

**THE HIGH COURT**

[2021] IEHC 32

[2019 No. 758 JR]

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

**BETWEEN**

**X**

**APPLICANT**

**- AND -**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr Justice Max Barrett delivered on 22nd January 2021.**

1. Mr X, a national of Nigeria, claims to be bisexual or homosexual (both terms have been used by his lawyers in the pleadings, though Mr X's own claim at his s.35 interview was that he is bisexual). His claims as to his sexuality have not been believed by the Minister. Consequently he has failed to secure a refugee declaration, a subsidiary protection declaration or permission to remain in the State and, latterly, has had a deportation order issue against him.
2. On 22nd May 2017, a permission to remain decision issued to Mr X along with a s.39 report dated 15th May 2017. That s.39 report referred to the wrong person in the recommendation section. On 30th May 2017, a s.39 report issued which now referred in Section 10 to Mr X. The brief cover letter which accompanied the report of 30th May 2017 states, *inter alia*, as follows:

*"I refer to our recent letter to you dated 22nd May 2017 in relation to the recommendation made in respect of your application for international protection. I wish to advise you that [the] s.39 report that issued to you with the letter on 22nd May 2017, contained an error in section 10 of that report. I wish to apologise for this error and am now enclosing a copy of the s.39 report containing the correct details. Please also find attached a new recommendation letter which, you will note, has been dated 30th May 2017"*
3. There is dispute between the parties as to whether the s.39 report should be treated as having issued on 22nd May 2017 or 30th May 2017. Regardless of where the truth of this lies, to the extent that Mr X now seeks to bring a challenge by reference to the just-described events of May 2017, the court must respectfully decline to extend the time for the bringing of that claim for the reasons set out below.
4. Under s.5 of the Illegal Immigrants (Trafficking) Act 2000 as amended by s.34 of the Employment Permits (Amendment) Act 2014 and s.79 of the International Protection Act 2015, Mr X had a 28-day period within which to question the validity of a s.39 recommendation. Taking his case at its height, he ought to have brought that claim by end-June 2017. Instead, as mentioned, he commenced it in November 2019. Under s.5(2) of the Act of 2000, the court may extend the 28-day period where (i) it considers that there is good and sufficient reason for extending the period within which the application shall be made, and (ii) the court is satisfied that there are substantial grounds

for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed. Turning then to consider items (i) and (ii):

- (i) *is the High Court satisfied that there are substantial grounds for contending that the impugned act/ion is invalid or ought to be quashed?*

The court's answer to this question is 'no'. What occurred, with respect, was an administrative error. The wrong person was named in the recommendation section of the s.39 report but it is patently obvious that the report was concerned with all the circumstances of Mr X's case, it is clear from the summary findings in Section 9 what the only recommendation could be, and it is clear that the civil servant who signed Section 10 could only have meant his recommendation to apply to Mr X. We all make mistakes, this was a small administrative mistake, and it was swiftly and honestly corrected; perfection of action is not a standard that the law demands of decisionmakers.

- (ii) *is there good and sufficient reason for extending the period within which the application shall be made?*

The court's answer to this question is 'no'. Mr X has had the benefit throughout his asylum application of legal advice/advisors. He had every opportunity to raise the point that he now seeks to raise concerning the s.39 report and never did so for no good reason other than that he did not. Moreover, the court cannot overlook the extraordinary duration of the extension of time that is sought of it in the within proceedings. Taking Mr X's case at its height and so counting the time from 30th May 2019, the court is being asked to allow a timeframe for bringing the within proceedings that is about 30 times the standard timeframe of 28 days. The court does not see that it can properly grant an extension of time of such a radical duration in all the circumstances presenting. The court respectfully does not accept that because Mr X was informed on 24th July 2019 that the permission to remain decision remained unchanged, that re-set the clock in terms of challenging that decision. To conclude otherwise would run counter to the clear 28-day timeframe contemplated by s.5 of the Act of 2000; it flies too in the face of the practical reality that Mr X has known since May 2017 of the matter of which he now seeks to make complaint.

5. The first of the two questions contended by Mr X to arise in the within proceedings is "Was the permission to remain decision, made under s.49 of the International Protection Act 2015 (the 'Act') and dated 30th May 2017 and affirmed on the 24th July 2019 (the 'PTR Decision') and which includes the consideration of refoulement, vitiated for illegality as having been made prior to the recommendation under s.39(3)(c) of the Act? As the court is declining to grant the extension of time sought to raise this question, it follows that the court will not consider this question. The court turns therefore to the second of the two questions raised by Mr. X, viz. *"Is the Deportation Order vitiated by the Respondent's failure to provide a written decision of his opinion under ss.50 and 51(3) of the Act?"*

6. Mr X contends that, as per his written submissions, *"The Respondent...issued the deportation order under s.51 without giving the applicant any notice of his s.50 reasoning which he was required to do under s.51(3)"*. Three points might be made in this regard.
- *first, s.51(3) requires that the reasons for making the deportation order be given, i.e. the "it" referred to is the deportation order. Section 51(3) does not require per se that the reasons for the view taken as to non-refoulement be given, though the fact of the view taken as to non-refoulement would almost undoubtedly be among the reasons as to why the Minister was satisfied to make a deportation order.*
  - *second, in point of fact Mr X was provided with the reasons for the making of the deportation order in the notice of the deportation order that issued on 2nd October 2019.*
  - *third, there can be no question that Mr X was left in the dark as to why his s.50 submissions were unsuccessful. The s.50 submissions in essence amounted to an assertion by his lawyers that he is homosexual and that LGBTI+ people suffer badly (and they do suffer badly) in Nigeria, thus presenting a danger to him if he is returned there. But Mr X knows through his participation in the asylum process from start to finish that the Minister has never accepted that Mr X is either homosexual or bisexual, so it is, with all respect, obvious why the Minister took the view that he did concerning non-refoulement. In the context of this third point, it is perhaps worth remembering the observation of Fennelly J. in Mallak v. Minister for Justice and Equality [2012] 3 IR 297, para.[66] that:*
- "The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."*
7. These are standards that have been satisfied in the process in which Mr X has participated.
8. The court respectfully declines to grant any of the reliefs sought by the applicant in his notice of motion. The court, in the Appendix hereto, considers in still more detail the facts and issues presenting in the within applications. That Appendix and all of the text which precedes it together comprise the court's judgment in these proceedings.
9. In this and the next paragraph, the court respectfully makes a number of *obiter* observations. The granting of asylum is an exercise in humanity. To borrow from the imagery in the Christian parable of 'The Good Samaritan', it involves the Irish people reaching out through the legal guise of the State to help a fellow traveller in life, a stranger who has been stripped and beaten and left for dead, yet in whom we recognise a

neighbour in desperate need of help. The State, in the substance and operation of its asylum laws, seeks therefore to attain a particular moral ideal. There are moments in the progress of Mr X's application when an onlooker might wonder at how the State has proceeded. Three examples suffice:

- (i) Mr X has recounted a number of sexual encounters with other males, yet his truthfulness in this regard has been assailed on the basis that "*it simply is not credible that a young man having been raised in...a restrictive environment would engage in behaviour both unacceptable and outlawed in the society in which he lives*". Such a conclusion, with respect, does not follow. Growing up in a 'straight' or strait-laced environment does not mean that a male of any age who is bisexual/homosexual is going to avoid expressing his natural sexuality. As a nation we ought surely to be particularly alive to this truth, for there were doubtless many bisexual/homosexual men in Ireland who – in the particularly bleak period that lasted from the enactment of the Offences against the Person Act 1861 through to the belated decriminalisation, in the early-1990s, of consensual same-sex intercourse between males of/above the age of consent – rightly continued, regardless of the law, to express their natural sexual orientation by engaging in consensual same-sex adult relationships, even though such relationships were wrongly considered by many in that period to involve behaviour that was so unacceptable as to merit condemnation through criminalisation.
- (ii) it was not believed that a bisexual/homosexual man would have naked 'selfies' of himself and his partner on his mobile phone because if he was caught with such photos that could lead to a lengthy prison sentence. Again, such a conclusion, with respect, does not follow. If even the prospect of getting into trouble yielded the result that one would not commit a crime, then no crimes would ever be committed.
- (iii) there was early consideration of whether Mr X, in his first months in Ireland, had invoked the assistance of LGBTI+ rights organisations or visited any gay bars/clubs. But many LGBTI+ people doubtless go through life without ever becoming involved in rights organisations and the notion that a poor man seeking asylum would have money to throw about in bars/clubs speaks for itself.

10. The just-mentioned aspects of Mr X's case are matters that are not the focus of the present application and thus matters in respect of which no order can be made in this application. *Quaere*, however, whether, given the just-mentioned aspects of Mr X's case, the State is at risk of falling short, in this case, of attaining that general moral ideal which it recognises in, and seeks to attain through, its asylum regime, for if the Minister is wrong and Mr X *is* bisexual, he is set to be deported to a country where LGBTI+ people are treated badly and suffer greatly.

## APPENDIX

### I

#### GROUNDING AFFIDAVIT – PART 1

1. In his grounding affidavit, Mr X avers, *inter alia*, as follows:

"2. *This is my second application for judicial review. I brought an application for judicial review...seeking to quash the decision of the International Protection Appeals Tribunal made under s.46(a) of the International Protection Act 2015 (the 'Act'). Leave was granted on 13th November 2017 and my application was denied on 11th June 2018, for the reasons set out in DU v. IPAT [2018] IEHC 630.*

#### *Initiating documents*

3. *On 2nd October 2019, the Repatriation Division of the Department of Justice and Equality issued me with the deportation order dated 9th September 2019 (the 'Deportation Order'). I was instructed to leave the State by 2nd November 2019 to make arrangements for my removal. I beg to refer to a true copy of the notice and the deportation order...".*

### II

#### THE NOTICE AND THE DEPORTATION ORDER

2. The said notice of deportation reads, *inter alia*, as follows:

*"Dear Mr X*

*Following the refusal to give you a refugee declaration, a subsidiary protection declaration and permission to remain in the state under s.47 and 49(4) of the International Protection Act 2015, the Minister for Justice and Equality has now made a deportation order in respect of you. The deportation order is made under s.51 of the International Protection Act 2015. A copy of the order is enclosed with this letter.*

*In making the deportation order the Minister has satisfied himself that the provisions of section s.50 (prohibition of refoulement) of the International Protection Act 2015 are complied with in your case. The Minister is also satisfied that s.48(5) (option to voluntarily return to your country of origin) of the International Protection Act 2015 does not apply in your case...".*

3. The said deportation order states, *inter alia*, as follows:

#### *"DEPORTATION ORDER*

*WHEREAS it is provided by s.51 of the International Protection Act 2015...that, subject to the provisions of s.50 (prohibition of refoulement) of the Act, the Minister for Justice and Equality shall by order require a non-national specified in the order to leave the State within such period as may be specified in the order and thereafter to remain out of the State.*

*WHEREAS [Mr X] is a person referred to in subsection (1) of section 51 and in respect of whom a deportation order shall be made under subsection (2) of the said section 51;*

*AND WHEREAS the provisions of section 50 (prohibition of refoulement) of the International Protection Act 2015 are now complied with in the case of [Mr X]...*

*NOW I...in exercise of the powers conferred on me by subsections (1) and (2) of section 51 of the International Protection Act 2015 hereby require you the said [Mr X] to leave the State within the period ending on the date specified in the notice given to you under subsection (3) of the said section 51 and thereafter to remain out of the State."*

### **III**

#### **GROUNDING AFFIDAVIT – PART 2**

4. Mr X continues:

- "5. *On or around the 30th May 2017, the IPO issued an 'Examination of File under Section 49(3) of the International Protection Act 2015' by which it made a decision under s.49(4)(b) of the International Protection Act 2015 (the 'Act') that I be refused permission to remain in the State (the 'PTR Decision')...*
6. *On the 24th July 2019, I was served by the IPO with an "Examination post-IPAT Recommendation" dated 17th July 2019, which noted that no additional relevant information had been submitted in relation to prohibition of refoulement, but that the IPO had considered COI which did not indicate that I would be at risk..."*

### **IV**

#### **'EXAMINATION POST-IPAT RECOMMENDATION' AND COVER LETTER**

5. The cover letter to the said Examination states, *inter alia*, as follows:

*"Dear Mr X*

*I am directed by the Minister for Justice and Equality to refer to your application for international protection.*

*International Protection Decision*

*As you are aware, the International Protection Appeals Tribunal affirmed the recommendation of the International Protection Office that you should not be granted either a refugee declaration or a subsidiary protection declaration.*

*I must therefore inform you that under s.47(5) of the International Protection Act 2015 the Minister is refusing to give you a refugee or subsidiary protection declaration.*

*Permission to Remain Decision*

*You were previously informed by the International Protection Office that the Minister had decided to refuse you a permission to remain in the State under s.49 of the 2015 Act. As you did not submit further information pursuant to s.49(9) this decision was not reviewed and remains unchanged...”.*

6. The “*Examination post-IPAT Recommendation*” states, *inter alia*, as follows:

*“I refer to the application for international protection in the State.*

*The Tribunal recently affirmed a recommendation by the International Protection Officer that the applicant should not be granted either a refugee or subsidiary protection declaration. Thereafter, the applicant was notified that the Minister for Justice and Equality had refused to give the applicant, and any dependents named in the application, an international protection declaration under s.47(2) of the International Protection Act 2015 (‘the Act’).*

*Under s.49(7) where the Tribunal affirms the recommendation of the International Protection Officer made under s.39(3)(c), the Minister shall, upon receiving information from an applicant in accordance with s.49(9), review an earlier decision to refuse to give an applicant permission to remain in the State.*

*By letter dated the 17/10/2017 the applicant was informed of his entitlement under s.49(9) of the International Protection Act 2015, to submit information that would have been relevant to the decision made by the Minister under s.49(4) to either give or refuse a permission to remain in the State, had it been in the possession of the Minister at that time and further that the applicant was obliged to inform the Minister of any change of circumstances that would have been relevant to the decision made by the Minister under s.49(4) to either give or refuse a permission to remain in the State, had it been in the possession of the Minister at that time.*

*It is noted that no further information has been submitted by the applicant under s.49(9) of the Act, and, as such no further consideration is required under s.49(7) of the Act.*

*It is further noted that no additional relevant information has been submitted by the applicant in respect of any change of circumstances in the country of origin concerning the prohibition of refoulement. The Minister has had regard to all the circumstances of the case and (Ref 1) United States Department of State, 2018 Country Reports on Human Rights Practices – Nigeria, 13 March 2019, does not indicate that the life or freedom of the applicant would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion. Further, it does not indicate that the applicant would be at risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment in Nigeria.*

*Therefore, the applicant no longer has permission to remain in the State.”*

## V

### GROUNDING AFFIDAVIT – PART 3

7. Mr X continues, *inter alia*, as follows, under the heading “*Submissions made on my behalf*”:

*"On the 30th of July 2019, my solicitors submitted materials to the International Protection Office ('IPO') in relation to refoulement under s.50 of the Act including up to date COI in relation to the mistreatment of gay men in Nigeria. Receipt of the submissions was acknowledged by the IPO which stated on 16th August 2019 that 'The Minister will consider the representations submitted, dated the 30th of July 2019, as part of the refoulement consideration in advance of any deportation order being signed in respect of your client.'"*

## VI

### THE SECTION 50 SUBMISSIONS

8. The said s.50 submissions refer to the fact that “*our client is homosexual*”. There is also reference in his application that he believes himself to be bisexual. Either way, he holds himself out to be a member of the LGBTI+ community. The section 50 submissions, which are considered in greater detail later below, comprise almost entirely a series of reputable international reports which point to a Nigeria as a jurisdiction in which the LGBTI+ community is treated very badly indeed. Thus reference is made to reports from, *inter alia*, Amnesty International, EASO, Human Rights Watch, and the Immigration and Refugee Board of Canada. As the court noted at the hearing, the reports make for sad reading.

## VII

### GROUNDING AFFIDAVIT – PART 4

9. Mr X continues, *inter alia*, as follows, under the heading “*Notice of the Impugned Decision*”:

*"I was notified of the Deportation Order dated 9th September 2019 by way of a letter, sent by registered post....I wish to challenge the decision to refuse me permission to remain for the reasons set out in the Statement of Grounds."*

## VIII

### THE (AMENDED) STATEMENT OF GROUNDS

10. In the Amended Statement of Grounds, the grounds upon which relief is sought by Mr X are stated to be as follows:

"1. *Illegality. The Applicant contends that the Deportation Order is vitiated for illegality in the following respect:*

- (i) *Contrary to the Respondent's statement in the Deportation Order and accompanying notice that 'the provisions of section 50 (prohibition of refoulement) of the International Protection Act 2015' have been complied with, the Respondent has failed, contrary to his obligations under s.50(2)(a) of the Act to have any proper or adequate regard to country of origin*

*information ('COI') and submissions furnished by the Applicant on 30th July 2019. The 'Supplemental Note to File' which was not furnished to the Applicant prior to the making of the Deportation Order, makes no reference to the Applicant's refoulement concerns based on sexual orientation or why the section on 'Acts of Violence, Discrimination and Other Abuses Based on Sexual Orientation and Gender Identity' in the US Department of State, 2018 Court Reports on Human Rights Practices – Nigeria, 13th March 2019 is not relevant to the Applicant's claim under s.50 of the Act.*

- (ii) In failing to issue a written decision of his opinion under s.50 of the Act, the respondent has failed, contrary to s.51(3) of the Act, to provide the Applicant with notice of his reasons for making the Deportation Order.*
- (iii) The consideration of refoulement made under s.50 of the Act as contained in the s.49(3) Examination of File dated 15 May 2018 was unlawful as having been made prior to the recommendation under s.39(3)(c) of the Act which did not occur until 30th May 2019. The Respondent's assertion in the s.49(3) report that the IPO had 'recommended that the applicant should neither be given a refugee declaration nor a subsidiary protection of refoulement was also considered in the context of the International Protection determination was erroneous, and any reliance by the Respondent on same on 15th May 2017 was unlawful.*
- (iv) The Deportation Order is unlawful on its face as having been made in reliance upon an unlawful s.50 determination made on 15th May 2017 such that the "provisions of section 50 (prohibition on refoulement)" have not lawfully been complied with in the case of the Applicant for the purposes of s.51(1) of the Act.*

*2. Illegality and/or procedural unfairness. The Applicant contends that the PTR Decision, including the decision under s.50 of the Act, was unlawful in the following respect:*

- (i) the PTR Decision, as affirmed by the Respondent on 24th July 2019, was unlawfully made under s.49(1) as it had issued on 15th May 2019 prior to the making of a recommendation under section 39(3)(c) of the Act which did not occur until 30th May 2019;*
- (ii) as the unlawful PTR Decision 'was not reviewed and remained unchanged' following the decision of the International Protection Appeals Tribunal under s.46(2) of the Act, the Respondent has brought forward and given effect to an unlawful decision, including an unlawful refoulement consideration by way of his decision dated 24th July 2019."*

*[Underline indicating amendments in original]*

## IX

### THE AFFIDAVIT OF MS AB

11. The most fulsome affidavit from the respondent's side is an affidavit of 23rd January 2020, sworn by an IPO official whom the court shall refer to as Ms AB (not her initials). She avers, *inter alia*, as follows:
  - "5. *I say that on 18th January 2017, in the context of his interview under s.13 of the 2015 Act, the Applicant claimed asylum due to a cult targeting him because his father owns a clothes shop. In his interview for the purposes of s.35 of the 2015 Act, the Applicant claimed that he was bisexual. On 30th May 2017, the International Protection Office recommended pursuant to s.39 of the 2015 Act that he should be given neither a refugee declaration nor a subsidiary protection declaration. The credibility of his account was rejected....*
  6. *I say and believe that the Respondent carried out an 'Examination of File under section 49(3) of the International Protection Act 2015' on 15 May 2017, which also examined the refoulement issue pursuant to the requirements of s.50 of the 2015 Act. I beg to refer to a copy of the Examination of File (including the country of origin information considered) pursuant to s.49(3) in respect of the Applicant....*
  7. *I say that the Applicant was furnished with his respective s.39 report and s.49(3) report under cover of letter dated 30 May 2017. The said letter informed the Applicant of his entitlement to appeal the s.39 recommendation to the International Protection Appeals Tribunal (IPAT) and following any IPAT decision, he would have 5 days from receipt of the appeal decision in which to submit information pursuant to s.49(9)(a) or to notify the Minister of any change of circumstances under s.49(9)(b) for the Minister to consider, upon receipt of which the Minister would carry out a review of the decision refusing the Applicant permission to remain....*
  8. *I say that the Applicant submitted an appeal of the s.39 recommendation on 1st June 2017. The IPAT affirmed the recommendation of the IPO in a decision of 17th October 2017. The Applicant was notified of the IPAT decision by letter dated 17th October 2017.....As can be seen from the terms of the IPAT decision, the Applicant claims regarding his sexual orientation were found to be not credible.....*
  9. *The Applicant challenged the decision of the International Protection Appeals Tribunal by way of an ultimately unsuccessful judicial review. In the decision of DU (Nigeria) v. IPAT [2018] IEHC 630, the Court...rejected the three challenges to the decision of the tribunal which essentially fell under three headings; the credibility assessment, an alleged lack of clarity, and failure to consider future risk by reason of the Applicant's sexual orientation....*
  10. *On 17th July 2019, the International Protection Office conducted an 'Examination Post-IPAT Recommendation' and noted that no further information had been submitted by the applicant under s.49(9) of the 2015 Act, and that as such no further consideration was required under s.49(7) of the Act. It was also noted that*

*no additional relevant information was submitted by the Applicant in respect of any change of circumstances in the country of origin concerning the prohibition of refoulement. It was noted that the Minister had regard to all the circumstances of the case and that (Ref 1) United States Department of State, 2018 Country Reports on Human Rights Practices – Nigeria, 13 March 2019, did not indicate that life or freedom of the applicant would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion. Further, there was no indication that the Applicant would be at risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment in Nigeria...*

- 11. On 24th July 2019 the Applicant was notified by letter that all appeals having been exhausted, under s.47(5) of the 2015 Act, the Respondent was refusing to give the Applicant a refugee or subsidiary protection declaration. The Applicant was also informed that with regard to the permission to remain decision, as he did not provide any further information pursuant to s.49(9) of the 2015 Act, the decision was not reviewed and remained unchanged. The Applicant was informed that he must either return voluntarily or be deported and that a deportation order would issue in respect of him if he decided not to return voluntarily or failed to notify the respondent within the required timeframe that he had decided to return voluntarily....*
- 12. I say and believe that as the Applicant did not avail of the option to voluntarily return in his country of origin, the final step in the process was to proceed to issue the deportation order in accordance with s.51(3) of the Act. However, prior to the signing of the deportation order, the Applicant's legal representatives submitted representations on 30th July 2019 which were stated to be "pursuant to section 50 of the International Protection Act 2015" to the International Protection Office regarding the alleged mistreatment of gay men in Nigeria....*
- 13. The correspondence was replied to by Mr CD [not his real initials] of the International Protection Office on 16th August 2019. He acknowledged receipt of this letter and informed the Applicant that consideration would be given to the representations submitted as part of the refoulement consideration prior to the signing of any deportation order....*
- 14. I say and believe that prior to the making of the deportation order, Mr CD considered the facts of the case again and the representations submitted by the applicant's legal representatives in a 'Supplementary Note to File' dated the 6th September 2019. Mr CD considered country of origin information in respect of Nigeria (United States Department of State, 2018 Country Reports on Human Rights Practices – Nigeria, 13th March 2019). As appears from the file note, Mr CD was satisfied that the Applicant would not be at risk of refoulement if returned to Nigeria.*

15. *I say and believe that the Minister then proceeded to sign the deportation order in respect of the applicant on 9th September 2019....On the basis that all matters in respect of the 2015 Act had concluded, the Applicant's file was sent from the International Protection Office to the Repatriation Division for final notification to the Applicant of the deportation order.*
16. *I say that a letter dated 2 October 2019 was sent to the Applicant by the Repatriation Division...which covered and explained his deportation order dated 9 September 2019. I say that this letter referred to the headline reasons for the making of the deportation order by reference to the relevant statutory provisions. Broadly, these might be summarised as the fact of the Applicant's unsuccessful applications for international protection; the fact of the Applicant's unsuccessful application for permission to remain in the State; the fact that the Applicant had not availed of the opportunity to voluntarily return; and the negative conclusion regarding the possibility of refoulement.*
17. *I say and believe that...the letter reflects the fact that there was consideration of the provisions of s.50 of the 2015 Act. I say that the Minister had on numerous occasions fully satisfied himself by considering the Applicant's representations and consulting additional country of origin information that deporting the Applicant would not be contrary to s.50 of the 2015 Act."*

**X**

**AFFIDAVIT OF MR CD**

12. Mr CD was referred to in the previous section of this judgment. He has sworn an affidavit of 23rd January 2020 in which he avers, *inter alia*, as follows:

"3. *I say that prior to the making of the deportation order, I considered the facts of the case again and the representations submitted by the Applicant's legal representatives on 30th July 2019. I considered country of origin information in respect of Nigeria (United States Department of State, 2018 Country Reports on Human Rights Practices – Nigeria, 13th March 2019). Thereafter I attached a 'Supplementary Note to File' dated 6th September 2019 to the Applicant's file. As appears from the file note, I was satisfied that the Applicant would not be at risk of refoulement if returned to Nigeria."*

13. The note to file to which Mr CD refers states, *inter alia*, as follows, under the heading "Supplementary Note to File":

*"A consideration under the provision of s.50 of the 2015 Act (Prohibition of Refoulement) was undertaken on 17/7/2019. Having considered the facts of the case again (including country of origin information) and the representations submitted by the applicant 's legal representatives. There is no indication that the applicant would be at risk of refoulement if the applicant was returned to Nigeria."*

**XI**

### **THIRD AFFIDAVIT OF MR X'S SOLICITOR**

14. In a third affidavit sworn on 26th February 2020, Mr X's solicitor avers, *inter alia*, as follows concerning the proposed amended statement of grounds:

- "3. *The Applicant seeks to amend the Statement of Grounds in these proceedings to add relief, namely an order of certiorari to quash the 'Permission to Remain' Decision of the Respondent made under s.49 of the Act on 30th May 2017 and affirmed on the 24th July 2019 (the 'PTR Decision'). In essence, this relief is grounded on the point that the PTR decision was unlawfully made as it had issued on 15th May 2019 prior to the making of a recommendation under s.39(3)(c) of the Act which did not occur until 30th May 2019.*
4. *Whereas the PTR decision was made on 30th May 2017, it was affirmed by the Respondent on 24th July 2019. Accordingly, the Applicant will seek to assert that his time to challenge the PTR Decision runs from 24th July 2019.*
5. *In any event he requires a generous extension of time to challenge the PTR Decision. These proceedings were initially brought to challenge the deportation order only, and that order had issued on the 9th September 2019.*
6. *However, upon a closer review of the file in advance of preparing submissions, and in particular the Affidavit of [Ms AB]...at paragraphs 6 and 7 [quoted above] and the exhibits thereto, it became apparent that the PTR Decision had been issued before the s.39(3)(c) recommendation (and not simultaneously as is usually the case). This highlighted an illegality which continues to have an impact on the Applicant's case and in particular the decision-making in relation to refoulement.*
7. *Accordingly, upon instructions, the Applicant respectfully requests an extension of time to contest the PTR Decision, in addition to the Deportation Order, without prejudice to any challenge which the Respondent may raise".*

### **XII**

#### **FURTHER AFFIDAVIT OF MS AB**

15. On 16th June 2020, Ms AB swore a further affidavit to elaborate on the timing of certain decisions of the respondent:

- "6. *A section 39 report was produced which was dated 15th May 2017. This Report, together with the s.49(3) report, which was also dated 15th May 2017, issued to the Applicant under cover of a recommendation letter dated 22nd May 2017, with its accompanying s.49(3) report...*
7. *At page 14 of the s.39 report of 15th May 2017, there was an error in the Recommendation section; section 10, where the wrong applicant name is stated. I say that this name has been redacted in the exhibited report for data protection reasons. This error did not come to light until after the s.39 and the s.49(3) reports, both dated 15th May 2017, issued together under cover letter dated 22nd May 2017.*

8. *When the error was uncovered, correspondence was sent to the applicant dated 30th May 2017, informing the applicant of the error in s.10 of the s.39 report, apologising for same, and enclosing a corrected version of the s.39 report – which was the only report that contained the error. The corrected s.39 report was dated 30th May 2017 and it was noted that a new recommendation letter dated 30th May 2017 was also included...*
9. *I say that the Applicant was not disadvantaged in any way by receiving a corrected version of his s.39 report under a cover letter dated just over one week after receiving the initial correspondence. I say that this was a minor clerical error which was rectified quickly. It is clear from the foregoing that the consideration of permission to remain under s.49(3) did not occur prior to a s.39 analysis”.*
16. That is one way of looking at things.

### **XIII**

#### **SUMMARY CHRONOLOGY**

17. There is a lot in the foregoing. A summary chronology may assist in understanding the issues at play:

- |            |   |
|------------|---|
| 11.8.2016  | Mr X leaves Nigeria.  |
| 1.10.2016. | Mr X enters Ireland.  |
| 28.12.2016 | Mr X claims asylum.   |
| 18.1.2017  | Section 13 interview.   |
| 6.2.2017   | Application for international subsidiary protection made.   |
| 3.3.2017   | Section 35 report issues.   |
| 15.5.2017  | PTR decision made on this date. (PTR decision also contains consideration of refoulement under s.50).   |
| 22.5.2017  | PTR decision issues under cover letter of even date along with a s.39 report dated 15.5.2017 but referring to the wrong person in the recommendation section. |
| 30.5.2017  | Corrected s.39 report issues. The brief cover letter states, <i>inter alia</i> , as follows:  |

*"I refer to our recent letter to you dated 22nd May 2017 in relation to the recommendation made in respect of your application for international protection. I wish to advise you that [the] s.39 report that issued to you with the letter on 22nd May 2017, contained an error in section 10 of that report.*

*I wish to apologise for this error and am now enclosing a copy of the s.39 report containing the correct details. Please also find attached a new recommendation letter which, you will note, has been dated 30th May 2017"*

[*Court Note: What occurred was an administrative error. The wrong person was named in the recommendation section of the s.39 report but it is patently obvious that the report was concerned with all the circumstances of Mr X's case, it is clear from the summary findings in Section 9 what the only recommendation could be, and it is clear that the civil servant who signed Section 10 meant his recommendation to apply to Mr X. We all make mistakes, this was a small mistake, and it was swiftly and honestly corrected.*]

- 17.10.2017 IPAT issues a s.46 decision denying the appeal.
- 13.11.2017 Leave to bring judicial review proceedings in respect of the s.46 decision.
- 11.6.2018 The said judicial review proceedings fail.
- 24.7.2019 Applicant served with "*Examination post-IPAT Recommendation*" dated 17.7.2019. This notes that as no further information had been submitted under s.49(9) of the Act of 2015, no further consideration of permission to remain under s.49(7) was required. The document also noted that no additional relevant information had been submitted in relation to the prohibition of refoulement, but that the respondent had considered information which did not indicate that the applicant would be at risk. It was also indicated that if Mr X did not return voluntarily to Nigeria, the respondent would make a deportation order under s.51 of the Act of 2015.
- 30.7.2019 Section 50 representations made for applicant. (The applicant complains that no new determination issued under s.50 following these representations).
- 2.10.2019 Department issues notice to applicant containing deportation order of 9.9.2019.
- 4.11.2019 Leave granted to bring the within application.
- 19.1.2021 Within application heard.

#### **XIV**

##### **ISSUES ARISING**

18. Two key questions are contended by Mr X to arise from the foregoing:

"(i) *Was the permission to remain decision, made under s.49 of the International Protection Act 2015 (the 'Act') and dated 30th May 2017 and affirmed on the 24th*

*July 2019 (the 'PTR Decision') and which includes the consideration of refoulement, vitiated for illegality as having been made prior to the recommendation under s.39(3)(c) of the Act?*

- (ii) *Is the Deportation Order vitiated by the Respondent's failure to provide a written decision of his opinion under ss.50 and 51(3) of the Act?"*

## **XV**

### **DELAY**

19. Section 5 of the Illegal Immigrants (Trafficking) Act 2000 as amended by s.34 of the Employment Permits (Amendment) Act 2014 and s.79 of the International Protection Act 2015 provides, *inter alia*, as follows:

- "(1) *A person shall not question the validity of...(og) a recommendation of an international protection officer under paragraph (b) or (c) of section 39(3) of the International Protection Act 2015...otherwise than by way of an application for judicial review under Order 84 of Rules of the Superior Courts...hereafter in this section referred to as 'the Order'...*
- (2) *An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in subsection (1) (hereafter in this section referred to as an 'application') shall be made within the period of 28 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed."*

20. As can be seen, there are two questions that arise for the court to answer under s.5(2) before it may grant the leave sought:

- (1) Is the High Court satisfied that there are substantial grounds for contending that the impugned action is invalid or ought to be quashed?
- (2) Is there good and sufficient reason for extending the period within which the application shall be made?

21. The answer to both questions must be 'yes' before the court decides to grant the leave sought. If the answer to both questions is 'yes' it does not seem to the court that it is precluded in all the circumstances presenting in any one case from exercising its discretion so as to refuse the leave sought – though there would need to be good reason for so doing in the face of two 'yes' answers.

## **XVI**

### **AN ASIDE ON THE 'NEED FOR SPEED'**

22. There is nothing in s.5 of the Act of 2000 to suggest that the usual 'need for speed' that applies in judicial review proceedings does not apply with equal vigour in the context of proceedings to which s.5 applies. It is useful to consider some of the applicable case-law in this regard. The court turns briefly to consider: *De Róiste v. Minister for Defence* [2001] 1 IR 190, *O'Brien v. Moriarty* [2006] 2 IR 221, and *Shell E&P Ireland v. McGrath* [2013] 1 IR 247.

(i) De Róiste

23. *De Róiste* makes clear that time is more of the essence, more urgent in judicial review proceedings.

24. In *De Róiste*, the applicant had been 'retired' from the defence forces in 1969 on the suspicion that he had associated with subversives. In 1997, he sought to challenge the decision to retire him. He claimed that the trauma suffered by him as a result of the original decision that had prevented him from proceedings as they ought. The respondents claimed that the applicant was barred from bringing the proceedings by reason of the delay presenting. The applicant's action was dismissed in the High Court and an appeal to the Supreme Court failed, that court holding that there had been inordinate and inexcusable delay and that the court would not exercise the (still-presenting) jurisdiction to allow the matter to proceed to trial. In her judgment, Denham J. observed, *inter alia*, as follows, at p. 210:

*"The time element in judicial review proceedings requires early application to court by an applicant. This is indicated by the requirement that the application be made promptly, and in any event within three or six months from when the grounds for application arose, unless there is good reason to extend the period within which the application shall be made. This is a shorter time span than the time required in other proceedings, for example a plenary summons. Time is more of the essence, more urgent, in judicial review proceedings."*

(ii) O'Brien

25. *O'Brien* points to the fact that from sometime around the turn of the century, the courts have applied a greater level of scrutiny when it comes to belated applications for judicial review.

26. In September 2004, the applicant applied to the High Court for leave to apply for judicial review of, *inter alia*, a decision of the tribunal of the respondent, which was established by order on the 26th September 1997, to proceed to public hearings in respect of a purchase in August 1998. It was contended by the applicant that the respondent did not have sufficient evidence to proceed to public hearings and that the transaction occurred after the establishment of the tribunal. The High Court refused the application for leave and refused to grant interlocutory relief restraining the respondent from proceeding to hold public hearings in respect of the transaction until the determination of the application for judicial review. The applicant appealed successfully to the Supreme Court. In the course of his judgment, Fennelly J. referred, at p. 237, to it being "*undoubtedly the case*

*that the courts have in recent years applied much more severe scrutiny to delayed applications for judicial review than formerly”.*

(iii) Shell

27. The judgment in *Shell* points to the public interest in the finality of decisions.
28. In 2002, on the application of the plaintiff and in the context of the proposed development by the plaintiff of the Corrib gas field, the predecessor of the first defendant to the counterclaim made a pipeline consent order pursuant to s. 40 of the Gas Act 1976, and certain compulsory acquisition orders pursuant to s. 32 of that Act of 1976. In 2004, planning permission was granted for an onshore gas terminal. In March 2005, the plaintiff instituted proceedings against the defendants, alleging, *inter alia*, that the defendants had obstructed or interfered with the plaintiff’s right to carry out work in respect of the construction of the pipeline. As part of the defence to the claim, the defendants joined the State parties as defendants to a counterclaim in which the validity of the relevant statutory decisions concerned were challenged. The plaintiff subsequently advised the defendants that it intended to discontinue its claims against them, and in April 2007 the High Court. The counterclaim of the defendants against the plaintiff and the defendants to the counterclaim remained extant. The court ordered that the contention that the defendants were out of time to raise public law issues should be tried as a preliminary issue. The defendants to the counterclaim, supported by the plaintiff, contended, *inter alia*, that the defendants’ pleas came within O.84 RSC, in that they could have been pursued by way of judicial review. Further, they contended that in the context of a plenary action, the time limitations prescribed by O.84 RSC were applicable by analogy to the defendants’ pleas, and that the defendants had not complied with these time limitations. The High Court held that the defendants were not barred on grounds of time. A successful appeal to the Supreme Court ensued. In the course of his judgment in the Supreme Court, Clarke J., as he then was, observed, *inter alia*, as follows, at p. 264:

*“The underlying reason why the rules of court impose a relatively short timeframe in which challenges to public law measures should be brought is because of the desirability of bringing finality to questions concerning the validity of such measures within a relatively short timeframe. At least at the level of broad generality there is a significant public interest advantage in early certainty as to the validity or otherwise of such public law measures. People are entitled to order their affairs on the basis that a measure, apparently valid on its face, can be relied on. That entitlement applies just as much to public authorities. The underlying rationale for short timeframes within which judicial review proceedings can be brought is, therefore, clear and of significant weight. By permitting time to be extended the rules do, of course, recognise that there may be circumstances where, on the facts of an individual case, a departure from the strict application on whatever timescale might be provided is warranted. The rules do not purport to impose an absolute time period.”*

29. What principles can be derived from the foregoing cases? It seems to the court that the following five principles may safely be stated:

1. Time is more of the essence, more urgent, in judicial review proceedings (*De Róiste*).
2. From sometime around the turn of the century, the courts have applied a greater level of scrutiny when it comes to belated applications for judicial review (*O'Brien*).
3. The underlying reason why the rules of court impose a relatively short timeframe in which challenges to public law measures should be brought is because of the desirability of bringing finality to questions concerning the validity of such measures within a relatively short timeframe (*Shell*).
4. At the level of broad generality there is a significant public interest advantage in early certainty as to the validity or otherwise of such public law measures. That entitlement applies just as much to public authorities (*Shell*).
5. By permitting time to be extended the rules recognise that there may be circumstances where, on the facts of an individual case, a departure from the strict application on whatever timescale might be provided is warranted. The rules do not purport to impose an absolute time period (*Shell*).

## **XVII**

### **APPLICATION OF SECTION 5(2)**

30. The court turns now to consider the two questions that arise under s.5(2) of the Act of 2000.
31. *Question (1). Is the High Court satisfied that there are substantial grounds for contending that the impugned act/ion is invalid or ought to be quashed?*
32. The court's answer to this question is 'no'. What occurred was an administrative error. The wrong person was named in the recommendation section of the s.39 report but it is patently obvious that the report was concerned with all the circumstances of Mr X's case, it is clear from the summary findings in Section 9 what the only recommendation could be, and it is clear that the civil servant who signed Section 10 meant his recommendation to apply to Mr X. We all make mistakes, this was a small mistake, it was swiftly and honestly corrected, and that is the end of matters.
33. *Question (2). Is there good and sufficient reason for extending the period within which the application shall be made?*
34. The court's answer to this question is 'no'. Mr X has had the benefit throughout his asylum application of legal advisors. He had every opportunity to raise the point that he now seeks to raise concerning the s.39 report and never did so for no good reason other than that he did not. Moreover, the court cannot overlook the extraordinary duration of the extension of time that is sought of it in the within proceedings. Taking Mr X's case at its height and so counting the time from 30th May 2019, the court is being asked to allow a timeframe for bringing the within proceedings that is about 30 times the standard timeframe of 28 days. The court does not see that it can properly grant an extension of

time of such a radical duration in all the circumstances presenting. The court respectfully does not accept that because Mr X was informed on 24th July 2019 that the permission to remain decision remained unchanged, that re-set the clock in terms of challenging that decision. To conclude otherwise would run counter to the clear 28-day timeframe contemplated by s.5 of the Act of 2000; it flies too in the face of the practical reality that Mr X has known since May 2017 of the matter of which he now seeks to make complaint.

### **XVIII**

#### **THE FIRST KEY QUESTION RAISED**

35. It will be recalled that the first key question that it is sought to raise in the within proceedings was the following:

*"(i) Was the permission to remain decision, made under s.49 of the International Protection Act 2015 (the 'Act') and dated 30th May 2017 and affirmed on the 24th July 2019 (the 'PTR Decision') and which includes the consideration of refoulement, vitiated for illegality as having been made prior to the recommendation under s.39(3)(c) of the Act?"*

36. As the court is declining to grant the extension of time sought to raise this question, it follows that the court will not consider this question.

### **XIX**

#### **THE SECOND KEY QUESTION RAISED**

##### **i. The Second Key Question**

37. It will be recalled that the second key question that it is sought to raise in the within proceedings was the following:

*"(ii) Is the Deportation Order vitiated by the Respondent's failure to provide a written decision of his opinion under ss.50 and 51(3) of the Act?"*

##### **ii. The Text of Sections 50 and 51**

38. To understand this question it is necessary to quote ss.50 and 51 of the Act of 2015:

*"Prohibition of refoulement*

*50. (1) A person shall not be expelled or returned in any manner whatsoever to the frontier of a territory where, in the opinion of the Minister—*

*(a) the life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or*

*(b) there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*

*(2) In forming his or her opinion of the matters referred to in subsection (1), the Minister shall have regard to—*

- (a) *the information (if any) submitted by the person under subsection (3), and*
  - (b) *any relevant information presented by the person in his or her application for international protection, including any statement made by him or her at his or her preliminary interview and personal interview.*
- (3) *A person shall, where he or she becomes aware of a change of circumstances that would be relevant to the formation of an opinion by the Minister under this section, inform the Minister forthwith of that change.*
- (4) *A person who, but for the operation of subsection (1), would be the subject of a deportation order under section 51 shall be given permission to remain in the State.*
- (5) *A permission given under this section shall be deemed to be a permission given under section 4 of the Act of 2004 and that Act shall apply accordingly.*
- (6) *A reference in any enactment to a permission under section 4 of the Act of 2004 shall be construed as including a reference to a permission given under this section.*
- (7) *In this section "person" means a person who is, or was, an applicant.*

#### *Deportation order*

51. (1) *Subject to section 50, the Minister shall make an order under this section ("deportation order") in relation to a person where the Minister—*
- (a) *has refused under section 47 both to give a refugee declaration and to give a subsidiary protection to the person, and*
  - (b) *is satisfied that section 48(5) does not apply in respect of the person, and*
  - (c) *has refused under section 49(4) to give the person a permission under that section.*
- (2) *A deportation order shall require the person specified in the order to leave the State within such period as may be specified in the order and thereafter to remain out of the State.*
- (3) *Where the Minister makes a deportation order, he or she shall notify the person specified in the order of the making of the order and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that the person understands.*
- (4) *A deportation order made under this section shall be deemed to be a deportation order made under section 3(1) of the Act of 1999, and accordingly—*
- (a) *that Act (other than subsections (2), (3), (4), (5), (6), (7), (8), (9)(b) and (12) of section 3) shall apply to the deportation order,*

(b) *a reference in section 3(9)(a) of that Act to a notification under subsection (3)(b) (ii) of that section shall be construed as including a reference to a notification under subsection (3), and*

(c) *references in any enactment to a deportation order made under the Act of 1999 shall be construed as including references to a deportation order made under this section.*

(5) *A deportation order shall be in the form prescribed or in a form to the like effect."*

iii. Alleged breach of s.50(2)

39. The principle of non-refoulement is not an afterthought in the asylum process. It is one of the founding principles of international refugee law. The principle of non-refoulement finds its most prominent modern expression in Article 33 of the Refugee Convention 1951, a treaty concluded at a time when the depth of the depravity to which we as humans can so easily descend in our treatment of fellow humans had become manifest in the horrors of the Second World War, the depraved wickedness of the Holocaust, and the displacement of millions of people from their home countries. It was in this context that the Refugee Convention was adopted, Article 33 providing, *inter alia*, as follows:

*"(1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."*

40. An echo of the spirit that informs Art.33 is to be found in Art.3 of the European Convention on Human Rights which provides that *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment"*, with a consequential ECHR-derived principle of non-refoulement being identified, *e.g., in JK and Ors v. Sweden* (Application No. 59166/12). At domestic level the principle of non-refoulement finds reflection in s.50 of the Act of 2015.

41. Here the basis on which Mr X sought application of the principle of non-refoulement was through a reliance on s.50(1), specifically that he should not be expelled or returned to Nigeria where, in the opinion of the Minister, his life or freedom would be threatened for reasons of membership of a particular social group (the LGBTI+ community) and/or that there was serious risk that Mr X would be subjected to death penalty, torture or other inhuman or degrading treatment or punishment. (It is perhaps worth noting in passing that, rightly or wrongly – the Minister would say rightly – the Minister has never accepted, on the evidence that has been placed before him, that Mr X is in fact homosexual or bisexual).

42. Section 50 submissions were made for Mr X on 30th July 2019. If one returns to the affidavit of Ms AB of 23rd January 2020, it is clear that these submissions were considered before the making of the deportation order. Thus she avers, *inter alia*, as follows:

12. *...[P]rior to the signing of the deportation order, the Applicant's legal representatives submitted representations on 30th July 2019 which were stated to be 'pursuant to section 50 of the International Protection Act 2015' to the International Protection Office regarding the alleged mistreatment of gay men in Nigeria....*
13. *The correspondence was replied to by Mr CD [not his real initials] of the International Protection Office on 16th August 2019. He acknowledged receipt of this letter and informed the Applicant that consideration would be given to the representations submitted as part of the refoulement consideration prior to the signing of any deportation order....*
14. *I say and believe that prior to the making of the deportation order, Mr CD considered the facts of the case again and the representations submitted by the applicant's legal representatives in a 'Supplementary Note to File' dated the 6th September 2019. Mr CD considered country of origin information in respect of Nigeria (United States Department of State, 2018 Country Reports on Human Rights Practices – Nigeria, 13th March 2019). As appears from the file note, Mr CD was satisfied that the Applicant would not be at risk of refoulement if returned to Nigeria.*
15. *I say and believe that the Minister then proceeded to sign the deportation order in respect of the applicant on 9th September 2019....On the basis that all matters in respect of the 2015 Act had concluded, the Applicant's file was sent from the International Protection Office to the Repatriation Division for final notification to the Applicant of the deportation order.*
16. *I say that a letter dated 2 October 2019 was sent to the Applicant by the Repatriation Division...which covered and explained his deportation order dated 9 September 2019. I say that this letter referred to the headline reasons for the making of the deportation order by reference to the relevant statutory provisions. Broadly, these might be summarised as the fact of the Applicant's unsuccessful applications for international protection; the fact of the Applicant's unsuccessful application for permission to remain in the State; the fact that the Applicant had not availed of the opportunity to voluntarily return; and the negative conclusion regarding the possibility of refoulement.*
17. *I say and believe that...the letter reflects the fact that there was consideration of the provisions of s.50 of the 2015 Act. I say that the Minister had on numerous occasions fully satisfied himself [by way of the s.49(3) report and again on 17th July 2019] by considering the Applicant's representations and consulting additional country of origin information that deporting the Applicant would not be contrary to s.50 of the 2015 Act."*
43. *Respectfully, when one has regard to this affidavit evidence, there is no basis on which to conclude – indeed once the affidavit containing the above averments and exhibiting the*

file note, the court does not see that there was any basis on which to contend – that any error presented under s.50(2) of the Act of 2015. The Minister clearly considered all the relevant information, including but not limited to the s.50 submissions made on 30th July 2019.

iv. Failure to give Reasons

44. Section 51(3) of the Act of 2015 provides, *inter alia*, as follows;

*"Where the Minister makes a deportation order, he or she shall notify the person specified in the order of the making of the order and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that the person understands."*

45. Mr X contends that, as per his written submissions, *"The Respondent...issued the deportation order under s.51 without giving the applicant any notice of his s.50 reasoning which he was required to do under s.51(3)"*. Three points might be made in this regard. First, s.51(3) requires that the reasons for making the deportation order be given, *i.e.* the *"it"* referred to is the deportation order. Section 51(3) does not require *per se* that the reasons for the view taken as to non-refoulement be given, though the fact of the view taken as to non-refoulement would almost undoubtedly be among the reasons as to why the Minister was satisfied to make a deportation order. Second, in point of fact Mr X was provided with the reasons for the making of the deportation order. On 2nd October 2019, the Department issued a notice to Mr X containing a deportation order of 9th September 2019. The said notice reads, *inter alia*, as follows:

*"Dear Mr X*

*Following the refusal to give you a refugee declaration, a subsidiary protection declaration and permission to remain in the state under s.47 and 49(4) of the International Protection Act 2015, the Minister for Justice and Equality has now made a deportation order in respect of you. The deportation order is made under s.51 of the International Protection Act 2015. A copy of the order is enclosed with this letter.*

*In making the deportation order the Minister has satisfied himself that the provisions of section s.50 (prohibition of refoulement) of the International Protection Act 2015 are complied with in your case. The Minister is also satisfied that s.48(5) (option to voluntarily return to your country of origin) of the International Protection Act 2015 does not apply in your case..."*

46. Third, there can be no question that Mr X has been left in the dark as to why his s.50 submissions were unsuccessful. His s.50 submissions in essence amounted to an assertion that he is homosexual and that homosexuals suffer badly (and they do suffer badly) in Nigeria, thus presenting a danger to him if he is returned there. But he knows through his participation in the asylum process from start to finish that the Minister, rightly or wrongly, has never accepted that Mr X is either homosexual or bisexual, so it is,

with all respect, obvious why the Minister took the view that he did concerning non-refoulement.

47. In the context of this third point, it is perhaps worth remembering a valuable observation made by Fennelly J. in *Mallak v. Minister for Justice and Equality* [2012] 3 IR 297. That, it will be recalled, was a case in which Mr Mallak claimed that the declination by the Minister of a certificate of naturalisation was invalid because of the Minister's failure to give reasons for it. He was successful before the Supreme Court, the particular point of interest for the purposes of the within judgment being the following observation of Fennelly J. at para.[66] of his judgment:

*"In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."*

48. These are standards that have been satisfied in the process in which Mr X has participated.

**XX**

**CONCLUSION**

49. Having regard to all of the foregoing, the court respectfully declines to grant any of the reliefs sought by the applicant in his notice of motion.