# AN CHÚIRT UACHTARACH
# THE SUPREME COURT

**S:AP:IE:2021:000064**

**[2022] IESC 48**

**O'Donnell C.J.**
**MacMenamin J.**
**O'Malley J.**
**Baker J.**
**Hogan J.**

**BETWEEN/**

**MK (ALBANIA)**

**Applicant/Appellant**

**AND**

**MINISTER FOR JUSTICE & EQUALITY**

**Respondent**

**JUDGMENT of Ms. Justice Baker delivered on the 24th day of November, 2022**

**1.** I am in agreement with the other members of the Court that the Minister ought to have conducted a proportionality analysis in respect of the potential impact of the proposed deportation order on MK's rights under the Constitution and the European Convention of Human Rights ("the Convention") prior to making a decision on his leave to remain application and the making of a deportation order. I adopt the reasoning of my colleague MacMenamin J. regarding the correct sequencing to be applied by a decision maker, and I agree too that the test as formulated by the Court of Appeal in *C.I. & Ors. V. the Minister for Justice, Equality & Law Reform* [2015] IECA 192, [2015] 3 I.R. 385 ("*C.I.*") was incorrect.

**2.** I agree with the judgment of MacMenamin J. that this Court should make an order of *certiorari* on account of the fact that the decision of the Minister was not in

accordance with law. To that extent, I disagree with the views of the majority. I wish to take this opportunity to make some comments in support of the conclusion of MacMenamin J. with regard to the appropriate remedy.

**3.** The fact that only a small number of applications for leave to remain by unsettled migrants are likely to succeed, and that there are but a few "exceptional cases" is an observation regarding the result of the decision making process, and not the method engaged. It is not that exceptionality has to be shown before the decision maker should embark upon a consideration of whether Article 8 Convention rights exist and whether they are likely to be breached, but rather that the test, involving as it does a requirement to reconcile the right of the individual with that of the State to control its borders, imposes a high bar which is met in its application in relatively few cases.

**4.** Further, the statutory provisions do not appear to envisage an exceptionality test, and s. 49(3) of the International Protection Act 2015 ("the 2015 Act") mandates the Minister to have regard to the right to respect for private and family life of an applicant and then set out the applicable considerations. I do not think it is possible to read these statutory provisions as suggestive of an approach that those private and family life rights arise for consideration only in exceptional cases.

**5.** The jurisprudence of the ECtHR supports the proposition that in assessing the possible impact of Article 8, the first question to be asked is whether Article 8(1) is actually "engaged". This means simply that the decision maker is to categorise the application and, as MacMenamin J. says in para. 148 of his judgment, the gravity of any impact or effect on those rights is not relevant at that stage of the process, which could properly be described as a screening process to ascertain whether the rights under Article 8(1) exist and/or fall for consideration. At the later stage, the respective rights of the State in protecting its borders and the integrity of the immigration system

generally, are weighed against the interests of an applicant in his or her personal or family or private life. That analysis involves an assessment of the facts and factors in the life of the applicant. It is true, as my colleague MacMenamin J. notes, that there are few cases where the interests of a precarious unsettled migrant with a personal family or private life could outweigh the significant interests of the State. What is necessary, however, is that the individual circumstances of the private and family life of an applicant be ascertained and weighted in the balancing exercise.

**6.** I agree with the observations of MacMenamin J. at para. 151 of his judgment that the fact that a process is sometimes telescoped does not detract from the generality of application and the mode by which the decision maker must proceed to fully answer an application.

**7.** That the process be correct, and be seen to have been correctly applied, is not a mere formality. To ask first whether the potential impact could be of such a grave nature as to outweigh the interests of the State, could, and will often, mean that the decision maker will conclude that the Article 8 rights are not "engaged" at all, when an application does have those rights.

**8.** The decision maker must ask first, whether the rights exist, and then then what the elements of the rights are, and how weighty they are, and this analysis involves an examination of the granular detail of the elements of private life rights said to be enjoyed by the applicant.

**9.** It may be that the answer that emerges from the application of the correct sequence is the same as that from a more telescoped process where the exceptionality test is applied for the purpose of ascertaining whether right exists in the first place. But the essence of administrative law is to ensure that the process followed by an administrative decision maker were correct, not because due process is an end in itself,

but because a person who invokes a process is entitled to understand that process, to know that it was properly applied, and as a result to be in a position to know that the decision maker acted lawfully.

**10.** The remedy of *certiorari* is probably the most important tool to protect these procedural rights, not because procedure matters above all else but because procedural correctness is the framework within which administrative decision making must occur and must be seen to occur, and by which rights are protected. The general proposition remains that a person whose rights have been infringed by a wrongful exercise of administrative decision making is entitled as of right to a remedy: the dicta of O'Higgins C.J in the seminal *State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] IR 381, at 393 retains its force:

> "In the vast majority of cases, however, a person whose legal rights have been infringed may be awarded *certiorari ex debito justitiae* if he can establish any of the recognised grounds for quashing; but the Court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief or, I may add, if the relief is not necessary for the protection of those rights. For the Court to act otherwise, almost as of course, once an irregularity or defect is an established in the impugned proceedings, would be to debase this great remedy."

**11.** The remedy allows for the restoration of an applicant to a position where an administrative decision maker will come to a concluded view in accordance with law. I adopt the dicta of Clarke J. (as he then was) in *Tristor Ltd v. Minister for the Environment and ors* [2010] IEHC 454, at para. 4.1:

> "The overriding principle behind any remedy in civil proceedings should be to attempt, in as clinical a way as is possible, to undo the consequences of any

wrongful or invalid act. The court should not seek to do more than that, but equally the court should not seek to do less than that."

**12.** While I agree that logically, the result of the application of the correct legal test in a sequence that fully respects the right of an applicant to have his or her private and family rights considered and weighed against the opposing interests of the State may in many, or most, cases arrive at the same result on the facts, I do not agree with the consequence for which the majority advocates. It is not the function of the court in an application for judicial review to ascertain whether a decision is correct, but rather to ascertain whether an impugned decision was legal.

**13.** That long-established proposition does not require authority and almost goes without saying. A person who challenges an administrative decision does so on the basis of the legality and not the correctness, or substance, of the decision. It is not the function of the court by a process of logical reasoning to deduce what the correct answer would have been, and to refuse relief because the answer would, and must, have been the same as that challenged. The logic for which my colleagues contend is not a mere syllogism, that one proposition necessarily follows from another, but rather a conclusion that the decision arrived at by the decision maker would have been the same whether he or she had assessed the nature and strength of the private rights asserted by MK in coming to a conclusion as to whether those rights were "engaged" or whether they were sufficiently weighty to outweigh those of the State. The solution proposed by the majority is to presume that the decision maker had examined all of the personal characteristics and details of the private life of MK in Ireland, and that the conclusion of that analysis can be presumed from the decision and extrapolated from there to a decision on the merits. My reading of the decision is that there is no analysis at all of how the private and family rights of MK were assessed or weighed against those of the

State. In other words, the proportionality analysis was not conduced, and it is not appropriate for this Court to now extrapolate from the decision that the error in process can, as the Chief Justice says, "have no consequence for the substance and therefore the validity of the decision" (para. 9).

**14.** My primary concern is that the approach for which the majority of this Court contends fails to recognise that the decision maker had screened out the application of MK by coming to a decision that his private and family rights were not "engaged". That word strictly speaking must be taken to mean that the rights did not fall for further consideration. I accept that the word "engaged" is used as shorthand, and shorthand is liable to confuse or obscure, but the fact is that MK did have rights which were engaged, albeit those rights may not have had sufficient weight when compared against those of the State. Whilst the decision maker did say that all information submitted on behalf of MK had been considered, that decision was that any interference with the asserted rights would not have "consequences of such gravity as potentially to engage the operation of Article 8(1) ECHR." The decision was one that there were no potentially grave consequences, and the decision maker did not thereafter go on to conduct a proportionality assessment to ascertain the nature of the rights asserted and the likely degree of interference with those right and how and whether they were sufficient to outweigh the interests of the State. A person reading the decision would not, save by extrapolation, understand the elements that went to form the concluded view of the proportionality assessment.

**15.** The decision maker conducted a screening analysis, and like all screening, the purpose was to categorise. Once an application was screened out, the decision maker was excused from further consideration, such that the balancing of the private rights of MK against those the State was not done. It is not that screening is formulaic as such,

but the screening exercise can be one that results from the application of certain pre-conditions, such as an assumption that a precarious or unsettled migrant does not or could not have private family rights, or, as in this case, an assumption that because MK's presence in the State was precarious, and because he was, for all purposes an unsettled migrant, his rights had to be "exceptional" before they fell for comparison with the rights of the State.

**16.** The difference is one of the fullness or degree of detail or analysis engaged with the individual facts and factors in the life of an applicant. I am not convinced that it is possible to say, notwithstanding the logical analysis for which the majority of this Court contends, that because the decision maker considered that MK had not asserted or been shown to have any exceptional factors in his private life in the State, that his application had been lawfully assessed. In fact, the application had not been lawfully assessed. The result of the logical analysis for which the majority contends is that the decision is to be found to have been actually correct notwithstanding that the methodology was unlawful.

**17.** It is important to repeat that administrative law has as its purpose the protection of the rights of the individual, not by the correction of an error as occurs in an appellate process, but rather by supporting those rights by ensuring that the rules by which decision makers are to act, and the methodology they must engage, is properly so engaged and applied. In that sense, administrative law is designed to close the gap, and to vest in the courts the power to review the process by which a decision is arrived, but not to displace an administrative appellate process which has been established to correct error. Many, or most, administrative bodies operate within a legislative or regulatory structure which provides for the correction of errors by an appellate body. The proper functioning of those bodies, and the preservation of the principle that there be finality

in decision making, requires in general that courts considering an applicant for judicial review will not interfere with the substance of a decision by an administrative appellate body. The historic basis of the development of judicial review was a perceived need to enable procedural, rather than substantive, challenges, because by that means the citizen was supported, and the actions of state bodies regulated, by the imposition of fair procedures, protection against bias, and a general oversight regarding the process and methodology of administrative decision makers.

**18.** This is not a matter of form over substance, and it would be wrong to see compliance with the requirements of formal correctness as an end in itself. Formal correctness rather is to be seen as a means by which fairness of process is achieved in order to properly support the rights of an applicant. It is closely allied to the requirement to give reasons and provided the reasons are clear, and the error of process did not result in an injustice, a decision will not or does not need to be quashed in order that fairness be achieved. As stated by Fennelly J. in *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59, [2012] 3 I.R. 297 at para. 68:

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

**19.** It is a matter of where one draws the line, but in my view, it is not appropriate for this Court to draw the line by the application of logic, if as in the present appeal, the Court is convinced that a wrong turn was taken early in the process, and if, again as here, that one turn was to screen out an applicant from a full assessment of how and to what extent the private and family rights of MK were weighed against those of the State in supporting its immigration system.

**20.** It is possible to ascertain from a reading of the decision under challenge that the decision maker did examine the elements of private and personal life for which MK contended, but it is not possible to say how in his case his rights as a very young person, who came to this State as a minor and whose formative teenage years were spent in schooling and later in work in the State, were properly balanced against the interests of the State. It is possible to say that the decision maker was aware of the elements or details of MK's life in Ireland, but not possible to say whether the decision maker properly weighed those against the interests of the State.

**21.** I am conscious that in *Mallak,* Fennelly J. observed that having determined that the appropriate order would be one of *certiorari*, it was a matter for the Minister to decide what procedures he would adopt in order to comply with the requirements of fairness. I am also conscious of the fact that in *Krumpscki v. The Minister for Justice and Equality (No 2)* [2018] IEHC 538, Humphreys J. adopted what the authors of Hogan, Morgan, and Daly called in the 5th edition of their *Administrative Law in Ireland* a "more sophisticated and serviceable analysis" of remedy, that a court should be sensitive to fashion a proportionate and just remedy, rather than to automatically reaching for the "crude, nuclear option of immediately quashing the decision" in full, merely because of the identification of any error. Humphreys J. was dealing with a case where the reasons were found not to be sufficient, and considered, correctly in my view,

that a court does have discretion to fashion a remedy, and to seek a solution that is just and appropriate in any given set of circumstances. He did however say that that approach more properly belongs when a case concerns "a decision that might otherwise be valid if the problem can be dealt with simply by directing reasons" (para 35.)

**22.** I do not believe that this present appeal concerns a decision which is "otherwise valid". The decision maker went wrong in a fundamental way early in the process, and while on the merits it might be possible to say it logically the decision would have been the same had the decision maker properly applied the process, I am not convinced that that possibility of correctness, no matter how logical it appears, is sufficient to refuse the remedy of *certiorari*.

**23.** As stated in para. 27 of the judgment of Hogan J., the applicant was entitled to a decision made which considered his rights under the Constitution and the Convention, and the Minister ought to have conducted a proportionality analysis in respect of the potential impact in respect of these rights prior to making the s. 49 decision and the subsequent making of a deportation order, in line the decision of this Court in *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701. As such, *certiorari* is the most appropriate remedy in this case as it allows the case to return to the Minister for consideration and a legally sound process to be followed, respecting the rights and entitlements of MK.

**24.** I would for these reasons allow the appeal.

**25.** With regard to the issue discussed in the judgments of my colleagues I agree with the approach of O'Malley J. and I too do not consider that the resolution of the present appeal does not require a decision as to the potential role of Articles 40.1, 40.3 and 40.6 of the Constitution.