Irish Court of Appeal

Judgment

Title:	Luximon & Ors -v- The Minister for Justice and Equality & Ors
Neutral Citation:	[2016] IECA 382
Court of Appeal Record Number:	2015 316
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Judgment by:	Finlay Geoghegan J.
Status:	Approved
Result:	Dismiss

THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 382

Finlay Geoghegan J.
Peart J.
Hogan J.

Appeal No. 2015/316

BETWEEN

DANIYBE LUXIMON AND PRASHINA CHOOLUN

(A MINOR SUING BY HER MOTHER AND NEXT FRIEND,

DANIYBE LUXIMON)

APPLICANTS/RESPONDENTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT/APPELLANT

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 15th day of December 2016

1. The Minister for Justice and Equality appeals against the decisions of the High Court (Barr J.) in a written judgment of the 20th March, 2015, *Luximon v. Minister for Justice* [2015] IEHC 227 and order made pursuant thereto. The High Court granted an order of *certiorari* quashing the decision of the Minister dated the 5th November, 2012, refusing the first applicant, Ms. Luximon's application for permission to remain in the State pursuant to s. 4(7) of the Immigration Act 2004 ("the 2004 Act") and for what was referred to as a "change of status".

2. The trial judge certified that the High Court decision involved points of law of exceptional public importance in relation to which it was desirable in the public interest that an appeal be taken:-

> 1. Is the appellant obliged to consider rights alleged to arise under the Constitution/European Convention on Human Rights Act 2003 in applications made under s. 4(7) of the Immigration Act 2004, by or on behalf of persons whose permission to be in the State has expired where such rights must be considered by the appellant where the appellant is considering whether or not to make a deportation order in respect of the person concerned in the deportation process under s. 3 of the Immigration Act 1999?
>
> 2. Is there an obligation imposed in law on the appellant to publish any criteria applicable under s. 4(7) to a person in [Ms. Luximon's] position i.e. a timed-out non-EEA student without any current resident permission at the time of application who seeks permission to change their immigration status?

3. This appeal was heard at the same time as another appeal from the High Court (Humphreys J.) in *Balchand v. Minister for Justice* [2016] IEHC 132. In that case an application for *certiorari* had been refused to the applicants in relation to an analogous application to the Minister pursuant to s. 4(7) of the 2004 Act.

4. The Irish Human Rights and Equality Commission was granted leave to appear as *amicus curiae* in both appeals by order of the court of the 29th April, 2016. Helpful submissions were made both in writing and orally on its behalf on the primary issue in both appeals in respect of which the High Court judges had reached differing conclusions.

5. Whilst this judgment is given on the appeal in these proceedings it takes into account the views expressed by the trial judge in the *Balchand* proceedings and also the submissions made both in writing and orally on that appeal. A separate judgment is being delivered in that proceeding.

Background facts

6. Ms. Luximon is a citizen of Mauritius. The second named applicant is her daughter, also a citizen of Mauritius, who at the time of commencement of the proceedings in 2013, was a minor and in her first year of secondary school in Ireland.

7. Ms. Luximon arrived in the State in July 2006 for the purpose of pursuing a course of study in the State. At the time citizens of Mauritius did not require a visa to enter the State. She was granted permission to remain in the State and was registered on "Stamp 2" conditions. She was joined in the State by her two minor daughters in the same year.

8. "Stamp 2" conditions permitted Ms. Luximon to remain in Ireland to pursue a course of studies; precluded her from engaging in any business or profession other than employment for up to 20 hours per week during school term and up to 40 hours per week during school holidays and specified a date beyond which she might not remain in the State. In addition she had no recourse to public funds unless otherwise provided. Ms. Luximon has been continuously employed since her arrival in the State in the role of a dental practice co-ordinator. Ms. Luximon's permission to remain in the State on "Stamp 2" conditions were renewed from time to time and the last such permission expired on the 26th June, 2012.

9. On the 27th March, 2012, her employer had made an application for a Green Card Employment Permit which was not successful.

10. By letter dated the 30th October, 2012, application was made by Ms. Luximon's solicitors for renewal of her permission to remain in the State pursuant to s. 4(7) of the 2004 Act and for a change in her immigration status to "Stamp 4" conditions. The application specifically referred to the protection of the applicants' rights to private and family life pursuant to Article 8 of the Convention on Human Rights :

> "Article 8 ECHR Rights engaged
>
> Our client and her daughters have been resident in the State permanently since 2006. The family have a wide network of friends and are fully integrated into their local community. Ms. Luximon instructs that she is very happy in the State and that her daughter is thriving at school. She says her sole motivation is to continue to contribute to the local and family economy.
>
> The European Court of Human Rights has noted that the protection of Article 8 of the European Convention on Human Rights both in its "family life" and "private life" applies to integrated aliens or long term residents of an EU Member State (see the case of *Uner v. Netherlands*). Clearly, Article 8 of the ECHR is engaged by our client. For the Minister to refuse the within application to allow Ms. Luximon to reside lawfully in the State so as to provide for her minor daughter financially, would result in their Article 8 rights being irreparably infringed. We would respectfully submit that the Minister in his Article 8 assessment of this application ought to consider the best interests of the minor child, as per the guidance of the UK Supreme Court in *ZH Tanzania*.
>
> Conclusion
>
> Our client's immigration history in the last number of years has been exemplary. Whilst the present lapse of her permission to remain is regrettable, she has endeavoured to remedy this. It was

> never her intention to become illegally present in the State. It is acknowledged that the State has the right to control the entry, presence, and exit of foreign nationals, subject to the Constitution and international agreements. It is further acknowledged that the Minister must have regard to the common good. We would respectfully submit that the grant of temporary permission to remain on stamp 4 conditions to Ms. Luximon would be in accordance with the common good in this instance having regard to her children's best interests."

11. That application was refused and the decision communicated in a letter dated the 5th November 2012. The reasons given related primarily to what are termed "Student Immigration Rules" set out under a "New immigration regime for full time non-EEA students" published in September 2010 and which had been in effect since the 1st January, 2011. Those rules permit non-EEA students to reside in the State as students for a maximum period of seven years but lesser periods for certain courses. The decision granted Ms. Luximon an extension of her student permission up to the 19th December, 2012, to permit her to finalise her affairs in Ireland. The letter then stated:-

> "At the end of this period your client MUST leave the State unless they have secured another form of immigration permission eg. a work permit or green card. Upon leaving the State your client MUST provide this office with evidence of their departure (eg. copy of Chinese re-entry stamp)
>
> This evidence should be provided no later than 30 days after your client has left the State.
>
> If evidence of your client's departure from the State is not received by the due date it is the intention of this office to issue a notification under the provision of s. 3(4) of the Immigration Act 1999, (Notification to deport) in respect of him/her."

12. The decision made no reference to the rights of the applicants pursuant to Article 8 ECHR and no reference at all to the position of her minor daughter, the second named applicant.

Judicial review

13. By order of the High Court (McDermott J.) of the 14th February 2013, the applicants were granted leave to apply for an order of *certiorari* of the Minister's decision of the 5th November 2014 and related reliefs upon four of six proposed grounds. The first two grounds were that the decision was unlawful by reason of "the failure to have any regard to the personal and/or family and/or private rights of [the first and second applicants] pursuant to Article 40.3 and/or 41 of the Constitution and/or Article 8 of the European Convention on Human Rights".

14. The response in the notice of opposition to those grounds was:

> "The respondent is not obliged to consider Article 8 rights and/or personal and/or private and/or family rights either under the European Convention on Human Rights and/or the Constitution of Ireland at this stage in the process. These are matters to be taken into consideration at the stage of expulsion from the State. Clearly, the applicants do not fall into that category at this stage."

15. The Minister did not assert in these proceedings, as a ground of opposition, that the applicants did not have rights to private life or family life capable of protection either by the Constitution or Article 8 of ECHR. Rather, as appears, the Minister contended that

there was no obligation on her to consider such matters at this stage i.e. on the application pursuant to s. 4(7) of the 2004 Act to renew the permission to be in the State. She contends that these were matters to be taken into account at the stage of expulsion from the State or as more precisely put in submission, in the deportation process pursuant to s. 3 of the Immigration Act 1999.

16. The trial judge at para. 116 correctly identified on this aspect of the judicial review proceedings the central question before him as being "whether the Minister or an immigration officer acting on her behalf, when making a decision in respect of a s. 4(7) application, is obliged to consider *any rights* the applicant may have under the Constitution and/or the Convention". (Emphasis added)

17. The trial judge appears to have distinguished between those decisions on an application pursuant to s. 4(7) of the 2004 Act, which brought to an end a period of lawful residence in the State and those which did not. He concluded that in relation to the applicant her period of lawful residence in the State was brought to an end by the Minister's decision unless she obtained another permission. Her further green card application was refused. The letter of decision expressly required her to leave the State by the specified date. He then concluded having considered case law from this jurisdiction and that of the European Court of Human Rights and in particular *Rodrigues da Silva v. The Netherlands* (2007) 44 EHRR 34, at para. 143 :

> "I am of the view that the holding of the ECtHR in *da Silva* indicates that in circumstances where the refusal of a residence permit would lead to the expulsion of an applicant from the State, and would affect an applicant's private and family life, Article 8 rights are capable of being engaged. As the ECtHR noted, it was the refusal of the residence permit and the expulsion of the applicant from the State that would impact on the applicant's family rights."

18. The trial judge concluded that the effect of the Minister's refusal of the s.4(7) application was that Ms Luximon was under a legal obligation to leave the State by the specified date; failure to do so would mean that she would be illegally present and subject to a proposal to deport. He considered the practical effect of the s. 4(7) refusal to be analogous to the effect of the refusal of a residence permit in *da Silva* in respect of which on its facts the ECtHR had found the Netherlands to have in breach of Article 8 ECHR.

19. The trial judge considered that it followed from da Silva that Article 8 rights of Ms. Luximon were engaged in the circumstances of the case

20. He then concluded at para. 173:-

> "173. In conclusion, having considered the relevant authorities, and the submissions so ably made by counsel for both sides, the court is satisfied that there is an obligation on the Minister, when considering an application pursuant to s. 4(7) of the Immigration Act 2004, to have regard to any constitutional and/or Convention rights of an applicant that are engaged by the decision. Moreover, the court would observe that once the Minister has taken into account the relevant considerations, the weight to be attached to each of them is properly a matter for the Minister in her discretion, subject to the principle of proportionality."

21. Two further issues were decided by the trial judge and are the subject of appeal. First, in the course of submissions before the High Court counsel for the applicants contended that the Minister had an obligation pursuant to s. 4 of the 2004 Act, when making a decision pursuant to s. 4(7) to have regard to the matters set out in s. 4(10).

The trial judge decided that this contention went beyond the grounds upon which leave had been granted in these proceedings and that his jurisdiction was constrained to try the terms upon which leave was granted.

22. The trial judge upheld the contention of the applicants that the Minister was in breach of fair procedures in not publishing her policy as to the criteria to be applied by her in considering an application for a change of immigration status to stamp 4 conditions from a person such as Ms Luximon who was a "timed-out" non-EEA student pursuant to s. 4(7) of the 2004 Act.

Appeal

23. On the central issue in the decision of the High Court, the Minister submits that the High Court judge was in error in determining that the Minister was under an obligation to consider any family, private life or personal rights of the applicants alleged to be protected by the Constitution or Article 8 of the ECHR when deciding whether to renew the permission to be in the State. She relies upon the submissions made to the High Court, fully set out in the judgment in the High Court and subsequent decisions of the Supreme Court in *P.O and Another v. Minister for Justice and Equality* [2015] IESC 64, *Hussein v. Minister for Justice and Equality* and the judgment of this Court in *C.I. v. Minister for Justice, Equality and Law Reform* [2015] IECA 192, [2015] 2 I.L.R.M. 389. The submissions made on behalf of the Minister also included matters which, in my view, went beyond the issues identified by the grounds upon which leave was granted and notice of opposition in these judicial review proceedings. They were in part addressed to the question as to whether the applicants enjoyed at the time of the Minister's decision rights protected by the Constitution; whether the Minister had been asked to consider any such rights and matters which go to the weight to be attached to any family or private life which the applicants contended they were entitled to have respected and not interfered with in accordance with Article 8 of ECHR. These submissions may in part have been influenced by the approach taken by the trial judge in *Balchand*.

24. In this appeal the central question is whether or not the trial judge was correct in deciding that the Minister, when considering an application pursuant to s. 4(7) of the 2004 Act to renew a permission to be in the State, is obliged to consider any rights of the applicants alleged to be protected by the Constitution or Art. 8(1) of ECHR prior to making a decision to refuse to renew the permission. The Minister accepts that any such alleged rights of the applicants fall to be considered in the procedure established by s. 3 of the Immigration Act 1999 (as amended) prior to making a deportation order.

25. However, the submissions on behalf of the Minister on appeal included that the trial judge having identified in his judgment (para. 86) a submission made on her behalf that as the application made by the solicitors for the applicant pursuant to s. 4(7) on the 30th October, 2012, did not assert that the applicants had any rights protected by the Constitution that the Minister's decision could not be impugned on the basis of a failure by the Minister to consider a submission that was not made.

26. It is correct that the trial judge did not expressly consider this submission. It must be observed that the notice of opposition filed on behalf of the Minister did not include as a ground of opposition any such contention. The focus of the High Court judgment was on the rights expressly contended for in the application pursuant to Article 8 of ECHR.

27. The question as to the extent of the rights, either pursuant to or protected by the Constitution, to which a person who is not a citizen of Ireland, but lawfully in the State in accordance with a permission granted by the Minister pursuant to s. 4 of the 2004 Act, is entitled has not been determined by the High Court judge. It would be accordingly inappropriate - and, it is in any event, unnecessary - to address that issue in

this appeal. At a level of general principle it appears correct that the Minister in an application under s. 4(7) of the 2004 Act, is only obliged to consider and take into account matters which have been raised on behalf of the applicants in the application or which objectively may be considered as having been brought to the Minister's attention or matters of which the Minister should be aware. As the reasoning of the trial judge is primarily directed to the rights of the applicants pursuant to Article 8 of the Convention, I propose in this judgment considering the issue in dispute principally by reference to those rights and insofar as I refer to the position if constitutional rights had been relied upon I do so without in any way determining that the applicants enjoy any such rights or that they did in fact seek to rely upon them.

28. It is important to recall for the purposes of this appeal that the Minister has not asserted in the judicial review proceedings that Ms Luximon and her daughter, at the time of the s. 4(7) application did not hold rights to private life and/or family life which the State was obliged to respect pursuant to Article 8 ECHR. The contention is that when taking a decision on an application pursuant to s. 4(7) the Minister is not under any obligation to consider any such rights.

Section 4 of the Immigration Act 2004

29. The statutory power being exercised by the Minister pursuant to s. 4(7) of the 2004 Act (considered in the context of the entire of s. 4 of the 2004 Act) is relevant to the central question as to the obligation of the Minister to consider any Article 8 rights in reaching a decision under s. 4(7). In so far as relevant this provides:

> "(1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as "a permission").
>
> (2) A non-national coming by air or sea from a place outside the State shall, on arrival in the State, present himself or herself to an immigration officer and apply for a permission.
>
> (3) Subject to section 2 (2), an immigration officer may, on behalf of the Minister, refuse to give a permission to a person referred to in subsection (2) if the officer is satisfied:-
>
> (a) . . .(k)
>
> (4) An immigration officer who pursuant to subsection (3) refuses to give a permission to a non-national shall as soon as may be inform the non-national in writing of the grounds for the refusal.
>
> (5)(a) An immigration officer may, on behalf of the Minister, examine a non-national arriving in the State otherwise than by sea or air referred to subsequently in this subsection as "a non-national to whom this subsection applies") for the purpose of determining whether he or she should be given a permission and the provisions of subsections (3), (4) and (6) shall apply with any necessary modifications in the case of a person so examined as they apply in the case of a person coming by sea or air from a place outside the State.
>
> (b) A non-national to whom this subsection applies and who is not exempt, by virtue of an order under section 17, from the requirement to have an Irish

visa shall have a valid Irish visa.

(c) A non-national to whom this subsection applies and who is arriving in the State to engage in employment, business or a profession in the State shall within 7 days of entering the State-

(i) report in person to the registration officer for the place in which he or she intends to reside,

(ii) produce to the officer a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality, and

(iii) furnish such information as the officer may reasonably require regarding the purpose of his or her arrival in the State.

(d) A non-national to whom this subsection applies shall not remain in the State for longer than one month without the permission of the Minister given in writing by him or her or on his or her behalf by an immigration officer.

(6) An immigration officer may, on behalf of the Minister, by a notice in writing to a non-national, or an inscription placed on his or her passport or other equivalent document, attach to a permission under this section such conditions as to duration of stay and engagement in employment, business or a profession in the State as he or she may think fit, and may by such a notice or inscription at any time amend such conditions as aforesaid in such manner as he or she may think fit, and the non-national shall comply with any such conditions.

(7) A permission under this section may be renewed or varied by the Minister, or by an immigration officer on his or her behalf, on application therefor by the non-national concerned.

(8) A non-national, being a member of a class of persons declared by order under section 17 to require a transit visa to enter the State, shall have a valid transit visa.

(9) A non-national who contravenes subsection (2), paragraph (b), (c) or (d) of subsection (5) or subsection (6) or (8) is guilty of an offence.

(10) In performing his or her functions under subsection (6), an immigration officer shall have regard to all of the circumstances of the non-national concerned known to the officer or represented to the officer by him or her and, in particular, but without prejudice to the generality of the foregoing, to the following matters:

(a) the stated purpose of the proposed visit to the State,

(b) the intended duration of the stay in the State,

(c) any family relationships (whether of blood or through marriage) of him or her with persons in the State,

(d) his or her income, earning capacity and other financial resources,

(e) the financial needs, obligations and responsibilities which he or she has or is likely to have in the foreseeable future,

(f) whether he or she is likely to comply with any proposed conditions as to duration of stay and engagement in employment, business or profession in the State,

any entitlements of him or her to enter the State under the Act of 1996 or the treaties governing the European Communities within the meaning of the European Communities Acts 1972 to 2003."

30. As appears, s. 4(7) expressly authorises the Minister (or an immigration officer on his or her behalf) to renew or vary a permission under the section on the application by a non national. A permission is defined for the purposes of the Act by subs. (1) as the authorisation "to land or be in the State". Subsection (6) expressly envisages that there may be attached to a permission "conditions as to duration of stay and engagement in employment, business or profession in the State" by an immigration officer on behalf of the Minister and for the amendment of such conditions. In administrative practice the Court was informed that such conditions are grouped and known as "Stamp 2" or "Stamp 3" or "Stamp 4" etc. Subsection (10) expressly obliges an immigration officer in performing his or her functions under subs. (6), i.e., imposing or amending conditions to have regard to the matters stated in paras. (a) to (g).

31. The submissions made on behalf of the Irish Human Rights and Equality Commission suggested that the Court could determine the appeal simply as a matter of statutory construction. I do not agree. The application made to the Minister which is the subject matter of these proceedings was an application pursuant to s. 4(7) of the 2004 Act. It was expressly an application, firstly, to renew the permission to be in the State which had by then expired. It also sought what was termed "a change of status". That change of status was expressed to be from "Stamp 2" to "Stamp 4" conditions. A change of status did not arise as the renewal of the permission was refused. It is also necessary to observe that the second part of the application raises an issue in respect of the construction of s. 4 which was not expressly addressed in the High Court or, indeed, in submissions by the parties on appeal and it does not appear it would be appropriate to determine same. Nevertheless it appears to me to justify the approach taken by the trial judge of not considering in this particular judicial review, having regard to the grounds upon which leave was granted, the contention that the Minister in considering the application bound to have regard to the matters set out in subsection (10).

32. I would just add on this issue that is not obvious to me what is intended by the power purportedly conferred on the Minister under subs. (7) to *vary* a permission under the section having regard to the definition of a permission in subsection (1):to land or to be in the State. The variation appears to have been understood as the potential change in status from being the holder of permission with "Stamp 2" conditions to permission

with "Stamp 4" conditions. Is it the permission or conditions attached thereto which it is sought to change? If the latter, a question may arise as to the applicability of subss. (6) and (10) to the decision.

33. If, in the High court the applicants herein had sought and been given leave to challenge the decision of the Minister on an additional ground that the Minister (or an immigration officer on her behalf) was obliged to consider the matters set out in paras. (a) to (g) of subs. (10) then the parties would probably have expressly addressed the questions as to whether the requested change from a "Stamp 2" to a "Stamp 4" is properly to be regarded as a variation of a permission within the meaning of subs. (7) or an amendment of the conditions under subs. (6).

34. The application of subs. (10) to the exercise by the Minister of the powers given to him by subs. (7) formed part of the issues before the Supreme Court in *Hussein v Minister for Justice* [2015] IESC 104. In that case the applicant had applied for "long term residence with exemption from work permit conditions". Hardiman J. stated that this is sometimes referred to as "Stamp 4 permission". On the question of the application of subs. (10) to the exercise of the discretion given the Minister by subs. (7) Hardiman J. then stated:-

> "In considering the significance of subsection (10) it must first be observed that the purpose of that subsection is a very specific one. It is to guide and constrain immigration officers "in performing [their] functions under subsection (6)." There is nothing on the face of the statute to suggest a more general application. Secondly it is clear that the decision being addressed by the Immigration officer is of quite different nature to that addressed by the Minister under subsection (7). It is clear especially from the first two phrases set out above that the Immigration officer's decision is one taken in advance of the non-national's first legal entry into the State. This emerges clearly from the use of the phrases "proposed visit to the State" and "intended duration of the stay in the State". On the other hand the Minister's decision relates to a decision as to whether or not to vary the conditions the permission (sic) to remain in the State enjoyed by a person who is already established here, in Mr. Hussein's case, for six years. I can see no basis for the argument that the criteria set out either in subsection (3)(a) to (k) or in subsection (10) should be read into the powers provided by subsection (7)."

35. There is obviously a word or words missing in his phrase "the conditions the permission". It appears probably intended to be "the conditions attached to the permission". It does not appear from the judgment that there was any submission made as to whether a variation of the conditions attached to the permission fell exclusively within the jurisdiction of the Minister under subs. (7) or also involved amendment of the conditions under subsection (6).

36. Accordingly I would uphold the decision of the trial judge in refusing to entertain any submission in these proceedings in reliance upon alleged obligations of the Minister under s. 4(10) of the 2004 Act in reaching her decision.

37. In any event, it is clear that it is not relevant on the facts of these proceedings. The decision of the Minister was to refuse to renew the permission. That is a decision exclusively taken under s. 4(7). The question of what if any, conditions might be attached to such a permission if renewed would only arise in the event that the Minister decided to renew the permission. It is only in the event that the Minister was considering the imposition of either the same ie. "Stamp 2" conditions or a variation as

requested to "Stamp 4" conditions that any question as to the obligation to consider the matters set out in subs. (10) could arise.

Decision to refuse to renew permission

38. The remaining part of this judgment is concerned exclusively with the decision made on behalf of the Minister to refuse to renew the permission of Ms. Luximon to be in the State. The consequences for a non national such as Ms. Luximon of a refusal to renew a permission to be in the State is that she is then unlawfully present in the State (s. 5(1) and (2) of the 2004 Act). If she wishes to abide by the law of the State then she must leave the State unless as indicated in the letter of the 5th November, 2012, she secured another form of immigration permission such as a work permit or green card. Those avenues had already been explored and were not available to Ms. Luximon or had already been refused.

39. If, thereafter, she were to remain in the State then, in addition to being unlawfully present in the State, she faced the further difficulty that it was expressly stated that it was intended to issue a notification proposing to deport her under s. 3(4) of the Immigration Act 1999. She would then be a person in respect of whom the Minister might make an order of deportation pursuant to s. 3(2) of the 1999 Act.

40. Ms. Luximon is a person who entered the State lawfully. She obtained a permission to be and remain in the State and with the exception of a short period of time (which the Minister has not relied upon in making her decision) she was at all times lawfully present in the State. If she wishes to continue to behave lawfully, then she must leave the State by reason of the Minister's refusal to renew her permission to be in the State.

41. The stark submission made on behalf of the Minister is that there is no obligation to consider in any way family or private life rights which Ms. Luximon and her daughter allege the State is bound to respect pursuant to Article 8 ECHR prior to reaching a decision which will require her to leave the State if she wishes to continue to act lawfully in relation to her immigration status. Further that contention is made in a context that Ms. Luximon had lawfully lived in the State pursuant to s.4 permission for approximately 7 years at the time of the decision and the Minister would consider such alleged rights if it was proposed to deport the applicants.

42. I am of the view that the trial judge was correct in deciding that such refusal by the Minister to consider matters (which she accepts must be considered prior to the making of a deportation order) is not consistent with her obligations in exercising the discretion conferred on her by s. 4(7) of the 2004 Act.

43. First, it cannot be disputed that in accordance with the judgments of the Supreme Court in *East Donegal Co-Operative Livestock Mart Limited v. Attorney General* [1970] I.R. 317 and in The State (Lynch) v. Cooney [1982] I.R. 337, that the Minister must exercise the discretion given her by s. 4(7) in a manner which would be in conformity with the Constitution. Accordingly, where an applicant for a renewal of permission under s. 4(7) identified a relevant right which it is contended the applicant holds pursuant to the Constitution or protected by the Constitution then the Minister is obliged to exercise her discretion in a manner consistent with respecting and upholding such right.

44. For the reasons already set out I do not propose addressing further the Minister's obligations pursuant to constitutional principles in respect of the applicants herein. No reliance was placed on the Constitution in the letter of application.

45. The Minister's obligations in relation to the rights expressly asserted in reliance on Article 8 of the ECHR are statutory obligations imposed by s. 3(1) of the European

Convention on Human Rights Act 2003, (the "2003 Act")which provides:-

> "3(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

46. The Minister is an organ of the State in accordance with the definitions in s. 1 of the 2003 Act. Further, pursuant to s.2of the 2003 Act the Court must interpret and apply any statutory provision including s. 4 of the 2004 Act "insofar as possible" in a manner compatible with the State's obligation under the Convention. There is nothing in s.4 of the 2004 Act which precludes the Court from interpreting or the Minister from exercising the statutory powers conferred by it in a manner compatible with the State's obligations under Article 8 of the Convention. Hence the Minister in exercising the discretion given her by s. 4(7) must do so *inter alia*, in a manner compatible with the State's obligations under Article 8 of the Convention. This provides:-

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

47. Whatever may be the position in relation to the assertion of rights protected by the Constitution by a non-national, it is not in dispute that a non national in the State has a right to respect for his private and family life by the State pursuant to the 2003 Act and Article 8(1) ECHR. The Minister correctly accepts that prior to deportation of a non national; there is an obligation to consider such rights.

48. One of the difficulties in considering obligations pursuant to an Irish statute to consider rights claimed to be protected by Article 8 ECHR is the use of the phrase that "Article 8 rights are engaged". It is not always clear what this means and it does appear to be used in more than one sense. The first is where an applicant's right to family or private life within the meaning of Article 8 is relied upon in support of or to contest a proposed decision by a public authority and the nature of the decision is such that it has the potential to interfere with the applicant's right to such respect. A proposal to make a deportation order is accepted as such a decision. However, whilst it is sometimes said in such a situation that Article 8 rights are engaged that does not appear to me either accurate in accordance with the case law and may lead to confusion. In such a situation Article 8 right s are only "capable of being engaged" or "potentially engaged" or as is sometimes put the decision is "within the scope of Article 8". It follows from that potential engagement by reason of the nature of the decision to be taken that the applicant is entitled to an assessment of whether the proposed decision will have consequences of such gravity for the applicant's private or family law rights such that Article 8 is engaged in the second sense that term is used. That second sense means that the public authority is bound to make the assessment required by Article 8(2) prior to taking the decision.

49. The trial judge correctly identified a number of principles which have been established by the case law of ECtHR in relation to interaction of Article 8 and immigration issues in particular from the judgments in *da Silva and Tuqabo-Tekle v. Netherlands* (Application 60665/00). The most important for this appeal are:

> 1. Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence or to authorise family reunion in its territory.
>
> 2. The essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There may however be positive obligations inherent in "respect" for family and private life.
>
> 3. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.

50. In so far as an applicant seeks to rely on Article 8 in support of a renewal of a permission pursuant to s. 4(7) she may be considered as asserting that respect for her family or private life rights imposes a positive obligation on the State i.e. to grant a renewal of permission. This was the position in *da Silva* where a breach of Article 8 was established in relation to the refusal of a residence permit albeit on very different facts to those of Ms Luximon and her daughter. In principle it therefore appears to me that the trial judge was correct in deciding as he did at para 143 of his judgment that Article 8 is "capable of being engaged" when the Minister is considering an application for renewal of a permission under s. 4(7). However I do not agree that that it necessarily follows that the applicants' Article 8 were engaged or that it is a matter for the Court to decide in this judicial review that the applicants' Article 8 rights were engaged in the second sense referred to above which is the sense used in recent judgments. That decision appears to me to be a matter for the Minister subject only to judicial review by the courts.

51. This appears to follow from the approach which has been developed as to how Article 8 rights should be considered when relied upon to contest a proposal to deport. The questions to be considered and decided by the adjudicator (the Minister) were first suggested by a majority opinion of Lord Bingham at para. 17 in *R. v. Secretary of State for the Home Department ex p. Razgar* [2004] UKHL 27, [2004] 2 A.C. 268 and followed in this jurisdiction by Feeney J. in *Agbonlahor v. Minister for Justice* [2007] 4 IR 309, [2007] IEHC 166. They are:-

> "(1) Will the proposed removal be interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public

end sought to be achieved?"

52. As appears from this passage it is only if the first two questions to be addressed by the adjudicator, i.e., the Minister are answered in the affirmative that Article 8 is considered to be engaged such that the proposed action must be justified in accordance with Article 8(2).

53. In the context of an application for renewal under s. 4(7) of the 2004 which it is proposed to refuse the appropriate first question should probably be: will the proposed refusal of a renewal of the permission be (or potentially be) an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

54. Examinations of immigration files which essentially followed the above approach - albeit with a different first question - were the subject of judgments given by me in this Court in *C.I. v. Minister for Justice, Equality and Law Reform and Others* [2015] IECA 192 and *Dos Santos and Others v. Minister of Justice and Equality and Others* [2015] IECA 210, [2015] 2 I.LR.M. 283. Those judgments were given in two appeals heard together where High Court judges had reached differing conclusions on similar questions. Those judgments were delivered subsequent to the High Court judgment in these proceedings.

55. The officials examining the files in those cases on behalf of the Minister adopted an approach whereby the proposed deportation *potentially* constituted an interference with the right to private life of the applicants within the meaning of Article 8. (Emphasis added). They then considered the second question as identified by Lord Bingham namely: if so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

56. For the reasons set out in the *C.I.* judgment with particular reference to the judgments of the European Court of Human Rights in *Nnyanzi v. United Kingdom* [2008] 47 EHRR 18, *Bensaid v. United Kingdom* [2001] 33 EHRR 10 and *Costello-Roberts v. United Kingdom,*(1995) 19 EHRR 112 this approach was upheld by this Court. As stated at para. 33 of my judgment in *C.I.* (in relation to private life which was at issue therein) "the current case law of the ECtHR as reflected by the principles stated in *Nnyanzi* appears to support an approach of first identifying a potential interference with the right to respect for private life within the meaning of Article 8 and then considering as a second question whether the proposed deportation would have consequences of such gravity for the individual as to engage the operation of Article 8(1)".

57. In those judgments, the Court upheld as reasonable the conclusion reached on behalf of the Minister that, on the facts of those applications, the potential interference by deportation of the applicants would not have consequences of such gravity for the applicants as to engage the operation of Article 8.

58. I refer to these decisions (which I understand were not appealed) for the purpose of making clear the basis upon which I consider the decision of the High Court to grant *certiorari* in relation to the failure of the Minister to consider the Article 8 rights of the applicant asserted in the application made on their behalf should be upheld.

59. I am in agreement with the trial judge that a proposed decision not to renew a permission pursuant to s. 4(7) of a person such as Ms. Luximon who had been in the State lawfully pursuant to a s. 4 permission for several years has the potential to be an interference with her right to respect for private life and family right such that it is capable of engaging Article 8 of ECHR. The question as to whether or not on the particular facts of the application, a decision not to renew the permission would have

consequences of such gravity for Ms. Luximon and her daughter in relation to their alleged rights to family or private life such that Article 8 is engaged in the sense that term is used in the Razgar, *C.I.* and *Dos Santos* judgments is a matter for determination by the Minister subject only to judicial review by the courts.

60. Another way of putting my conclusion is that the obligations of the Minister pursuant to s. 3 of the 2003 Act in relation to Article 8 ECHR in proposing not to renew a permission pursuant to s. 4(7) of the 2004 Act, are similar to the obligations which she accepts exist where there is a proposal to deport save of course that a different decision is under consideration.

61. I am also in agreement with the trial judge for the reasons he gives that the position of Ms. Luximon as the holder of a permission to be lawfully in the State and the s. 4(7) decision to refuse to renew that permission is wholly distinguishable from the position of applicants in *Bode v. Minister for Justice* .

62. The trial judge was in error in his conclusion that the Minister was in breach of fair procedures or natural and constitutional justice in not publishing a policy or criteria according to which she would decide an application from a timed out non-EEA student pursuant to s. 4(7) of the 2004 Act for change of immigration status to "stamp 4" conditions. For the reasons already set out in this judgment s. 4(7) grants a discretionary power to the Minister which must be exercised in accordance with the principles set out in relation to the individual facts and circumstances advanced by the applicant. A timed out non-EEA student has no right, as such, to be granted stamp 4 status. The general policy in relation to non-EEA students has been published since 2011. It indicates certain paths according to which such persons may attain long term residency in the State. Ms Luximon was unfortunate in that she was unable to avail of any of those. In making an application under s. 4(7), s she is entitled to do, she is seeking to have the Minister exercise in her favour a statutory discretion given by the Oireachtas. That application is based upon her individual facts and circumstances which the Minister must consider and decide upon in accordance with the constitutional principles set out above and pursuant to s. 3 of the 2003 Act in a manner consistent with the State's obligations under ECHR.

Relief

I would dismiss the appeal and uphold the order of *certiorari* which had been granted by the High Court for the reasons set out in this judgment and remit the application to the Minister for further consideration and decision.