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THE COURT OF APPEAL [2022] IECA 108

Record No.: 2019/75

Donnelly J.

Ní Raifeartaigh J.

Power J.

BETWEEN/

MOEEN AKRAM

APPELLANT

- and-

THE MINISTER FOR JUSTICE AND EQUALITY AND
THE COMMISSIONER OF AN GARDA SIOCHÁNA

RESPONDENTS

JUDGMENT of Ms. Justice Donnelly delivered on the 12th day of May, 2022

Introduction

1. On the 21st October, 2017 Moeen Akram, the appellant, a national of Pakistan then a student in Cyprus, presented himself to an immigration officer at Dublin Airport. He was in possession of a travel visa but following an interview with an immigration officer in the course of which the officer searched certain text messages on the appellant's phone, the immigration officer refused the appellant permission to land pursuant to section 4(3)(k) of the Immigration Act, 2004 ("the Act of 2004"). He was handed a standard form document signed by the immigration officer which read:-

> "This is to inform the person to whom this notice is addressed … [that] s/he is being refused permission to land in accordance with the provisions of the Immigration Act 2004 on the

following grounds: (k) that there is reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national".

2. The appellant was held at Cloverhill Prison until the 25th October, 2017 when he was removed from the State. Shortly thereafter, the appellant brought proceedings by way of judicial review, challenging his detention and the decision to refuse him entry into the State. He later amended his statement of grounds to include a claim for declaratory relief that the search of his phone was a breach of his rights under Article 8 of the European Convention on Human Rights ("the ECHR" or "the Convention").

Certificate for Leave to Appeal

3. In a judgment delivered on the 19th November 2018 ([2018] IEHC 643), the trial judge refused the appellant the reliefs sought by way of judicial review. By further judgment delivered on the 29th January, 2019 ([2019] IEHC 33) the High Court granted the appellant leave to appeal on the issue of whether s. 7 of the Act of 2004 permitted the search of the phone of a non-national landing or embarking in the State by an immigration officer (or member of An Garda Síochána). The appellant had, as a part (b) to that question, sought to have the following question certified "Is the power prescribed by law?" The trial judge stated that question (b) adds nothing to question (a) and will therefore not be certified.

4. The appellant also sought to have a second question certified. This was a question that referred back to the first question above asking: "If so, does that law comply with Art. 8(2) ECHR, is it "necessary in a democratic society?". The trial judge refused leave stating as follows: *"This point was not argued in this format at hearing. Nor is it a point of law that arises from the Court's judgment. It is not therefore a point in respect of which the requisite certificate /leave can or will issue."*

5. The appellant's appeal extended beyond the issue on which the required certificate permitting him to appeal had been granted. He included in his appeal various grounds which concerned the two issues of:

(a) the refusal to grant him permission to enter the State; and

(b) the legality of the search of his phone.

6. There is no bar to an applicant for relief by way of judicial review concerning immigration matters requiring a certificate from the High Court from expanding the grounds of appeal beyond the question certified thereby appealing in respect of other matters which were determined against him or her in the High Court (See *Chen v. Minister for Justice and Equality* [2021] IECA 99). A separate issue arises as to the extent of the grounds upon which leave to seek judicial review was granted and I will deal with that as it arises in the course of this judgment.

Background

7. The appellant had previously booked a flight to Dublin from Lanarca with a return flight to Larnaca from Belfast. On that occasion he was refused a UK visa. He later changed his flights so that not only would he fly to Dublin, but he would also return from Dublin. He obtained an Irish visa; itself not a guarantee of the granting of permission to enter the State. He presented himself at Dublin airport. Over the course of a number of affidavits, the appellant gave increasingly detailed accounts as to what occurred during his exchanges with the immigration official. Exhibited to one of the appellant's affidavits is his own letter of instruction to his solicitor where he said that upon flying to Dublin Airport from Larnaca, Cyprus, he was stopped at a passport control counter by INIS uniformed officers. The appellant says that the immigration officer asked him questions about studying in Cyprus and then said to him "to give [him] his mobile phone" and asked him to open it as it was locked. He says that he showed something on a computer to another official and then asked if he was engaged to be married. When the appellant replied in the negative he was asked to go with them. He was kept waiting for 30 or 40 minutes

while they checked his phone. He was asked the question "who [was] Kate"; he replied saying she was his ex-girlfriend. He was asked questions about whether he was paying her to marry him. There were further questions about texts on the phone. His solicitor's affidavit said that he was shown photographs on his phone. The appellant was asked if he had applied for a visa in the UK and was asked further questions about what he planned to do there.

8. Mr. Francis Grehan, one of the two immigration officers who stopped the appellant, deposed in an affidavit that he had dealt with the appellant at the airport. Mr. Grehan averred that he and his colleague questioned him for the purpose of establishing his immigration status and verifying his entitlement to enter into the State. He said he had made notes of what happened contemporaneously in what is known as a *Border Management Unit Entry* (BMU). These notes had been previously disclosed to the appellant under a Freedom of Information request; this disclosure was made after the initiation of proceedings. From a later affidavit of the appellant's solicitor, it appears that the disclosed documentation included notebook entries that were made by the immigration officer.

9. In the BMU entry, the immigration officer records his dealings with the appellant before the appellant was refused leave to land. The entry records that the immigration officer asked the appellant for "any documents, electronic or otherwise, in relation to his travels to Ireland and informed him that [he] intended to search these under section 7(3) of the Immigration Act 2004." In his affidavit, Mr. Grehan avers that contained in that BMU record there is "reference to text messages which were on the Applicant's phone when it was searched pursuant to s. 7(3) of the Immigration Act 2004" and he exhibits certain "screen shots" of texts *i.e.* photographs of the appellant's phone while it was displaying certain messages. The BMU notes make a number of references to the search of the phone revealing Irish numbers, texts and photographs. The BMU entry states that the immigration officer did a "search of [the appellant's] phone" which revealed messages regarding his application for permission to marry in Cyprus. The immigration officer

searched the appellant's phone for any Irish numbers and found a message, from a person the appellant alleged to be his uncle, stating that his girlfriend had been in an accident and "she can't come". Mr. Grehan found other texts relating to that issue, including contact with a Cypriot lawyer, which led him to the view that the messages suggested that the appellant's uncle was coaching him on how to communicate in relation to the arranging of the marriage. The BMU entry notes record that Mr. Grehan asked the appellant about his relationship with "Katie" and it was put to him that the messages suggested that he intended to reside in Ireland. The passenger denied this. It was put to him that he was suspected of being involved in the arrangement of a marriage of convenience, but he denied it, saying "this is just how we talk". He was asked about a trip to Northern Ireland and about his studies also.

10. The appellant obtained leave to amend his statement applying for judicial review to include relief concerning the search of his phone. No further affidavit was sworn on behalf of the Minister for Justice and Equality or the Commissioner of An Garda Síochána ("the respondents") in answer to the appellant's new claim for declaratory relief to the effect that the search of his phone was a breach of his rights under Article 8 of the Convention.

11. The relief that the appellant first sought in these proceedings related to the refusal of leave to enter the State and I will now address that issue.

The refusal of leave to enter the State

12. The appellant sought relief by way of *certiorari* to quash the decision of the first respondent ("the Minister") to refuse him permission to enter the State. The first ground upon which this relief was sought was that the Minister, his servants or agents erred in failing to provide any reason for the belief that the appellant intended to enter the State for purposes other than those expressed by him. The second ground was that the Minister, his servants or agents took into account irrelevant considerations and/or failed to take into account relevant considerations in the decision to refuse the appellant permission to enter the State.

Irrelevant Considerations?

13. Dealing with the issue of irrelevant considerations first, this ground concerns a notation in the immigration officer's notebook which was a contemporaneous record of the interactions the immigration officer was having with the appellant. That notation read "Brother's sham marriage?" The reference to the brother's sham marriage is on p. 5 of 7 of the notebook of the immigration officer. There is a separate Border Management Unit entry which is a more-lengthy typed document which contains an expansion on the notes made in the notebook. The first mention of his brother is made at the very beginning of the notebook entry which includes the words "10 day's stay" (*sic*). Even without reference to the Border Management Unit entry, it can reasonably be inferred that this was information coming from the appellant. In the notebook, there are various references to the questions that appear to have come from the phone and it is only at a later stage that the "brother's sham marriage?" is actually written therein.

14. The trial judge held that:

> *"The notebook, the court finds, contains but a record of the immigration officer's conversation with, inter alia, Mr. Akram, as well as thoughts (and potential/real lines of enquiry) arising. The impugned texts suggest a line of enquiry that occurred to the immigration officer as he proceeded. The court does not see that any irrelevant consideration was taken into account. The notebook details, and a contemporaneous computer log ('the Border Management Unit entry') suggests that all (and only) relevant details were taken into account in refusing Mr. Akram permission to land."*

15. In the appeal, counsel for the appellant accepts that an immigration official is entitled to ask questions about family and even search for a family member on the internal immigration system. Counsel submits that the suspicion however was triggered by the reference to the appellant's brother and that there was a wrongful suspicion created about his brother's marriage. Counsel submits that the immigration officer took it upon himself to impugn his brother's marriage

which marriage was in fact later found to be perfectly lawful. Counsel submits it was the impugning of his brother's marriage that was so irrational it was unreasonable and, he also submits, it was an irrelevant consideration to the appellant.

16. Based upon the findings in the High Court as to the evidence, the submissions of counsel must be rejected. In the course of the messages reference was made to the appellant's brother and the immigration officer was entitled to ask questions about his brother and his brother's activities. In particular, the presence of the question mark after "Brother's sham marriage?" supports the finding by the trial judge that what the entire quotation suggests is a line of enquiry that occurred to the immigration officer as he proceeded. This is particularly pertinent where one of the text messages that was considered by the immigration officer was that the appellant had asked one of his contacts "have Mateen girlfriend or still a (sic) single?" This was despite the fact that Mateen, the brother of the appellant, was applying for residency in the State on the basis of his marriage to an EU national. All of this was relevant to the consideration of whether this particular appellant intended to enter the State for purposes other than those expressed by him. In my view this ground of appeal must fail.

The giving of reasons

17. The appellant's central complaint is that only the *ground* for refusal under the Act of 2004 was given to him, rather than the *reason* the immigration officer reached his conclusion on that ground. At a subsequent stage when he challenged the detention, he was given the immigration officer's notebook and subsequently, under a freedom of information request, was granted access to the Border Management Unit entry. In counsel's submission there was a failure to give a reason sufficient to have allowed the appellant challenge the decision at the time. In that regard, counsel submits that it should be noted that the Border Management Unit entry set out separate reasons as to why he was refused leave to land. The relevant parts of that entry are as follows:-

- The passenger received messages that suggested he was coming to Ireland to reside.

- The passenger appeared to be arranging a marriage in Cyprus while denying he was in fact in a relationship.
- The passenger's brother had also studied in Cyprus before subsequently meeting and marrying an EU national who resides in Ireland and applying for residency here.
- The passenger referred to his brother as single on the phone.
- The passenger had applied for a UK visa and advised this was because it was his lifelong dream to visit the UK but has very little knowledge of the UK.
- There are inconsistencies between what he told the immigration officer and what his brother told him in relation to that.
- Due to the numerous inconsistencies in this investigation the immigration officer did not find the passenger credible and for the reasons above, he was not satisfied that the passenger intended to enter the State for the reasons he expressed to him.

18. The appellant relies upon the decision in *Ermakov v. Westminster City Council* [1996] 2 All E.R. 302 to the effect that a court when reviewing a decision must confine itself to the decision itself and the reasons contained in it and not permit *ex post facto* rationalisation. The Minister on the other hand submits that this was not *ex post facto* rationalisation, the reasons granted were in fact sufficient. I accept that this Court must not engage in an *ex post facto* rationalisation but look at whether the reasons actually given to the appellant at the time were sufficient.

19. The appellant also relies upon the decision of *E v. Governor of Cloverhill Prison* [2011] IESC 41 in which Denham C.J. stated that persons refused permission to enter the State were required by s. 4(4) of the Act of 2004 to be given the reasons for the refusal in writing and those reasons were open to challenge by way of judicial review.

20. The appellant also relied on the decision in *T. A. R. and Another v. The Minster for Justice Equality and Defence* [2014] IEHC 385 in which McDermott J. stated at para. 24:-

"the shortness of the reasons given render it difficult for the court to understand the basis for the decision and, therefore, to exercise its jurisdiction as to whether the determination was unreasonable within the meaning of the Keegan test. There is no evidence available from the decision-maker as to how or why the extensive evidence advanced on behalf of the applicants fell short of proof on the balance of probabilities that they would return home after their visit. Attempts to identify potential inadequacies that may have formed part of that decision highlight the lack of clarity in the reasons given and render it extremely difficult for the court to exercise its jurisdiction to determine whether the decision was unreasonable or irrational. In particular, it is not possible on the basis of the course of correspondence or the material submitted to ascertain from the course of dealing between the parties or the context in which the decision was made, what the shortcomings in proofs were and consequently, whether the conclusion reached in respect of the applicants was reasonable. I am, therefore, not satisfied that adequate reasons were furnished to the applicants in this case sufficient to enable the court to exercise its jurisdiction by way of judicial review. In making this determination, the court is not to be taken as condemning the use of a short form reason in such decisions as evidenced in the affidavit submitted by the respondent. The sheer volume of applications submitted for visas suggests that such an approach may well be prudent in most cases."

21. I do not consider that *E v. Governor of Cloverhill Prison* assists the appellant in any way. The central issue in that case had been whether the appellant was in lawful custody because of what was alleged to be a defective warrant. That appellant was detained in Cloverhill on foot of a document which simply stated that "[i]n exercise of the powers conferred upon me [a detective garda] by section 5(2) of the Immigration Act, 2003, I direct that pending the making of arrangements for his/her removal from the State, that: [the appellant] be detained in Cloverhill Prison, a prescribed place for the purpose of section 5(2)(a) of the Immigration Act, 2003 in the

custody of such officer of the Minister for Justice or Member of the Garda Síochána for the time being in charge of that place." Denham C.J. pointed out that the document was defective because it did not state on its face the reason for the arrest and detention of the appellant. Denham C.J. pointed out that s. 5(1) of the Immigration Act, 2003 applied to a non-national who had been refused a permission under s. 4(3) of the Act of 2004 provided that the garda had the additional suspicion, mentioned in the said s. 5(1), that the appellant had unlawfully been in the State for a continuous period of less than three months. It was the failure to cite the jurisdiction that led to the warrant being defective.

22. With respect to the initial decision to refuse leave to land, in the course of her judgment, Denham C.J. referred at para. 32 to the fact that:-

> *"The appellant had been given those reasons in writing, as was required by section 4(4) of the Act of 2004. They were open to challenge by judicial review, if there were grounds."*

Thus, the Supreme Court was satisfied with the fact that the appellant had been given the grounds in writing in circumstances where those grounds were, essentially, a recital of the particular grounds set out in the Act. Therefore, on the facts of *E v. Governor of Cloverhill Prison*, the warrant itself was defective as it did not state all that was required by statute to justify the detention of that applicant; that is not the position on the facts of this appeal. On the other hand, the Supreme Court in *E v. Governor of Cloverhill Prison*, said that the appellant had received the reasons concerning the decision refusing him refusing him leave to land. The statement by the Supreme Court that such reasons were judicially reviewable, *if there were grounds*, does no more than state the legal position that is available to all persons who may judicially review decisions where there are grounds to do so. It is to be noted that in *E v. Governor of Cloverhill Prison*, the Supreme Court stated that the appellant had been given three separate reasons for refusal of leave to land on three separate pages.

23. This appellant has also relied upon the decision of this court in *Borta (a minor) v. The Minister for Justice and Equality* [2019] IECA 255 ("*Borta*") for the purpose of saying that a simple statement of the grounds set out in the Statute was not sufficient to give reasons. The position in *Borta* was entirely different. In that case, the applicant sought a certificate of naturalisation under s. 16 of the Irish Nationality and Citizenship Act, 1956. The Minister acknowledged that she was a person with "Irish association" as that term is defined under s. 16(2) of the Act of 1956, but the Minister did not consider those associations sufficiently strong to warrant the exercise in her favour of the absolute discretion to grant a certificate of naturalisation.

24. There had been a completion of an application form, which appeared to require minimal information. The Irish associations were those set out by Statute and had been submitted as part of the application by Ms. Borta. In circumstances where there was no indication from any source as to why the strength of the association with her sister was not sufficient for consideration of naturalisation it was held that it was incumbent on the Minister to explain why the strength of her Irish association was insufficient to grant the certificate to Ms. Borta.

25. The position in *Borta* is unlike the position in this appeal. The ground on which the immigration officer refused leave to enter the State is entirely is self-contained; it is set out in full in paragraph 1 of this judgment. Moreover, unlike *Borta,* this appellant could not have been under any illusion as to why he was being refused. It was clear from the course of dealings with the immigration officer that he was being questioned about whether he was paying the woman called Kate to marry him. She was one of his contacts on the phone and he was asked whether he wanted to marry her in Ireland and to stay here. The detailed notes in the Border Management Unit entry have not been contested by the appellant by means of a replying affidavit. His own earlier email to his solicitor is exhibited as part of his information as to what occurred. I refer to these not as indicative of *ex post facto* rationalisation but as indicating the course of dealing between the parties leading up to the giving of the decision. It is clear from the evidence that he was questioned about

his studies in Cyprus, his relationship with Kate, his intention to marry in Cyprus, his intention to reside in Ireland, his earlier application for a visa to visit the UK and what he intended to do in the UK, and questions about travelling to the north. As referred to in paragraph 9 above, Mr. Grehan expressly put it to the appellant that he suspected him to be intending a marriage of convenience which the appellant denied. There could have been no doubt in the appellant's mind that the immigration officer simply did not believe his version that he was merely intending to visit his brother for a ten day stay.

26. It is well recognised that the adequacy of reasons will vary depending on the circumstances. In *Connelly v. An Bord Pleanála* [2018] IESC 31 Clarke C.J. held that the extent of the reasons will vary depending on the case. Furthermore, it is possible to incorporate into the reasons a document or other information to be found elsewhere. In circumstances such as the present, where a document containing the statutory reasons for refusal were given to him and it is an event that takes place over a relatively short period of time, at a busy airport, in circumstances where no "right" to enter the State was engaged or any other circumstance arose which might have demanded a greater degree of scrutiny, the provision of what may be termed a *pro forma* reason is sufficient, in my view, particularly where there has been a clear engagement with the appellant in which highly relevant questions about his intentions were asked of him by the immigration officer. In those circumstances, and notwithstanding the fact that he did not receive the Border Management Unit notes until after he had made a freedom of information request, I am satisfied that the appellant could have been in no doubt as to why he was being refused entry to the State. From his interaction with the officer at immigration control, it cannot but have been clear to him that the immigration officer believed that he was intending to enter the State for a purpose other than that which he disclosed at the relevant time.

27. For the reasons set out, the appellant was given sufficient reason as to why he was being refused permission to enter the State. I therefore reject his submission that he was not in a position to challenge the legality of his detention. This ground of appeal is therefore rejected.

28. It is also perhaps noteworthy, although this is not the basis for the decision on this appeal, that the appellant did not engage with the details of the reasoning as to why he was refused permission to land even after he had received those reasons.

The legality of the search of the appellant's phone

Circumstances of the examination and detention of the phone

29. The mobile phone was handed over by the appellant to the immigration officer, Mr. Grehan, who had made a demand for it pursuant to the provisions of s. 7(3) of the Act of 2004. The relevant circumstances have been set out above in the section headed "Background".

30. The appellant makes no complaint that *his mobile phone* was retained by the immigration officer after the relevant evidence was obtained. The *screen shots* taken of the messages on his phone were however retained (as evidenced by their subsequent release pursuant to the Freedom of Information request). As the appellant's appeal turns on the terms of s. 7(3) of the Act of 2004, it is appropriate to refer to its full terms here.

Section 7(3) of the Act of 2004

31. Section 7(3) of the Act of 2004 provides that:-

> "(a) Any non-national landing or embarking at any place in the State shall, on being required to do so by an immigration officer or a member of the Garda Síochána, make a declaration as to whether or not he or she is carrying or conveying any documents and, if so required, shall produce them to the officer or member.
>
> (b) The officer or member may search any such non-national and any luggage belonging to him or her or under his or her control with a view to ascertaining whether the non-national is carrying or conveying any documents and may examine and detain, for

such time as he or she may think proper for the purpose of such examination, any documents so produced or found on the search.

(c) In this section, "documents" includes –

(i) any written matter,

(ii) any photograph,

(iii) any currency notes or counterfeit currency notes,

(iv) any information in non-legible form that is capable of being converted into legible form, or

(v) any audio or video recording."

32. I will turn now to the relevant findings of the High Court.

The High Court findings regarding s. 7 of the Immigration Act 2004

33. The trial judge held that the search of the appellant's phone was not in contravention of s. 7 of the Act of 2004. The trial judge explored the definition of "documents" within the meaning of the Act of 2004. The definition in s. 7(3)(c)(iv) includes "any information in non-legible form that is capable of being converted into legible form." The trial judge held that this puts the matter beyond doubt that an electronic device on a non-national's person would be included. He held that this seems to be the *"natural and correct reading of"* s. 7(3)(b) and section 7(3)(c)(iv) (the trial judge appears to have mistakenly referred to s.7(3)(c)(iii) but nothing turns on that). He therefore held that the search of the appellant's phone was in accordance with s. 7 of the Act of 2004.

34. The trial judge also stated that at hearing *"counsel for [the appellant] argued that there is a query arising as to whether s. 7 allows the retention of documents produced/found pursuant to s.7(3)(b). No such argument appears in the statement of grounds or in the written submissions prepared by counsel for [the appellant]. So no such argument can properly be made at this time".*

The Issues on this Appeal

35. The appellant puts forward two grounds of appeal in respect of the alleged illegality of the search of the appellant's phone. These grounds are as follows:-

(i) The appellant argues that the trial judge erred in finding that s. 7 of the Act of 2004 enables an immigration officer or a member of An Garda Síochána to search the phone of a non-national landing or embarking in the State; and

(ii) The trial judge erred in finding that any such power of search by an immigration officer or a member of An Garda Síochána of the phone of a non-national landing or embarking in the State pursuant to s. 7 of the Act of 2004 is *in accordance with the law* within the meaning of Article 8 of the European Convention on Human Rights. I am using the phrase "in accordance with the law" as that is the phrase used in Article 8 of the Convention and in the amended statement grounding the application for judicial review; the appellant used the phrase "prescribed by law" in his request for a certified question and also in submissions.

36. Those issues relate in the main to the question of whether a mobile phone comes within the meaning of documents and if it does, whether the absence of any protections for the accessing and retention of information contained on that phone, has the result that this search was not one which was conducted in accordance with the law. While those two points appear relatively straightforward, the history of these proceedings and in particular the manner in which the Statement of Grounds (as amended) was phrased, have caused some difficulties in resolving the precise issues that require to be addressed. I will now turn to the manner in which the case was pleaded by the appellant.

The Extent of the Claim made in the Judicial Review

37. The relief sought in the amended statement grounding the application for judicial review in respect of the search of the phone was as follows:-

"A Declaration that the Respondent's search of the Applicant's phone was a breach of his rights under Article 8 of the European Convention on Human Rights."

38. The sole ground upon which the appellant sought that relief was as follows:

"The search of the Applicant's phone was not in accordance with law as required by Article 8(2) of the European Convention on Human Rights and, consequently, Section 3 of the European Convention on Human Rights Act, 2003 ("the Act of 2003")."

39. An appellant is entitled to plead their case as they see fit, provided that the manner of pleading is permitted by law. Having said that, the sparsity of the claim made in these pleadings is striking. In particular, the appellant did not include a straightforward claim that the search was conducted other than in accordance with the provisions of s. 7 of the Act of 2004 *simpliciter*; such a claim could have said that the Minister (*via* his agent, the immigration officer) had acted *ultra vires* the legislation. Instead, his pleadings approach this very issue in a cumbersome manner; he says that the search of the appellant's phone was not in accordance with law as required by Article 8. He submits that because the search was not carried out in accordance with s. 7 it was a breach of the State's obligations under the Convention. He also submits that the ground as pleaded encompasses the situation where there was a failure to exercise s. 7 in accordance with the overall obligations on the State which included an obligation to perform the function in accordance with s. 3 of the Act of 2003, that is, in accordance with the State's obligations under Article 8 of the Convention.

40. Moreover, the appellant did not claim, in the alternative, that if the search was carried out in accordance with the section, then the section was unconstitutional. He did not claim, in the further alternative, a declaration pursuant to s. 5 of the Act of 2003 that s. 7(3) was incompatible with Ireland's obligations under the Convention. Finally, while the appellant claimed damages in his grounding statement, this was not claimed pursuant to s. 3(2) of the Act of 2003; no damages claim was pursued in the appeal. Section 3(2) would require an appellant, who has suffered injury, loss

or damage, to demonstrate that no other remedy in damages was available to them. This appellant did not advance any other *domestic* ground, other than his claim (pursuant to s. 3(1) of the Act of 2003) that the immigration officer performed his function in a manner that was incompatible with the State's obligations under the Convention provisions. The appellant accepts that the phrase at the start of s.3(1) "[s]ubject to any statutory provisions (other than this Act) or rule of law..." might mean that he is "in difficulties" because he had not pleaded incompatibility of s. 7 if this Court were to find that the search had been carried out in accordance with the provisions of s. 7 of the Act of 2004, but persists with his submission that the performance of the function under s. 7 of the Act had to be in compliance with Article 8 of the Convention.

Article 8 of the ECHR

41. The appellant claims his right to privacy under Article 8.1 ECHR was violated when the immigration officer engaged in a search of the appellant's phone. The appellant argues that this interference was not justified as such a search is not in accordance with s. 7(3) of the 2004 Act. Article 8 ECHR provides:-

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

42. The key questions that a court must consider when asked to rule that a right under Article 8 has been violated are:

a) Is a right protected by Article 8(1) at issue?

b) Has there been an interference with the right?

c) Is the interference in "accordance with the law"?

d) Is the interference for the purpose of the interests set out in paragraph 2 of Article 8?

e) Is the interference "necessary in a democratic society" in pursuit of those interests?

43. In the order set out above, the manner in which those questions were addressed in these proceedings is as follow:

a) The respondents accept that a search of a mobile phone may engage aspects of the right to privacy.

b) The respondents accept that the searching of the contents of a person's mobile phone may amount to a *prima facie* interference with the right to privacy under Article 8.1 of the Convention.

c) The appellant expressly claims that the interference was not in accordance with the law. The respondents submit however that this search was carried out in accordance with the law and there was no unjustified interference with the right as claimed by the appellant.

d) The appellant does not contest that the interference, albeit allegedly not in accordance with the law, was for the purpose of immigration control, which itself comes within the purpose of at least one of the interests set out in para. 2 of Article 8.

e) The issue of whether the "interference is necessary in a democratic society" was not pleaded expressly by the appellant. The respondents object to it being raised in this appeal. In so far as the Court is required to deal with that aspect of the appeal, I will address that issue at a later stage.

44. The simplicity of the appellant's pleadings contrasts with the complexity that may arise because of the interaction between the Act of 2003, the Constitution and the provisions of s. 7 of the Act of 2004. The appellant accepts that this Court could not give to the Convention a type of "direct effect". Counsel for the appellant correctly conceded during the appeal that his only entitlement was to bring this claim pursuant to the Act of 2003 and in particular s. 3(1) thereof as

this is the only section relied upon in his pleadings. Therefore, the appellant's nuanced argument is that there was *a purported exercise* of the s. 7 power but *in a manner* that was incompatible with s. 3 of the Act of 2003 *i.e.* in a manner that is incompatible with the State's obligations under the Convention. He submits he is entitled to impugn *the manner in* which the State applied the section to his situation, even if he cannot impugn the section itself because he has not included in his pleadings a claim for a declaration of incompatibility. He does however submit that in interpreting s. 7, the provisions of s. 2 of the Act of 2003 must be applied; in so far as it is possible, subject to the rules of law relating to such interpretation and application, s. 7 is to be interpreted in a manner compatible with the State's obligations under the Convention provisions.

45. The nature of the incompatibility claimed by the appellant in this appeal is that the definition of *documents* within s. 7 in its natural meaning does not include a mobile phone, that there was no right to retain the contents of the phone and that there were no safeguards in place in respect of the search, such as restrictions on the evidence that could be searched and the extent to which they could be retained.

Challenging the search rather than challenging the legislation

46. Section 2(1) of the Act of 2003 provides that:-

> "In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

47. Section 3(1) of the Act of 2003 states that "[s]ubject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions".

48. The fact that the pleadings challenged the search rather than the legislation was an issue that troubled members of the court during the oral hearing and was raised with counsel for the appellant. Reference was made by a member of the Court to De Londras and Kelly, *European*

Convention on Human Rights Act – Operation, Impact and Analysis (1st Edn., Round Hall, 2010). In their book the authors state with respect to s. 3(1) that the phrase "subject to … statutory provision … or rule of law" is *"quite vague"*. However, the authors note at para. 5-06 that:-

> *"Despite this lack of clarity, a number of ways in which an organ of the State may be in breach of its obligation under s. 3 can be identified. The actions objected to could be ultra vires and also incompatible with the Convention. The organ of the State could act intra vires but exercise a statutory discretion or perform its statutory functions in a manner incompatible with the State's obligations under the Convention. Alternatively, even if, on the face of it the body was acting in compliance with a statue, it could be found that the body was not in fact acting in compliance with the statutory provision or rule of law as interpreted by a court under s. 2 of the Act, and hence a breach of s.3 may be found."*

49. Prior to engaging in those issues, it is worthy of note that there is Supreme Court precedent for the granting of a declaration that the Convention was breached by the manner in which a search was (or may be) carried out even where there was no challenge to the underlying section; *CRH plc v. The Competition and Consumer Protection Commission* [2018] 1 I.R. 521.

50. The facts of that case concerned a search and seizure of materials pursuant to a search warrant issued to an officer of the respondent Competition and Consumer Protection Commission pursuant to s. 37(3) of the Competition and Consumer Protection Act, 2014 (hereinafter, "the Act of 2014"). Like the present case, the specific relief claimed was a declaration in accordance with s. 3 of the Act of 2003 that the Commission had acted in contravention of Article 8 of the Convention; a claim for damages was abandoned at an earlier stage in the proceedings.

51. Among the documents seized was the email account of the third plaintiff which contained over 100,000 individual emails, many of which were unrelated to the business activities of the second plaintiff company but were private to the third plaintiff. The parties were unable to resolve the dispute as to the material seized and the plaintiffs issued plenary proceedings seeking

declaratory and injunctive relief, complaining about the scope of the materials seized and contending that there had been an unlawful interference with the second and third plaintiffs' rights under Article 8 of the Convention and Article 40.3 of the Constitution. The Commission accepted that there was a high probability that not all of the seized emails related to the activity under investigation. The emails, whilst seized, had not been accessed by the Commission. While issues relating to the legality of the search as well as the retention of the material were at issue before the High Court, the High Court restricted its orders to a declaration that *"were the [Commission] to access, review or make use of the electronic documents, this would involve in accordance with s. 3 of the [Act of 2003], a contravention of article 8 [ECHR]"* and an order that the Commission *"be restrained from accessing, reviewing or making any use whatsoever of the electronic documents"*.

52. The Supreme Court dismissed the appeal but substituted an order restraining use of the unrelated electronic documents other than in accordance with agreement between the parties and granting liberty to apply to the High Court. Three lengthy judgments were delivered in the Supreme Court. The majority judgments of Laffoy and Charleton JJ. dismissed the appeal in so far as it related to the Article 8 issue. MacMenamin J. also dismissed the appeal but on different terms. While he made extensive reference to the jurisprudence of the European Court of Human Rights, he was of the view that cumulatively there were a number of factors critical to finding that the search was *ultra vires* and violated both the plaintiffs' constitutional and ECHR rights.

53. Laffoy J. for the majority held despite the Commission's objection, that the High Court was correct to make the orders it did preventing the Commission breaching the Article 8 rights of the plaintiffs by its continued inspection, unless restrained by the Court, having regard to the factual basis that some of the material seized was outside the scope of the search warrant. Otherwise the plaintiffs would have been utterly devoid of any remedy to effectively enforce their rights *under article 8 of the Convention* (but note there was no express reference to the Act of 2003 and rights

or remedies under that Act). Laffoy J. observed that although there was a lacuna in the Act of 2014, there was no reason in a particular case why an undertaking or an individual whose digital material is to be seized could not reach an agreement as to the appropriate mechanism to process out of scope material by following the template which that legislation provided for in respect of safeguards protecting legal professional material from inspection. It is of note that in the judgment of Charleton J. (with whom the majority also agreed) is a statement that in general there appeared to be no difficulty with powers that permitted items seized to be taken away for later examination (para. 239).

54. For present purposes, I will refer to an aspect of the judgment of MacMenamin J. which is not undermined by anything said in the other judgments. MacMenamin J. traced how common law courts had played an important role in the supervision of powers of search and seizure citing *inter alia*, the landmark English decision of *Entick v. Carrington* (1765) 2 Wils. K.B. 275 where those executing the warrant had "read over", "pried into" and "examined" all the papers the subject of the warrant and carried away vast amounts of material and property. MacMenamin J. made the important point that the court in that case did not focus only on what was permitted by the wording of the particular statute but had held that *"the search was illegal by virtue of excessive use of powers"*. As MacMenamin J. stated at paras. 36-37:-

> *"Not even a search warrant, even if it had purportedly been issued reflecting the words of a statutory power, could render the search process lawful, because of the arbitrary and indiscriminate nature of its execution, which was not permitted by the common law, or indeed by statute.*
>
> *Precisely the same themes underlie our own jurisprudence in this area; that of other countries governed by the rule of law; and by decisions of the Court of Justice of the European Union; and those of the European Court of Human Rights."*

The judgment of Laffoy J., while not relying upon the Constitution, refers in considerable detail to cases from the ECtHR and the CJEU where the exercise of search functions was found to be disproportionate to the purpose of the search. Therefore, there is a strong jurisprudential basis for a claim that the purported execution of a search may contravene the powers of search granted by the relevant statutory provisions.

55. As the Supreme Court in *CRH plc v. The Competition and Consumer Protection Commission* concluded the High Court had been correct to grant the declaration concerning a breach of Article 8 rights even where a claim for damages had been abandoned, that would appear to resolve any issue (see *Pullen v. Dublin City Council* [2009] 2 I.L.R.M. 484 and [2010] 2 I.L.R.M. 61 and references by Irvine J. in both her first and second judgments respectively) concerning the possible limitation to the availability of a remedy for a breach of s. 3(1) to a claim for damages under s. 3(2) of the Act of 2003. In any event, the jurisdiction to grant such a declaration based upon s. 3(1) of the Act of 2003 was not raised as an objection by the respondents in these proceedings; no doubt because the State accept, on the basis of the *CRH plc v. The Competition and Consumer Protection Commission* decision which was not cited to us, that such a declaration is appropriate. For the sake of clarity in this judgment, I have included in this judgment this explanation as to why the Court has jurisdiction to make a declaration concerning a breach of Article 8 where the conditions set out in s.3(1) of the Act of 2003 are met.

Was the search in accordance with the law?

56. As set out above, the appellant's case has only been pleaded on the basis that this interference was not "in accordance with the law". As will be discussed further, the meaning of "in accordance with the law" extends beyond purely formal legality but requires compliance with the principles of legal certainty and an absence of arbitrariness; the appellant makes his case on both those grounds.

57. In support of his claim that the search was not carried out in accordance with law, the appellant relied upon a number of European Court of Human Rights (ECtHR) decisions. According to s. 4 of the Act of 2003, a court shall, when interpreting and applying the Convention provisions, take account of the principles laid down by, *inter alia*, the judgments and advisory opinions of the European Court of Human Rights. This complements the interpretive provisions of s. 2 of the Act of 2003.

58. The appellant relied in particular on the decisions of the ECtHR in *Gillan and Quinton v. The United Kingdom* (2010) 50 E.H.R.R. 45, *Beghal v. The United Kingdom* (2019) 69 E.H.R.R. 28 and *Ivashchenko v. Russia* (App. No. 61064/10, Judgment of the 13th February 2018). In each of those cases, the European Court repeated the general principles as to how the phrase "in accordance with the law" is to be assessed. As the Court in *Beghal v. The United Kingdom* said of these principles:

> *"[87] The words "in accordance with the law" require the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The law must therefore be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be, with appropriate advice – to regulate his conduct....*
>
> *[88] For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its*

exercise. [...] see amongst other examples, Gillan and Quinton v the United Kingdom [....] The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number of and status of those to whom it is addressed [....]"

59. This concept of *law* as requiring more than a merely formal characteristic is also required by the Constitution. Perhaps its most memorable iteration was in the *dicta* of Henchy J. in *King v. The Attorney General* [1981] I.R. 233. In declaring the law to contravene a number of articles of the Constitution, Henchy J. referred, *inter alia* to the *"breadth and arbitrariness of the discretion"* and to the vague ingredients of the offence, not dissimilar to the passage cited by the European Court of Human Rights above. The prohibition against arbitrariness in decision making under enactments permits judicial review of actions taken in otherwise purported compliance with a legislative provision *e.g. Loftus v. Attorney General* [1979] I.R. 211.

60. The appellant pointed to the text of s. 7(3) of the Act of 2004 in submitting that the natural meaning of the phrase "search any such non-national" or his "luggage" does not include a power to remove a person's phone and search its contents. His submission is that once one interpreted the section properly there was in fact no power to search the phone. Unlike other statutory powers of search, this provision did not provide the power to search a device, an electronic device or even a "thing". The appellant submits that the power to search the non-national or his luggage for *documents* does not include the power to search for and detain/retain a *phone*. The appellant submits that the phrase "any information in non-legible form that is capable of being converted into legible form" does *not include the search and detention of the phone* itself.

61. The second aspect of his claim as regards the interpretation of the section is that the provisions do not provide any legal basis for the *copying and retention* of the documents.

62. Counsel submits that s. 7(4) makes it a criminal offence for a non-national to contravene s. 7(3) of the 2004 Act and that, as such, a strict interpretation of the section is required; a principle of statutory interpretation, the applicability of which to these proceedings is not contested by the respondents. A strict reading of the section would exclude, counsel for the appellant submits, the search of an electronic device as distinct from an individual document in an electronic form. The respondents contests that interpretation and submit that the definition of document includes the contents of computers and modern smartphones.

63. The appellant also made the wider argument that the search was not in accordance with the law because the provisions under which it was carried out did not have sufficient certainty nor did it provide sufficient safeguards against arbitrary interference with the right to privacy. In that regard the appellant submits that the section must be interpreted in accordance with s. 2(1) of the Act of 2003.

64. The respondents submit that the section clearly permits the demand for and seizure of the phone as contained within the phone were documents. The respondents rely upon the interpretation in the section itself and submit that there is now a widespread equivalence between what is meant by the word "document" and the contents of computers and modern smartphones. The respondents point to similar provisions in other statutes.

65. As regards compliance with Article 8(2), the respondents rely upon the case law of the ECtHR in which that court had referred to the breadth of the impugned powers in reaching its conclusion that they were not in accordance with the law. The respondents submit that limited areas (ports), limited spheres (immigration and only applicable to non-nationals), were sufficient to justify heightened powers of search and investigation.

Submissions on the European Court of Human Rights caselaw

66. The appellant relies on *Gillan and Quinton v. The United Kingdom* where the ECtHR found that the power of search in the UK's Terrorism Act, 2000 had insufficient safeguards and was

therefore not "in accordance with the law" within the meaning of Article 8 of the Convention. That case concerned random "stop and search" provisions of the public at large which did not require reasonable suspicion prior to initiating the search. The search was restricted to a search for articles of a kind which could be used in connection with terrorism. The relevant provisions permitted a senior police officer to grant an authorisation which permitted random *i.e.* no suspicion required, searches in an area or place specified in the authorisation. That authorisation could last for a specified period of no longer than 28 days. If that authorisation was not confirmed by the Secretary of State within 48 hours the authorisation lapsed (without prejudice to what had occurred before). The Secretary of State may confirm the authorisation and can only amend it by saying it is to expire on an earlier but not later date. The Secretary of State may not narrow the area of the search. The evidence demonstrated that there had been successive authorisations granted to the entire Metropolitan Police district.

67. The information placed before the European Court of Human Rights about these searches was considerable and included various reviews of the legislation as had been required by statute. The Court also considered the detailed judgments of the House of Lords which had rejected that there was a violation of Article 8. The Court said that in:-

> *"matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise [...]. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed" para 77)*

68. The Court said at para. 79:-

> *"The applicants, however, complain that these provisions confer an unduly wide discretion on the police, both in terms of the authorisation of the power to stop and search and its application in practice. The House of Lords considered that this discretion was subject to effective control, and Lord Bingham identified 11 constraints on abuse of power (see paragraph 16 above). However, in the Court's view, the safeguards provided by domestic law have not been demonstrated to constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference."*

69. The European Court of Human Rights also noted that the decision to search made by the police officer was based exclusively on the "hunch" or "professional intuition" of the officer concerned; there was no need to demonstrate the existence of any reasonable suspicion or even subjective suspicion. The sole proviso is that the search must be for the purpose of looking for articles which could be used in connection with terrorism, a very wide category which could cover many articles commonly carried by people in the streets. This was noted to have been stated in the House of Lords to *"radically ... departs from our traditional understanding of the limits of police power"*. (para. 83).

70. The view of the Court was that there *was "a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration, as the judgments of Lord Hope, Lord Scott and Lord Brown recognised"*. The ECtHR rejected the UK's argument that the stop and search could be challenged by judicial review, because in particular, the absence of the requirement of a reasonable suspicion would make it *"likely to be difficult if not impossible to prove that the power was improperly exercised"*.

71. The appellant relied upon the decision of the European Court of Human rights in the case of *Beghal v. the United Kingdom*. The facts in *Beghal v. The United Kingdom* were that the appellant was stopped at an airport, searched and questioned for over 3 hours (the legislation permitted being held for up to 9 hours) pursuant to Schedule 7 of the UK Terrorism Act, 2000. The applicant, a UK resident, was returning with her children from visiting her husband in France who was in custody in relation to terrorist offences. At immigration control, she and her children were stopped but not formally detained or arrested. The appellant was told she was not suspected of being a terrorist but that the authorities needed to speak to her to establish if she might be "a person concerned in the commission, preparation or instigation of acts of terrorism." Her two older children were allowed proceed through the airport while she was taken with her youngest child for examination. She asked for a lawyer but was only allowed speak to one by telephone after she had been searched. The officers would not wait for the arrival of her lawyer prior to the examination. She said she would only answer questions after her lawyer arrived. Just over 2 hours after being stopped she was cautioned and reported for the offence of failing to comply with her duties under Schedule 7 by refusing to answer questions. She was convicted of an offence of wilfully failing to comply with a duty under Schedule 7 of the Act of 2000.

72. The ECtHR did not consider that wide powers at ports and borders in themselves were contrary to the principle of legality; they expressly stated that *"all persons crossing international borders can expect to be subject to a certain level of scrutiny"*. The Court also held that the absence of any requirement of reasonable suspicion *alone* would not be fatal to the lawfulness of the regime. It was however, a combination of factors, including the possibility of the examination continuing for up to nine hours while a person is compelled to answer questions without a lawyer present, that led them to say that the particular powers under Schedule 7 were not in accordance with the law. The Court held that if she had been formally detained then that would have resulted in a much more significant interference with her rights under the Convention.

73. The appellant also relies on *Ivashchenko v. Russia* (App. No. 61064/10, judgment of 13th February, 2018). In that case the applicant travelled from the Russian Federation to Abkhazia to prepare a report with photographs on what he describes as "the life of this unrecognised public". Arriving at customs on return to Russia, data from the applicant's laptop was copied to a mobile or external hard drive and then recopied to six DVDs. According to the applicant his laptop remained with the immigration officer for seven hours. That officer read through various correspondence of the applicant and copied 26 gigabytes of data including personal correspondence, photographs and passwords. The Russian response was that this was because of the need to verify the information contained in his customs declaration. The DVDs with the data were returned to the applicant after two years. The respondent government stated the information was deleted from the external drive and the original data was not deleted.

74. The applicant brought judicial review proceedings under the Code of Civil procedure. His claim was dismissed. The ECHR noted that:-

> *"the domestic courts merely referred to Article 11 of the Customs Code, which defines goods for the purposes of customs legislation as moveable property that is being transferred across the customs border, to then conclude that such items as laptops, flash memory cards, cameras, video-cameras, printed material and the like fell within the notion of 'goods'".*

The appellant was not prosecuted in any criminal, administrative or other proceedings in connection with the data obtained from the laptop by the customs officials.

75. The ECtHR, in addressing whether there was formal legality (meaning compliance with rules of domestic law), held that the Customs Code did *"not seem to provide a sufficiently sound legal basis for copying electronic data in the customs context"*. The Court also went on to assess whether the law provided sufficient protection against arbitrariness and contained adequate safeguards. The Court noted that the apparent safeguards in terms of "risk profiling" contained in

an instruction were not mentioned in any of the courts which had reviewed the actions of the customs' officers. The Court noted that in relation to the copying of the data which was at the heart of the complaint was not addressed in the risk management. The Court observed that even if extensive copying was needed because of the diverse nature of the goods to be sampled, the usual approach to the sampling by customs of "goods" was not adequate as regards electronic data. The Court however was not prepared to find that a "reasonable suspicion" was required. The Court did say that when a person is at customs after arriving in the country, bearing in mind the margin of appreciation afforded to the respondent State in the customs context, it is particularly pertinent to ascertain whether *post factum* judicial remedies were available and provided adequate safeguards. The Court found however that the domestic authorities, including the courts, were not required to give – and did not give – relevant and sufficient reasons for justifying the "interference" in the present cases. Therefore, in addition to finding a breach because of the lack of formal legality, the Court held that the relevant legislation and practice afforded inadequate safeguards against abuse in a situation of applying the sampling procedure in respect of data contained in an electronic device.

The submissions regarding the case law of the European Court of Human Rights

76. The appellant submits that if s. 7 of the Act of 2004 permits removing an electronic device on a non-national's person and reading the data thereon without any limitation to that power, then it must fall foul of the Convention. The appellant submits that a mobile phone contains a large amount of information about a person's life including their private life and there are no procedural safeguards in the Act of 2004 or other legislation. The appellant submits that the breadth of this power renders the impugned provision unlawful due to the unlimited nature of that power. There is no oversight by an outside agency or superior officer unlike the situation in *Gillan and Quinton v. The United Kingdom* and no express basis for the copying or retention of the documents retrieved from the phone. The appellant submits that the legislation does not make it clear that it covers

access to electronic devices and due to s. 7(4) rendering contravention with s. 7(3) a criminal offence, section 7(3) must be construed strictly.

77. In the course of written submissions with reference to the facts of *Gillan and Quinton v. The United Kingdom*, the appellant noted particularly that there was no requirement at the authorisation stage *i.e.* the stage at which the senior police officer grants the authorisation for these types of searches, that the stop and search power be considered "necessary". Therefore, there was no requirement for any assessment to be made of the proportionality of the measure. This, it was submitted, was a factor that the Court had referred to in making its decision. This reference to "necessity" and proportionality" in the submissions is of concern to the respondent as the separate limb of Article 8(2) *i.e.* whether the interference was "necessary in a democratic society" had not been pleaded by the appellant or relied upon by him in the High Court. The respondents are of the view that the Court should not consider that aspect of the case.

78. In my view, it is noteworthy that the ECtHR in *Gillan and Quinton v. The United Kingdom* made the observation about the lack of any kind of requirement of a consideration of "necessity" in the Terrorism Act at the stage of authorisation or indeed at the stage of confirmation by the Secretary of State. In its final determination however, the Court held that "the powers of authorisation and confirmation *as well as* those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore "in accordance with the law" and it follows that there has been a violation of Article 8 of the Convention. Therefore, the Court viewed the absence of all these safeguards as crucial to whether the search *complied with legal certainty* and not simply as matters which went to whether they were *necessary or not*.

79. The respondents submit that it is important to note that the powers of search under s. 7(3) of the Act of 2004 only applies to non-nationals who are in the course of entering the country. The respondents contrast the facts of *Gillan and Quinton v. The United Kingdom* with those of the

present case. In *Gillan and Quinton*, the power concerned stops and searches of the general public in public places which were being carried out on a random basis. The situation of a search at an airport for a non-national is entirely different. All those flying know that they are liable to be searched. It is a fact of life. The appellant could have decided that he did not want to submit to any searches and he could have decided not to subject himself to this search by not seeking leave to enter the Sate.

80. At para. 64 of *Gillan and Quinton v. The United Kingdom*, the ECtHR said it was unpersuaded by the argument of the UK government in that case that there is an analogy with those who submit uncomplainingly to searches at an airport. They observed that *"an air traveller may be seen as consenting to such a search by choosing to travel. He knows that he and his bags are liable to be searched before boarding the aeroplane and has a freedom of choice, since he can leave personal items behand and walk away without being subjected to a search."*

81. Counsel for the appellant draws the Court's attention to the breadth of the powers at stake where a person's mobile phone may be taken which would contain a large amount of private material and submits that it was unlawful. The appellant refers to the present case where there was no time limit to the search and no oversight by an outside agency or even a superior officer and that there was no express basis for the copying and retention of the documents. The appellant also submits that it is not clear that the legislation covers access to electronic documents.

82. The appellant points to comparative legislation, noting that there is a marked contrast with the Criminal Justice (Surveillance) Act, 2009 and powers to obtain search warrants in legislation for example in s. 16 of the Official Secrets Act, 1963 where there were restrictions on the length of time the material could be retained and s. 14 of the Criminal Assets Bureau Act, 1995 (where there was a time limit of 24 hours on the execution of the search warrant).

83. The respondent also refers to *Beghal v. DPP* [2015] UKSC 49 where the UK Supreme Court distinguished between port controls and street searches and therefore sought to distinguish it from

Gillan and Quinton v. The United Kingdom on that basis. The majority decision cited the Canadian Supreme Court decision of *R v. Simmons* [1998] 2 SCR 495 to the effect that the degree of personal privacy reasonably expected at customs is lower than in most other situations. The appellant relies however on the ECtHR decision of *Beghal v. The United Kingdom* where the Court found that the particular border search power at issue involved a violation of the applicant's Article 8 rights as the particular power contained in domestic law was not sufficiently circumscribed nor subject to adequate legal safeguards against abuse. In *Beghal v. The United Kingdom*, the Court restated its view that *"national authorities enjoy a wide margin of appreciation in matters relating to national security."* The respondents submit that the facts giving rise to *Beghal v. The United Kingdom* were different in so far as what was at issue in the present case. In that case there was a situation where an examination involving the questioning of a person for a period of up to 9 hours was permitted. That did not apply here.

84. The appellant relies on *Ivaschenko v. Russia* to demonstrate that the permission to copy the documents had to be set out in the law but also that the seizure and search had to be subject to certain safeguards, none of which were present in this case. The respondents again submit that the situation was entirely different as there was express domestic law which permitted what was done here and that adequate safeguards existed.

Analysis and Decision on whether the search was in accordance with law

85. I will first address whether the actions of the immigration officer were performed in accordance with the law as required by Article 8; that is to say not in accordance with the provisions of s. 7(3) of the Act of 2004. This is a question of whether the immigration officer acted outside his powers when he acted in purported performance of his duties under the said subsection.

In accordance with the law: formal legality

86. Counsel on behalf of both the appellant and the respondents rely upon the language used in s. 7(3) of the Act of 2004 concerning the search of a non-national and his or her luggage in support of their respective interpretations. The evidence before the Court was that the search of the phone took place after a demand was made of the appellant by Mr. Grehan to produce documents, electronic or otherwise. Mr. Grehan advised him that he intended to search these.

87. Two questions arise here for consideration: first, whether the definition of "documents" in the subsection includes information on a mobile phone such as text messages; and secondly, (in the event that it does so), the extent of the power (if any) to retain and/or copy such information.

Whether "documents" in s. 7 encompass information on a mobile phone?

88. As we have seen above the appellant's argument is that the provisions of s. 7(3) did not permit the search of the phone as there was no express reference to "phone" or "electronic device" in the section and that, in particular, the reference to documents did not include information stored on the phone. How to approach interpretation, even when the principle of strict construction applies, has been the subject of attention by the Supreme Court in recent years. In the recent judgment of *People (DPP) v. AC* [2021] IESC 74, O'Donnell C.J. reviewed the relevant principles of interpretation as follows:

> *"[3] I agree that the basic approach to interpretation is the approach that gives primacy to the words used. I prefer to describe this as 'the plain meaning approach' rather than a 'literal approach', because it may be that the literal meaning may, at its margin, have a connotation of strict or even artificial interpretation, and the two terms are used relatively interchangeably. It is important, however, that this approach does not invite a court to isolate the critical words, in this case, 'a certificate purporting to be signed by a registered medical practitioner and relating to an examination of that person', and consider if they have a plain or literal meaning in the abstract. A statute is a form of communication, albeit a formal and very particular one. The function of interpretation,*

whether officially by a court, by a professional lawyer or by an interested individual, is to understand what is being communicated. It may be that there are writers whose expression is so limpid that each individual sentence could, if placed upon a transparent slide, be understood immediately and without any doubt or hesitation, although I doubt it. But most language carries layers of meaning, which contributes to the richness of literature, and most communication does not occur in disjointed individual phrases. Instead, what is said occurs, and is understood, against a background created by what has gone before, the subject matter of the communication, assumed knowledge and shared assumptions, all of which assist in the understanding by one party of what is being said by another.

[4] Interpretation of a statute and considering if it has a plain meaning involves in every case considering the words in their context. This, indeed, is apparent from this extract from the judgment in DPP v. TN [2020] IESC 26 (Unreported, Supreme Court, McKechnie J., May 28th, 2020):-

> *'Therefore, while the principle of strict construction of penal statutes must be borne in mind, its role in the overall interpretive exercise, whilst really important in certain given situations, cannot be seen or relied upon to override all other rules of interpretation. The principle does not mean that whenever two potentially plausible readings of a statute are available, the court must automatically adopt the interpretation which favours the accused; it does not mean that where the defendant can point to any conceivable uncertainty or doubt regarding the meaning of the section, he is entitled a construction which benefits him. Rather, it means that where ambiguity should remain following the utilisation of the other approaches and principles of interpretation at the Court's disposal, the accused will then be entitled to the benefit of that ambiguity. The task for the Court, however, remains the ascertainment of the intention of the legislature through, in*

the first instance, the application of the literal approach to statutory interpretation.'

[5] A similar approach was taken in the context of taxation statutes by the same judge in Dunnes Stores v. Revenue Commissioners [2019] IESC 50 (Unreported, Supreme Court, McKechnie J., June 4th, 2019):-

'As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. "The words themselves alone do in such cases best declare the intention of the law maker" (Craies on Statutory Interpretation (7th Ed.) Sweet & Maxwell, 1971 at pg. 71). In conducting this approach "...it is natural to inquire what is the subject matter with respect to which they are used and the object in view" Direct United States Cable Company v. Anglo – American Telegraph Company [1877] 2 App. Cs. 394. Such will inform the meaning of the words, phrases or provisions in question. McCann Limited v. O'Culachain (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy J. at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.'

On the approach which seeks to ascertain the literal and plain meaning, the words must still be approached in their context and having regard to the subject matter of the legislation, and the objective to be discerned."

89. In interpreting s. 7 of the Act of 2004 therefore, the words "any information in non-legible form that is capable of being converted into legible form" must be approached in their context and

having regard to the subject matter of the legislation and the objective to be discerned therefrom. It is only when ambiguity cannot be resolved in the interpretation after the application of the appropriate principles and canons of statutory interpretation that the benefit of that ambiguity must be given to the view which does not result in penalisation.

90. Turning to the description of "documents", it can be seen that the definition is drawn widely. It gives to the word "documents" a meaning that the ordinary non-legally trained person may not give as an immediate response to a question on interpretation. To the lay person, the word "documents" tends to convey some sort of written material on paper. Lawyers however are well used to the word having a wider meaning. In this section, the meaning is widely drawn and that width is strengthened by the reference to the word "includes".

91. The particular phrase "information in non-legible form" is, as the respondents point out, a phrase that has been used in a number of statutes to deal with documents and the contents of computers (and by extension "smart phones"). An early example of the use of the phrase "non-legible form" is contained in s. 131 of the Central Bank Act 1989, which amended (by substitution) s. 5 of the Bankers' Books Evidence Act, 1879, to provide that:

> "(1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is further proved that-
>
> (a) In the case where the copy sought to be received in evidence has been reproduced in a legible form directly by either or both mechanical and electronic means from a banker's book maintained in a non-legible form, it has been so reproduced."
>
> (b) ..."

It would appear that the reference therein to "mechanical" means may have been to records held on microfiche which were a common means by which the banks held records at that time. The reference to information being reproduced in legible form through "means" whether mechanical

or electronic does not seem to have been carried through in later legislation which also referred to "information in non-legible form".

92. An example is contained in the Criminal Evidence Act, 1992, in which s. 5 permits "information in non-legible form" to be admitted into evidence as evidence of its contents if certain conditions are met. Furthermore, s. 6 of the Interpretation Act, 2005 provides that in construing a statutory provision a court "may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act.... and other relevant matters, which have occurred since the date of the passing of that Act..., but only in so far as its text, purpose and context permit."

93. The information contained within the phone was information in non-legible form because it was information stored in a computer. It is not necessary to utilise s. 6 of the Interpretation Act, 2005 to understand that information may be stored on a computer in a non-legible form. Nor do I consider that evidence is needed on that point (indeed no such argument was made by the appellant in this case). At this point in technological development, the courts are well able to take judicial notice of the fact that data on a computer is information converted into a binary numeral system of bits which themselves are stored as bytes. That is information in non-legible form that is capable of being converted into legible form. The phone itself is simply the hardware in which this information is stored. The information was contained within the phone and was capable of being converted into legible form. This type of information does not exist in a vacuum; the information has to be "encased" in something else. As O'Donnell J. stated in *People (DPP) v. AC* above, words in a statute have layers of meanings which come from shared knowledge and shared assumptions. That these words relate to information stored in electronic devices is understood within the law given the usage of the shorthand "information stored in a non-legible form" as set out in the legislative samples cited. That is a plain understanding of this phrase. There is no ambiguity at all in this statute. The documents within the section cover the electronic devices in

which this type of information is stored. That interpretation is also a rational and logical one fitting clearly within the context of the Act, which as discussed further below, is to provide for the control of immigration. It is difficult to see how it could be said that there is a right to search for and examine information that is not in legible form without being entitled to take charge of the device which holds that information for the duration considered necessary for the search.

94. I therefore reject the submission that an interpretation of s. 7(3) did not permit the demand for and search of the appellant's mobile phone.

Was the immigration officer entitled to retain and/or copy the information found on the mobile phone?

95. The remaining issue on whether there was formal compliance with the powers granted by s. 7(3) of the Act of 2004 is whether the subsection permitted the immigration officer to retain and/or copy the documentation. The appellant's argument is that there is no such power in the Act and therefore there can be no justification of the interference with his right to privacy under Article 8(2) because the actions were not in accordance with the law. The respondents submit that this argument was never made in the pleadings and they refer to the judgment of the High Court. Accordingly, a prior issue arises as to whether the Court should rule on this matter in all of the circumstances.

96. It is true to say that the pleadings in the High Court refer to the search of the phone and plead that this search was not in accordance with the law and that there is no reference to retention or copying of documentation. From the judgment of the trial judge, it appears that no issue with retention or copying of documents was raised by the appellant in written submissions. Clearly the matter was raised (or queried) however at the hearing in the High Court but this was rejected by the trial judge on the basis of the lack of pleading. The notice of appeal makes no reference to this finding and does not mention retention/copying of documents. The notice does however set out

that the trial judge erred in holding that any such power of search by the immigration officer was prescribed by law.

97. There is no doubt but that an applicant is only entitled to advance grounds upon which leave has been granted and if other grounds are sought to be advanced leave to amend the grounds must be sought. This principle was stated by the Supreme Court in *AP v. DPP* [2011] 1 I.R. 729 and recently applied by this Court in *Ahmed v. Fitness to Practice Committee* [2021] IECA 214. It is important that issues are pleaded carefully so that defendants/respondents can deal with all issues by evidence where appropriate. This requirement is particularly important in judicial review cases where leave must be granted.

98. In the present case however, I am satisfied that there are good reasons why the issue of whether the question of copying and retaining the data was permitted under the Act is and was a live one in these proceedings and ought to be decided in this appeal. Arguments about the retention and copying of the information are included in the appellant's claim about the absence of legal certainty in the law (the appellant pointed to them as an absence of safeguards which rendered the entire search illegal). This is an important aspect of the matter. The ECtHR jurisprudence engages with the issue of appropriate safeguards when considering whether the law at issue provides a measure of legal protection against arbitrary interference with the protected rights under the Convention. Thus, in assessing whether this search was in accordance with the law for the purpose of assessing whether there had been compliance with Article 8, the High Court and this Court on appeal, is required to take into account the legal safeguards surrounding the search. The Convention meaning of "in accordance with the law" was always at the heart of the appellant's case. Moreover, these were matters which were brought up in legal argument in the High Court and in the appeal. Furthermore, whether the wording of s. 7(3) of the Act *prima facie* prohibits the copying and retention of data is a matter of interpretation of the statute rather than a matter for evidence; thus, there is no prejudice to the respondent due to any inadequacy of pleading. The

respondents have had ample opportunity to make submissions on the issue of interpretation. It is also important to clarify that the issue of retention and copying of the data was argued and is being dealt with here as part of this Court's consideration of whether the search was performed "in accordance with the law". This issue is not an issue that only arises under the second limb of Article 8(2) *i.e.* whether the powers were "necessary in a democratic society". It arises directly from the pleadings that the performance of the functions by the immigration officer under s. 7(3) was not in accordance with the law.

99. I acknowledge the clarity with which my colleague Ní Raifeartaigh J. dissents on this point. It seems to me that our disagreement turns on whether a challenge to the legality of how a search is carried out pursuant to s. 3(1) of the Act of 2003 must expressly separate the challenge into the component parts of what may be termed the search *i.e.* the seizure, the accessing of materials, the copying of materials and the detention of materials. In my view that would result in an overly formalistic approach to the concept of search. In the present case, the appellant encapsulated those aspects of the search into his submissions that this search was not "in accordance with the law". At the oral hearing, counsel expressly referred to the fact that copying and retention occurred here in circumstances where there were no safeguards. As I will demonstrate, that absence of safeguards commences with the starkest of omissions; the law did not permit those actions. In my view, it is appropriate to approach that absence of formal legal provision in a direct way and to hold that the section simply did not permit the immigration officer to do what he did. It would be more artificial to bypass that direct mechanism and proceed to determine this case on the basis that the absence of safeguards (including the absence of any lawful ground or legal basis) regarding retention and copying of the documents rendered the entirety of the search unlawful.

Does s. 7(3) permit the copying and retention of the documents?

100. Returning to the wording of s. 7(3), it is clear that subsection (b) permits an immigration officer "to examine and detain, for such time as he or she may think proper for the purpose of such

examination, any documents so produced...". Perhaps somewhat unusually the word "detain" is used instead of "retain". In the present circumstances, it seems that "detain" is used in the same sense given to the word "retain" *i.e.* as meaning "withholding". If there is any difference, the use of the word "detain" suggests that the period of time in which the information will be kept is for a short time; "retain" conveying something kept back for a longer period. As I say however, I do not think that it is necessary or appropriate to give the word detain any other meaning other than that it gave power to the officials to "retain" or to "withhold" the documents for the purpose permitted by the statute.

101. The power to examine and detain documents may be exercisable in two ways under the subsection. There are powers available for an Immigration officer/Garda to demand production of the document and to search either the non-national or his/her luggage. Regardless of whether the document is produced *or* found on a search, the Immigration officer/Garda is entitled to examine *and detain* the document for such time as he or she thinks proper for the purposes of examining it.

102. Therefore, while there is a power in the subsection to examine the documents; the power to detain/retain the documents is only for the purpose of that examination. In the present case the examination was carried out by the reading of the documents. There is no other examination at issue in the present case. If any doubt exists about the meaning of such examination in the sense of defining its nature and purpose, it would be appropriate to consider that meaning in the context of its position in the Act as a whole. The long title to the Act of 2004 states that it is "An Act to make provision, in the interests of the common good, for the control of entry into the State, the duration and conditions of stay in the State and obligations while in the State of non-nationals and to provide for related matters". A clear objective of the Act is to control entry into the State of non-nationals. The relevant sub-section provides a particular power to immigration officials and

members of An Garda Síochána when dealing with non-nationals who are landing or embarking at any place in the State.

103. It is of particular significance that the powers are limited to the search of non-nationals and can only be carried out at the point that the non-national lands or embarks at any place in the State. On the face of the search, it was not one being carried out for general criminal law purposes, customs considerations or even general security purposes. Those types of powers of search may also apply at airports and may be applicable to all who travel across international frontiers. The relatively narrow band of persons to whom these provisions apply point to the purpose of the sections as being for the purpose of controlling entry to the State.

104. The control of entry to the State may however permit a broad examination of the documents that were on the phone. For the purpose of establishing the true intentions of a non-national who is seeking to enter the country, there may be a need to examine personal correspondence. Such an examination is one carried out for the purpose of control of immigration into the State in the interests of the common good and is in accordance with the powers granted to an immigration official under s. 7(3) of the Act of 2004. In so far as retention of documents is concerned, it is noteworthy that there is no power to retain the documents beyond such time as the *immigration officer* thinks is required for that examination.

105. Different considerations would arise if this was a situation where a member of An Garda Síochána had carried out the search and come across evidence which they believed to be evidence of an offence or suspected offence. There is a saver in s. 9 of the Criminal Law Act, 1976, that applies to a member of An Garda Síochána exercising *a power of search* to retain items seized in such a search "for use as evidence in any criminal proceedings, ... for such period from the date of seizure as is reasonable, or if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act, 1897, shall apply to the thing so seized...". That is a general provision which

would apply to this search if it had been carried out by a member of An Garda Síochána but only if the mobile phone contained evidence of an offence or suspected offence. It was not such a search, it was a search performed by an immigration officer. Furthermore, there was no suggestion here that there was evidence of an offence or suspected offence. The legislative provisions only granted to the immigration officer the power to detain (in the sense of retain) for the time limited to that which the immigration officer thinks proper for the purpose of such examination.

106. Examination of items recovered from a search can take a very long time in some cases. Charleton J. sets out in *CRH plc v. Competition and Consumer Protection Authority* at para. 239 of the reported judgment, the numerous and varied reasons why items of potential interest seized in searches *in criminal cases*, require to be taken away and subjected to examination. Unlike the situation in *CRH plc v. Competition and Consumer Protection Authority,* the search power here is not granted because a crime has been committed or is suspected to have been committed. In *CRH plc v. Competition and Consumer Protection Authority* the power to search was part of a process of investigation into suspected breaches of the criminal law. The power to search was premised on a Judge of the District Court being satisfied to issue a warrant. It is noteworthy however that the type of information being targeted in a search carried out pursuant to a warrant issued under the Competition and Consumer Protection Act, 2014 is subject to the express provisions in the Act regarding retention and copying of material. That Act also provides for protection as regards material that might be subject to legal professional privilege but did not provide protection for material that may invoke aspects of the right to privacy.

107. Charleton J. at para. 262 makes clear that the taking of or copying of emails may capture ordinary or everyday material irrelevant to the matter under investigation. In *CRH plc v. Competition and Consumer Protection Authority*, the issue of whether there had been a breach of privacy was to the fore and Charleton J. at para. 263 discussed how different considerations may arise in different contexts which may require differing levels of protection for privacy rights. He

referred by way of example to searches in terrorist investigations where immediate searches of material may be required, noting however that each search power may have its own statutory matrix.

108. It is an important feature of s. 7(3) of the Act of 2004 that it does not provide a power of search based upon the investigation of a crime, although failure to co-operate may itself constitute a crime. It is for the purpose of control of immigration; a purpose highlighted by the provisions that the search may only take place when a person is landing or embarking at any place in the State. I make the observation that while departure control may appear unusual in an immigration context, the power of search enables immigration officers to be sure that the person leaving the State is in fact the non-Irish national. It is also noteworthy that it is only a criminal offence for a non-national to be in the State other than in accordance with a permission (s. 5 of the Act of 2004). A person presenting at an approved port seeking permission to enter the State does not commit an offence merely because they may be refused permission to land. The importance of these remarks is that the nature and purpose of this section of the legislation is clearly limited as regards its objective, yet the section contains a wide power of search which is not based upon the formulation by an immigration official of a reasonable suspicion. The appellant has quite properly not sought to impugn the section solely on the basis of the absence of the necessity for a reasonable suspicion (or any suspicion); control of immigration usually being considered a justified interference for such a general power. The appellant's concern has been with the absence of limitations or safeguards on the power of search; the absence of a reasonable suspicion or indeed any suspicion may well be a factor to consider in combination with other factors in assessing whether the safeguards provided by the law were adequate so that the law can be truly said to bear the hallmarks of legal certainty. While those submissions were directed towards the wider issue of the quality of this law, I recite them here to demonstrate how broad these powers of search are and to remark

that very broad powers of search, where failure to comply creates criminal liability, must be interpreted strictly.

109. It is noteworthy that s. 15(1) of the Act of 2004 provides for a judge of the District Court to issue a search warrant in respect of a place and any persons found there where on sworn information from a permitted member of An Garda Síochána that:-

(a) It is reasonably necessary for the purpose of the enforcement of the Act that the place should be searched or,

(b)There are reasonable grounds for suspecting that evidence of or relating to an offence under the Act is to be found at a place specified in the information,

Section 15(1)(c) permits seizure of anything found there which may be evidence of or relating to an offence under the Act of 2004. These search provisions relate expressly to the objectives of the Act *i.e.* control of immigration because they must be "for the purpose of the enforcement of the Act". This is an important judicial oversight, in the form of the necessity to obtain judicial pre-approval for such a search. No such oversight exists or indeed could exist for searches carried out at a port of entry of every non-national seeking to enter the State. It points however towards a requirement that the legal provisions under which the legal power is exercised must be clear before they can be held to be in accordance with the law. This is all the more important where the lack of a requirement for a suspicion prior to exercising the power would make subsequent judicial review of the exercise of the power all the more difficult.

110. From the foregoing, there is no doubt that the phrase "such time for the purpose of such examination" must refer to an examination which relates to the exercise of the immigration officer's/Garda's role in ensuring control of immigration. In so far as it concerns a person presenting at the port for a permission to enter the State, the time for, and purpose of, the examination must relate to the decision to grant or to refuse the permission to enter. That is the plain meaning of the section. It is unnecessary to give the matter a strict interpretation because

that is the plain meaning. Naturally a strict interpretation would also limit the time and purpose to one related to the grant or refusal of the permission. It must also be said that this is a rational meaning as it limits the retention of materials which have been taken in a search which is not for the investigation of crime and is not subject to judicial control prior to its commencement and which could only be subject to very limited judicial control afterwards, given the absence of a requirement for reasonable suspicion to justify the search. I conclude therefore that the purpose of the search and the examination of the documents is only to permit the Immigration officer/Garda obtain information that will be of assistance for the purposes of controlling entry to the State. In so far as the immigration officer was dealing with this appellant as a non-national landing in the State, he was clearly performing his powers under s. 7(3) in the interests of the common good for the control of entry into the State.

111. Does the phrase "examine and detain, for such time as he or she may think proper for the purpose of such examination" permit the copying of the documents and their retention as occurred in this case? Mr. Grehan took photographs *i.e.* copies, of certain documents he found on the phone; referred to by him as screenshots. The evidence discloses that the material was in his possession at least until some point after the 2nd November, 2017, at which point a Freedom of Information request was received by the Department of Justice and Equality. That was at least more than one week since the appellant had been removed from the jurisdiction. At that point the purpose for which he could retain the documents, *i.e.* for the purpose of their examination, had long passed. The control of entry to the State had clearly finished.

112. The legislation does not expressly permit the copying of "documents". It only permits examination and detention for such time as may be proper for the purpose of the examination. Given the wide circumstances in which the power under the section may be invoked by an immigration officer/Garda *i.e.* without the necessity to form a suspicion, and the limited purpose of the Act being to control entry into the State of non-nationals, this omission is perhaps not

surprising. The plain meaning of the section is that copying of documents seized is not permitted *per se*. I do consider however that when one is dealing with "information in non-legible form that is capable of being converted into legible form", different considerations could potentially apply. The examination of the document requires the conversion into legible form of the information stored in non-legible form. A simple example would be where a document stored on an electronic device may require some kind of copying of that information from one device to another (or from one form to another) so that the document may be examined. Therefore, the resulting information is not so much a copying of the document but a conversion of the document into legible form so as to enable an examination of the document. This contrasts with a written document, such as a letter in an envelope, demanded from or found in the possession of a non-national, which may not be copied because it can be examined in the form in which it exists.

113. It may also be that an examination of a document in non-legible form may more properly be carried out by using specific software tools to make an "image" of the drive so as to enable examination to take place without any interference in the drive of the seized electronic equipment. It is unnecessary to go into detail of the type of examination that may be permitted here because it was not the type of examination carried out by the immigration officer. In the present case Mr. Grehan took photographs of the information on the telephone. He had already converted that information into legible form by "bringing it up" on the screen of the mobile phone. His act of photography was closer to the photocopying of a written document than a part of either the conversion process or the examination process. It is copying of material which is not permitted under the express terms of the legislation.

114. I am satisfied that in copying the documents the immigration officer was performing his purported powers under the Act in a manner which was not in accordance with the law as such a power was not permitted by s.7 or any other provision of law.

115. Even if I am incorrect in finding that he was not entitled to copy the data (by photographing it), I am in any event satisfied that the immigration officer did not perform his functions in accordance with the law, because there was a clear breach of s. 7(3) when he retained those photographs instead of returning them (or at least destroying all trace of them) when the examination had finished. The examination of the documents came to an end when he had read them and considered them. The power of detention of the document was expressly limited in the section to be a power exercised for the purpose of examining the document. As a matter of interpretation, given the context of the power granted to the immigration officer, that examination had to have been for the purpose of the exercise by the immigration officer of the power to grant or refuse to grant the non-national of the power to enter the State. Therefore, by the time the decision was made to refuse the appellant leave to land, the time for retention of the document had ceased. In the same way as the immigration officer appears to have handed back the mobile phone to the appellant, he was required to hand back the contents of that phone or at the very least destroy the copies he had made of the documents.

116. I have not ignored that the subsection provides that the time for examination of the document is that time which the immigration officer thinks proper for the examination. Regardless of whether the time for examination has to be assessed on a subjective and/or an objective basis, as a matter of fact what occurred in this case was that the immigration officer examined the documents and questioned the appellant accordingly. As a matter of law therefore, the examination was complete; the phone was returned and in the same way there was no reason to retain the photographs he had taken and no legal basis for doing so.

117. It is important to state that this decision is made on the wording of the section and the justification put forward by the respondent for the seizing of this phone and the examination of the information contained in non-legible form therein. There may be another basis for seizing and retaining evidence (e.g. s. 9 of the Criminal Law Act, 1976 by a member of An Garda Síochána

for, *inter alia*, use in proceedings) but that does not arise in this case. This is a finding that this immigration officer acted outside the specific powers of s. 7(3) of the Act of 2004 in retaining the documents beyond the period necessary for carrying out the examination of those documents.

118. I am satisfied therefore, that the actions of the immigration officer, in retaining copies of the documentation, were outside the scope of the provisions of s. 7(3) of the Act of 2004 and therefore, his actions when viewed in the light of the permitted parameters of his powers under the Act, were not performed in accordance with the law and were not performed in a manner compatible with the State's obligations under Article 8 of the Convention.

119. In reaching that conclusion, it has not been necessary to utilise s. 2 of the Act of 2003 in the interpretation of this subsection. An interpretation based upon the plain meaning of the subsection and an application of the subsection based upon that meaning is, on the facts of this case, sufficient to deal with the issue of whether the immigration officer performed his functions "in accordance with the law" as set out in s. 7(3) of the Act of 2004.

120. It is therefore not necessary to consider the issue of whether the appellant ought to be allowed make submissions on the second limb of Article 8(2) *i.e.* the question of whether the interference was "necessary in a democratic society" for a purpose permitted by the Article. That issue may arise in another case where properly pleaded and it will be for the Court to determine if the justifications put forward by the respondents in that case satisfy the twin requirements that the law be both necessary and proportionate to its aim.

The Entitlement to a Declaration

121. The respondents submit that the appellant ought not to be entitled to a declaration by suggesting that the point was a "moot" one unless the appellant could show that it somehow invalidated the refusal of his leave to land. They submit that it did not invalidate his leave to land.

122. The entitlement to the declaration is a self-contained issue in these proceedings. There was no overlap between the claim of relief by way of *certiorari* and that relief by way of a declaration.

They were on the face of the claim entirely separate issues, concerning respectively, entry into the State and an illegal search. In the amended statement of grounds, no additional reason was pleaded to the effect that the unlawful search must invalidate the decision refusing him entry into the State. No link was made between the two. Furthermore, the issue of an unlawful search invalidating the refusal was not addressed in written submissions and, in the order that written submissions addressed these issues (the refusal followed by the search), there was no indication that any link was being made between the two. Therefore, this Court does not have to address the issue of whether the illegality of the search did in fact render the decision to refuse him entry into the State unlawful.

123. On the other hand, the fact that the refusal to permit him entry to the State has not been found to be unlawful does not negate his right to a declaration based upon the findings made above that the search was not carried out in a manner compatible with the State's obligations under the Convention. This appellant's rights were breached; the making of the declaration sought in the proceedings is an appropriate manner in which to mark that fact. There is no suggestion that the appellant has done anything which would be of such significance as to disentitle him to that relief. Moreover, it is all the more important that the appellant obtains this declaration in circumstances where there is no evidence that the documentation retained has since been destroyed.

124. I therefore hold that the appeal on this ground ought to be allowed, and the appellant is entitled to a declaration that the copying and retention of documents obtained from his phone was carried out in a manner not permitted under s. 7(3) of the Act of 2004 and was incompatible with the State's obligations under Article 8 of the European Convention on Human Rights.

125. As for the appellant's claim that the entire search (meaning the demand for and the examination of the phone) was performed otherwise than in accordance with the law on the ground that the law was uncertain and arbitrary because of the failure to provide sufficient safeguards with regard to the search, I am satisfied that it is not necessary to reach any decision on that basis. The

declaration to be granted is sufficient to satisfy the claim of the appellant in circumstances where the claim for the declaration was a stand-alone one and was not linked in any way to the relief he sought concerning the decision to refuse to grant him leave to enter the State. In the absence of a link between those issues having been made in his pleadings, it is not appropriate for this Court to consider that issue any further.

Conclusion

126. For the reasons set out in this judgment, I dismiss the grounds of appeal in so far as they relate to the refusal of the High Court to grant an order of *certiorari* quashing the decision to refuse the appellant permission to enter the State.

127. For the reasons set out in this judgment, I have held that applying the plain meaning of the provisions of s. 7(3) of the Act of 2004, the immigration officer acted in excess of the powers permitted by the legislation in retaining the photographs that he had taken of documents displayed on the screen of the appellant's mobile phone after he had concluded his examination of those documents. I will therefore allow the appeal in part and make an order granting the appellant a declaration that the copying and retention of documents obtained from his phone was carried out in a manner that was not permitted under s. 7(3) of the Act of 2004 and was incompatible with the State's obligations under Article 8 of the European Convention on Human Rights.

128. If the parties do not notify the Registrar that they have agreed on the terms of the an order for costs within 14 days of the date of delivery of this judgment, the Registrar will contact the parties to arrange a suitable date for hearing of any application with regard to costs.

As this judgment is being delivered electronically Power J. has authorised me to note her agreement to it.

Aileen Donnelly

12/05/2022