THE SUPREME COURT

Record No. S:AP:IE:2021:000149

Between:-

JAIMEE MIDDELKAMP

Applicant

-and-

MINISTER FOR JUSTICE AND EQUALITY

Respondent

-and-

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

OUTLINE LEGAL SUBMISSIONS ON BEHALF OF THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

I. Introduction

1. In considering an application to vary an immigration permission under Section 4(7) of the Immigration Act 2004, is the Minister obliged to have regard to the applicant's fundamental rights? In the Commission's submission, this is the central question that lies at the heart of this appeal.

2. In its judgment in *Luximon & Balchand v. Minister for Justice* [2018] 2 IR 542 ("***Luximon***"), this Court confirmed that, in considering an application under Section 4(7) of the Immigration Act 2004 in respect of lawful, long-term residents in the State, the Minister was under a duty to assess whether the applicant's rights to respect for private and family life under Article 8 of the European Convention on Human Rights ("**ECHR**") were engaged. The Court observed *obiter* that the constitutional right to

family life under Article 41 of the Constitution of Ireland, 1937 (the "**Constitution**") might also be relevant in the consideration of such applications.

3. Since the delivery of that judgment, there has been uncertainty as to the precise scope and effect of the Court's ruling and, in particular, whether it is properly interpreted as being confined to lawful, long-term residents such as the applicants in *Luximon* and *Balchand* or as also applying to other applicants to vary an immigration permission under section 4(7) of the 2004 Act. The judgments of the Court of Appeal in *Rughoonauth & Omrawoo* [2018] IECA 392 and *Chen* [2018] IECA 542 - discussed in the parties' submissions - are illustrative of this uncertainty.

4. The facts of the Applicant's case, which are not in dispute, are summarised in the Applicant's and the Appellant's Submissions and the Commission relies on those summaries of the facts in making its submissions.

5. In the judgment under appeal, the High Court concluded *inter alia* that the Minister's postponement of consideration of the Applicant's rights under Article 8 ECHR until the deportation stage was not in accordance with law.

6. As summarised in the Appellant's Submissions (§13), the Minister's position on this appeal is that persons such as the Applicant on "*a "short-term" or finite limited permission*" are not entitled to a full assessment of rights under Article 8 ECHR in the context of an application under section 4(7) of the 2004 Act. In making this case, the Minister advances many of the arguments raised and rejected in *Luximon* and *Balchand*, seeking to distinguish the position by reference to the specific status of the Applicant.

7. While it is true that this Court in *Luximon* took care to emphasize that its judgment was addressed to the particular circumstances of the applicants in those cases, in the Commission's submission, the underlying basis and rationale of that judgment is found in the fundamental principle that, in engaging decision-making with implications for an individual's fundamental rights, the Minister is bound to have regard to those fundamental rights. While it is for the Minister to determine the weight to be afforded to those fundamental rights having regard to the particular circumstances of the individual case, the Minister must carry out her functions in a manner consistent with

such fundamental rights. This is so whether the case is considered by reference to the ECHR or the Constitution or both instruments.

II. The Issues

8. The parties have addressed the appeal by reference to the following five issues:

   (a) Whether a non-EEA national who has been granted a finite permission to temporarily reside and work in the State and who has undertaken to leave the State after the permission expires is entitled nonetheless to have an assessment of Article 8(1) ECHR rights in the context of an application for a change of immigration status made under section 4(7) of the 2004 Act.
   (b) Whether the trial judge erred in finding that the reasoning provided by the Minister in refusing the application for residence permission was inadequate in light of relevant case law and the correspondence exchanged between the parties and in particular in failing to have regard to the Minister's letter of 30th January 2020.
   (c) Whether the Supreme Court may, in an appeal made under the provisions of Article 34.5.4º of the Constitution, widen the scope of that appeal to include a consideration of constitutional rights in circumstances where no such arguments were made in the High Court.
   (d) Whether a person in the position of the Applicant is entitled to an assessment of the rights arising under the Constitution in the context of an application for a change of immigration status made under section 4(7) of the 2004 Act.
   (e) Whether the learned trial judge erred in appending letters to the Applicant to his judgments.

   Having regard to the basis on which the Commission has sought to be joined as *amicus curiae*, the Commission will focus its submissions on the duty of the Minister to consider the fundamental rights of an applicant to vary an immigration permission under section 4(7) of the 2004 Act.

9. As the fundamental rights which arise for consideration depend on the Court's determination of the third issue, the Commission will address the question of the scope of the appeal in the first instance (**Section III**). The Commission will then address the

first issue relating to the duty to consider an applicant's rights under Article 8 ECHR (**Section IV**). The Commission will conclude by considering the position under the Constitution, in the event that the Court considers it appropriate to widen the scope of the appeal in line with the Determination granting leave to appeal directly to this Court (**Section V)**.

10. Before turning to address these issues, the Commission makes the following preliminary observations.

11. First, it does not appear to be in dispute that, where decisions affecting a person's entitlement to remain in the State are made, a person's fundamental rights are engaged. There is, however, a dispute as to *when* a consideration of those fundamental rights would arise. As noted above, the Minister acknowledges that there would be an obligation to consider rights under Article 8 ECHR in the event that a person were subject to a deportation order (Appellant's Submissions, §13). In addition, the Minister says that, in certain exceptional circumstances where "*rare mitigating personal circumstances*" are specifically asserted by an applicant, such circumstances would be considered (Appellant's Submissions, §14). Insofar as the Minister acknowledges that the Applicant's rights under Article 8 ECHR would arise for consideration in the context of deportation but not in the context of an anterior application to vary an immigration permission with a view to ensuring a continued lawful basis to be in the State, this would - as the High Court recognised (Judgment, §26) - place the Applicant in precisely the Catch-22 situation which the Supreme Court found objectionable in its judgment in *Luximon* ([2018] 2 IR 542, 562).

12. Second, if a person's fundamental rights are engaged in the context of decision-making by the Minister in respect of the person's entitlement to remain in the State, it follows from this Court's judgment in *Luximon* that the Minister must give consideration to such fundamental rights: *Luximon* ([2018] 2 IR 542, 575). While the specific factors relating to the Applicant's precise status and position may be relevant to the question of the *weight* to be afforded to such rights in the decision-making process, they do not affect the duty of the Minister to consider those rights in the first instance. Such a duty is not triggered by the existence of certain undefined exceptional circumstances; it arises as a matter of law where a decision of the Minister has implications for an

applicant's fundamental rights, as is very frequently the case with decisions regarding immigration status of persons who have resided in the State.

13. Third, for the reasons already given in the Court's judgment in *Luximon* ([2018] 2 IR 542, 556 and 564), the Commission submits that there is no basis for the argument (Appellant's Submissions, §§21-22) that a person seeking to vary an immigration permission under section 4(7) of the 2004 Act, such as the Applicant, must make such an application from outside the State following departure under the existing permission. This position is not consistent either with the text of section 4 of the 2004 Act or with its purpose.

III. The Scope of the Appeal

14. The Commission recognises that the scope of the appeal is primarily a matter for the parties and ultimately a matter for the Court. Indeed, the Court will recall that in case management the Commission suggested as a preliminary view that it might not comment on the matter. On reflection, however, because the question of the scope of the appeal in this case is directly related to the fundamental rights that arise for consideration, the Commission makes the following observations for the assistance of the Court.

15. There appears to be broad agreement between the parties as to the legal principles applicable to the Court's jurisdiction to expand the scope of an appeal. It is only in exceptional circumstances where the interests of justice so require that the Supreme Court will consider and determine an issue which has not been tried in the High Court: *K.D. (otherwise C) v. MC* [1985] IR 697, 701; *A.G. (SPUC) v. Open Door Counselling (No. 2)* [1994] 2 I.R. 333, 341-342; *Lough Swilly Shellfish Growers Co-Op Society v. Bradley* [2013] 1 I.R. 227 ("*Lough Swilly*"); *A.S.A. v. Minister for Justice and Equality* (Supreme Court, 2 February 2022). In determining whether, exceptionally, it is in the interests of justice to allow an issue not tried in the High Court to be considered on appeal in the Supreme Court, the Court may have regard to whether the issue is closely linked to an issue raised in the High Court (*Lough Swilly*) or to the duty of the Court to

have regard to the Constitution even if certain issues are not specifically raised by the parties (*Callaghan v. An Bord Pleanála* [2017] IESC 60).

16. In this case, the issue arising on appeal which was not raised in the High Court is whether, in addition to the question of considering the rights of an applicant under Article 8 ECHR, the Minister, in determining applications under section 4(7) of the 2004 Act of persons in the position of the Applicant, must consider the rights of an applicant under the Constitution. In granting the Minister leave to appeal directly to this Court, the Court considered that "*a full and proper determination of the issues in this appeal requires a consideration of the provisions of the Constitution*": [2022] IESCDET 62, §9.

17. It is true that the constitutional issue identified in the Determination arises for the first time on appeal. By way of background, the Applicant's Submissions explain why the application for judicial review was made by reference to the ECHR only and not by reference to the Constitution also: Applicant's Submissions, §§78-83. It is also true that, while the protection under Article 8 ECHR and Articles 40 and 41 of the Constitution overlap to a certain extent, there are differences between the scope and extent of the rights guaranteed under the ECHR and the Constitution respectively. As noted above, in *Luximon*, the Supreme Court considered the issues arising in those cases by reference to Article 8 ECHR but observed *obiter* that Article 41 of the Constitution might also be relevant in the consideration of applications under section 4(7) of the 2004 Act. This is consistent with the position that, in the ordinary course, it is not appropriate for an issue which was not raised before the High Court to be considered for the first time before this Court.

18. However, in this case, there are considerations which would warrant the Court addressing the position under the Constitution in line with the Court's Determination if the Court considers this appropriate.

19. ***First***, although the constitutional issue is undoubtedly a distinct issue arising for the first time in the context of the appeal, the underlying question of principle in this case relates to the duty of the Minister to have regard to fundamental rights, whether under the ECHR or the Constitution, in making decisions under section 4(7) of the 2004 Act.

This being so, the constitutional issue is closely linked to the core issue under appeal to this Court.

20. ***Second***, while in *Luximon* the Court confined itself to noting *obiter* the potential relevance of the Constitution in the context of proceedings brought by reference to the ECHR, in its more recent case-law, the Court has underlined the primary importance of the Constitution in the protection of fundamental rights in this jurisdiction. Thus, in *Gorry v. Minister for Justice and Equality* [2020] IESC 55, McKechnie J. emphasised (§209) that the Constitution remained "*the principal source for the protection of rights in Ireland*". In the leading judgment in that case (§76), O'Donnell J. agreed with McKechnie J. that it was "*not necessary to address the issue of Constitutional and ECHR rights in any particular sequence*". In *Clare County Council v McDonagh* [2022] IESC 2, the Court stated that, while a litigant remained free in principle to elect as between the ECHR and the Constitution "*in terms of priority of emphasis and argument, albeit subject to the proviso that the ECHR does not have direct effect*", what could not be allowed to happen was that a court "s*hould engage with a provision of the ECHR in proceedings involving an organ of the State without also engaging at the same time with the corresponding provision of the Constitution*". According to the Court, such a constitutional provision could not be treated as if it did not exist but must be properly considered and addressed: [2022] IESC 2, §54.

21. In the Commission's submission, this case-law reflects the duty of the Court to uphold the Constitution, which is particularly important in the context of the protection of fundamental rights. While the Minister accepts that the Court must have regard to the Constitution in matters of statutory interpretation as all legislation must be interpreted in a manner compatible with the Constitution (Appellant's Submissions, §65), the Minister does not appear to accept that this principle would also apply to decision-making by the Minister of the kind at issue in these proceedings. However, the Commission submits that the principle applies no less in that context than in the context of statutory interpretation in light of the principles laid down in *East Donegal* and *The State (Lynch) v. Cooney*, discussed below.

22. ***Third***, , it is apparent that the ECHR, rather than the Constitution, has frequently been the primary reference point for decision-makers and for the courts in this field of

decision-making, notwithstanding the primary role of the Constitution in the protection of fundamental rights. This is apparent not only from *Luximon* but also from the circumstances of this case, including the practice of the High Court referred to in the Applicant's Submissions (§§78-83).

23. ***Fourth***, the primary purpose of the appeal is to provide clarity on the central question of principle to which it gives rise: that is, the extent of the Minister's duty to consider fundamental rights in the context of applications by persons in the position of the Applicant to vary immigration permissions under section 4(7) of the 2004 Act. In granting the Minister's application for leave to appeal directly to this Court, the Court referred to the asserted "*systemic importance*" of the issues raised in the appeal from the perspective of the Minister: [2022] IESCDET 62, §§10-11. The Court noted that although from the Applicant's perspective the case may have been moot (as is now the case), it was in the nature of cases concerning temporary permissions that "*the permission may have expired or the person may have left, or be about to leave, the State or have altered their status in some way before a final determination of the case*": [2022] IESCDET 62, §§8-10. Given that the appeal is intended to provide guidance on an issue of potentially systemic importance to a field of decision-making with significant implications for fundamental rights, it would appear particularly important - both at the level of principle and of practice - that it would provide clarity about the role of, and relationship between, the ECHR and the Constitution, especially in the wake of the Court's judgment in *McDonagh*.

24. ***Fifth***, this question of principle arises in a case where there is no material dispute of facts between the parties, which the High Court would be better placed than this Court to consider in the first instance.

25. For these reasons, the Commission submits that, exceptionally, it would appear to be in the interests of justice for the Court to consider the constitutional issue identified in its Determination in addition to the ECHR issue in respect of which the Minister has brought this appeal.

26. In view of the fact that the scope of appeal remains a live issue, and noting that it is not necessary to address the constitutional and ECHR issues in any particular sequence (*Gorry* [2020] IESC 55, *per* O'Donnell J., §76), the Commission will address the

position under the ECHR first and then consider the position under the Constitution in the event that the Court proceeds to examine that issue.

IV. The ECHR

27. In the Commission's submission, the starting point for the analysis in respect of the ECHR is - as recognised by this Court in *Luximon* ([2018] 2 IR 542, 567) - the relevant provisions of the European Convention on Human Rights Act 2003 (the "**2003 Act**"). In particular, section 3(1) of the 2003 Act provides that, subject to any statutory provision (other than the 2003 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's provisions"*.

28. As noted above, in *Luximon*, this Court confirmed that, in considering an application under Section 4(7) of the Immigration Act 2004 in respect of lawful, long-term residents in the State, the Minister was under a duty to assess whether the applicant's rights to respect for private and family life under Article 8 ECHR were engaged. While there are undoubtedly differences between the position of the Applicant in this case and the applicants in *Luximon* and *Balchand*, and the Court in *Luximon* was careful to emphasize that its judgment addressed only the facts arising in those appeals, in the Commission's submission, the principles laid down in *Luximon* are equally applicable to the Applicant's case.

29. Article 8(1) ECHR provides that *"everyone"* has *"the right to respect for his private and family life, his home and his correspondence"*. That right is not absolute. Under Article 8(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 wellbeing 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*". For its part, Article 1 ECHR obliges the Contracting Parties to the Convention to secure the rights and freedoms laid down in the Convention *"to everyone within their jurisdiction"*.

30. It is well established that Article 8 ECHR applies to non-citizens. In its jurisprudence, including in the large body of case-law referred to by this Court in *Luximon* and referred to the parties in their submissions in this appeal, the European Court of Human Rights has confirmed that non-citizens may invoke and rely on the right to respect for private and family life. It is also well established that Article 8 ECHR applies in the immigration context not only in the context of expulsion but also in the context of access to residence permits and regularisation of one's legal status. The Grand Chamber judgment in *Jeunesse v. the Netherlands* (Application no. 12738/10), considered in *Luximon*, remains an important reference point in this context.

31. While the essential object of Article 8 may be to protect the individual against arbitrary interference by public authorities, it has long been recognised that Article 8 may impose positive obligations on the State inherent in the effective respect for family life, including in the context of immigration, albeit that the boundaries between the positive and negative obligations do not lend themselves to precise definition: see e.g. *Abdulaziz, Cabales and Balkandali v United Kingdom* (Application no. 9214/80; 9473/81; 9474/81), §67; *Jeunesse*, §106. According to the Court, in the context of both positive and negative obligations under Article 8 ECHR, the applicable principles are similar and 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, in respect of which the State enjoys a certain margin of appreciation: *Jeunesse,* §106.

32. The Strasbourg Court has confirmed that Article 8 ECHR cannot be interpreted as imposing general obligations on the State to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory: see e.g. *Abdulaziz,* §68; *Jeunesse,* §107. Nor does the ECHR guarantee the right of a foreign national to enter or to reside in a particular country: *Jeunesse,* §100; *M.A. v. Denmark* (Application no. 6697/18), §131.

33. However, in cases involving family life as well as immigration, the extent of the State's obligations to admit to its territory relatives of persons lawfully residing there - or, as in this case as in *Luximon,* to permit such persons to reside or continue to reside in the State - "*will vary according to the particular circumstances of the persons involved and the general interest*": *Jeunesse,* §107; *M.A. v. Denmark,* §132. Factors to be taken into account in this regard are "*the extent to which family life would effectively be ruptured,*

the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion", as well as "*whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious*": *Jeunesse,* §§107-108; see also *M.A. v. Denmark,* §132.

34. It is thus clear that, although the Convention does not impose any specific obligation to respect a married couple's choice of residence or to authorise family reunification or confer any specific right to enter or reside in a particular country, a Contracting State's decision in respect of an individual's entitlement to reside in that State may very well engage the individual's right to private and family life under Article 8 ECHR. While the Court has laid down broad principles in its case-law, it has also made it clear that the question of whether a State's immigration decision violates Article 8 ECHR ultimately depends on an assessment of the particular facts and circumstances of the individual case.

35. While the notions of settled migrants and precariousness feature in the Strasbourg case-law, as recognised in *Luximon* ([2018] 2 IR 542, 550-551), there is a need for caution in deploying these notions in a manner that forecloses the individual assessment required under Article 8 ECHR: see also the discussion of the case-law prior to that judgment in Murphy, "Membership without Naturalisation? The Limits of European Court of Human Rights Case Law on Residence Security and Equal Treatment" in Thym, *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Bloomsbury, 2017).

36. Turning to the particular circumstances of this case, the Commission makes the following observations.

37. ***First***, in this case, the refusal to vary the Applicant's permission would - but for the intervening COVID-19 pandemic - have led to a significant rupture in the Applicant's family life in the State. As noted above, the Applicant and her husband had moved to

the State to enable her husband to pursue a four-year course of studies in the State. But for the COVID-19 pandemic, the Minister's decision would have compelled the Applicant and her husband, who was engaged in a four-year course of studies in this State, to live apart in separate countries, at a considerable distance and for a considerable period of time. While the notion of family life under Article 8 ECHR is not confined to such relationships, married relationships constitute one of the core elements of that notion. According to the Strasbourg Court, the essential ingredient of family life is "*the right to live together so that family relationships may develop normally*": *Marckx v. Belgium* (Application No. 6833/74) §31. Inherent consideration in the right to respect for family life under Article 8 are "*regard for family unity and for family reunification in the event of separation*": *Strand Lobben v. Norway* (Application No. 37283/13), §205. Although, as discussed above, special considerations arise in the context of immigration, it is nevertheless important to underline the central role of cohabitation and family unity in the notion of family life protected under Article 8 ECHR. In this regard, it is also relevant to note that, in contrast to the position in much of the Strasbourg case-law, the Applicant's family life was not created at a time when the Applicant's immigration status was uncertain; it existed both before and after the Applicant and her husband's period of residence in the State.

38. ***Second***, it cannot be said that there were insurmountable obstacles in the way of the family living in the Applicant's country of origin, at least in terms of legal obstacles in circumstances where both the Applicant and her husband are Canadian nationals and have returned to that jurisdiction on the completion of the Applicant's husband' studies. However, it is clear that, in practical terms, the Applicant and her husband would have had to make very significant personal and financial sacrifices if they had been compelled to return to Canada prior to the Applicant's husband's completion of his course of studies in the State. This would have undermined the very rationale for the couple coming to live in the State.

39. ***Third***, in the Applicant's case, it is not suggested that there are any factors of immigration control, such as a history of breach of immigration law, or considerations of public order which would have weighed in favour of exclusion or refusal of permission to reside in the State. As the history of this case attests, the Applicant at all times complied with the term of her immigration permission, was never unlawfully in

the State, and, in making the application to the Minister under section 4(7) of the 2004 Act well in advance of the expiry of her permission, sought to ensure that this would remain the case.

40. ***Fourth***, while the position of the Applicant and her husband may not fall neatly into the categories of immigration case which have traditionally come before the Strasbourg Court under Article 8 ECHR, this does not detract from the obligation on the Minister to have regard to the Applicant's right to private and family life under Article 8 ECHR and, in doing so, to have regard to the particular circumstances of the Applicant's case in deciding on the application to vary immigration permission under section 4(7) of the 2004 Act.

41. In the Commission's submission, the Applicant's right to private and family life under Article 8 was clearly engaged by the Minister's decision on her application under section 4(7) of the 2004 Act, no less than it would have been in the context of a deportation order had such an eventuality arisen. In practical terms, the Minister's decision determined whether or not the Applicant would be entitled to remain in the State. If the Applicant had been compelled to leave the State as a result of the Minister's decision (which would have been the case but for the general extension of permissions due to the COVID-19 pandemic), this would undoubtedly have had a significant effect on the Applicant's private and family life.

42. Even if a person in the position of the Applicant might face challenges in establishing that the Minister's refusal of an application to vary an immigration permission under section 4(7) of the 2004 Act amounted to an infringement of Article 8 ECHR, it is not possible to exclude *a priori* - without proper consideration of the particular circumstances of the case – the possibility that such a refusal could violate the State's obligations under that provision of the Convention. This being so, it is necessary for the Minister to consider such rights in deciding on an application to vary immigration permission under section 4(7) of the 2004 Act. While many of the considerations identified by the Minister may be relevant to the weight to be afforded to the Applicant's Article 8 rights in the decision-making process under section 4(7) of the 2004 Act, they do not affect the essential requirement for the Minister to give due consideration to the Applicant's Article 8 rights.

43. Like the applicants in *Luximon* and *Balchand*, the Applicant in this case lawfully entered and resided in the State over a period of some years during which time the Applicant developed her private and family life in the State. The Applicant lived with her husband who was pursuing a course of studies in the State. For most of this time, the Applicant worked in the State and, in this way, contributed to Irish society and the Irish economy. By virtue of her residence and employment in the State, the Applicant was subject to the law of the land, including its employment and tax laws. While the Applicant's Working Holiday Authorisation was limited to a two-year period which was non-renewable or at least "*not ordinarily renewable*" (Appellant's Submissions, §41), and thus shorter than the periods at issue in *Luximon* and *Balchand,* in the Commission's submission, a period of two years is nonetheless a significant period of time in the context of a person's private and family life. In any event, in this case, as a result of the COVID-19 pandemic, the Applicant ultimately lived in Ireland for a significantly longer period, extending to almost four years. The Applicant's was not "*a fleeting presence*" in the State, to use the language of O'Donnell J. in *Nottinghamshire County Council v. B & Others* [2013] 4 IR 662, §84. Nor can the position of the Applicant be characterised as "*entirely tenuous*", as submitted by the Minister (Appellant's Submissions, §21). In these circumstances, the Commission submits that the principles laid down in *Luximon* are also applicable to the Applicant's case.

44. Moreover, by contrast to the position in *Chen*, which concerned an application by a person who had entered the State on the basis of a 90-day visitor's visa, the Applicant in this case was not merely present in the State as a visitor for a short period of time. The Applicant was granted permission to remain in the State, including permission to work, for a much longer period of time, during which time it could be reasonably expected that the Applicant would develop her private and family life within the State. By further contrast with *Chen*, if the Applicant had been compelled to leave the State, there would unquestionably have been a significant rupture of the Applicant's family life in circumstances where her husband had embarked on a four-year course of studies in the State.

45. For these reasons, the Commission submits that, in considering an application to vary an immigration permission under section 4(7) of the 2004 Act on behalf of a person in

the position of the Applicant, and in line with this Court's judgment in *Luximon*, the Minister is obliged to consider the Applicant's right to private and family life under Article 8 ECHR.

V. The Constitution

46. In the event that the Court considers it appropriate to consider the position under the Constitution, it is submitted that, in carrying out her functions, including in the context of applications under section 4(7) of the 2004 Act, the Minister is also obliged to do so in accordance with the Constitution and, in particular, with the fundamental rights guaranteed thereunder.

47. Article 6(2) of the Constitution provides that the powers of government are exercisable only by or on the authority of the organs of State established by the Constitution. Article 28(2) provides that the executive power of the State shall be exercised by or on the authority of the Government "*subject to the provisions of this Constitution*". It follows from these provisions that the Minister, as a member of the Government, is obliged to respect and uphold the Constitution in the exercise of the powers conferred on her. Moreover, where those powers are conferred by statute, it is a corollary of the presumption of constitutionality that they be exercised in accordance with the Constitution.

48. In *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] IR 317, 341, Walsh J. recognised that:

> *…the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice*.

49. In a similar vein, in *The State (Lynch) v. Cooney* [1982] IR 337, 380, Henchy J. stated:

> *It is to be presumed that, when it conferred the power, Parliament intended the power to be exercised only in a manner that would be in conformity with the Constitution and within the limitations of the power as they are to be gathered from the statutory scheme or design. This means, amongst other things, not only that the power must be exercised in good faith but that the opinion or other subjective conclusion set as a precondition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful — such as by misinterpreting the law, or by misapplying it through taking into consideration irrelevant matters of fact, or through ignoring relevant matters. Otherwise, the exercise of the power will be held to be invalid for being ultra vires.*

50. Having regard to the fundamental rights guaranteed under Articles 40 to 44 of the Constitution, the obligation to exercise powers in a manner consistent with the Constitution necessarily entails an obligation to respect such fundamental rights.

51. In the Commission's submission, this obligation arises whether or not an applicant has specifically invoked his or her constitutional rights in the application, once an applicant has set out the relevant facts and personal circumstances relevant to such an assessment. It cannot be assumed that applicants seeking to vary immigration permissions under section 4(7) of the 2004 Act - who may or may not be legally represented and who may have different levels of familiarity with the laws and Constitution of the State - will always be in a position to identify with precision the rights applicable to their situation. By contrast, the Minister must be taken to be familiar with the rights guaranteed under the Constitution.

52. While the Applicant and her husband are not citizens of the State, the personal rights under Article 40 and 41 of the Constitution relevant to the Applicant's position, and in particular the privacy and family rights arising from their married life together in the State, are not limited in their application to citizens.

53. With respect to Article 40, while paragraphs 1 and 3 of that provision refer in their terms to citizens, the Court has long recognised that the fundamental rights under

Article 40 are not restricted to citizens only. In particular, in its judgment in *NHV v. Minister for Justice* [2018] 1 IR 246, this Court, interpreting Article 40.3 in light of Article 40.1, confirmed that non-citizens may invoke the unenumerated personal rights guaranteed under that provision if it can be established that to do otherwise would fail to hold such persons equal as human persons. At the same time, the Court recognised that, in the field of employment, the State was entitled to draw distinctions, even significant distinctions, between the citizens and non-citizens. While *NHV* was concerned with the right to work, it is submitted that the Court's statement of principle - regarding the entitlement of non-citizens to rely on the personal rights guaranteed under Article 40.3 - applies *a fortiori* to the fundamental right to privacy, including the right to marital privacy, having regard to the close connection of such a right with the dignity and freedom of the individual: see e.g. *McGee v. The Attorney General* [1974] I.R. 284; *Kennedy v. Ireland* [1987] IR 587; *Gorry* [2020] IESC 55.

54. For its part, Article 41, which does not use the language of citizens, has long been recognised as applying to non-citizens: see e.g. *Northampton County Council v ABF* [1982] ILRM 164; *Fajujonu v Minister for Justice* [1990] 2 IR 151; *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 IR 1. While many cases (including most recently *Gorry*) have involved consideration of a marriage between an Irish citizen and a non-Irish citizen, in the Commission's submission, there is no basis for excluding the application of the protection of Article 41 to a marriage of non-Irish citizens lawfully residing in the State, such as the Applicant and her husband at the time of the application under section 4(7) of the 2004 Act at issue in these proceedings.

55. After all, under Article 41.1.1º of the Constitution, the State recognises the Family as "*the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law*". Under Article 41.1.2°, the State, therefore, guarantees "*to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State*". Of special relevance in the present context, Article 41.3.1° provides that the State "*pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack*".

56. In *Gorry* [2020] IESC 55, this Court concluded, by a majority (McKechnie J. dissenting), that Article 41 of the Constitution did not guarantee a specific right to cohabitation of a married couple. However, in so concluding, the Court accepted that "*a decision affecting the lives of a married couple in a fundamental way*" demanded close scrutiny and required justification under the Constitution (judgment of O'Donnell J., §25) and that cohabitation by a married couple was "*something the State is required to have regard to in its decision making and to respect*" (§62). Although decisions on immigration and deportation were not matters within the authority of the Family within the meaning of Article 41.1.2°, the Minister was required to have regard *inter alia* to the obligation on the State to guard with special care the institution of Marriage and to the fact that "*cohabitation - the capacity to live together - is a natural incident of marriage and the Family and that deportation will prevent cohabitation in Ireland and may make it difficult, burdensome, or even impossible anywhere else for so long as the deportation order remains in place*" (§75).

57. In the Commission's submission, the Minister's decision in this case clearly engaged the Applicant's rights under Articles 40 and 41 of the Constitution as well as under Article 8 ECHR. In particular, for the reasons set out above in respect of the ECHR, the Minister's refusal of the application under section 4(7) of the 2004 Act in this case would - but for the intervening COVID-19 pandemic - have led to a significant rupture in the Applicant's family and marital life in the State. It would have compelled the Applicant and her husband, as a married couple, to live apart in separate countries, at a considerable distance and for a considerable period of time. While a married couple may not have a specific constitutional right to cohabitation, this Court's decision in *Gorry* expressly recognizes the constitutional value of cohabitation in the context of the rights of the family under Article 41 of the Constitution. Similarly, the fact that the Applicant or her husband may not have a constitutional right to enter and reside in the State does not mean that, once lawfully residing in the State, they are not entitled to the protections afforded by the Constitution. While the Minister submits that there is "*no triggering event*" for the purposes of Article 41 (Appellant's Submissions, §76), in the Commission's submission, the Applicant and her husband's taking up residence in the State for an extended period of time is what brings Article 41 into play in this context. For these reasons, and in accordance with the general principles set out above, it is

submitted that the Minister was obliged to have regard to the Applicant's constitutional rights.

58. While the fact that the Applicant and her husband were not Irish citizens, and that they resided in the State on the basis of specific immigration permissions, would be matters to which the Minister could have regard in determining the weight to be afforded to the Applicant's fundamental rights in this context, and while there might be complex issues about the precise scope and extent of the constitutional rights of persons in the position of the Applicant, in the Commission's submission, this does not affect the underlying duty of the Minister to give appropriate consideration to the Applicant's constitutional rights in making a decision which has potentially significant implications for the protection of those rights.

59. However, in this case, there was simply no consideration of the Applicant's constitutional rights and the Minister's position (Appellant's Submissions, §72) is that there was no obligation to consider Article 41 rights in the context of the Applicant's case.

60. In the Commission's submission, this position cannot be reconciled with the overarching duty on the Minister to act in a manner consistent with the Constitution in the exercise of her functions, including in the context of decision-making on applications to vary immigration permissions under section 4(7) of the 2004 Act.

VI. Conclusion

61. For these reasons, the Commission submits that, in carrying out her functions under section 4(7) of the Immigration Act 2004, the Minister is obliged to have regard to the Applicant's fundamental rights as guaranteed under the Constitution and the ECHR (as given further effect in the State through the European Convention on Human Rights Act 2003). This being so, it is submitted that the appeal should be dismissed.

David Fennelly BL

Michael Lynn SC

(Word Count: 7,217)