer no support for a general proposition that international immigration law imposes an obligation on the state to permit entry to a person for the purposes of making application for international protection, save in the limited circumstances where that person presents at the frontier of the state, the frontier being a place which is seen to be within the control of all the executive power implicit in sovereignty.

Right to an effective remedy?

73. Article 39 of the Procedures Directive provides for a right to an effective remedy, the material parts whereof are:

“1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:

.....

(c) a decision not to further examine the subsequent application pursuant to Articles 32 and 34;

2. Member States shall provide for time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.

3. Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:

(a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;

(b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an ex officio remedy; and

(c) the grounds for challenging a decision under Article 25(2)(c) in accordance with the methodology applied under Article 27(2)(b) and (c).”

74. The rights here protected are the opportunity to bring a subsequent application for protection, expressly contained in domestic legislation (s. 22), the right to seek review of that decision, and for a consideration of the right to remain pending a decision. Those remedies are available within the domestic legal order, expressly under s. 22 and by reason of the availability of judicial review and the statutory right to remain for the purposes of pursuing an application.

75. The respondent does not argue that he has been denied the right to make an application for protection, although his legal representatives have thus framed it, but his argument in substance is that he has a right which the Minister is obliged to facilitate by permitting him to enter the State for that sole purpose.

76. No support is found in the authorities considered above or from the Act for the broader proposition that there exists this right to be facilitated in entry to a Member State for the purposes of making application for asylum.

77. The immigration system that has operated in Ireland as amended and reframed in the Act of 2015 has developed largely as a result of the implementation of international agreements, and the principles which underlie these agreements have developed and evolved as a result of compromise, by balancing the recognition of the sovereign right of a state to control its borders, with the human rights of persons who seek protection from persecution. Nowhere in domestic or international instruments is there provision for the granting of consent to enter a state for the sole purpose of seeking protection, nor is there found a procedure for the making of an application from the place of the nationality of the person seeking protection. This is inherent in the internationally accepted definition of a refugee as a person who is outside the place of his or her nationality and cannot hope to be protected from harm in that place.

The principle of frustration

78. The trial judge relied on an argument that the principle of frustration imports an obligation on the Minister to revoke the deportation order so that the respondent could make the application permitted by IPAT. It is noted that the principle had not been raised in the course of argument before the trial judge. This creates the obvious difficulty that the point was argued only during the appeal, but I propose considering the argument at least in brief while reserving a more complete analysis to a case where it is fully argued.

79. He found that the principle of frustration prevented the Minister from refusing a right to enter the State and created a positive obligation to revoke the deportation order and grant a visa to the respondent to travel to the State for the purposes of making the application for international protection.

80. I accept that it can be said that once an applicant has obtained the consent of the Minister to make a subsequent application for protection the Minister may not take steps to prevent him or her from acting on that very consent if by doing so the Minister frustrates the legislative purpose. The trial judge drew from this general, and largely uncontroversial, proposition a wider obligation on the Minister to revoke a deportation order the legality of which has been finally judicially determined, or to take positive steps to grant an entry visa facilitate an applicant in making that subsequent application for protection.

81. I do not consider it necessary or desirable to address the argument that there exists a broad principle of frustration, at least on a stand-alone basis, in administrative law. At its height the argument made, and the principle stated by the trial judge take as its starting point an obligation not to frustrate the statutory purpose of the statute, or the specific obligations imposed by that statute. The statutory purpose is to make possible in certain circumstances the re-entry of a person into the protection process, and certain obligations are imposed on the Minister in s. 22, all of which are agreed to have been met. The respondent seeks now to argue that the statute imports implied obligations to take further steps to constitute a person who meets the requirements of s.22 as an applicant by facilitating that person in meeting other qualifying criteria be treated as a “refugee”.

82. The trial judge relied on the recent decision of the Outer House of the Scottish Court of Session in *Vince v. Prime Minister* [2019] CSOH 77,

“The argument is made that the ministerial consent furnished under s. 22(13) of the 2015 Act does not imply a right to enter or remain. Such a right, it is argued, depends on actually making a substantive application for protection under s. 15. The contention that the applicant therefore got what he asked for and is not entitled to the additional rights claimed in this action is essentially the gist of the argument made by the State

here. But implicitly, the grant of permission to make a reapplication is the start of a process, and the Minister is not entitled to frustrate that statutory process. The principle involved was vividly summarised recently in *Vince, Maugham and Cherry v. Johnson and the Lord Keen of Elie* [2019] CSOH 77 at para. 37 in the context of a suggestion that the UK Prime Minister might act in a manner so as to undermine the objectives of a particular Act of Parliament (the European Union (Withdrawal) (No. 2) Act 2019). The point was summarised as being ‘the public law principle that he cannot frustrate its purpose or the purpose of its provisions’. That principle is relevant here.” (at para. 14)

83. From this he derived a view that it is implicit in the process under s. 22 that an applicant who has obtained consent to bring a subsequent application for international protection must be permitted to conclude the process of making the application.

84. The respondent argues that the principle of frustration is derived from the rule of law, from the Constitution, and the principle well-established since *East Donegal Co-Operative v. Attorney General*, that legislation be interpreted in a constitutional manner and more especially for present purposes “only within the boundaries of the stated objects of the Act” (per Walsh J. at p. 334).

85. The argument is that a right to re-enter the State for the purpose of pursuing an entitlement which arises under statute includes, on a constitutional interpretation, an obligation on the Minister to remove legal obstacles to the proper processing of that application, and to take steps necessary to give effect to the statutory structure created by the 2015 Act, up to the revocation of the deportation order.

86. I have no difficulty in accepting at the level of high principle and as an element of the rule of law that a Minister may not frustrate a legislative purpose or exercise a discretionary statutory power in a manner that is inconsistent with the legal duty imposed on him by the

legislature. I do not see that it benefits the respondent in the present case. The effect of s. 22 of the 2015 Act was to compel the Minister to follow the decision of IPAT, and consent to the making by the respondent of an application for international protection. That step was taken by the Minister in accordance with his statutory duty. For the reason addressed above the role of the Minister has thereby been completed and the mechanism of the Act does not require the Minister to facilitate the making of the application for protection by permitting the respondent to enter the State and thereby be constituted as an applicant for the purpose of s. 15. There is no legal duty on the Minister whether from the Act or from international instruments that could oblige him to take this step.

87. I do not accordingly accept that the respondent has by virtue of the consent under s. 22 any right other than the one to make a subsequent application for protection. He is not on account of having that consent to be treated as an applicant but has the right to commence the process of seeking protection if he can meet the requirements of the Act.

88. I cannot for that reason see any basis on which it could be said that the Minister has acted in a manner that frustrates the operation of the Act or of the international instruments by refusing to take positive steps to revoke the deportation order or by granting an entry visa to the respondent.

Arbitrariness?

89. It is argued that the Minister's action in refusing to revoke the deportation order was arbitrary, in that it places an applicant who flouts a deportation order in a better position than one who complies with its terms and leaves the State.

90. The respondent argues that the consequence of the refusal to grant a visa to Mr. Sereych or otherwise permit him to re-enter the State is that he is being punished for leaving the country in response to the deportation order and that this interpretation favours those who enter or remain in the State illegally. That argument to my mind ignores the obvious fact that

Mr. Seredych resides in his country of nationality and cannot on any interpretation be classed as a refugee on that account. But it might also be said that domestic and international instruments do not, or more properly do not always, punish a person who enters or remains in a state illegally, and this is a feature of global inequality, injustice and poverty, from the precarious status of many persons who seek international protection, and from the recognition that persons move across state boundaries sometimes from desperation and fear and other times in the hope of a better life. That persons enter or remain in a state illegally of itself cannot and does not guide international or domestic legal principles towards the proposition that a state must permit entry to these persons to facilitate them in seeking international protection.

91. The approach of the Minister does not in my view amount to arbitrary treatment in this sense.

Separation of powers: the grant of a visa

92. The appellant accepts that, once IPAT made the decision giving liberty to the respondent to make a fresh application, the Minister had no alternative but to consent to the making of an application under s. 22 of the 2015 Act. This for the reasons explained earlier does not import a broader right, including the right claimed here, to have a lawful deportation order revoked, and/or a right to have a visa granted, so as to permit the respondent to enter the State. The grant of a visa is quintessentially a matter of executive power and a direction by the High Court to the Minister to exercise an executive power of the State is an impermissible straying into the executive power.

93. For the reasons stated above, and because the matter is one of statutory interpretation, I do not think this aspect of the appeal need to be further considered.

Comments in regard to counsel

94. I would here like to make some observations regarding certain comments and remarks of the trial judge in his principal judgement and in the judgement refusing leave to appeal,

Seredych v. The Minister for Justice and Equality [2019] IEHC 891, where he called into question the professional integrity and ability of counsel on both sides, and criticised each of them in different ways. In particular the judgement on the leave application contained a number of quite remarkable and personally insulting comments regarding the competence and trustworthiness of counsel for the State and the professional competence of both senior counsel.

95. The comments made were on any view offensive and humiliating and were capable of being damaging to the career of counsel and personally upsetting.

96. Counsel were identified by their names. It goes without saying that neither had opportunity to respond.

97. The tone may seem to be somewhat flippant or, were it not for the seriousness of the fact that they were contained in a written judgement of a senior member of the judiciary who has considerable experience in the area of immigration, might almost appear to be humorous or satirical. The trial judge may even have meant them in that way. But they must have caused upset and personal and professional embarrassment to the persons concerned.

98. Such comments have no place in a judgement. The relationship between counsel and court must be one of mutual respect. The judge is in a particular position of power and can damage or destroy a career with a remark made in court or in a written judgement. Equally a judge can cause personal distress, not just because the judge holds a position of power, but also because he or she is held in high esteem by the profession and generally by members of society.

99. It is no part of the judge's role to be personally insulting to the lawyers who appear before him or her. While there may be occasions when a judge may in a written judgement expressly doubt the integrity of counsel or his or her professional competence, that is not something to be done lightly and certainly not without giving an opportunity to the lawyer to respond and defend his or her reputation and professional competence.

100. What may trip lightly from the judge can fall heavily or very heavily on counsel in the light of the power imbalance. The unique position of the judge therefore carries the burden and responsibility of restraint in regard to observations, whether professional or personal, made regarding counsel or solicitor who appears before him or her.

101. While I disagree with the reasoning of the trial judge in the present case his judgement was lucid, reasoned, elegant and intelligent. It would be a shame if the erudition displayed in his writing were to be lost in his more colourful observations which in my view are regrettable and have no place in a judgment of a court of law.