THE SUPREME COURT

Supreme Court Record No: S:AP:IE:2018:000169

High Court Record No: 2018/430 JR

O'Donnell J.

McKechnie J.

MacMenamin J.

Charleton J.

Irvine J.

BETWEEN

A.W.K. (PAKISTAN)

Applicant/Appellant

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 25th day of March, 2020

Introduction:

1. The applicant in this case was born in Pakistan in 1991. Having arrived in this jurisdiction in August, 2015, he made an application for asylum because at that time the International Protection Act 2015, was not in force. That application was rejected, but whilst his appeal was pending before the Refugee Applications Tribunal, the most important and significant provisions of the Act were activated, as and from 31st December, 2016. As a result, he made an application for international protection under its terms which was rejected at both first instance and on appeal.

2. After the initial decision, the first named respondent ("the Minister for Justice" or "the Minister") considered, as he is required to do, whether or not to grant the applicant permission to remain in the state. He declined to do so. Subsequent to the appeal being dismissed, the Minister, on receipt of further information from the applicant, reviewed that decision but saw no reason to alter its outcome. That review was conducted under s. 49(7) of the International Protection Act 2015 ("the Act" or "the 2015 Act"). The most crucial question on this appeal is whether that "review" should be regarded as a "decision" under s. 49(4)(b) of the 2015 Act, for the purposes of the application of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended. Whilst a number of other matters were canvassed, particularly by the respondents, this by far is the most significant point of contention, between the parties.

The International Protection Act 2015 ("the 2015 Act"):

3. The Act, from an overall perspective, is, in its substantive terms logically structured and orderly laid out, in the manner in which it deals with the various steps of the regime, that is from inception to conclusion. Leaving aside legal challenges and the implementation phase of a deportation order, the process in substance commences with an application for international protection and reaches a near end point when a "review" decision by the Minister for Justice issues pursuant to s. 49(7) of the Act: if such a decision is negative, the final step is for the Minister to make a deportation order, which he is obliged to do, in respect of a person who is the subject of that decision. There are of course several intermediate junctions at which, for a variety of reasons, the process might terminate: but if the entire course should be navigated, the start and end points broadly speaking, are as indicated.

4. As this case is essentially concerned with the provisions of the 2015 Act, it would be helpful, in order to understand and follow the issues, if I were to give a short outline of its main sequential features, to be followed by a more focused look at the most pertinent provisions which affect this case. Unfortunately, what follows is a little dense, but probably unavoidable. Initially, a number of key definitions should be noted:-

- An "applicant": is a person who has applied for international protection in accordance with s. 15 of the Act, and who has not ceased to be such, under s. 2(2) of the Act.
- "international protection" means a status in the State either –

  (a) as a refugee, on the basis of a refugee declaration, or

(b) as a person eligible for subsidiary protection, on the basis of a subsidiary protection declaration

- "Refugee" is a person, or a "stateless person", who owing to a well-founded fear of persecution on any of the grounds set out in the s. 2 definition, is unable or unwilling to avail of the protection available in the country of his nationality or in the country of his former habitual residence, whichever may apply,
- "international protection officer" is a person who is authorised under s. 74 of the Act, to perform the functions so conferred on that office holder ("IPO"),
- "Tribunal" means the International Protection Appeals Tribunal established by s. 61 ("IPAT"),
- The circumstances in which a person ceases to be "an applicant" are those set out in s. 2(2) of the 2015 Act.

5. The various steps or stages in this regime can briefly be described as follows: -

(i) A person, either at the frontier of the State or in the State, either legally or not, who wishes to make an application for international protection and who, pending the outcome does not want to be expelled for fear of serious harm or persecution, is firstly interviewed by an officer of the Minister or by an immigration officer: the purpose of this is essentially to determine basic facts such as the identity, nationality and country of origin of the person in question, the route taken to get to this jurisdiction *etc*. Such a person may then submit an application for international protection: when made, that person, unless otherwise disqualified, becomes "an applicant" for the purposes of s. 15 of the Act.

(ii) An applicant shall be permitted to enter and remain or to remain in the State for the sole purpose of his or her application being examined and decided upon by an international protection officer and where an appeal is taken, pending the result thereof. This permission is valid but only until the subject person in question ceases to be an applicant under s. 2(2) of the Act.

(iii) This "permission to enter and/or to remain" has a purpose totally separate and distinct from a "permission to remain" given under s. 49 of the Act. That first mentioned, operates at the commencement of the process, whereas the latter permission only comes into play, if at all, at a point close to if not at the end of the process.

(iv) Disregarding the various intermediate steps which are provided for, an international protection officer examines each application for the purposes of making a recommendation under s. 39(2)(b) of the Act: as provided for by s. 34, the officer in his recommendation has three possible options available:

(v) It may be any one of the following:

- That the applicant should be given a refugee declaration,
- That the applicant should not be given such a declaration but instead should be given a subsidiary protection declaration, or
- That the applicant should be given neither a refugee declaration or a subsidiary protection declaration.

The second option is provided for in s. 39(3)(b) of the Act, with the option to refuse either declaration being provided for in s. 39(3)(c) of the Act. In this judgment the former is sometimes referred to as a "s. 39(3)(b) recommendation" and the latter as a "s. 39(3)(c) recommendation".

(vi) Again, without setting out the notification requirements in respect of the actual recommendation made, or the further steps which follow, s. 41 permits an appeal against either a s. 39(3)(b) or a s. 39(3)(c) decision. Therefore, whilst evidently no appeal is provided for, from a recommendation that a refugee declaration should be granted, there is an appeal from a recommendation that such a declaration should not be granted, but instead a subsidiary protection declaration should be, and also from where neither declaration is being recommended.

(vii) Under s. 46 of the 2015 Act, the Tribunal, depending on the nature of the appeal, has a number of options available to it, but at no time can it disturb a positive recommendation previously made by the IPO. So on an appeal under s. 39(3)(b), where a refugee declaration has been refused but a subsidiary protection declaration has been recommended, the Tribunal can either affirm that recommendation or set it aside and in its place recommend that the applicant should be given a refugee declaration (s. 46(2) of the Act). On an appeal from a s. 39(3)(c) decision, where neither of these declarations were recommended, the Tribunal may affirm that decision, or recommend a refugee declaration, or refuse such declaration but instead recommend a subsidiary declaration (s. 46(3) of the Act).

(viii) So in substance, a s. 46(2) recommendation deals with a s. 39(3)(b) recommendation, and a s. 46(3) recommendation deals with a s. 39(3)(c) recommendation, at of course appellate level.

(ix) The Minister for Justice, by virtue of s. 47 of the Act, is obliged to give effect to any recommendation made at first instance or on appeal. He does however have the power to decline to follow any such recommendations, if to

do so would endanger the security of the State, or where the individual concerned, by reason of having been convicted of a particularly serious crime, either in this jurisdiction or otherwise, constitutes a danger to the "community of the State".

It must be noted that both the IPO and IPAT issue only "recommendations" and not "decisions". As nothing turns in this case on that distinction, I have on occasion used the phrases interchangeably. However, the wording of the Act refers to "recommendations" and not "decisions".

6. The above overview of these sections brings us to the critical statutory provisions, relative to this appeal. These are contained in sections 49 and 51.

"49. (1) Where a recommendation referred to in section 39 (3)(c) is made in respect of an application, the Minister shall consider, in accordance with this section, whether to give the applicant concerned a permission under this section to remain in the State (in this section referred to as a "permission").

(2) For the purposes of his or her consideration under this section, the Minister shall have regard to—

(a) the information (if any) submitted by the applicant under subsection (6), and

(b) any relevant information presented by the applicant in his or her application for international protection, including any statement made by him or her at his or her preliminary interview and personal interview.

(3) In deciding whether to give an applicant a permission, the Minister shall have regard to the applicant's family and personal circumstances and his or her right to respect for his or her private and family life, having due regard to—

(a) the nature of the applicant's connection with the State, if any,

(b) humanitarian considerations,

(c) the character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions),

(d) considerations of national security and public order, and

(e) any other considerations of the common good.

(4) The Minister, having considered the matters referred to in subsections (2) and (3), shall decide to—

(a) give the applicant a permission, or

(b) refuse to give the applicant a permission.

(5) The Minister shall notify, in writing, the applicant concerned and his or her legal representative (if known) of the Minister's decision under subsection (4), which notification shall be accompanied by a statement of the reasons for the decision.

(6) An applicant—

(a) may, at any stage prior to the preparation of the report under section 39 (1) in relation to his or her application, submit information that would, in the event that subsection (1) applies to the applicant, be relevant to the Minister's decision under this section, and

(b) shall, where he or she becomes aware, during the period between the making of his or her application and the preparation of such report, of a change of circumstances that would be relevant to the Minister's decision under this section inform the Minister, forthwith, of that change.

(7) Where the Tribunal affirms a recommendation referred to in section 39 (3)(c) made in respect of an application, the Minister shall, upon receiving information from an applicant in accordance with subsection (9), review a decision made by him or her under subsection (4)(b) in respect of the applicant concerned.

(8) Subsections (2) to (5) shall apply to a review under subsection (7), subject to the modification that the reference in subsection (2)(a) to information submitted by the applicant under subsection (6) shall be deemed to include information submitted under subsection (9) and any other necessary modifications.

(9) An applicant, for the purposes of a review under subsection (7), and within such period following receipt by him or her under section 46 (6) of the decision of the Tribunal as may be prescribed under subsection (10) —

(a) may submit information that would have been relevant to the making of a decision under paragraph (b) of subsection (4) had it been in the possession of the Minister when making such decision, and

(b) shall, where he or she becomes aware of a change of circumstances that would have been relevant to the making of a decision under subsection (4)(b) had it been in the possession of the Minister when making such decision, inform the Minister, forthwith, of that change.

(10) The Minister may prescribe a period for the purposes of subsection (9) and, in doing so, shall have regard to the need for fairness and efficiency in the conduct of a review under this section.

(11) (a) A permission given under this section shall be deemed to be a permission given under section 4 of the Act of 2004 and that Act shall apply accordingly.

(b) A reference in any enactment to a permission under section 4 of the Act of 2004 shall be deemed to include a reference to a permission given under this section."

7. Subject to the prohibition of refoulement, s. 51 of the 2015 Act, provides for the making of a deportation order. The various steps outlined in that process are not of immediate concern, but two important points should be noted: firstly, that where the Minister has decided to refuse to give an applicant permission to remain in the State under s. 49(4)(b), he or she is then obliged to make a deportation order in respect of that individual by virtue of s. 51(1)(c) of the Act: and secondly, if such an order is made, it shall be deemed to be a deportation order made under s. 3(1) of the Immigration Act 1999, and accordingly, s. 3(11) of that Act will apply. That entitles a person to make an application to have a deportation order revoked or amended.

8. For the purposes of these proceedings two further statutory provisions should be mentioned. The first is s. 5(1) of the Illegal Immigrants (Trafficking) Act 2000, as substituted by s. 34 of the Employment Permits (Amendment) Act 2014, and as subsequently amended by s. 79 of the International Protection Act 2015 ("s. 5 of the 2000 Act"). That section provides that a person shall not challenge the validity of any of the various measures outlined in that subsection, save in accordance with the procedures therein specified. Those measures apply to several different situations, such as notifications, refusals, decisions, determinations, recommendations and orders

made, *inter alia*, under the Immigration Act 1999: included are deportation orders made under s. 3(1) of that Act, and also orders made under s. 3(11) of the Act.

9. In brief, the requirements specified in s. 5 of the 2000 Act are: (i) that a challenge to any of the steps described must be by way of judicial review proceedings commenced within a period of 28 days from the date on which the affected person is notified of the step in question, unless for good and sufficient reason that period is extended by the High Court, and (ii) that the determination of the High Court on any such application shall be final and no appeal shall lie from that decision save except with the leave of the High Court, which should be granted only where the decision involves a point of law of exceptional and public importance and that it is desirable in the public interest that an appeal should be taken therefrom. This procedure can be contrasted with the more generous requirements of Ord. 84 of the Rules of the Superior Courts which deal with judicial review proceedings other than those captured by s. 5 or by other similar or analogous provisions.

10. As stated, s. 79 of the 2015 Act further amended s. 5(1) of the 2000 Act by inserting, *inter alia*, the following matters as being included in that provision: -

> "(og) a recommendation of an international protection officer under para. (b) or (c) of section 39(3) of the International Protection Act 2015,
>
> (oh) a decision of the International Appeals Tribunal under subs (2) or (3) of section 46 of the International Protection Act 2015,
>
> (oi) a decision of the Minister under s. 49(4)(b) of the International Protection Act 2015, and
>
> (oj) a deportation order under section 51 of the International Protection Act 2015."

It is common case that there is no express reference in the amended s. 5 to a review decision under s. 49(7) of the 2015 Act: this omission for the applicant is determinative of the issue. Not so, says the Minister. In his view, such a review decision must be regarded as being one and the same as that made under s. 49(4)(b), which clearly is captured by the amendment set out at subpara. "(oi)" thereof.

11. The second provision in issue is s. 5(1) of the Interpretation Act 2005, which reads as follows:-

> "5.- 1 In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or will fail to reflect the plain intention of –
>
> in the case of an act to which paragraph (a) of the definition of "Act" in section 2(1) relates, the Oireachtas, or
>
> in the case of an Act to which paragraph (b) of that definition relates, the Parliament concerned,
>
> The provision shall be given a construction that reflects the plain intention of the Oireachtas or Parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

12. This section may or may not become relevant: if on a literal interpretation of the measures in issue the review decision should not be regarded as a decision for the purposes of s. 49(4)(b) of the 2015 Act, then, it is asserted, that by an appropriate

application of this provision, the conclusion urged by the Minister for Justice should nevertheless prevail. This is a point I will come back to a little later. But first a little more detail of the background circumstances of the case.

The Facts of this Case:

13. The applicant arrived in this jurisdiction on 25th August, 2015, just as his student visa, which permitted him to live, study and remain in the United Kingdom was about to expire. On the 26th August, he applied for asylum which was rejected, and his appeal to the Refugee Applications Tribunal was pending when the International Protection Act 2015, or at least its more significant provisions, came into force. That date was the 31st December, 2016. On 13th February, 2017, he made an application for international protection. That was rejected by the international protection officer on 10th July, 2017: his appeal to the International Protection Appeals Tribunal (IPAT) was likewise rejected on the 13th October, 2017. He was notified of such decision on the 24th October, 2017.

14. Where a recommendation has been made by the international protection officer under s. 39(3)(c) of the 2015 Act (para. 5(v) above), the Minister, despite such recommendation, is obliged to consider whether or not to give that person permission to remain in the State. (s. 49(1) of the Act). Having considered the various matters specified in subs (2) and (3), a decision is then made under subs (4) which is either to grant permission or refuse it. This obligation is on the Minister irrespective of any appeal. In this case the Minister by decision dated the 26th July, 2017, refused the applicant permission to remain (para. 5(iii) above). It will be noted that this predated the decision of IPAT.

15. Following that decision which issued on 13th October, 2017, representations were made to the Minister on the 15th and 24th November, 2017. If such representations are not made, then the Minister does not have to review his earlier decision to refuse permission to remain. If however further information is supplied, as it was in this case, the Minister must review that decision. This obligation arises from s. 49(7) of the Act. Having conducted that review, the Minister by decision dated the 15th March, 2018, saw no reason to alter the previously made decision to refuse permission to remain (para. 2 above).

16. Following notification of the Minister's decision under s. 49(7) of the Act, the applicant sought a further review on 3rd May, 2018. That was responded to by way of letter dated the 10th May, 2018, in which it was said:-

> "A section 49 PTR Review was completed and a decision issued on the 25th March, 2018. Under section 49 of the International Protection Act 2015, no further review can be considered in this case.
>
> Your client is no longer an applicant under the 2015 Act, and his application cannot be reconsidered under section 49.
>
> Your client has now ceased to be an applicant under the 2015 Act, and no longer has permission to remain in the State…"

As it happened, on the 8th May, 2018, a deportation order was made in respect of the applicant. Accordingly, subject to challenge, the Minister was entitled to implement or execute that deportation order.

<u>The High Court Proceedings</u>:

17. Having obtained leave to institute these judicial review proceedings, the applicant sought an order of *certiorari* seeking to set aside the "s. 49(9) decision of

15th March, 2018", and secondly, the deportation order. Further, if successful, an order of *mandamus* was sought so as to compel the Minister to consider the second review application made by him. The substantive application was ultimately determined by Humphreys J. who delivered his judgment on 25th September, 2018. Purely as an aside, but in the interest of accuracy, the decision of the 15th March, 2018, and notified on the 25th March, 2018 (paras. 15 and 16 above) was not made under s. 49(9) of the Act: the only decision in issue was that made under s. 49(7) of the Act.

18. Humphreys J., having correctly identified what the issue was, felt in no doubt but that by virtue of s. 49(8) of the 2015 Act (para. 6 above), the review conducted by the Minister under subs (7) of that section was one to which the provisions of subs (4) applied. Accordingly, in his opinion the review must be associated with the original decision and like it, must therefore be regarded as being expressly captured by s. 5(1)(oi) of the 2000 Act: consequently, it followed that the procedural requirements of that section had to be met. This conclusion was based on a literal interpretation of the measure in question. Even if incorrect in this regard however, the learned judge was satisfied that the provision in question should be given a purposive construction.

19. There were a number of bases advanced in support of this latter approach. Firstly, as decided by him in earlier cases, a rejection of a s. 3(11) request is an adverse immigration decision which is relevant to the continuing presence or absence of a non-national who illegally remains in this jurisdiction (*K.R.A. v. Minister for Justice and Equality* [2016] IEHC 289, (Unreported, High Court, Humphreys J., 12th May, 2016)). Therefore, s. 5(1)(oi) of the 2000 Act should be construed so as to give effect to the statutory purpose behind such a decision. Furthermore, it would be totally illogical in his view that where, a refusal under s. 49(4) of the 2015 Act, a

deportation order made under s. 50 of that Act and a refusal to revoke such an order under s. 3(11) of the Immigration Act 1999, were all subject to the provisions of s. 5 of the 2000 Act, a decision under s. 49(7) was not.

20. Another basis, external to the Interpretation Act 2005, which was relied upon was that a purposive interpretation applies to any legal text. Hart & Sacks were quoted as follows in this regard:-

> "Law is a doing of something, a purposive activity, a continuous striving to solve the basic problem of social living…Legal arrangements (laws) are provisions for the future in aid of this effort. Sane people do not make provisions for the future which are purposeless." (Henry Hart and Albert Sacks, *The Legal Process* (Cambridge C.U.P 1958 at 148).

Reference was also made to similar views expressed by Judge Aharon Barak, and his exposition on this topic. (*Purposive Interpretation Law* (Princeton, 2005) at p. XI). Accordingly, on this type of analysis alone, "a purposive interpretation applies to any form of legal instrument, legislative or otherwise" (para. 7 of the judgment).

21. On the statutory side, the learned trial judge was satisfied that in the event of some ambiguity arising from the measures in question, s. 5 of the 2005 Act did apply as a *fortiori* a deportation order in itself was neither "penal" or a "sanction". Such an order in his view was simply a civil consequence of a person's illegal presence in the State. Therefore, by applying this section, the conclusion above stated can equally be reached. Finally, Humphreys J. was unconvinced by the *rationale* of the majority in *Sessions v. Dimaya* 584 US, [2018] (17th April, 2018, [2018] U.S. Lexis 2497). As a result therefore, the decision in question, whilst amenable to judicial review, was one captured by s. 5(1)(oi) of the 2000 Act. In light of when the application was moved, it

was clear in his view that it was out of time and therefore barred by virtue of the provision mentioned.

22. The applicant, having then been refused leave to appeal to the Court of Appeal by the learned trial judge, made an application to this Court to entertain a further appeal on the issues arising. Despite being opposed, this Court in its Determination dated 2nd April, 2019 ([2019] IESCDET 76]), permitted such an appeal being satisfied that the constitutional threshold was met. The sole issue permitted however was one of statutory construction.

The Submissions of Both Parties:

23. The submissions made to the High Court on behalf of the applicant were in large measure repeated before this Court and as their essence can be seen from this judgment, it is therefore not necessary to separately cite them at any great length.

24. It is accepted that s. 5 of the 2000 Act does not infringe the applicant's right of access to the court, but nonetheless it does represent a restriction or limitation on that right. Accordingly, any provision to have that effect, must be clear and unambiguous and when in issue, must be strictly construed. A number of cases were referred to in support of this proposition. In the more specific context of this case, it is claimed that a negative review decision under s. 49(7) of the 2015 Act is one which implicates a person's right of access, as for all practical purposes it renders his presence in the state unlawful, thus inevitably leading to the making of a deportation order. It is therefore striking to note that whilst s. 5(1) of the 2000 Act covers a decision under s. 49(4)(b) of the 2015 Act, as well as a deportation order made under s. 51 thereof (para. 10 above), there is a no reference to a decision taken under s. 49(7)(b). The maxim *expressio unius est exlusio alterius* applies: what in effect the High Court has

done is to rewrite s. 79(a)(ii) of the 2015 Act and/or s. 5(1)(oi) of the 2000 Act, so as to read, "a decision of the Minister under s. 49(4)(b) or s. 49(7) of the International Protection Act 2015". It is claimed that the emphasised words, inserted for the purposes of this submission, in effect amend the statute and involves impermissible judicial law making. The High Court was incorrect in applying a purposive interpretation and cited no judicial authority to support its decision in this regard. It was therefore submitted on behalf of the applicant that this is an inappropriate means of interpretation of the measure at issue.

25. There then follows a widespread engagement with s. 5(1) of the 2005 Act, in respect of which *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, [2012] 2 I.L.R.M. 392 ("*Kadri"*), and *Nawaz v. Minister for Justice* [2012] IESC 58, [2013] 1 I.R. 142, and the decision of Gilligan J. in *Lackey v. Kavanagh* [2012] IEHC 276, [2012] 2 I.R. 585 are quoted. It was said that even if the section should apply, which is very much disputed, one cannot ignore the obvious, namely that the Oireachtas did not expressly legislate to have "the review decision" incorporated into s. 5(1) of the 2000 Act. There is nothing absurd about this omission. Even if such should be considered as an anomaly or as a lacuna, nonetheless judicial self-restraint is appropriate. Any defect, if there be one, must be remedied by the Oireachtas only.

26. It is further submitted that s. 5 of the 2005 Act does not apply to a deportation order, and likewise should not apply to the impugned decision in this case: in effect, there is no distinction between both. Such an order, even if not a sanction as such, must be regarded as akin to a penalty in that it constitutes a measure adverse to the subject person, in this case, the applicant. *Sessions v. Dimaya* 584 US [2018] (17th April, 2018, [2018] U.S. Lexis 2497), Kagan J "…To the contrary to this Court has reiterated that deportation is a particularly severe penalty", which maybe of greater

concern to a convicted alien than "any potential jail sentence". In conclusion therefore, for the above reasons the decision of the High Court should be set aside.

27. The respondent focuses on that part of the High Court judgment which states that there is no uncertainty or ambiguity in the provisions in question and therefore supports the conclusion that on a literal interpretation, a negative review decision is absorbed in or is otherwise captured by s. 49(4)(b) of the 2015 Act, and is therefore within s. 5(1)(oi) of the 2000 Act. Such a review is an integral part of the process and where a negative decision is made it "…entails a refusal to grant the applicant the permission and is therefore a decision covered by s. 49(4)(b)". It is further said that by virtue of subs (8) of s. 49, the reference to information in subs (2) includes that which is submitted under subs (9) and accordingly, these provisions support the same conclusion.

28. If however this Court should not be persuaded by the literal interpretative approach, then recourse can be had to s. 5(1) of the 2005 Act, as the Minister's decision under either or both s. 49(4)(b) and s. 49(7) of the 2015 Act, could not be described as amounting to a "penal or other sanction". In this context, even a deportation order itself falls outside this exclusionary phrase. The judge's description of such an order as simply being "a civil consequence of the applicant's illegal presence in the State" is correct. Reliance is also placed on *Kadri,* which is relied upon for the proposition that even the deprivation of personal liberty on foot of a deportation order would not necessarily be considered as excluding the application of s. 5 of the 2005 Act (Clarke J. – para. 3.3 of his judgment). Therefore, the High Court judgment should be upheld.

29. The Minister also submits that the approach contended for on behalf of the applicant leads to an absurdity in that all of the critical process decisions in this area

of law, both prior to and after a negative review decision, are subject to the time limits and other procedural requirements contained in s. 5(1)(a) of the 2000 Act. It would be highly anomalous if for some reason the Oireachtas intended to exclude from this overall regime the decision in question. What Ryan P. said at paras. 50 – 51 of his judgment in *K.R.A. v. B.M.A. (a minor) v. Minister for Justice and Equality* [2017] IECA 284 (Unreported, Court of Appeal, 27th October, 2017) are apposite in this regard, as are the passages from the judgment of Humphreys J. at paras. 41 and 42 thereof ([2016] IEHC 289).

30. Further, the respondent also suggests that the challenge in question amounts to a collateral attack on the deportation order which was made on the 8th May, 2018, which of course without debate or argument, is covered by s. 5(1) of the 2000 Act. Although, in a sense somewhat different, the decision of Hogan J. in *XX v. Minister for Justice and Equality* [2018] IECA 124 (Unreported, Court of Appeal, 4th May, 2018) is said to be an authority for this proposition. Finally, as no argument is advanced by the applicant which goes to the merits of the decision made by the Minister, there would be no real or practical utility in allowing this appeal.

Decision:

31. The essential issue in this case is one of statutory construction: it is whether the decision of the Minister to refuse permission to remain, taken on review, should be regarded as a decision within s. 49(4)(b) of the Act, or whether it is a decision separate and distinct from that. If the former, then any challenge is captured by s. 5 of the 2000 Act, with the result that the proceedings are out of time. As no extension was sought or argued for, it would follow that the action must fail on this basis.

32. This interpretative issue involves a discussion on the literal approach, and what factors may be considered as part of that principle. Secondly, the focus of the parties on what I describe as a purposive approach centred on the application or not, as the case may be, of s. 5(1) of the 2005 Act. Even though I am satisfied that the issue can be resolved by a consideration of the text used, when correctly contextualised by reference to the subject matter of the legislation as a whole, I should however make some observations on this statutory provision, as some of the comments in particular relating to *Kadri*, are said to influence even the common law position.

33. The main elements of a literal approach are now so well described that individual authority for what follows is hardly necessary. The most basic obligation of such an exercise is to determine the intention of parliament, to assess what the legislative wishes are. Whilst some may say that even such phraseology is in itself ambiguous, at least one aspect of any uncertainty in this respect, can be immediately resolved. It is that which the court is searching for, to identify the objective intention of the legislature as a whole, and not any subjective intention which it, or its members may have. (*The State (O'Connor) v. O'Caomhanaigh* [1963] I.R. 112, and *Crilly v. T&J Farrington Limited* [2001] IESC 60, [2001] 3 I.R. 251).

34. The most appropriate way to achieve this objective is by reference to the words used by the Oireachtas itself: when given their ordinary and natural meaning, the outcome should best reflect the plain intention of that body. The text published is the basic material involved because it is the most pre-eminent indicator of intention. As stated by the Law Reform Commission, in a publication later referred to (para. 45 *infra*), this approach remains the primary method of construction. Regard to alternative means, by reference to the various and multiple subsidiary rules, which

collectively are called aids to interpretation, are resorted to only where this primary approach lacks the capacity to resolve the issue or is otherwise found wanting. This method of construction is variously described as the literal method or, as giving the words their original meaning or their ordinary and natural meaning. There is no difference in effect between any of these descriptions. They all entail the same substantive drivers in the exercise undertaken.

35. As part of this approach however, it has always been accepted that context can be critical. It is therefore perfectly permissible to view the measure in issue by reference to its surrounding words or other relevant provisions and, if necessary, even by reference to the Act as a whole. Furthermore, it is presumed that the legislature did not intend any provision enacted by it to produce an "absurd" result. That rule, admittedly in a different context, was put as follows in *Murphy v. G.M.; Gilligan v. Criminal Asset Bureau* [2001] 4 I.R. 113, "A construction leading to so patently absurd and unintended a result should not be adopted unless the language used leaves no alternative: see *Nestor v. Murphy* [1979] I.R. 326" (Keane C.J. at 127 of the report). Accordingly, whilst not in any way trespassing upon a purposive approach, certainly not that as provided for by s. 5 of the 2005 Act, I believe that it is permissible to have regard to the underlying rationale for the provision(s) in question. On this basis, I propose to examine meaning.

36. As above explained, once an international protection officer makes a recommendation under s. 39(3)(c) of the 2015 Act, which is to the effect that both a refugee declaration and a subsidiary protection declaration should be refused, the Minister is obliged to operate the provisions of s. 49 of that Act, which, *inter alia,* deals with permission to remain. In so doing he considers any information supplied

by the applicant, either under subs (6) or otherwise, and must have regard to that person's family and personal circumstances, a requirement imaging the content of Article 7 of the Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights. On such basis, a decision is then arrived at: it may be to give permission to remain (s. 49(4)(a)): in which case, that is an end to the matter. On the other hand, it may be a refusal under s. 49(4)(b): subject to challenge that is also an end to the matter, save that a deportation order shall follow in respect of the subject person. (s. 51(1)(c) of the Act).

37. Where however, there has been an appeal to the International Protection Appeals Tribunal, a further stage in the process may have to be undertaken. I express it so because this step is not automatic and becomes mandatory only upon receipt by the Minister of the information provided for in subs (9) of the section. Where applicable, the Minister, pursuant to s. 49(7) of the 2015 Act, engages in a review of the decision previously made by him under subs (4)(b) of that section. Once concluded the applicant is notified of the outcome, as he was in this case.

38. It is instructive to look at context and to note that before a decision is made under s. 49(4)(b) of the 2015 Act, or a review undertaken in respect thereof, the applicant will have had his case fully considered at first instance by an international protection officer and again fully on appeal by IPAT. Both entities in this case came to the same conclusion, namely that he should not be granted either a refugee declaration or a subsidiary protection declaration. In this context, I am disregarding the situation where a refugee declaration has been refused, but a subsidiary declaration has been granted. The next step immediately after notification of such an adverse decision is the making of a deportation order under s. 51 of the 2015 Act. It is clear beyond doubt that the recommendations which I have mentioned, emanating

from the IPO and IPAT, are captured by s. 5 of the 2000 Act (para. 10 above); as of course is a decision made under s. 49(4)(b) of the Act, and the making of a deportation order. It would therefore seem strange if by deliberate choice the Oireachtas had omitted a review decision from this regime. But, if on the application of the appropriate principles that should be the result, then so be it.

39. Section 49(8) of the 2015 Act specifically applies subs (2) – (5) of that section to a review conducted under subsection (7). I will disregard all references to modification for a moment. What effect do these subsections have on subs (7)? That question, for greater clarity, can be somewhat more refined and can be asked on the assumption that only subs (4) applies to a review decision. In the context of this case, what would be the outcome of such an analysis? Subsection (4) deals with a decision to either grant permission to remain or to refuse permission to remain. No other provision has the same effect. No review could be conducted in the absence of a subs (4) decision. When a review concludes with a negative decision, what remains? It is of course the original decision made under s. 49(4)(b) of the Act.

40. There can be only one decision on whether to grant permission to remain or to refuse it. In an appeal situation, the applicant must activate a review by invoking subs (9), which he does by submitting the information therein provided for. That must be done "within such a period following receipt by him or her under section 46(6) of the decision of the Tribunal as may be prescribed under subsection (10)". By virtue of the International Protection Act 2015 (Permission to Remain) Regulations 2016 (S.I. No. 664 of 2016) the prescribed period is five days from as stated, the notification of the Tribunal's decision. That is the only start point and the period provided is the only period. Consequently, there can be only one review. It therefore seems to me

that there cannot be other than one application to remain and one refusal decision on that application.

41. This can be tested from another view point, namely what is the basis upon which the Minister can make a deportation order in the circumstances described? It is a decision made under s. 49(4)(b) of the Act. Unless a review alters that decision by giving a permission to remain, in which event a deportation order could not be made, then that is the only decision which legally sustains the making of such an order. I am therefore satisfied that on a literal interpretation of these provisions, the decision which stands after a review, is not the refusal arrived at, but rather is that as originally made under subs (4)(b) of the Act. Such a refusal in and of itself could never form the basis of a valid deportation order. As such, since the original decision is expressly within s. 5(1)(oi) of the 2000 Act, then the time limits and other requirements therein specified must be complied with.

42. As is evident from the foregoing discussion, if the submission made on behalf of the applicant is correct, it would have consequences entirely discordant from the overall scheme of the Act. It would mean that both the antecedent and subsequent decisions, namely refusing permission to remain and the making of a deportation order respectively, which are so closely related to a review decision, were subject to the restrictive regime but not the review. The purpose behind s. 5 of the 2000 Act was clearly set out by Keane C.J. in the courts judgment in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 392. The time limits imposed and the other requirements specified were part of a public policy objective that cases, where issues of the type covered by the section were involved, would be resolved in a speedy and timely manner. That was seen as being of benefit not simply to the State, but also to the applicants involved. The effectiveness of that objective would be

seriously undermined if challenges to a negative decision under s. 49(7) of the 2015 Act were able to avail of Ord. 84 of the Rules of the Superior Court, rather than being captured by s. 5 of the 2000 Act. That in my view could never have been intended: whilst such a result may not accurately be described as an "absurdity", nonetheless it clearly would not reflect the underlying policy of the legislation in this area, or the specific intention of the Oireachtas when enacting the 2015 Act.

43. A similar type of issue, though not by any means identical, arose in the case of *K.R.A. & B.M.A. v. Minister for Justice and Equality* [2017] IECA 284 (Unreported, Court of Appeal, 27th October, 2017). The issue of relevance related to s. 3(11) of the Immigration Act 1999, under which the appellant made an application to revoke a deportation order which was refused by the Minister. It will be recalled that "an order" made under the section is captured by the restrictive provision. The argument advanced on behalf of the applicant was that there was "no order" so made upon that refusal. Therefore, s. 5 of the 2000 Act did not apply. At para. 50 of his judgment, Ryan P. had this to say:

> "50. Humphreys J. held that the legislative purpose behind the new section 5 would be frustrated by a literal interpretation of s. 5(1)(m). It would limit the application of the paragraph so that it would only apply to "the almost unheard-of situation of an amended deportation order. This is not consistent with the policy of the legislation generally or this particular measure.
>
> 51. I agree. I do not think that such an interpretation is legitimate. Under the subsection the Minister has to make a decision which if it is in favour of the applicant will not be a matter for judicial review. It is clearly a decision and the same must apply for a refusal. Although para. (m) could have

specified a refusal, it cannot be the case that a decision to refuse is somehow excluded as being different. There is no logical basis for that interpretation.

52. The process of consideration of an application to revoke a deportation order comes to a conclusion in a decision by the Minister. A decision under that subsection is specified in paragraph (m) so there is a clear statutory application of the restriction. It is of course true that any limitation of the right of appeal from the High Court to this court or the Supreme Court has to be expressed in clear and unambiguous terms, failing which the right continues to be available. Having said that, there is no room in this case in my view for any doubt that the legislature intended to impose this restriction on a revocation application or that it actually achieved its purpose."

44. In my view, the facts of the instant case are much stronger than those which gave rise to the judgment of the President of the Court of Appeal in *KRA.* I am therefore satisfied that on a literal interpretation the impugned decision in this case is within s. 49(4)(b) of the 2015 Act, and a *fortiori* is captured by the provisions of s. 5 of the 2000 Act. I am not in any way persuaded that this conclusion is disturbed by the decision of the US Supreme Court in *Sessions v. Dimaya*, above referred to. The facts, circumstances, background, legislation, and the interpretive approach of the court in sessions are entirely different. Neither its reasoning or outcome therefore, are of assistance to the issue presently under discussion.

Some Observations on Section 5 of the 2005 Act:

45. In the year 2000, the Law Reform Commission published a report on Statutory Drafting and Interpretation, which to a considerable extent informed the drafting of

the 2005 Act. Putting its proposal in context *viz-a-viz* the literal approach, it had this to say:-

> "We recommend a provision which retains the literal rule as the primary rule of statutory interpretation. The other significant feature of our proposed formulation is that it specifies exceptions to this primary approach, not only in cases of ambiguity and absurdity, but also – and here is the slight change from the common law as expressed in some judgments – where a literal interpretation would defeat the intention of the Oireachtas. The draft provision which we propose also indicates that such an exception should only apply where, in respect of the issue before the court, the intention of the Oireachtas is plain." (2.42 of report)

Although the Oireachtas did not fully embrace the suggested draft of what ultimately became s. 5 of the 2005 Act, for example the Commission did not exclude any "penal or sanction" provisions from its proposal, nonetheless as is evident from the enacted section, the substance of what had been suggested was in fact incorporated. The resulting s. 5 means that for the first time a provision on a statutory footing had been made for such an approach in respect of Acts of the Oireachtas generally.

46. Even though the section has now been on the statute books for more than fifteen years, its full effect and implications have yet to work their way through the case law. It remains unclear what the words "obscure" and "ambiguous" truly mean and to what extent one overlaps with the other. It is curious that the word "purpose" or "purposive" or any derivative thereof, does not feature anywhere in the section, and that the only reference to a "literal interpretation" is that as contained in s. 5(1)(b): why this is so, is at least for me, not self-evident. The subsection would seem to reject a literal interpretation if such should fail to reflect the "plain intention" of the

Oireachtas, or if its application would be absurd, again a word which is not clear of uncertainty. In most interpretive situations a court might be satisfied to simply reject a construction which had such effect, and go no further. However, the section requires the court to give the provision in question a construction that reflects the plain intention of the Oireachtas, but restricts the utility of that obligation by imposing a limitation, namely that such can only be given where the plain intention can be ascertained from the Act as a whole. There are therefore several issues which remain unresolved about the true scope and nature of this provision. (see Dodd: *Statutory Interpretation in Ireland,* Chapter 8,)

47. Even without determining whether a deportation order, or for that matter a review decision under s. 49(7) of the 2015 Act is within or is excluded from the ambit of the section, there also remains uncertainty about the scope of the exclusion provided for. Whilst much of the debate in this case has been on whether or not, a deportation order from the applicant's point of view, and a decision under s. 49(7) of the Act from the Minister's point of view, could be considered as either "a penal or other sanction", that description of itself does not reflect the precise wording of the relevant subsection. The exclusionary element of subs (1) reads:-

> "other than <u>a provision that relates to</u> the imposition of a penal or other sanction". (emphasis added)

It remains to be seen whether there is any difference where the provision constitutes a penal or other sanction, or where it relates to a penal or other sanction. Given the view which I have taken however, it is not necessary to make any definitive decision on the rival contentions of the parties regarding either a deportation order, or a review decision.

48. *Kadri,* has been cited by both parties for somewhat different reasons. In that case, the applicant, in respect of whom a valid deportation order existed, was first detained in custody on the 8th February, 2012, pursuant to a notification issued in accordance with s. 5(1) of the Immigration Act 1999. A further such notification followed on the 29th March, 2012. On an Article 40 application, the issue was whether or not the eight-week maximum detention period specified in s. 5(6) of the Act had been breached in the circumstances of his case. The Supreme Court so agreed with the main judgment being given by Fennelly J. However, both he and MacMenamin J. agreed with the concurring judgment of Clarke J. The applicant has referred us to para. 3.4 of that judgment, whereas the Minister has highlighted the content of paragraph 3.3.

49. When referring to the provisions of s. 5(1) of the Interpretation Act 2005, the learned judge said as follows:-

> "3.3 There are a number of features of that section which seem to me to be of some importance. First, it should be noted that no argument was addressed which suggested that s. 5 had no application to this case because of the exclusion of "penal" provisions from its ambit. That does not, of course, mean that the court may not be more circumscribed in the scope of its interpretive remit in cases, such as this, which involved personal liberty. (emphasis added)
>
> 3.4 Second, s. 5 is a section which speaks of the court giving a construction or interpretation to relevant provisions. It must be borne in mind, therefore, that the mandate given to the court by s. 5 is one to engage in constructive interpretation rather than rewriting."

50. It is not entirely clear as to what the passage emphasised accurately intended to reflect. The parties take a different view on that point. Whichever, as this judgment does not rely on s. 5 of the 2005 Act, it is unnecessary to further discuss this point. In particular, it is not required to decide whether a deportation order or a review decision is excluded from its operation by the reference to provisions which are "penal" or "sanction" related. Accordingly, I do not see the direct relevance of *Kadri* to this case.

Some Observations on Hart and Sacks:

51. As above mentioned in para. 20, Humphreys J. also advanced, in support of his interpretation of the relevant parts of s. 49 of the 2015 Act, a further basis unconnected to the 2005 Act, which is that a purposive interpretation ought to apply to any and every legal text, the source of this assertion coming from the jurisprudential text co-authored by Henry Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge C.U.P 1958). It is clear that the proposition stated is of an extremely wide-reaching nature, as well as overlooking to a large extent the well-established principles of statutory interpretation which apply in this jurisdiction, the most pivotal of which is to give a provision a literal meaning where possible. Whilst immediately acknowledging that any attempt to gain a proper understanding of the theories advanced by Hart and Sacks, is entirely outside the scope of this judgment, I would however like to make some observations, even at a cursory level.

52. At a more general level, the teaching materials whence the proposition comes centre around a legal theory or school of legal thought formulated by Hart and Sacks called 'legal process theory'. Whilst this term is sometimes used to generally describe

the work of a whole host of legal scholars from the 1950s and 1960s, it also derives from the text under discussion here, which was perhaps the most composite attempt at articulating a process-based theory of law. The book is made up of some of the teaching materials of Hart and Sacks, and despite being planned for publication in 1956, this did not occur until 1994: however, the text was widely-circulated in manuscript form in the 1950s and went through four editions like so.

53. Legal process theory centres around several related themes which include: a recognition that courts and the judiciary do not simply apply the law but rather they often 'make' it; that the role of the courts in the legal system is significant but also limited and exists alongside other important players such as the legislature and certain administrative agencies; and finally that adjudication can be rational, when, in instances where the legal material in question is indeterminate, the statute or constitutional provision or case-law is applied in a principled manner and by reference to its purpose.

54. Specifically, in relation to the question of statutory interpretation, legal process theory represents a move away from the approach taken in legal realism, in that it posits that judges should employ a process with a set of interpretative tools in order to determine what the purpose behind the law in question is and what purpose ought to be attributed to the words. Hart and Sacks believed that every law or statute was developed by way of a decisional process and had some kind of purpose or objective and their approach to interpretation is based on this idea. They used the term "reasoned elaboration" to describe the ideal process to be employed. Reasoned elaboration asks the judge to elaborate in a procedural manner, on the subject statute by at all times having regard to any principles or policies contained in it. In situations

where the statute is more general and does not provide such guidelines, the judge is required to return to the more basic and underlying purpose of the law in question.

55. It seems quite evident even from these few words that little will be gained by continuing this dialogue: I must therefore be realistic to that end and accordingly, at this juncture will have to depart from this fascinating topic. However, just in case there is any misunderstanding, I do not accept that the theory which underlies the publication of the text in question can be said to have any over-arching authority on statutory interpretation which in principle remains governed by well-established rules. Whilst I have been concentrating on the literal approach mention may also be made in this context to "the mischief rule". (*Heydon's Case* (1584) 76 ER 637). Since its establishment it has always been accepted that a statute may be interpreted in light of its purpose. What was the mischief that led to its enactment? Such approach is quite different from what the learned trial judge describes as "a purposive approach", one that extends to achieving a result thought to be intended, even if the words do not lend themselves to such view. In any event, for the reasons herein outlined, it is in my view quite unnecessary to have any recourse to the material referred to.

Conclusion:

56. For the reasons above set forth, I would dismiss the appeal and affirm the decision of the High Court on the single issue in respect of which permission to further appeal was granted.