CA86

Irish Court of Appeal

Judgment

Title:	N.H.V. -v- The Minister for Justice and Equality & Ors
Neutral Citation:	[2016] IECA 86
Court of Appeal Record Number:	2015 263
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Court:	Court of Appeal
Composition of Court:	Ryan P., Finlay Geoghegan J., Hogan J.
Judgment by:	Finlay Geoghegan J.
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Result:	Dismiss

Judgments by	Link to Judgment	Concurring	Dissenting
Finlay Geoghegan J.	Link	Ryan P.	Hogan J.
Hogan J.	Link		

THE COURT OF APPEAL

Record No. 2015/263

Ryan P.
Finlay Geoghegan J.
Hogan J.

BETWEEN

N.H.V.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

THE ATTORNEY GENERAL AND

THE IRISH HUMAN RIGHTS COMMISSION

NOTICE PARTIES

Judgment delivered by Ms. Justice Finlay Geoghegan on the 14th day of March 2016

Introduction

1. This is an appeal from the judgment and order of the High Court (McDermott J.) dismissing the application for judicial review of the appellant, a Burmese national, who arrived in the State on the 16th July, 2008 and applied for refugee status on the following day.

2. The factual background to his application for judicial review was that by May 2013, his application for a declaration of refugee status had not been determined. There had been decisions which had been the subject of successful judicial review applications and the matter was remitted back to the Refugee Appeals Tribunal. The appellant was experiencing distress and demoralisation being obliged to remain living in direct accommodation. He obtained a potential offer of employment and through his solicitor applied to the Minister for temporary permission to reside and work in the State either pursuant to s. 4 of the Immigration Act 2004 or s. 9(11) of the Refugee Act 1996 (as amended) or by exercise of executive discretion. This was refused and the Minister indicated that he was precluded from granting permission by virtue of s. 9(4) of the Refugee Act 1996 (as amended).

3. The appellant was granted leave to apply for judicial review (Mac Eochaidh J.) on the 29th July, 2013, to seek the following reliefs:-

> "(i). An order of *certiorari* quashing the decisions of the respondent dated 13th June and 15th July, 2013, to refuse to grant permission to the applicant to take up employment in the State on the ground that the Refugee Act 1996 precludes the respondent from so doing.
>
> (ii). A *declaration* that the applicant, as a person who has sought protection in the State, is not precluded in law from being granted permission to take up employment in the State by the respondent.
>
> (iii). In the alternative to (i) and (ii), if the effect of s. 9 (4) of the Refugee Act 1996 (as amended) is that the respondent is precluded in law from granting permission to the applicant to take up employment, a *declaration* that s. 9 (4) is repugnant to the Constitution, and in breach of Articles 7 and 15 of the Charter of Fundamental Rights and/or incompatible with the European Convention on Human Rights"

4. Leave was granted on the following grounds:-

> "(i) By refusing the applications made by or on behalf of the applicant for a residence permission pursuant to section 4 of the Immigration Act 2004 and/or pursuant to the respondent's executive discretion, which would

permit him to take up employment, the respondent unlawfully fettered his discretion and/or unlawfully refused to process a valid application and/or imposed a restriction on himself which in law did not exist.

(ii) The respondent has wrongly applied section 9(4) of the Refugee Act 1996 by failing to recognise the express provision at section 9(11) of the Act which allows for section 9(4) to be waived.

(iii) The applicant has resided lawfully in the State since 17th July, 2008. To continue to prohibit him from working after such a long period of lawful residence in the State is in breach of the applicant's rights under the Constitution (including Article 40.3 thereof), the Charter of Fundamental Rights (including Articles 7 and 15 thereof) and section 3 of the European Convention on Human Rights Act 2003 (with reliance on inter alia Articles 8 and 14 of the European Convention on Human Rights).

(iv) By reason of (iii), if section 9(4) of the Refugee Act 1996 imposes a continuing prohibition on the applicant taking up lawful employment in the State, and prevents any exception being made to this prohibition, then the said section is repugnant to the Constitution, in breach of the Charter of Fundamental Rights and incompatible with the European Convention on Human Rights."

5. The application was heard in the High Court with a similar application which is no longer under appeal. The High Court (McDermott J.) in the written judgment delivered on the 17th April 2015, rejected each of the grounds relied upon and dismissed the application. The appellant has appealed on all grounds and the issues on appeal may be summarised as follows:-

1. Does the Minister have a discretion under s. 9 of the Refugee Act 1996, as amended to grant a work permit to a person in the position of the appellant;

2. If the Minister has no discretion under s. 9 of the 1996 Act, does she enjoy an inherent executive discretion to grant such a permit;

3. If the answers to the first two questions are in the negative is s. 9(4) of 1996 Act in breach of the EU Charter of Fundamental Rights;

4. Does the appellant have a personal right to work or earn a livelihood in the State protected by Article 40.3 of the Constitution and if so is s. 9(4) of the 1996 Act repugnant to the Constitution;

5. Does the appellant have a right to work in the State pursuant to Article 8 of the European Convention on Human Rights and if so is s. 9(4) of the 1996 incompatible with the ECHR.

6. I have had the opportunity of reading in draft the judgment of Hogan J. in which he addresses comprehensively all of the above issues. I am in agreement with his conclusions and reasons therefor on all issues, other than his conclusion that the appellant has a right to work or earn a livelihood protected by Article 40.3 and his consequential conclusion that s. 9(4)(b) of the 1996 Act is repugnant to the Constitution.

7. In this judgment I only propose addressing the appeal against the conclusions reached by the trial judge on the constitutional issues.

8. Hogan J. has referred to the principal judgments which trace the development of the approach of the Supreme Court and the High Court to the entitlement of non-citizens to rely upon different Articles of the Constitution and to challenge the constitutionality of an Act of the Oireachtas. Those judgments form the backdrop for the narrower questions at issue in this appeal. The appellant, as an applicant for asylum, contends that he has a personal right to work or earn a livelihood protected by Article 40.3 which he is entitled to enforce against the State. Article 40.3 in its express terms only refers to citizens:-

> "1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

9. The trial judge identified correctly in my view the issue which the High Court had to decide on the application for judicial review in respect of which leave was granted namely whether the appellant, as an asylum seeker, is entitled to the right to work or earn a livelihood as a "personal right" under Article 40.3 of the Constitution. Hogan J. identifies at para. 60 a broader issue as to "whether a non-citizen can ever invoke the constitutional right to earn a livelihood". I am not addressing that broader question. There are many classes of non-citizens, including EU citizens. The *locus standi* of the appellant is confined to his position as an applicant for asylum in the State.

10. The trial judge, correctly in my view, concluded, in accordance with the judgment of the Supreme Court in *Re. Article 26 and ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, [2000] 2 I.R. 360 and the other judgments to which he referred, that the fundamental rights or personal rights protected by Article 40.3 to which a non-national may be entitled under the Constitution do not always coincide with the rights protected as regards citizens. Accordingly where a person, such as the appellant, claims to be entitled to a particular fundamental right or personal right within the meaning of Article 40.3 it is necessary to examine whether he is entitled to that particular right. Further, the appellant's status within the State is a relevant consideration to deciding whether he is entitled to the particular right.

11. I cannot share the view of Hogan J. that the Supreme Court by its judgments in *Re. Article 26 and the Electoral (Amendment) Bill* [1984] I.R. 268, Re. Article 26 and the *Illegal Immigrants (Trafficking) Bill 1999* and *Nottinghamshire County Council v. K.B.* [2011] IESC 48, [2013] 4 I.R. 662 has "concluded that non-citizens in principle enjoy the rights guaranteed by the fundamental rights provisions of Articles 40 to 44 of the Constitution in much the same general (but perhaps not identical) manner as citizens". That, in my view, is too broad a proposition. Nor can I agree with the view which he expressed in *Omar v. Governor of Cloverhill Prison* [2013] IEHC 579, [2013] 4 I.R. 186, in reliance upon the Electoral (Amendment) Bill judgment (and repeats in his judgment herein) that "the Supreme Court has made it clear that the fundamental rights provisions of the Constitution apply without distinction to all persons within the State". My reasons for this disagreement are as follows.

12. In the *Electoral (Amendment) Bill* judgment, the Supreme Court was concerned with the constitutionality of a Bill the effect which was to permit a British citizen ordinarily resident in a constituency to have a right to vote in an election of members of Dáil Éireann. The then Article 16.1 of the Constitution granted the right to vote at an election for members of Dáil Éireann to "every citizen . . .". The judgment of the court addressed the question as to whether Article 16.1 could properly be construed as contemplating the extension of the franchise to persons who were not citizens. The court considered the submissions in favour of confining the right to vote to citizens primarily by reference to Articles 6, 12, 16 itself and 47 and then stated in the passage upon which I understand Hogan J. relies for his conclusion:-

> "The most powerful argument against this interpretation of Article 16 and,

> in particular of Article 16.1.2 and of the associated Articles is the contention, strenuously submitted on behalf of the Attorney General, that various other rights such as the freedom of association, the freedom of conscience, inviolability of a dwelling and other similar rights are granted in the Constitution to citizens, and the Courts have interpreted those provisions as having the effect, at least in certain circumstances, of not excluding the existence or the granting of similar or identical rights to persons who are not citizens. It is the view of the Court that that argument fails by reason of the clear distinction between the provisions of Article 16, Article 12 and Article 47 which provide the mechanism by which the People may choose and control their rulers and their legislators, and Articles such as Article 40 and Article 44, which grant to individuals particular rights within society and in relation to the organs of State."

13. I cannot read the above passage as the Supreme Court making it clear "that the fundamental rights provisions of the Constitutions apply without distinction to all persons within the State". It must be noted that the submission made to it on behalf of the Attorney General related to "various other rights such as . . ." and that the court had interpreted those provisions as having the effect "at least in certain circumstances of not excluding . . .". The manner in which that submission was rejected may be considered to have impliedly involved an acceptance by the court that certain other rights had in certain circumstances been determined to extend to persons who were not citizens but it cannot, in my view, be considered as having decided anything further.

14. Next and most importantly is the judgment of the Supreme Court in the *Illegal Immigrants (Trafficking) Bill* 1999. The court was in this instance considering certain constitutional rights of persons in the position of the appellant herein. Sections 5 and 10 of the Bill had been referred to the Supreme Court pursuant to Article 26. Section 5 of the Bill restricted the manner in which a series of immigration and asylum decisions could be challenged to judicial review brought within fourteen days and also imposed restrictions on an appeal to the Supreme Court.

15. The court at p. 383 considered initially the wide power of the State to control aliens and then turned to the question of the rights under the Constitution of persons seeking asylum:

> "Both counsel assigned by the court and counsel for the Attorney General made submissions, in the light of their particular status, as to the nature and extent to which persons seeking asylum or refugee status enjoy the protection of certain rights under the Constitution in accordance with the principles of natural justice and constitutional justice. Counsel assigned by the court submitted that, despite the undoubted power of the State over non-nationals (including asylum seekers), such persons are not without rights while they are within the jurisdiction of the State. It is only necessary to examine this question in this part of the judgment to the extent that such rights are relevant to the interpretation of s. 5 of the Bill. The rights, including fundamental rights, to which non-nationals may be entitled under the Constitution do not always coincide with the rights protected as regards citizens of the State, the right not to be deported from the State being an obvious and relevant example.
>
> Counsel assigned by the court submitted that among the rights of a non-national which have been recognised by the courts are the following:-
>
> > (i) If detained, a right under Article 40.4.2 of the Constitution to apply to the High Court to question the legality of his or her detention. The Article is clearly not limited to citizens but applies to

> 'any person';
>
> (ii) A right of access to the courts to enforce his or her legal and constitutional rights;
>
> (iii) In dealing with applications for refugee status or asylum, a right to fair procedures and to the application of natural and constitutional justice;
>
> (iv) A right to require that any measures taken against a non-national by the State, in the exercise of its rights and powers, are exercised in a constitutionally valid manner and in accordance with laws which are not repugnant to the Constitution.

> Counsel also submitted that non-nationals enjoy a constitutional right to equal treatment in the sense that any difference in treatment must be justified by some legitimate government objective. It was also submitted that non-nationals were entitled to the unspecified personal rights guaranteed by Article 40.3.2 of the Constitution and a right of reasonable access to legal advisors. Counsel for the Attorney General, although they differed materially in respect of certain of the submissions made by counsel assigned by the court on this subject, were in general agreement, in their submissions, that the rights referred to above are enjoyed by non-nationals as well as citizens."

16. As appears, the court expressly stated that "the rights, including fundamental rights, to which non-nationals may be entitled under the Constitution do not always coincide with the rights protected as regards citizens of the State".

17. The court in its judgment then continued to consider the rights identified at paras. (i) to (iv) by counsel assigned by the court with which it appeared counsel for the Attorney General agreed were rights enjoyed by non-nationals as well as citizens.

18. The court, in considering both the right of access to the courts and rights to fair procedures contended for on behalf of non-nationals, emphasised that it was only concerned with the provisions of s. 5 of the Bill determining the procedure by which the validity of a decision or other matters governed by s. 5(1) might be challenged before the courts. Whilst, recognising a more general right of access to the courts of non-nationals and also a right to fair procedures albeit stating that in certain circumstances they might be subject to conditions or limitations which would not apply to citizens the court's conclusion at p. 386 in relation to the decisions referred to in s.5 of the Bill.

> "The court is satisfied that, in the case of applications to the High Court to challenge the validity of such decisions or other matters, a non-national is entitled to the same degree of natural justice and fairness of procedure as a citizen".

19. The approach of the Supreme Court in the above judgment emphasises, in my view, the requirement that where it is contended that a non-citizen has a right in the State which is claimed to be a fundamental right or a personal right protected by Article 40.3, it is necessary to look at both the status of the non-citizen and also the nature of the particular right being contended for. Again, it does not appear to me that this judgment can be considered as authority for a broad proposition that non-citizens enjoy the rights guaranteed by the fundamental rights provisions in the Constitution. Rather it supports the conclusion that certain non-citizens may be entitled to certain constitutionally protected fundamental or personal rights.

20. The final decision of the Supreme Court referred to by Hogan J. is *Nottinghamshire*

County Council v. K.B. [2013] 4 I.R. 662 and [2011] IESC 48 and in particular the judgment of O'Donnell J. Again, with respect I cannot read that judgment as support for the broader conclusion. At p. 743, O'Donnell J. stated:-

> "The issue of whether some or all of the constitutional provisions are limited to citizens was first raised almost 50 years ago in *The State (Nicolaou) v An Bord Uachtála* [1966] I.R. 567 and was debated in that case over nine days in the High Court, and eleven days in the Supreme Court without definitive resolution. It has not been resolved since, albeit that a *modus vivendi* appears to have been arrived at in which non-citizens have been permitted to invoke some provisions of the Constitution that while it is accepted that some aspects of the Constitution essentially related to voting and representational matter are nevertheless properly limited to citizens. It has not however been possible to articulate any unifying theory. It follows, that the related and even more complex question as to whether and if so how, a person can assert that the act of travelling to Ireland can give rise to constitutional rights or claims has not been addressed yet. However, the requirement that issues are determined in cases which are the subject of a real dispute which requires resolution, and the necessity and desirability that any such issues should be the subject of comprehensive argument both in the High Court and Supreme Court, means that it is neither necessary, nor possible to seek to resolve the issue here. If the issue is to arise in any future case, it will be necessary to consider carefully the constitutional text, many more decisions than were cited in this case, and a number of different fact situations including questions as to the significance of citizenship, residence, or fleeting presence in the jurisdiction. It may be that regard might usefully be had to the provisions of Article 40.1 of the Constitution which does not appear to have figured significantly in the decisions or commentary to date. Whether that provision or any other provision is of any assistance, is a matter which may however properly await a case in which the issue is squarely addressed, and where it requires determination."

21. The next issue therefore is whether the appellant at the time he made his application for judicial review to the High Court or at the date of the hearing of this appeal should be considered as having a personal right to work or earn a livelihood in the State which is protected by Article 40.3 of the Constitution.

22. On appeal, it was common case that a citizen enjoys such a right. The trial judge drew attention to the analysis of Costello J. in *Cafolla v. O'Malley* [1985] I.R. 486 at p. 493:-

> "Generally speaking the right to earn a livelihood can properly be regarded as an unspecified personal right first protected by Article 40.3, subsection (1). But this right may also exist as one of the bundle of rights arising from the ownership of private property capable of being commercially used and so receive the protection of Article 40, s. 3, subsection (2) . . ."

23. The appellant relies upon the first formulation. The appellant is not asserting any property right. In the absence of an existing contract of employment or occupation that does not seem possible.

24. Central to the assessment of whether or not a person in the position of the appellant has a constitutionally protected personal right to work or earn a livelihood is his current status in the State. He is here as an applicant for asylum who has been given leave to enter the State and remain here pursuant to s. 9 of the 1996 Act. Counsel for the

respondent relies upon the assessments made by Murray J. (as he then was) of the status of such a person in the State in *G.A.G. v. Minister for Justice* [2003] 3 I.R. 442 in the single judgment delivered with whom the other members of the court agreed at p. 474:

> ". . . that persons who are allowed to enter the State for the purpose of making an application for asylum fall into a particular category and never enjoy the status of residents as such who have been granted permission to enter and reside in the State as immigrants. Even though such immigrants may be subject to certain limitations as to time and requirements as to renewal of work permits, they nonetheless enjoy legitimate residence status. In fact the very purpose of an application for refugee status is to seek permission to be allowed to enter and reside in the State as an immigrant and benefit from such a status."

25. The appellant herein is undoubtedly in the unfortunate situation that he has now lived in the State in direct provision for a significant number of years (in excess of five years at the time of the High Court application and in excess of seven years at the hearing of the appeal). Counsel on his behalf submitted that he has been lawfully in the State during that period. That is so in a limited sense. He is not unlawfully present in the State. He is, however, a person who is only permitted to remain in the State pursuant to s. 9 of the 1996 Act, while his application for a declaration of refugee status is decided. Whilst, undoubtedly, one has significant sympathy for the appellant in relation to the situation in which he finds himself nevertheless objectively his status in the State cannot be considered to have changed or be any different from the day he arrived in the State.

26. In my judgment it cannot be concluded that a person who is in the State for one purpose only namely to have his application for refugee status decided and does not have any right to reside in the State as an immigrant, has a personal right protected by Article 40.3.1 to work or earn a livelihood within the State. A right to work or earn a livelihood within the State is inextricably linked to a person's status within the State. A right to work cannot be exercised *in vacuo*. It is a right to work and earn a livelihood in the State.

27. As confirmed by the Supreme Court in the *Illegal Immigrants (Trafficking) Bill* judgment at p. 382 the power of the State to control aliens in their activities within the State reflects "an inherent element of State sovereignty over national territory long recognised in both domestic and international law". One activity that is and was consistently restricted or controlled is the right to work or earn a livelihood. Whilst I recognise that work or earning a livelihood may not be solely concerned with an economic activity, but may also contribute to a person's sense of dignity or well being, nevertheless the inextricable link between a person's status in the State and their right to work in the State is such that Article 40.3 cannot be construed as giving to an applicant for asylum a constitutionally protected right to work or earn a livelihood within the State.

28. Insofar as such a right forms part of the personal rights of a citizen protected by Article 40.3 capable of enforcement against the State, such a constitutionally protected right must be considered as flowing from the social contract between the citizen and the State and is intimately connected with the citizens entitlement to live in the State.

29. Accordingly in my judgment the trial judge was correct in concluding that the appellant does not have a constitutionally protected personal right to work or earn a livelihood within the State.

30. By reason of the conclusion reached on this issue it is not necessary to consider the

further question as to whether s. 9(4) of the 1996 Act, as amended, is repugnant to the Constitution. In the absence of the appellant having a right to work or earn a livelihood protected by Article 40.3 there is no basis for an alleged repugnancy.

31. As identified by the trial judge at para. 62 of his judgment the real complaint in this case is the delay which has occurred in the processing of the appellant's asylum application. As stated above, in accordance with the decision of the Supreme Court in the *Illegal Immigrants (Trafficking) Bill*, the appellant may have constitutionally protected right to fair procedures, although the ambit of that right remains to be determined. However, the appellant did not seek in his judicial review proceedings any relief upon grounds of delay alone. This is understandable as the applicant is seeking a positive declaration from bodies that may be considered to be in delay. Regrettable though the delay may be, it is not a ground for the appellant obtaining any of the reliefs sought in these judicial review proceedings in relation to the constitutional issue for the reasons given in this judgment and on all other issues for the reasons in the judgment of Hogan J. with which I agree.

32. Accordingly, notwithstanding sympathy for the appellant in his present circumstances, the appeal must be dismissed.

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 14th day of March 2016

Part I: Introduction

1. Does an asylum seeker who seeks international protection in this State have an entitlement to work here pending the determination of that application, especially where, as here, that application has been beset by considerable delays? This is the essential question which arises on this appeal. In his judgment in the High Court ([2015] IEHC 246), McDermott J. rejected these claims and the applicant, Mr. V., has now appealed to this Court.

2. Mr. V. is a Burmese national who arrived in the State on 16th July 2008 and who applied for asylum on the following day. Perhaps the most striking feature regarding his application for asylum is that in over some seven years and six months there has been no final determination on this application. As McDermott J. noted in his judgment it is scarcely surprising that the applicant's indefinite sojourn in direct provision (*i.e.,* where his basic food and accommodation is provided by the State) for such a remarkable period of time with no opportunities for gainful occupation has led him to complain of personal distress and demoralisation. This is the background against which the present proceedings have been brought.

3. On 25th November 2008, Mr. V. attended for interview with the Office of the Refugee Application Commissioner and he subsequently received a negative recommendation in respect of his application for asylum on 22nd December 2008. His appeal hearing before the Refugee Appeals Tribunal took place on 26th May 2009, following which a negative recommendation was made in July 2009.

4. There then followed judicial review proceedings to challenge that decision and the

applicant ultimately succeeded in having it quashed by decision of the High Court on 16th July 2013. Following this determination the applicant was obliged to re-enter the process and re-attend the Tribunal for a fresh hearing. This culminated in a further adverse decision from the Tribunal in November 2013 which was again successfully challenged in judicial review proceedings, as that decision was quashed by the High Court on consent in February 2014. The matter was once again remitted following by the High Court to the Tribunal.

5. At the hearing of the appeal in this Court in February 2016, the Court was informed that the latest Tribunal hearing took place in July 2015, but, as yet, at least the Tribunal had yet to reach a decision.

6. Perhaps the most charitable observation that might be made regarding delays of this magnitude is that they reflect little credit on the public administration and, for that matter, the legal system, of this State. For even if the Tribunal were to rule adversely to Mr. V.'s claim, he states that his intention is then to apply to the Minister for Justice for subsidiary protection, a process which, he is advised, could also take several years. If this were to transpire, the entire process of an application for international protection might take the best part of ten years.

7. Since his arrival in the State Mr. V. has been obliged to remain in direct provision, residing in accommodation at St. Patrick's Centre, Drumgask, Co Monaghan living on €19 per week. As McDermott J. said in his judgment in the High Court which is under appeal to this Court:

> "[Mr. V.] experiences insomnia and deteriorating health because of his accommodation and feels depressed because he is prevented from engaging in meaningful employment. He fears that it could take up to 10 years to complete his engagement with the protection process and that it would transform his existence if he could take up employment."

8. By letter dated 8th May 2013, Mr. V. was offered employment as a chef in St Patrick's Accommodation Centre. By letter dated 30th May 2013, his solicitor applied to the respondent for temporary permission to reside and work in the State either pursuant to s. 4 of the Immigration Act 2004 ("the 2004 Act") or s. 9(11) of Refugee Act 1996 (as amended)("the 1996 Act") or, in the alternative, by the exercise of executive discretion. By letter dated 13th June 2013, his application was refused. On 15th July 2013, his solicitor wrote again repeating the submission that the respondent had the power to grant him permission to reside and work in the State whilst his protection application was being determined. By letter dated 15th July 2013, the Department responded and again refused his application.

9. A person who arrives in the State seeking international protection is granted leave to enter or remain in the State on a conditional basis pursuant to the provisions of s. 9 of the 1996 Act. This section provides:-

> "(1) Subject to the subsequent provisions of this section, an applicant, being a person referred to in section 8 (1)(a), shall be given leave to enter the State by the immigration officer concerned.
>
> (2) Subject to the subsequent provisions of this section, a person to whom leave to enter the State is given under subsection (1) or an applicant, being a person referred to in section 8(1)(c), shall be entitled to remain in the State until -
>
> (a) the date on which his or her application is transferred to a

Convention country pursuant to section 22 , or

(b) the date on which his or her application is withdrawn or deemed to be withdrawn pursuant to subsection (14) (b), or

(c) the date on which notice is sent that the Minister has refused to give him or her a declaration.

(3) The Minister shall give or cause to be given to a person referred to in subsection (2) a temporary residence certificate (in this section referred to as 'a certificate') stating the name and containing a photograph of the person concerned, specifying the date on which the person's application for a declaration was referred to the Commissioner and stating that, subject to the provisions of this Act, and, without prejudice to any other permission or leave granted to the person concerned to remain in the State, the person referred to in the certificate shall not be removed from the State before the final determination of his or her application.

(4) An applicant shall not -

(a) leave or attempt to leave the State without the consent of the Minister, or

(b) seek or enter employment or carry on any business, trade or profession during the period before the final determination of his or her application for a declaration."

10. Section 9(7) and s. 9(11) of the 1996 Act provide:

"(7) A person who contravenes subsection (4) … shall be guilty of an offence and shall be liable on summary conviction to a fine…or to imprisonment for a term not exceeding one month or to both.

(11) Subsections (4), (5), (8) and (10) shall apply only to an applicant who, but for the provisions of this Act, would not be entitled to enter or remain in the State…"

11. Section 4 of the 2004 Act provides that an immigration officer may, on behalf of the respondent give to a non-national a document or place on his or her passport or other equivalent document a permission to land or be in the State. Section 4(2)(b) of the 2004 Act empowers the immigration officer to refuse to grant such permission if the non-national intends to take up employment in the State but is not in possession of a valid employment permit within the meaning of the Employment Permits Act 2003. Section 5 of the 2004 Act provides:-

"(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister.

(2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State.

(3) This section does not apply to -

(a) a person whose application for asylum under the Act of 1996 is under consideration by the Minister,

(b) a refugee who is the holder of a declaration (within the meaning of that Act) which is in force,

(c) a member of the family of a refugee to whom section 18(3)(a) of that Act applies, or

(d) a programme refugee within the meaning of section 24 of that Act."

12. It should also be observed that the Oireachtas has specifically addressed the right of those who *have been* granted refugee status to work or earn a livelihood by granting them the same entitlements to enter the workforce as any Irish citizen. Section 3(2)(a) of the 1996 Act states that:-

> "without prejudice to the generality of subsection (1), a refugee in relation to whom a declaration is in force -
>
> (i) shall be entitled to seek and enter employment to carry on any business, trade or profession and to have access to education and training in the state in the like manner and the like extent in all respects as an Irish citizen…"

13. As McDermott J. noted in his judgment, such a provision is in accordance with the provision of Chapter 3 of the Geneva Convention of 1951, in respect of "gainful employment". Article 17 of the Convention provides that each contracting state shall accord to refugees lawfully staying in their territory the right to engage in wage earning employment and also the rights under Articles 18 and 19 to engage in "self employment" and the "liberal professions". The Convention does not contain any provision regarding access to the labour market during the asylum process, nor did this State assume any obligation in that regard under the Convention.

14. There are accordingly four questions which the Court is required to consider. First, does the Minister enjoy a discretion under s. 9 of the 1996 Act to grant a work permit to a person in the position of the applicant? Second, if the Minister has no discretion under the s. 9, does she enjoy an inherent discretion to grant such a permit? Third, if the answer to both of the first two questions is in the negative and there is no such discretion, then the applicant maintains that s. 9 of the 1996 Act is contrary to Article 15 of the EU Charter of Fundamental Rights and should accordingly be disapplied by this Court. Fourth, if s. 9 is not contrary to the Charter, then the applicant maintains that the section is unconstitutional.

15. I propose now to consider each of these questions in turn. Before doing so it is necessary to observe that the references to "non-national" or "third country national" in this judgment are not intended to refer to EU/EEA citizens for whom special rules in relation to employment and establishment are provided for under EU law. Nor does the term include Swiss nationals for whom special arrangements in relation to free movement and establishment have been made by law: see ss. 2 and 3 of the European Communities and Swiss Confederation Act 2001.

Part II: Is there a discretion under Section 9?

16. The applicant claims that s. 9 of the 1996 Act does not preclude the respondent from granting permission to a refugee applicant to take up employment, but imposes an obligation on a refugee not to seek or enter employment unless he obtains permission to take up such employment which may be granted outside the terms of the Act. In the

alternative it was contended that s. 9 (11) expressly provides that the employment restriction may be waived by the granting of an alternative permission to a refugee applicant to remain in the State. The applicant further contended that the respondent was vested with an inherent power by virtue of Article 28.2 of the Constitution, such as that granted to foreign nationals to reside and work in the State under the IBC/05 Scheme, as illustrated by the Supreme Court's decision in *Bode v. Minister for Justice Equality and Law Reform* [2008] 3 I.R. 663.

17. Counsel for the applicant, Mr. Lynn S.C., further submits that if the respondent did not have a discretion to grant an alternative permission to a refugee applicant, s. 9 (11) would be superfluous. In addition, it is claimed that s. 9(3) contemplates that a refugee may be permitted to reside in the State while awaiting the determination of his or her application, on a more favourable basis than that provided for under the provisions of the statute. Therefore, it is said that there is a discretion vested in the Minister which can be exercised without offending the provisions of the 1996 Act and furthermore that the respondent is not precluded from granting the applicant permission to work under s. 4 of the 2004 Act or in the exercise of the inherent executive discretion arising by virtue of Article 28.2. As a result, it is submitted that the refusal to consider the applicant's application is wrong in law.

18. The respondent submits that s. 9(11) of the 1996 Act has two purposes. It preserves the pre-existing entitlements of a person who may become a refugee *sur place* while otherwise lawfully present in Ireland and it enables an asylum seeker to benefit from legal entitlements which might otherwise accrue to him or her while present in Ireland as an asylum seeker; for instance, if a person has entered the State as an asylum seeker but subsequently acquires an entitlement to reside in the State following the birth of a child (for example, under the IBC/05 Citizen Child Scheme or by virtue of the decision of the Court of Justice in C-34/09 *Ruiz Zambrano* EU:C:2011:124 [2014] E.C.R. I-1177) or following a marriage to an Irish citizen.

19. Counsel for the State, Ms. Butler S.C., submitted that s. 9(4)(b) of the 1996 Act applies only to an applicant who "but for the provisions of this Act would not be entitled to enter or remain in the State". Both applicants are persons who "but for" the permission to which they were entitled under s. 9 have no right or entitlement to be in the State. Therefore it is submitted that the provisions of s. 9(4) (b) apply in mandatory terms to the applicant. Furthermore, it should be noted that under s. 9(7) a person who contravenes s. 9(4) shall be guilty of an offence and liable on summary conviction to a fine or imprisonment for a term not exceeding one month or both. The respondent also relies on the fact that s. 9 is addressed and confined to those who are entitled as a matter of legal right to be granted leave to enter and remain in the State as applicants for protection defined under s. 8(1)(a) of the Act. The prohibition on seeking or entering employment during the course of that application is confined to those who "but for" their entitlement to be granted leave to enter and remain in the State as asylum seekers would not be entitled to enter or remain in the State.

20. The right of an asylum seeker to enter and to remain in the State and the conditions under which they may do so are defined by the provisions of the 1996 Act. This is illustrated by the judgment of Murray J. for the Supreme Court in *G.A.G. v. Minister for Justice Equality and Law Reform* [2003] 3 I.R. 442. In that case, two of the applicants were failed asylum seekers in respect of whom deportation orders had been made and the third was an asylum seeker the subject of a transfer order to Germany for examination of his application for asylum in accordance with the Dublin Convention. They sought permission to remain in the State on the basis of an intention to invoke a right of establishment under the Association Agreements then in force between the Czech Republic and the European Union. This was refused by the Minister on the basis that the applicants could apply for a right of establishment from outside the State.

21. In his judgment Murray J. held that member states of the European Union were entitled to impose a system of prior control requiring that applications for a right of establishment must be submitted from the applicant's home State and that such a system did not nullify or impair the benefits accruing to the applicants under the relevant Association Agreements. Murray J. then held that asylum applicants were permitted to enter the State for the sole purpose of having the application for asylum examined and upon refusal of such application they had no right or entitlement to remain in the State. In his judgment Murray J. stated ([2003] 3 I.R. 442, 474):

> "Entry to the State by the applicants for the purposes of making an application for asylum was the consequence of the exercise by the State of its inherent power to determine for what purposes and subject to which limitations non-nationals may be allowed to physically enter the State. Persons seeking asylum status are permitted pursuant to s. 9 of the Act of 1996 to enter the State solely (emphasis supplied) for the purpose of having their application for asylum examined by a fairly elaborate independent procedure, so that those genuinely entitled to asylum may be granted permission to enter and stay in the State on those grounds.
>
> Persons allowed to enter the State for such a limited purpose are subject to a variety of restrictions. In an exceptional departure from general policy the applicant in the first case was at one point permitted to become employed and this permission ceased on the 9th November, 2002. After that date it was illegal for him to work in the State either as an employee or as a self-employed person. As and from the coming into force of the Refugee Act 1996 in October, 2000, the status of each of the applicants has been governed by the provisions of the Act of 1996. That is what is material for the purposes of these proceedings. Section 9(4) of the Act of 1996 provides that applicants for asylum shall not leave or attempt to leave the State without the consent of the first respondent or seek or enter employment or become self-employed in any form(emphasis supplied) before the final determination of their application for a declaration as to refugee status. Subsection 5 of the Act of 1996 permits an immigration officer to require such persons to reside or remain in a particular district or places in the State or to report at specified intervals to an immigration officer or a member of An Garda Síochána. Persons who contravene subs. (4) or subs. (5) of s. 9 of the Act of 1996 shall be guilty of an offence which may lead to a fine or a term of imprisonment not exceeding one month. Such persons are granted only a 'temporary residence certificate' pursuant to s. 9(3) which is governed by the foregoing restrictions. That temporary residence certificate ceases to be in force and must be surrendered as required by the Refugee Act 1996 Regulations, once notification is given to an applicant for asylum that the application has been refused or is being transferred to another country. Accordingly, at the time when they purported to make applications for establishment to the first respondent, none of the applicants possessed a temporary residence certificate.
>
> It seems to me quite clear that the foregoing restrictions highlight and confirm that persons who are allowed to enter the State for the purpose of making an application for asylum fall into a particular category and never enjoy the status of residents as such who have been granted permission to enter and reside in the State as immigrants. Even though such immigrants may be subject to certain limitations as to time and requirements as to renewal of work permits, they nonetheless enjoy legitimate residence status. In fact the very purpose of an application for

> refugee status is to seek permission to be allowed to enter and reside in the State as an immigrant and benefit from such a status.
>
> If the applicants are correct in their contentions, then it would mean that persons who are allowed to enter for no other purpose than having their application for asylum examined could seek to do so when their real purpose was to apply for establishment rights. In those circumstances any legitimate system of prior control could be circumvented…."

22. For my part, I consider that the Oireachtas plainly intended the application of clear restrictions on asylum seekers such as the applicant who was granted permission to enter and remain in the State for the purpose of seeking international protection. This precludes them from seeking or entering employment, as noted by Murray J., "in any form" pending the determination of their applications and failure to comply with these conditions renders them liable to prosecution.

23. Specifically, it is clear that the prohibition contained in s. 9(4)(b) applies to asylum seekers in the position of the applicant by virtue of the provisions of s. 9(11). Persons seeking asylum only have an entitlement to enter or to remain in the State by virtue of s. 9(1) of the 1996 Act. In these circumstances the applicant is someone who "but for the provisions of [the 1996 Act] would not be entitled to enter or remain in the State" within the meaning of s. 9(11) since his entitlement to be in the State is entirely contingent on a permission granted under the 1996 Act. It follows, therefore, that the absolute exclusion from the labour market provided for in s. 9(4)(b) applies to such persons by virtue of s. 9(11) and the Minister enjoys no statutory discretion in the matter.

Does the Minister enjoy an inherent discretion to grant the applicant a work permit?

24. It is true that, generally speaking and in the absence of statutory regulation, the Minister would enjoy an inherent jurisdiction to admit non-nationals into the State on conditions which might include the right to enter the labour market. Such an inherent jurisdiction is, however, derived from the executive power of the State provided for in Article 28.2 of the Constitution:

> "The executive power of the State shall, *subject to the provisions of this Constitution*, be exercised by or on the authority of the Government." (Italics supplied)

25. It is, however, important to stress that that the executive power of the State cannot be exercised in a manner which would essentially give the Government (or, for that matter, the relevant Minister) the power to disapply the law. As I said in the course of a judgment I delivered as a judge of the High Court in *MacDonncha v. Minister for Education* [2013] IEHC 226 :

> "The exclusive right to legislate is, of course, assigned to the Oireachtas by Article 15.2.1 and is one of those other provisions of the Constitution to which the exercise of the executive power is subject. It follows that it is the right of the Oireachtas alone both to make and to unmake law. One aspect of the executive power is that it is duty of the Government to ensure that these laws are carried into effect and enforced. But the Government enjoys no right to suspend or to disapply the law, for if such a power were to be allowed, it would be tantamount to saying that the Government could in effect secure a repeal of the law without the necessity for legislation. This would plainly violate Article 15.2.1 and, moreover, this Court had already said as much in *Duggan v. An Taoiseach* [1989] I.L.R.M. 720. In that case Hamilton P. held that a Government instruction to suspend the operation of the Farm Tax Act 1985 was

unlawful."

26. All of this means that where, as here, the Oireachtas has legislated on a particular topic in a manner which (either expressly or impliedly) precludes the exercise of any ministerial discretion in relation to that issue, the executive power cannot be exercised in a manner which would override that legislative prohibition. If it were otherwise, this would mean that the Minister could effectively suspend or dis-apply the law in a manner which was contrary to Article 15.2.1 of the Constitution.

27. In these particular circumstances, it follows in turn that the Minister enjoys no discretion to grant the applicant a permission to enter the labour market by virtue of the exercise of executive power of the State, since to do otherwise would be in effect to set aside the statutory prohibition contained in s. 9(4)(b) of the 1996 Act as applied by s. 9(11) of the same Act.

Part III: Is section 9 in breach of European Union law?

28. The applicant contends that if s. 9 of the 1996 Act (as amended) prohibits the Minister from considering or granting an asylum seeker permission to work in the State, it is incompatible with European Union law in general and Article 15 of the Charter of Fundamental Rights in particular.

29. Article 15 of the Charter provides:

"Freedom to choose an occupation and right to engage in work

> 1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
>
> 2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
>
> 3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union."

30. Article 18 of the Charter deals with the right to asylum

"Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

31. It is also necessary to draw attention to the so-called horizontal provisions of the Charter which sets out its scope of application:

> "Article 51
>
> 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred

on it in the Treaties.

2. This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties." (emphasis supplied)

32. Article 52 further provides:

"1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."

33. It will be seen that the application of the Charter is contingent on the applicant demonstrating that the State is "implementing" Union law within the meaning of Article 51.1 of the Charter. I will return presently to this question.

34. The applicant also points to what he claims is the general right to work is derived from Article 11 of Council Directive 2003/9/EC ("the Reception Directive") and its successor the provisions of Council Directive 2013/33/EU ("the 2013 Reception Directive").

35. Article 11 of the Reception Directive provided:-

"1. Member States shall determine a period of time starting from the date

on which an application for asylum was lodged, during which an applicant shall not have access to the labour market.

2. If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant.

3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.

4. For reasons of labour market policies, Member States may give priority to EU citizens and nationals of States parties to the agreement on the European economic area and also to legally resident third country nationals."

36. Ireland elected not to participate in the terms of the 2003 Directive in accordance with Article 1 of the Protocol on the Position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community.

37. Article 15(1) of the 2013 Reception Directive reformulated the entitlements of asylum seekers in that participating member states were now obliged to ensure that applicants for asylum have access to the labour market no later than nine months from the date when the application for international protection was lodged if a first instance decision by a competent authority had not been taken, and the delay could not be attributed to the applicant. Applicants must be granted "effective access" to the labour market, but the member states retain the right to determine the conditions upon which access would be permitted.

38. Ireland also elected to opt-out of the 2013 Reception Directive in accordance with Article 1 of the Protocol: see recital 33 of the Directive.

39. The key provision of the Charter is, of course, Article 51(1) which provides that it applies only to Member States when they are "implementing" Union law. Classically, of course, a Member State is "implementing" Article 51(1) when it exercises a discretionary power pursuant to a Directive or a Regulation. But beyond these obvious contexts, this is a phrase which is one which, perhaps, avoids precise definition.

40. The recent decision of the Court of Justice in Case C-617/10 Åkerberg Fransson EU:C: 2013:280 is illustrative of some of these difficulties. Here the question was whether the *ne bis in idem* provisions of Article 50 of the Charter applied to a tax penalty imposed for VAT purposes. The taxpayer in this case had previously paid administrative tax penalties and the question was whether Article 50 of the Charter precluded the application of further penalties in later proceedings.

41. A Grand Chamber of the Court of Justice, drawing on the official Explanations for the Charter in accordance with Article 52(7), held in essence that the Charter bound Member States "when they act in the scope of Union law" and that is what the phrase "implementing" Union law in Article 51(1) really meant. The Court of Justice then held that Sweden was "implementing" Union law in the present case because "the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT."

42. The Court then pointed to specific anti-evasion provisions of the consolidated VAT Directive 2006/112/EC which ensured that Member State are under an obligation to take

all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion. Given further that VAT revenue formed part of the Union's own resources:

> "...there is thus a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second...."

43. The Court then concluded that tax penalties and criminal proceedings for tax evasion, constituted the implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU. It followed, therefore, that Sweden was "implementing" European Union law for the purposes of Article 51(1) of the Charter.

44. In my view, in the context of the present case, it cannot be said that the State was "implementing" EU law. Ireland had already sometime previously elected to opt-out of the 2013 Reception Directive as it was fully entitled to do. By so electing, it must be accepted that the topics which were the subject matter of the Directive itself remained entirely within the sovereign realm of this State and, accordingly, fell outside the scope of EU law. As the right of asylum seekers to participate in the labour market pending the determination of their claim is one of these very topics which were addressed by the 2013 Reception Directive, legislation enacted by the Oireachtas regulating the rights of asylum seekers in relation to employment and the labour market equally falls outside the scope of EU law. One may thus say that by electing to opt-out of the Directive (and, in that sense, not to implement the Directive), the State could hardly be said to be implementing Union law.

45. In any event, I do not think that there is anything in Article 15 in the Charter which assists the applicant, the apparently broad language of Article 15(1) notwithstanding. Counsel for the applicant, Mr. Lynn S.C., urged that the language of Article 15(1) of the Charter should be regarded as having conferred the right to work on all ("Everyone has the right to engage in work….") who happened to be within the territory of the Union. This guarantee must, however, be seen in the context of the rest of Article 15. Article 15(2) then deals with the right of citizens of the Union to seek employment and to work in any Member State.

46. Critically, however, Article 15(3) deals expressly with the rights of third country nationals:

> "Nationals of third *countries who are authorised to work in the territories of the Member States* are entitled to working conditions equivalent to those of citizens of the Union." (emphasis supplied)

47. It is quite clear that the general words of Article 15(1) are substantially qualified by this specific and particular provision which is addressed to the position of third country nationals such as the applicant. Such third country nationals must accordingly be *authorised to work*. The natural inference from this specific provision of Article 15(3) is that third country nationals have no other rights other than those specified in this provision.

48. In effect, therefore, all that Article 15(3) provides is that third country nationals who are authorised to work - impliedly by one of the Member States - to work under working conditions equivalent to those of citizens of the Union. But since, of course, Mr. V. is not in fact authorised to work in the territories of the Member States - whether in this State or in another Member State - it follows that Article 15(3) cannot assist him.

49. As it happens, in *Fariborz Rostami v. The Secretary of State for the Home Department* [2013] EWHC 1494, Hickinbottom J. arrived at the same conclusion with regard to the effect of Article 15 of the Charter::

> "In fact, Article 15(1)…quite clearly does not confer the general right to work. Despite its terms…there is clearly no absolute right to work: the provision can refer to no more than some form of access to the labour market. However, there are many UK nationals and other EU citizens who, without permission, have a right to work because of their nationality and citizenship and who wish to work but are unemployed because of a lack of jobs for which they are equipped and qualified. They have a right of access to the labour market, but that right for many is empty in the sense that they have at best a very limited chance of obtaining employment.
>
> But leaving that general point to one side, it is clear from Article 15(2) and (3) that Article 15(1) does not confer a right to work on everyone, in the sense of all individuals who happen to be within the territories of the EU at a particular time. Article 15(1) cannot be considered in a vacuum. Article 15(2) provides that every citizen of the EU has the right to seek employment and to work in any member state, a right which presumes that there is no wider right to work or access to the labour market, available to EU and non-EU citizens. Article 15(3) also presumes that, to work, those who are not EU citizens require authorisation outside the Charter itself. Despite the use of the word "everyone" in Article 15(1), far from conferring a general right to work on all who happen to be in EU territories at any time, in terms of the right to engage the labour market, Article 15 draws a fundamental distinction between citizens of the EU on the one hand and those who are not such citizens on the other; and its objective, patently, is to recognise that EU citizens have the freedom or right to seek employment and to work, but not to recognise that same freedom or right in non EU citizens. It is perhaps worthy of note that Mr. Wilson (for the applicant) did not contend that Article 15 gave a failed asylum seeker any right to work.
>
> I consider it is plain, that on the face of the wording of Article 15, read as a whole, it does not confer a discrete right to work on non EU nationals who happen to be in the EU at any particular time, including asylum seekers,…however, considerable support for that construction is gained from the authorities. In none of the authorities to which I was referred - and there were many - have either the European courts or the domestic courts found there to be such a right."

50. Hickinbottom J. concluded:

> "Despite the wording of Article 15(1) of the Charter, I am quite satisfied that the provision was not intended to and did not confer on non EU citizens any discrete right to work or permission to have access to the domestic labour market without national authorisation or outside the terms of any such authorisation. To find such a right, one must look elsewhere."

51. I cannot but agree with the entirety of this analysis.

Conclusions on the EU law issue

52. In summary, therefore, I am of the view so far as the EU law issue is concerned that:

> (i) Given that Ireland has exercised its right to opt-out of the 2013

Reception Directive, it follows that the matters which were the subject-matter of the Directive itself remained entirely within the sovereign control of this State and, accordingly, fell outside the scope of EU law so far as this State is concerned. As the entitlement of asylum seekers to enter the labour market was addressed in that Directive, it follows equally that the State was not "implementing" EU law for the purposes of Article 51(1).

(ii) In any event, the provisions of the Charter cannot assist the applicant. Article 15(3) makes it clear that the rights of third country nationals to enter the labour market are contingent on such nationals being "authorised" for this purpose. As the applicant is not, of course, authorised to enter that market, it follows that Article 15 is not of any assistance to the applicant.

Part IV: The Constitutional Issue

53. I now turn to a consideration of the applicant's challenge to the constitutionality of s. 9(4) of the 1996 Act. This general issue itself raises a number of fundamental questions. First, is there a constitutional right to earn a livelihood and, if so, what is the nature of that right? Second, if there is such a right, can a non-citizen such as the applicant invoke this right? Third, if the answer to this question is in the affirmative, are legislative restrictions of this kind contained in s. 9(4)(b) of the 1996 Act as applied to this applicant constitutionally valid. I propose to consider these issues in turn.

The right to earn a livelihood

54. If this matter were *res integra*, I confess that, for my part, the question as to whether the Constitution protected the right to earn a livelihood in the sense of a legally enforceable and justiciable right would have to remain an open one. After all, the only express reference to such a right (or what in substance is the equivalent of such a right) is contained in Article 45.2.i of the Constitution which provides:

> "The State shall, in particular, direct its policy towards securing:-
>
> i. That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs."

55. The Preamble to Article 45 makes it clear that the "application of [these] principles in the making of laws shall be the care of the Oireachtas exclusively" and "shall not be cognisable by any Court under any of the provisions of this Constitution."

56. To that extent, therefore, one might question the extent to which it is legitimate to have regard to Article 45 in assessing whether the right to earn a livelihood is constitutionally protected as an unenumerated personal right for the purposes of Article 40.3.1 of the Constitution, whatever Kenny J. may have said to the contrary on the topic in *Murtagh Properties Ltd. v. Cleary* [1972] I.R.330. One might also question the consistency of a constitutional interpretation which assumes the existence of an *implied* constitutional right for the purposes of Article 40.3.1 (and, hence, a right which is justiciable and enforceable by the courts) when the very same right is (to all intents and purposes) expressly recognised by Article 45.2.i, but Article 45 declares that such a right is not justiciable or enforceable by the courts.

57. At all events, the matter is far from res integra, as it is clear from the Supreme Court's decision in *Murphy v. Stewart* [1973] I.R. 97, 117 that, in the words of Walsh J., "among the unspecified personal rights guaranteed by [Article 40.3.1] of the Constitution is the right to work." This was further confirmed by the decision of the

Supreme Court in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321, 366 where Hamilton C.J. said that "the right to carry on a business earn a livelihood" was protected by Article 40.3.1, i.e., that it is one of the unenumerated personal rights guaranteed by that provision. There is also impressive authority for the proposition that this right may also be regarded as an aspect of the personal property rights as guaranteed by Article 40.3.2: see Cafolla v. O'Malley [1985] I.R. 486, 493, *per* Costello J.

58. In *Cox v. Ireland* [1992] 2 I.R. 503 the Supreme Court held that s. 34 of the Offences against the State Act 1939 (which provided for the automatic dismissal of any public servant convicted of a scheduled offence by the Special Criminal Court and which further disqualified such persons from being employed by the public service for a seven year period) was unconstitutional on the basis that it constituted a disproportionate attack on the "unenumerated personal right of that person to earn a living": see [1992] 2 I.R. 503, 5622, per Finlay C.J. The Court also regarded as an attack on the property rights of the individual concerned, namely "the right to the advantages of a subsisting contract of employment."

59. It is clear, therefore, in the light of these authorities, that the right to earn a livelihood is a personal right which is protected by Article 40.3.1 and may also be regarded as an aspect of the protection of the property rights for the purposes of Article 40.3.2. Since, however, the applicant does not have a subsisting contract of employment, in the light of the comments of Finlay C.J. in *Cox*, it seems more likely that the constitutional right at issue in the present case, is strictly, the applicant's unenumerated constitutional right to earn a livelihood under Article 40.3.1 rather than the protection of property rights as such under Article 40.3.2. Given, however, that both rights are derive squarely from the provenance of Article 40 (and thus in principle open to non-nationals in the light of the *Electoral (Amendment) Bill* analysis which is discussed in greater detail later in this judgment), nothing may greatly turn on this.

May a non-citizen invoke the right to earn a livelihood?

60. So far as the constitutional question is concerned, the fundamental issue is whether a non-citizen can ever invoke the constitutional right to earn a livelihood. The present proceedings accordingly bring into sharp relief a question which has surfaced from time to time, namely, the extent (if at all) to which non-citizens can invoke the Constitution and the rights secured thereby.

61. This issue first surfaced in the High Court in *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567. In that case the child of an unmarried father (who was a British citizen) had been given up for adoption without that father's knowledge. When the father learned of this event he commenced judicial review proceedings in which he sought, *inter alia*, to challenge the constitutionality of the Adoption Act 1952 on the ground that it violated the provisions of Article 40.1, Article 40.3 and Article 41 of the Constitution. His claim ultimately failed for reasons which need not here detain us.

62. The question, however, as to whether or not a non-national applicant could invoke the Constitution for this purpose was considered in some detail. One of the judges of the Divisional High Court, Henchy J., conducted a close textual analysis of the relevant provisions of the Constitution which referred in some cases to "citizen" and in other cases to "person". Henchy J. took two examples to illustrate his point.

63. First, while Article 40.1 provides for the equality before the law of all citizens, Henchy J. noted ([1966] I.R. 567, 617) that Article 40.2 sought to provide:

> "that there shall be no obtrusion on this quality of citizenship by the conferring of titles of nobility by the State or by any citizen accepting a

> title of nobility or honour except with the prior approval of the Government."

64. Henchy J. considered that it necessarily followed that the citizens referred to in Article 40.1, are the same as those in Article 40.2, namely citizens "as defined by Article 9 of the Constitution". Henchy J. likewise drew attention to the fact that while Article 40.4.1 guarantees that no citizen shall be deprived of his personal liberty save in accordance with law, the habeas corpus provisions of Article 40.4.2 refers to the unlawful detention of a "person". Henchy J. then concluded on this point ([1966] I.R. 567,617):

> "Article 9.2 says: "Fidelity to the Nation and loyalty to the State are fundamental political duties of all citizens". In so far as personal rights are concerned, the State is concerned only with its citizens, who owe it this loyalty. The Preamble to the Constitution, by the words, "We, the people of Éire .. do hereby adopt, enact and give to ourselves this Constitution", shows that this is basically a Constitution of the Irish people for the Irish People.
>
> The [effect of the] provisions of Article 40.3 of the Constitution and other provisions with which I need not concern myself - is to state a constitutional right which attaches to citizenship and falls as a duty on the State. It is only a citizen who can claim that right, and he is entitled to it as a constitutional incident of his citizenship. [The applicant], being an alien, has no claim to it."

65. On appeal the Supreme Court dealt fully with the merits of the applicant's argument in relation to the provisions of Article 40 and 41 of the Constitution and, as already indicated, the Court found against him on the merits of these grounds. At the conclusion of his judgment, however, Walsh J. stated ([1966] I.R. 567, 645):

> "The High Court judgments rested in part upon the fact that the appellant is not a citizen of Ireland. This Court expressly reserves for another and more appropriate case considering of the effect of non citizenship upon the interpretation of the Articles in question and also the right of an non citizen to challenge the validity of an Act of the Oireachtas having regard to the provision of the Constitution. The opinion which the Court is pronounced upon these Articles is not dependant upon or effective by the fact that the appellant is not a citizen of Ireland or by the fact that the Attorney General through his counsel involved this Court that he did not wish to submit in this case that the rights, if any, of the appellant under the Articles in question were any the less by reason of the fact that he was not a citizen of Ireland."

66. In the wake of *Nicolaou* the question of the right of a non-citizen to invoke the Constitution seems to have laid largely dormant subject to a number of specific examples and specific areas which I will consider presently.

67. The first case in which an Act of the Oireachtas was declared unconstitutional at the suit of a non citizen appears to have been *Kostan v. Ireland* [1978] I.L.R.M. 12. In *Kostan* a Bulgarian citizen successfully challenged the constitutionality of provisions of the Fisheries (Consolidation) Act 1959 on the ground that provided for summary trial of a fishing offence which was in truth not a minor offence for the purposes of Article 38.2. The next example came in 1986 with the decision of the Supreme Court in *The State (Gilliland) v. Governor of Mountjoy Prison* [1987] I.R. 201, a case where regulations giving effect to the Ireland-U.S. Extradition Treaty were declared unconstitutional at the suit of a U.S. national. In that case the Supreme Court held that the provisions of Article 29.5.2 of the Constitution had not been complied with as the Dáil had not approved the terms of an international treaty creating a charge on public funds. It might be said, of course, that both *Kostan* and *Gilliland* were both cases were non citizens successfully

invoked provisions of the Constitution, but not in a context involving personal rights.

68. The same might be said of the next case involving a finding of unconstitutionality at the suit of a non-citizen, *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26, where provisions of the Aliens Act 1935 were held unconstitutional on the grounds that they violated the non delegation provisions of Article 15.2 of the Constitution. One of the two dissenting judges, Barrington J., nevertheless seemed to suggest that the applicant, who was a Romanian citizen, could not invoke the provisions of the Constitution for this purpose. He noted that the non delegation doctrine was ([1999] 4 I.R. 26, 71):

> "..developed in an effort to strike a balance between the rights of the individual citizen and the exigencies of the common good. But there is no such grounds to be struck in the present case, for the simple reason, that under our law, an alien, has, generally speaking, no right to reside in Ireland. That is the principle on which the [Aliens Act 1935] rests. It is important to remember that we are dealing, not with the rule, but with the exception."

69. This, however, was a minority view and the majority of the Court (Hamilton C.J., Keane and Denham JJ.) saw no obstacle to the provision of Article 15.2.1 being invoked by a non-citizen.

70. The last decade has witnessed at least four other cases where statutory provisions have been found to be unconstitutional at the suit of non-citizens. Thus, for example, *in ZS and Ireland* [2011] IESC 49, [2013] 3 I.R. 626 a Pakistani national facing trial on serious criminal charges obtained a declaration that s. 2(1) of Criminal Law (Amendment) Act 1935 contravened Article 38.1 of the Constitution. In *Dokie v. Director of Public Prosecutions* [2011] IEHC 110, [2011] 1 I.R. 805 a Nigerian national successfully challenged the constitutionality of s. 12 of the Immigration Act 2004 on the basis that it contravened Article 38.1 and 40.4 of the Constitution. In *Damache v. Director of Public Prosecutions* [2012] IESC 11, [2012] 2 I.R. 260, an Algerian national - whose home had been searched - successfully challenged the constitutionality of s. 29(1) Offences against the State Act 1939 (which permitted a Garda officer to issue a search warrant) on the ground that it contravened Article 40.5 of the Constitution. Finally, in *Bederev and Ireland* [2015] IECA 38, [2015] 1 I.L.R.M. 301 this Court found a part of the Misuse of Drugs Act 1977 unconstitutional on the grounds that it contravened Article 15.2 of the Constitution in a case in which the applicant happened to be a Lithuanian national.

71. In none of these cases was the *locus standi* of the successful challenger qua non-national ever put at issue. There are, however, a number of post-*Nicolaou* cases where the issue has been examined in varying degrees of detail.

72. The first such case is *Re Article 26 and the Electoral (Amendment) Bill* [1984] I.R. 268, a case which concerned the constitutionality of the Electoral (Amendment) Bill 1983. The 1983 Bill sought to extend the franchise to British citizens, but the Supreme Court held that this would be unconstitutional. As O'Higgins C.J. observed ([1983] I.R. 268, 276:-

> "…The entire provisions of Article 16 would appear to form a constitutional code for the holding of an election to Dáil Éireann, subject only to the statutory regulation of such an election. Can, therefore, so comprehensive an Article properly be construed as contemplating the extension of the franchise to persons who are not citizens, if it can, then, by an analogous interpretation of Article 16.1.1 and Article it would be constitutionally possible to enact a law permitting a non-citizen to be elected President or to be elected a member of Dáil Éireann. It is the view of the Court that

> Article 16 of the Constitution, taken in its entirety, cannot be so construed."

73. At the conclusion of its judgment, however, the Supreme Court addressed the wider question which had been left over by that Court in *Nicolaou*, namely whether non-citizens could invoke the provisions of the Constitution and, if so, in what circumstances ([1984] I.R. 268, 277):

> "The most powerful argument against this interpretation of Article 16 and, in particular of Article 16.1.2 and associated Articles is the contention strenuously submitted on behalf of the Attorney General, that various other rights, such as the freedom of association, the freedom of conscience, inviolability of a dwelling and other similar rights are guaranteed in the Constitution to citizens, and the Courts have interpreted those provisions as having the effect, at least in certain circumstances, of not excluding the existence or the granting of similar identical rights to persons where not citizens. It is the view of the Court that that argument fails by reason of the clear distinction between the provisions of Article 16, Article 12 and Article 47 which provide the mechanism by which the People may choose and control their rulers and their legislators, and Articles such as Article 40 and Article 44 grants to individuals particular rights within society and in relation to the organs of State."

74. For completeness it should be noted that the 9th Amendment of the Constitution Act 1984 subsequently amended Article 16 so as to permit the Oireachtas to extend the franchise by law to non-citizens in certain circumstances.

75. In *Ighama v. Minister for Justice, Equality and Law Reform*, High Court, 4th November 2002, dealt in passing with the right to work of a non citizen who happened to be an asylum seeker. In his judgment, Ó Caoimh J. stated:

> "With regard to his claim to an entitlement to work, I am satisfied that.. the decision of this Court in the case of *Murtagh Properties Ltd. v. Cleary* [1972] I.R. 330 was based upon the entitlements of citizens under the Constitution. I am satisfied that the applicant has failed to show he has been deprived of any constitutional protected right to work and that the scheme introduced by the Minister was not an abrogation of any constitutional fundamentally right of the applicant."

76. The decision in *Ighama* would appear to be the only decision prior to this case which addresses the question of whether a non-national can invoke the constitutional right to work. It is, perhaps, worth noting that the applicant in that case had been in the State since March 1999, so that at the date of the judgment he had been physically present here for some three years and eight months.

77. One other feature of the judgment should also be mentioned at this juncture: Ó Caoimh J. stated that the judgment of Kenny J. in *Murtagh Properties* turned on the status of the defendant (who was invoking the right in question) qua Irish citizen. As it happens, in *Murtagh Properties*, Kenny J. drew on the language of Article 45.2.i in support of his conclusion that men and women had an equal right to earn a livelihood by virtue of Article 40.3.1. But, in my view, the comments of Ó Caoimh J. in Ighama regarding the reasoning in *Murtagh Properties* cannot be sustained.

78. Save for a passing reference to the provisions of Article 9 and Article 16, there is no discussion at all in *Murtagh Properties* of whether the right to earn a livelihood is in some way linked to citizenship. It is true, of course, that all the main cases dealing with this question - such as, for example, *Murtagh Properties, Murphy v. Stewart* [1973] I.R. 97, *Attorney General v. Paperlink Ltd.* [1984] I.L.R.M. 373 - were all decided entirely within an Irish context, involving Irish citizens and Irish entities. This, however, once again simply serves to emphasise the fact that the issue of the right to earn a livelihood

and citizenship has - with the apparent sole exception of *Ighama* - never arisen prior to this case.

79. This issue also featured in the Supreme Court's judgment in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, [2000] 2 I.R. 360 where one of the issues was whether the Constitution's guarantees of right of access to the courts (Article 34.1) and Article 40.3 (fair procedures) applied to non-nationals. The Supreme Court answered this question affirmatively ([2000] 2 I.R. 360, 385-386):

> "It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34, justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights. In *Murphy v. Green* [1990] 2 I.R. 566,578 Griffin J. observed:
>
> > 'it is beyond question that every individual, be he a citizen or not, has a constitutional right of access to the courts. Stated in its broadest terms, this is a right to initiate litigation in the courts.'
>
> It may be that in certain circumstances a right of access to the courts of non-nationals may be subject to conditions or limitations which would not apply to citizens. However, where the State, or State authorities, make decisions which are legally binding on, and addressed directly to, a particular individual, within the jurisdiction, whether a citizen or non-national, such decisions must be taken in accordance with the law and the Constitution. It follows that the individual legally bound by such a decision must have access to the courts to challenge its validity. Otherwise the obligation on the State to act lawfully and constitutionally would be ineffective. For the purpose of this reference, the Court is satisfied that non-nationals have a constitutional right of access to challenge the validity of any of the [immigration-related] decision taken in relation to him or her.
>
> Similar considerations arise with regard to a non-national's right to fair procedures and to the application of natural and constitutional justice where he or she has applied for asylum or refugee status. The Refugee Act 1996 and the Immigration Act, 1999 confer and regulate the legal right of non-nationals to apply for asylum or refugee status. Persons charged with taking decisions pursuant to those acts are engaged in the administration of the law of the State. As regards judicial review of those decisions the court adopts the following statement of the law by Barrington J. in *The State (McFadden) v Governor of Mountjoy Prison* [1981] I.L.R.M. 113, 177:
>
> > "The substantive rights and liabilities of an alien may be different to those of a citizen. The alien, for instance, may not have the right to vote or may be liable to deportation. But when the Constitution prescribes basic fairness of procedures in the administration of law it does so, not only because citizens have rights, but also because the Courts in the administration of justice are expected to observe certain forms of due process enshrined in the Constitution. Once the Courts have seisin of a dispute it is difficult to see how the standards they should apply in investigating it, should, in fairness, be any different in the case of

an alien than those to be applied in the case of a citizen."

> In that case Barrington J. was concerned with fairness of procedures in the administration of law by the courts. In this reference the court is not concerned with the constitutional principles which should apply in the operation of procedures envisaged by the Refugee Act, 1996 and the Immigration Act, 1999. There is a presumption that those Acts are applied in accordance with those principles. The court is concerned only with the provisions of s. 5 determining the procedure by which the validity of a decision or other matter governed by s. 5(1) may be challenged before the Courts. The Court is satisfied that, in the case of applications to the High Court to challenge the validity of such decisions or other matters, a non-national is entitled to the same degree of natural justice and fairness of procedures as a citizen."

80. The effect of the Supreme Court's decision in *Illegal Immigrants* would accordingly appear to be that non-citizens may invoke these constitutional guarantees of access to the courts and fair procedures in much the same way as citizens, save only that the Oireachtas might, in principle, be entitled to prescribe statutory conditions or other formalities in the case of non-citizens which not might be justifiable in the case of citizens.

81. To complete the picture prior to turning to the cases on family law and Article 41 and Article 42 of the Constitution, I should perhaps mention my own judgment as a judge of the High Court in *Omar v. Governor of Cloverhill Prison* [2013] IEHC 579, [2013] 4 I.R. 186. The principal issue in that case was whether a Somali family who were facing deportation and who had been living here for some eight years could rely on the provisions of Article 40.5 in order to challenge the legality of a search of their dwelling. Relying on the decision in the *Electoral (Amendment) Bill* case, I held that they could, saying ([2013] 4 I.R. 186, 191):

> "Article 40.5 of the Constitution provides:
>
> 'The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.'
>
> It is important to state at the outset that this provision applies to every home in the State, irrespective of the nationality or status of the occupants of the dwelling. The Supreme Court has made it clear that the fundamental rights provisions of the Constitution apply without distinction to all persons within the State: see *The Electoral (Amendment) Bill 1983* [1984] I.R. 268."

82. The issue of non-citizenship has, however, surfaced quite often in the context of family law, child abduction and immigration. Here the cases fall into two distinct types of categories. In the immigration cases the argument has often been that the deportation of the non-national parent or parents of Irish citizens effectively negates the constitutional right of the family under Article 41 to family unity and, specifically, the constitutional right of the children to the care and company of their parents. While the case-law on this topic has ebbed and flowed since the decision of the Supreme Court in *O & L v. Minister for Justice* [2003] 1 I.R. 1, it is clear from the decision in that case that while non-nationals may invoke the provisions of Article 41 and Article 42 of the Constitution, the State also enjoys a major margin of appreciation in regulating these rights in an immigration context. It could not be suggested, for example, that a non-national married to an Irish citizen could insist by virtue of the fact alone on the right to live and remain in the State.

83. This basic principle has not been doubted in the subsequent case-law: the disputes

and arguments have rather been in the context of how a balance is to be struck between the interests of the State in controlling illegal immigration on the one hand and protecting the substance of the Article 41 and Article 42 on the other when invoked by non-nationals.

84. In the family abduction cases the not untypical situation has been that nationals of other countries (generally from the United Kingdom) have travelled here with their children in other to avoid the children being put into care (and, in some cases, even being adopted) in their home country. The argument advanced on their behalf is that the parents are nonetheless entitled to invoke Article 41 and Article 42 of the Constitution as grounds for the non-recognition of court orders in their country of origin under the Hague Convention. While the majority of the cases touching on this issue have been in the immigration area, the most detailed analysis of the question has come in the child abduction cases.

The Supreme Court's decision in Nottinghamshireshire CC v. KB

85. In the wake of *Nicolaou* the question of the right of a non-citizen to invoke the Constitution seems to have lain largely dormant subject to a number of specific examples and specific areas which I will consider presently. As O'Donnell J. observed in *Nottinghamshire County Council v. KB* [2011] IESC 48, [2013] 4 I.R. 662, 743 the issue which had thus been raised in *Nicolaou*:

> "……has not been resolved since, albeit that a modus vivendi appears to have been arrived at in which non citizens have been permitted to invoke some provisions of the Constitution that while it is accepted that some aspects of the Constitution, essentially related to voting and representational matters are nevertheless properly limited to citizens. It has not however been possible to articulate any unifying theory."

86. Perhaps the most convenient place to start with a consideration of this question is the Supreme Court's decision in *KB* itself. In that case the parents of children who had lived all their lives in the UK and who had no connections with this country arrived in Ireland in November 2008. The relevant local authority, Nottinghamshire County Council had become concerned about the treatment being afforded to the children and had commenced proceedings in the UK courts some days earlier.

87. The Council brought an application pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (The Hague Convention 1980) and Article 11 of Council Regulation 2201/2003/EC. The parents contended that this Court should refuse to order the return of the children pursuant to Article 20 of the Hague Convention, the provisions of which had become part of the domestic law by virtue of the provisions of the Child Abduction and Enforcement of Custody Orders Act, 1991. Article 20 of the Hague Convention provides:

> "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

88. The Supreme Court ultimately upheld an order made by the High Court for the return of the children to the United Kingdom. In his judgment, however, O'Donnell J. summarised the issue which was before the Court ([2013] 4 I.R. 662, 711) in the following terms:

> "The parents' case was that they, together with their children, constituted a family for the purposes of Article 41 and 42 of the Irish Constitution and that return of the children would be in breach of those provisions of the Constitution because the law of the United Kingdom permitted adoption of the children of married couples in circumstances which would not be

> permitted in this jurisdiction by virtue, it was said, of the constitutional rights afforded to families under the Irish Constitution."

89. The Court ultimately found that the return of the children in the circumstances of the case was not contrary to Article 20 of the Hague Convention. But the judgment is notable for a sustained and detailed analysis by O'Donnell J. of the underlying issues regarding the capacity of non-citizens to invoke the Constitution. As it happens, Denham C.J., Fennelly and Macken JJ. agreed with O'Donnell J. Murray J. delivered a separate judgment in which agreed with the ultimate result, but he appears to have disagreed in part with the reasoning of O'Donnell J.

90. In his judgment, O'Donnell J. first stated ([2013] 4 I.R. 662, 719):

> "It is however important to keep in mind that the ultimate standard for the Court is that imposed by the Constitution. For reasons which I will elaborate upon later in this judgment I consider that the Constitution prohibits the return of children under Article 20 when the adoption or other care proceedings in the requesting state are so proximately and immediate a consequence of the Irish court's order of return, and are so contrary to the scheme and order that the Constitution envisages and guarantees within Ireland, that the order of return would itself be a breach of the court's duty to uphold the Constitution. Why that is so, and the factors which may be considered in applying this test, will be addressed later in this judgment. However it should be said here that in this case the claim falls decisively short of satisfying either limb of the test. An adoption of these children is not so proximate and an immediate consequence of an order of return and in any event, it is not so contrary to the Irish constitutional scheme so as to require an Irish Court to refuse to make an order returning the children."

91. O'Donnell J. then noted the significant of the decision of the High Court in *Northampton County Council v ABF* [1982] I.L.R.M. 194. In that the plaintiff Council sought the return of an infant child born in England to an English couple who were married to each other but who were at the time of the case separated from each other. It was common case that if returned to England, the child would be adopted with the consent of the mother but against the wishes of the father.

92. Hamilton J. rejected the submission that the protections of Article 41 and 42 were restricted to Irish citizens. Relying on a passage in the judgment of Walsh J. in *McGee v Attorney General* [1974] I.R. 284, 317 Hamilton J. continued:

> "It seems to me however that non citizenship can have no effect on the interpretation of Article 41 or the entitlement to the protection afforded by it. What Article 41 does is to recognise the Family as the natural primary and fundamental group of society and as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law, which rights the State cannot control. In the words of Walsh J. already quoted "these rights are part of what is generally called the natural law" and as such are antecedent and superior to all positive law.
>
> The natural law is of universal application and applies to all human persons, be they citizens of this State or not, and in my opinion it would be inconceivable if the father of the infant child would not be entitled to rely on the recognition of the family contained in Article 41 for the purposes of enforcing his rights as the lawful father of the infant the subject matter of the proceedings herein or that he should lose such an entitlement merely because he removed the child to this jurisdiction for the purposes of enforcing his rights.

> These rights are recognised by Bunreacht na h-Éireann and the courts created under it as antecedent and superior to all positive law: they are not so recognised by the law or the courts of the jurisdiction to which it is sought to have the infant returned."

93. As it happens, these comments were made in the context of what appears to have been a summary application brought by the Council in the High Court for the return of the children. Hamilton J. refused to make the order sought and directed a full plenary hearing. In KB O'Donnell J. observed ([2013] 3 I.R. 662, 723):

> "There is no record of any such hearing and it appears to be assumed that the case was settled. (See *Shatter Family Law* 4th edition, para 13.160). There, and rather unhelpfully, the trail comes to an end."

94. As O'Donnell J. noted, the treatment in the *Northamptonshire* case of many complex issues involving the inter-action of the conflict of laws and the Constitution, along with the right of non-citizens to invoke constitutional provisions is not entirely satisfactory, not least where those non-citizens had no prior connection with this State prior to their arrival in this country.

95. There then followed a series of child care cases where this issue was also raised. Thus, in *Oxfordshire County Council v JH* (High Court, 19th May 1988) Costello J. made an order returning that child to the care of the County Council in England on the basis of his analysis of the position under English law and accordingly, that there was no risk of adoption. He did however observe in passing:

> "although it may seem somewhat strange so to hold, the situation is that people who come into this jurisdiction, even for a short while, are entitled to gain the benefits that the Constitution confers on citizens as well as non-citizens".

96. The question of the rights of non-citizens was also raised in *Saunders v Mid-Western Health Board* (High Court, 11th May 1987) and (Supreme Court, 24th June 1987), an application was made by the British parents of the British citizen children under Article 40 of the Constitution seeking custody of their three children, then in the custody of the Mid-Western Health Board. In his judgment Finlay C.J. stated that the parents had brought the children to Ireland unlawfully and in breach of an order made by the English courts. Finlay, C.J. continued:

> "Where as happened, as happened in this case, parents having no connection with Ireland bring their children unlawfully from the country in which they are, into the jurisdiction of this Court, in breach of an order made by the court in the jurisdiction in which they are domiciled and in which the children were being reared, I do not accept that they can by that act alone confer on themselves and their children constitutional rights under Article 41 and 42 of the Constitution. These parents do not claim any grounds for asserting constitutional rights under Articles 41 and 42 of the Constitution other than that they arrived in this country in the circumstances which I have just outlined. I am accordingly satisfied that the submission made on their behalf that the existence of these constitutional rights prevents the making of the order made by the [High Court] must be rejected."

97. As it happened, *Saunders* was relied on heavily by the plaintiff Council in the hearing in the High Court in *KB*. In her judgment in the High Court ([2010] IEHC 9) Finlay Geoghegan J. had indicated her unease with the suggestion that the decision in *Saunders* was an authority for the proposition that non-citizen parents could not invoke the provisions of the Constitution:

> "In the course of hearing, I raised with counsel for the applicant the existence of subsequent Supreme Court decisions indicating that a family, even if made up of exclusively non-Irish citizens, may be entitled, whilst

in this jurisdiction, to the constitutional recognition and rights of a family pursuant to Articles 41 and 42 of the Constitution. I have not had the benefit of submissions of counsel on both sides in relation to this issue. There are a number of dicta (probably all obiter) in judgments of the Supreme Court which indicate that a family of non-Irish citizens, whilst in the State, may be entitled to rely on Articles 41 and 42, at least in certain circumstances. For example, in *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1, 82-83 which concerned families, at least one member of which was an Irish citizen, Murray J. ….in giving one of the majority judgments, stated:

> "… in my view, the protection afforded by the Constitution to the family is not dependent entirely on whether it counts among one of its members a citizen of the State. …. When a family of non-nationals is within the State it has all the attributes which the Constitution recognises as a 'moral institution'. I do not think that there can be any question but that the non-national children of such a family have a constitutional right to the company, care and parentage of their parents within a family unit while in the State and that one or both parents could not be removed from that role on grounds any different from those which the Constitution permits as the basis for removing children from the custody of their parents who are citizens."

I am hesitant therefore to consider *Saunders* as authority for the applicant's submission that the respondents and their children should not be entitled to recognition as a family whilst in Ireland for the purposes of Articles 41 and 42 and, whilst here, to rely on the constitutional rights accorded to families and their members thereunder. The ratio of *Saunders* appears to be that the parents in that case, by bringing their children unlawfully into this jurisdiction in breach of an English Court order, were not, by that act alone, entitled to rely upon constitutional rights under Articles 41 and 42, so as to preclude the Irish Courts, pursuant to the principle of comity of Courts and the then principle that the welfare of children should be determined by Courts of the jurisdiction in which they ordinarily reside and in which they were intended to be brought up, making an order for their custody to be given to the person entitled in accordance with the English Court order and, in substance, an order for their return to England.

I have concluded that, having regard to the terms of Articles 41 and 42 of the Constitution, and the fact that the applicant accepts that the respondents are persons married to each other, that I should, for the purpose of this application, consider them as entitled to recognition as a family in this jurisdiction for the purposes of Articles 41 and 42 and the rights accorded to a family and its members by those articles. Hence having regard to the decision of the Supreme Court in *Saunders*, and the terms of Article 20 of the Convention, the primary issue to be determined in this case is whether Articles 41 and 42 do not permit the Courts to make an order for the return of the children in circumstances where they have been unlawfully removed from England to Ireland, in the sense of being wrongfully removed, and where the purpose of the order for return is to enable the Courts of their habitual residence, *i.e.* England, determine disputed matters affecting their welfare in accordance with the laws of England and Wales, even where such decisions might include the making of an adoption order which would not be permissible in this jurisdiction."

98. In the Supreme Court O'Donnell J. observed that the High Court judge "was entirely correct" to take this approach. He continued ([2013] 4 I.R. 662, 741-742):

> "The broad principle the respondents sought to deduce from *Saunders* and apply in this case would be extremely far-reaching. Even within the narrow confines of the case itself, the proposition, if correct, raised a number of difficulties. Why if *Saunders* was justification for holding that parents were disentitled to rely on Articles 41 and 42, were the parents in *Saunders* nevertheless entitled and permitted to invoke the jurisdiction under Article 40.4? Would it follow that while the children in Saunders or in this case were in the care of the HSE or its statutory predecessor that by reason of the circumstances in which the children came to Ireland alone that the Health Board/HSE would be entitled to treat the children and the parents differently from an Irish family? Would it be possible to pass legislation allowing the adoption of children of any married non nationals, or even just those brought to Ireland "wrongfully" within the meaning of the Hague Convention? These are substantial issues which are not addressed in the decision itself or in the arguments sought to be constructed on foot of it.
>
> I should say immediately that in my view the decision in *Saunders* is much too slender a basis to bear the argument the respondents seek to construct. Nor can reliance be placed upon Saunders as part of any wider proposition without a comprehensive analysis of case law extending well beyond the question of child abduction…..
>
> There were, in my view, many reasons why the applicants in *Saunders* were bound to fail in their application. At a most basic level they do not seem to have articulated any basis for saying that either the return of the child to England, or indeed the existence of the wardship jurisdiction in England, was in any plausible or arguable sense a breach of Article 41 and Article 42. Furthermore and plainly, Saunders does not purport to establish any general principle. It does not itself address any other authority most notably the Northampton case. Second, if it did decide that the fact of a breach of a court order disentitled the parents in that case from reliance on the constitutional provisions, that reason cannot be readily applied here where the breach does not amount to contempt of court. Indeed, if the respondents and notice party were correct, then a consequence would be that Article 20 [of the Hague Convention] would have no meaning whatsoever at least in the case of Ireland."…. Is, for example, an Irish citizen albeit non resident, debarred from invoking the provisions of the Irish Constitution if removal to this jurisdiction is "wrongful" under the provisions of the Convention? Is the prohibition on invoking the Constitution absolute or is it limited to certain of its provisions and does it apply only in certain circumstances? In my view, in this respect, *Saunders*, far from establishing a principle of broad and general application, is a case to be treated as one decided on its own particular facts."

99. O'Donnell J. then continued ([2013] 4 I.R. 662, 743-744):

> "The issue of whether some or all of the constitutional provisions are limited to citizens was first raised almost 50 years ago in *The State (Nicolaou) v An Bord Uachtála* [1966] I.R. 567 and was debated in that case over nine days in the High Court, and eleven days in the Supreme Court without definitive resolution. It has not been resolved since, albeit that a *modus vivendi* appears to have been arrived at in which non-citizens have been permitted to invoke some provisions of the Constitution that while it is accepted that some aspects of the Constitution essentially related to voting and representational matter are nevertheless

> properly limited to citizens. It has not however been possible to articulate any unifying theory. It follows, that the related and even more complex question as to whether and if so how, a person can assert that the act of travelling to Ireland can give rise to constitutional rights or claims, has not been addressed yet. However, the requirement that issues are determined in cases which are the subject of a real dispute which requires resolution, and the necessity and desirability that any such issues should be the subject of comprehensive argument both in the High Court and Supreme Court, means that it is neither necessary, nor possible to seek to resolve the issue here. If the issue is to arise in any future case, it will be necessary to consider carefully the constitutional text, many more decisions than were cited in this case, and a number of different fact situations including questions as to the significance of citizenship, residence, or fleeting presence in the jurisdiction. It may be that regard might usefully be had to the provisions of Article 40.1 of the Constitution which does not appear to have figured significantly in the decisions or commentary to date. Whether that provision or any other provision is of any assistance, is a matter which may however properly await a case in which the issue is squarely addressed, and where it requires determination."

100. It is also of interest that although in his concurring judgment Murray J. agreed with the result, he appears to have taken a somewhat different view on the capacity of the English parents to invoke the relevant constitutional provisions where "the mere physical fact of an abduction to this country and no more by [the parents] would deprive the courts in their own country of the jurisdiction [under the Hague Convention] which this country is bound to recognise." Given that the children's life and their family life had been "inextricably and exclusively linked" with the UK, Murray J. considered that this was the appropriate governing law. In effect, therefore, Murray J. was prepared to apply the earlier reasoning of the Supreme Court in *Saunders* without any qualifications.

101. If one endeavours, therefore, to sum up the case-law on this topic, the following generally principles may be discerned:

102. First, the word "citizen" as it appears in the Constitution does not have a single, uniform meaning. In some contexts, the word must be understood as meaning "citizen" in the sense in which that term is defined in Article 9. In other contexts, the word may be regarded as equivalent to "person".

103. Second, the *Electoral (Amendment) Bill* reference makes clear that in the case of matters touching on elections, referenda, voting and the general political organisation of the State, the rights conferred by the Constitution are confined to those persons who are also citizens of Ireland, subject now only to the specific amendments to Article 16 effected by the 9th Amendment of the Constitution Act 1984.

104. Third, the three major Supreme Court decisions which have addressed this point in the wake of *Nicolaou* - *Electoral (Amendment) Bill, Illegal Immigrants* and *KB* - have all concluded that non-citizens in principle enjoy the rights guaranteed by the fundamental rights provisions of Articles 40 to Article 44 of the Constitution in much the same general (but perhaps not identical) manner as citizens.

105. Fourth, there may nonetheless be special cases where non-citizens will not be permitted to invoke the fundamental rights provisions of the Constitution or, at least, where claims of this nature will be viewed with circumspection. These cases might include cases such as where non-citizens travel here for the purpose of circumventing the governing legal rules prevailing in their own State (as happened in cases such as Saunders and KB) or where their presence in the State is purely fleeting, accidental or

temporary or conditional.

106. Fifth, the State's capacity to regulate or restrict the fundamental rights of non-citizens is generally greater where the non-citizen is present for reasons which are fleeting, accidental, temporary or conditional.

Whether a non-citizen can invoke the constitutional right to earn a livelihood
107. This brings us to the issue which is at the heart of the constitutional question, namely, whether a non-citizen can invoke the constitutional right to earn a livelihood.

108. It may be observed immediately that there are certain categories of employment and occupations that either are linked, or which might reasonably be linked, to the status of citizenship. This is well summed up by Article 51 TFEU which provides that even in the EU free movement context, the right of establishment does not apply to occupations which "are connected, even occasionally, with the exercise of official authority." One could well envisages circumstances where this State (or, for that matter, any State) would reserve certain categories of public service or occupations to those who are its own citizens and who have accorded demonstrated loyalty to the State. Examples here in an Irish context might include members of An Garda Siochána, the Defence Forces, the judiciary and court service, diplomats, the Revenue Commissioners and, indeed, (subject perhaps to exceptions for the lowest grades) the wider public service. All of these positions and occupations could be said to be connected with the exercise of official authority in one shape or another.

109. While the linkage between citizenship and the right to pursue certain vocations or employments is a tangible one in those cases involving the exercise of official authority, this is not true so far as the majority of occupations, trades or employment opportunities are concerned. In the generality of cases, therefore, the right to earn a livelihood is, as cases such as *Murphy v. Stewart* illustrate, a pure unenumerated personal right derived from Article 40.3.1. It is clear, therefore, from the comments of the Supreme Court in *Electoral (Amendment) Bill* that non-citizens can in principle and under certain circumstances invoke a constitutional right of this kind which is derived from Article 40.3.1.

110. It follows, therefore, that non-citizens should be *in principle* be permitted to rely on the constitutional right to earn a livelihood. Here it must be recalled that employment is not just simply a means of earning a living. Employment gives dignity to what otherwise would be for many a soulless existence and for those of us those fortunate to have an occupation, trade or employment, this may be said to be one of the key defining features of our lives. The protection of the dignity of the *individual* (and not simply citizens) is, of course, one of the objectives which the Preamble to the Constitution seeks to secure.

Whether s. 9(4)(b) of the 1996 Act meets constitutional standards
111. In assessing the question of whether s. 9(4)(b) of the 1996 Act meets appropriate constitutional standards by excluding the possibility of any asylum claimant engaging in gainful employment pending the determination of their claim, I propose to apply the classic proportionality test set out by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593, 607:

> "In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society…The objective of the impugned provision must be of sufficient importance to warrant

> overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-
>
> > (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
> >
> > (b) impair the right as little as possible, and
> >
> > (c) be such that their effects on rights and proportional to the objective…"

112. One may start from the proposition that the regulation of access by non-nationals to the labour market is a matter in which the State has a considerable and vital interest. This interest is especially acute in the context of access to that market by asylum seekers. Recent experience - both in this State and elsewhere in the European Union - has shown that the careful system of asylum adjudication introduced by the Geneva Conventions in the aftermath of the horrors of the Second World War currently labours under severe stress. The last twenty years or so have witnessed very significant numbers of applications for asylum in this State, often in circumstances where the applicants themselves are simply economic migrants seeking a better life for themselves and their families and who could not qualify as asylum seekers.

113. The evidence in the High Court furthermore clearly showed - and McDerrmott J. very properly accepted - that if asylum seekers were permitted to work in the State pending the determination of their asylum claim this would operate as a form of "pull" factor which would tempt many economic migrants to come here and to make asylum claims. All of this would place further burdens on an already heavily burdened State asylum system. If, moreover, such economic migrants could arrive here and immediately claim a right to work pending the adjudication of their asylum system, this would tend to undermine the integrity of the asylum system by encouraging false and abusive claims at the hands of those who were in reality simply economic migrants.

114. In any assessment of the proportionality of the measure it is also relevant to bear the comments of Keane C.J. in *Illegal Immigrants* in mind when he stated that ([2000] 2 I.R. 367, 381-382):

> "It may be that in certain circumstances a right of access to the courts of non-nationals may be subject to conditions or limitations which would not apply to citizens."

115. While these comments were made in the context of access to the courts, similar observations may be made *a fortiori* in terms of the access of non-nationals to the labour market.

116. The exclusion of non-nationals from the labour market accordingly serves important State goals which are based on rational considerations. The dangers presented to the organisation of society by unrestricted or unregulated migration are obvious and all free and democratic societies have seen fit to impose restrictions on such migration for reasons that are all too clear. Legislation giving effect to this State policy cannot accordingly be regarded in principle as unconstitutional. It follows, therefore, that a measure which excluded non-nationals entirely from the labour market for even a period of years would not *in principle* - and I again stress these words - be unconstitutional.

117. That, however, does not mean that this particular section should necessarily survive constitutional challenge *in its present form*. The all-embracing and, most especially, the indefinite nature of the exclusion from any type of gainful occupation, is

particularly striking. It is clear from the *Heaney* test that the essence of the constitutional right in question must be preserved if the impugned legislative measure in question is to pass any proportionality analysis.

118. In the present case the applicant has been waiting for over seven years for a proper and lawful adjudication of his asylum claim. If he indeed has a constitutional right to work and to earn a livelihood (albeit a right which is more qualified than that which would apply in the case of citizens), how much longer is he supposed to wait before he is granted permission to seek to take up some gainful occupation? It is one thing to wait for a fixed (if lengthy) period in a scheme of direct provision: it is quite another to wait for over seven years in circumstances where individual autonomy and self-respect is sapped and where the key constitutional objective of preserving the essential dignity of the individual is ultimately compromised by a State scheme which over a prolonged period of time leads to idleness, aimlessness, demoralisation and, ultimately, psychological difficulties and, doubtless in some instances, psychiatric disturbance.

119. Extraordinary delays of this kind moreover lessen the State's interest in maintaining such complete exclusions from the labour market in the case of asylum seekers such as the applicant. If applicants for asylum were entitled to work as soon as they arrived in the State (or, at any rate, quickly thereafter), it may be assumed that such a "pull" factor would be likely to attract very large numbers of economic migrants who claimed asylum upon their arrival. If, for example, asylum seekers were required to wait for three years before any application for permission to work could be considered, this would have the effect of deterring many - admittedly not all - claimants who were in reality economic migrants. But very few economic migrants who arrived under the guise of making asylum claims while in reality seeking employment opportunities would be attracted to come here in order to wait for seven years before being permitted even to apply for permission to enter the labour market.

120. For my part, I do not think that the *Heaney* proportionality test should be applied in some mechanistic or formalistic fashion such as would essentially negate the core of the fundamental right. It would be a poor constitutional right indeed that could endure without objection such an open-ended exclusion lasting for more than seven years.

121. Nor do I think that the *Heaney* test should be applied in such a fashion as would obscure the very reason of having a Constitution with fundamental rights guarantees in the first place. It was never the intention of the drafters of the Constitution that these fundamental right guarantees would be reduced to pure platitudinous statements of benevolent good will which could readily be overborne once any attempt to take these rights seriously was likely to prove inconvenient or might thwart policy choices made by the Oireachtas or the Government. The object instead was to the ensure that, subject to the ultimate decision of the People via the referendum process, the substance and core of certain fundamental rights of the individual should be placed beyond the reach of majority vote in the Oireachtas. This objective, was, after all, as the Preamble to the Constitution declares, to secure the dignity and freedom of the individual as befits a democratic society governed by the rule of law. These are objectives which soar above the exigencies of public administration, the fine calculations of the legislative and the executive branches or the vagaries of public opinion.

122. Measured against these considerations I am driven to the conclusion that the open-ended and indefinite exclusion of the applicant from the labour market contained in s. 9(4)(b) of the 1996 Act for a period now lasting over seven years strikes at the very substance of his constitutional right to earn a livelihood. It fails the *Heaney* proportionality test for this precise reason.

123. It is for this reason that I find myself respectfully differing from the contrary conclusion reached by McDermott J. in the High Court.

Conclusions on the constitutional issue

124. I would accordingly grant the applicant a declaration that s. 9(4)(b) of the 1996 Act is unconstitutional *in its present form*. While, for the reasons I have already stated, I do not think that legislation of this kind is *in principle* unconstitutional, provided that the periods of exclusion from the labour market are not of indefinite duration capable (as here) of applying for very many years to individuals such as the applicant. Given, however, that the legislation applies in this indefinite fashion, I see no alternative but to invalidate this sub-section by reason of its constitutional overbreadth.

Part V: The European Convention of Human Rights

125. As I am aware that my colleagues have reached a different conclusion so far as the

the constitutional issue is concerned and that I am in dissent on this question of constitutional validity, I propose now to consider arguments based on the European Convention of Human Rights. In this context the first thing to note is that the ECHR has no counterpart to Article 40.3.1 of the Constitution. Nor can I identify any specific provision of the Convention which could be said to be deal with the right to earn a livelihood along the lines recognised by the Supreme Court in cases such as *Murphy v. Stewart, Cox* and the *Employment Equality Bill*.

126. All of the ECHR authorities relied on by Mr. Lynn S.C. on behalf of the applicant involved cases where individual freedoms guaranteed by the Convention (such as the right to private life in Article 8 ECHR) inter-acted with national employment law. Thus, in *Demir v. Turkey* [2008] ECHR 1345 the European Court held that the nullification of a collective trade union agreement violated Article 11 ECHR (right of association). In *Martínez v. Spain* [2014] ECHR 615, (2015) 60 EHRR 3 a Spanish Employment Tribunal held that the non-renewal of a teaching contract of a priest charged with teaching Roman Catholic faith doctrine was lawful as the priest in question was married with children, contrary to the teachings of his Church. The European Court held that this was not a breach of Article 8 given that the Spanish state was entitled to take proportionate measures to protect the autonomy and religious freedom of the Church. Finally, in *Volkov v. Ukraine* [2013] ECHR 288 the dismissal of a judge because he had, *inter alia*, heard appeals from his brother-in-law was held to be a breach of Article 8 ECHR.

127. These - and other similar decisions of the ECHR - are all cases with one unifying theme, namely, the impact of substantive provisions of the Convention (such as private life or the right to free speech or association) and domestic employment law in certain, specific factual circumstances. There is, however, nothing at all in the extensive jurisprudence of the European Court of Human Rights which suggests that there exists a substantive, free standing right to earn a livelihood of the kind under the ECHR which might otherwise assist the applicant.

128. The English Court of Appeal reached a similar conclusion *in R. (Negassi) v. Home Secretary* [2013] EWCA Civ 151 (a case concerning the rights of asylum seekers to work under both the Reception Directive and the ECHR) where Kay L.J. said, following an exhaustive review of the authorities, that it was "common ground that Article 8 ECHR does not embrace a general right to work", adding that the Court had not been referred "to any Strasbourg authority which supports the engagement of Article 8 in these circumstances."

129. I would accordingly decline to grant the applicant a declaration pursuant to s. 5 of the European Convention of Human Right Act 2003 that s. 9(4) of the 1996 Act of the

1996 is incompatible with the State's ECHR obligations.

Part VI: Overall conclusions

130. In summary, therefore, I believe that on its proper construction s. 9(4) of the 1996 Act (as applied by s. 9(11)) precludes an asylum seeker engaging in any gainful activity pending the determination of his or her claim. In these circumstances, the Minister enjoys no discretion to grant such permission, whether by virtue of the inherent executive power under Article 28.2 of the Constitution or otherwise.

131. The State lawfully exercised its discretion to opt-out of the Reception Directive which addresses the right of asylum seekers to work after an interval of time. The State cannot accordingly be said to be "implementing" EU law for the purposes of Article 51(1) of the EU Charter of Fundamental Rights.

132. Even if the State were indeed implementing EU law for this purpose, it is clear that Article 15.1 of the Charter dealing with the right to work does not avail the applicant. On the contrary, Article 15.3 of the Charter makes it clear that the rights of non-nationals to work within the European Union territory are confined to those who are authorised to work for this purpose. The applicant is not, of course, so authorised.

133. In the light of the Supreme Court's decision in the *Electoral (Amendment) Bill* it is clear that non-nationals are in principle entitled to invoke the fundamental rights guarantees contained in Article 40 to Article 44 of the Constitution, even if in some circumstances the exercise of such rights by non-nationals may legitimately be subjected to restrictions which could not legitimately be applied to citizens.

134. In the light of cases such as *Murphy v. Stewart* onwards, it is clear that the Supreme Court has determined that the right to earn a livelihood falls into the category of such an unenumerated personal right protected by Article 40.3.1

135. Given the State's interest in deterring illegal migration and false claims for asylum by those who are simply economic migrants, an absolute exclusion on the right to work for even a period of years would not in principle be unconstitutional. Nevertheless, I am of the view that s. 9(4)(b) of the 1996 Act as cast *in its current form* fails a proportionality test in that provided for an *indefinite* exclusion of this applicant from the labour market in circumstances where he has now been waiting for over seven years for a valid and proper adjudication on his application for asylum.

136. It is in these circumstances that I find myself coerced to the conclusion that s. 9(4)(b) of the 1996 Act negates the core and substance of the applicant's constitutional right to earn a livelihood. I would accordingly grant the applicant a declaration that s. 9(4)(b) of the 1996 Act is unconstitutional.

137. The ECHR does not contain any provision which corresponds to Article 40.3 of the Constitution. I cannot identify any right under the ECHR which would assist his claim regarding a right to work and I would accordingly decline to grant a declaration pursuant to s. 5 of the European Convention of Human Rights Act 2003 that s. 9(4) of the 1996 Act is incompatible with the State's obligations under that Convention.