AN CHÚIRT UACHTARACH
THE SUPREME COURT

Supreme Court Appeal No. 2016/31

Between:

N.H.V.

Applicant

AND

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

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

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I. Introduction

1. On 19th July 2016, on foot of an application made pursuant to section 10(2)(e) of the Irish Human Rights and Equality Commission Act 2014, this Court made an Order granting the Irish Human Rights and Equality Commission ('the Commission') liberty to appear as *amicus curiae* in this appeal.

2. The Commission now makes the following submissions on the issues set out in this Court's Determination of 27th April 2016.[1] It does so, having had sight of the Appellant's Written Submissions dated 8th July 2016 but without having had sight of the Respondent's Written Submissions.

II. Issues

3. In its Determination of 27th April 2016, this Court identified the following three issues as being at the centre of this appeal and the Commission will address these issues in turn:

> Where a non-national comes to the State and seeks refugee status, or subsidiary protection status does Section 9 (4) of the Refugee Act 1996, or any other provision of law, prohibit the Minister for Justice and Equality from granting permission to the person to work?
>
> If there is such a prohibition, is it nonetheless within the scope of governmental power to nonetheless grant permission to work pending the resolution of such an application?
>
> If it is not within the scope of governmental power to grant permission to work pending the resolution of such an application and if section 9(4) of the Refugee Act 1996 prohibits the Minister for Justice and Equality

[1] *N.H.V. v. Minister for Justice and Equality* [2016] IESCDET 51, paragraph 16.

from granting such permission, is that prohibition consistent with the Constitution?

III. The Judgment of the Court of Appeal

4. The Court of Appeal concluded, unanimously, that section 9(4) of the Refugee Act 1996 ('the Act of 1996') prohibited the Minister from granting a person in the position of the Applicant permission to work.[2] However, there was a division within the Court as to whether this prohibition was unconstitutional on the basis that it interfered with the Applicant's constitutional right to work or earn a livelihood. Finlay Geoghegan J. (with whom Ryan P. agreed) concluded that the Applicant did not have a constitutionally protected personal right to work or earn a livelihood within the State.[3] Dissenting on this issue, Hogan J. took the view that non-citizens should in principle be permitted to rely on the constitutional right to earn a livelihood and that section 9(4)(b) of the Act of 1996 negated "the core and substance of the applicant's right to earn a livelihood".[4]

IV. Submissions

5. The Commission's core submission is that non-citizens, including persons seeking asylum or subsidiary protection such as the Applicant, are entitled to invoke and enjoy the right to work or earn a livelihood which has long been recognised under Article 40.3.1° of the Constitution. While this right may of course be subject to limitations and restrictions, including more significant limitations and restrictions in the case of non-citizens than might apply in the case of citizens, the nature of this right is not such that it is properly confined to citizens in the State and any such interpretation would run contrary not only to this Court's jurisprudence on Article 40.3.1° but also to the State's obligations under European and international law.

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[2] *N.H.V. v. Minister for Justice* [2016] IECA 86, judgment of Hogan J., para. 23.
[3] *N.H.V. v. Minister for Justice* [2016] IECA 86, judgment of Finlay Geoghegan J., para. 29.
[4] *N.H.V. v. Minister for Justice* [2016] IECA 86, judgment of Hogan J., para. 136.

(i) First Issue: where a non-national comes to the State and seeks refugee status, or subsidiary protection status, does Section 9 (4) of the Refugee Act 1996, or any other provision of law, prohibit the Minister for Justice and Equality from granting permission to the person to work?

6. The first issue identified by this Court is whether section 9(4) of the Refugee Act 1996, or any other provision of law, prohibits the Minister for Justice and Equality from granting permission to work to a non-national who comes to the State and seeks refugee status or subsidiary protection. In the Commission's submission, the relevant legislative provisions, interpreted in their context and in light of the Constitution, do not prohibit the Minister from granting an applicant for refugee status or subsidiary protection permission to work.

7. This issue was addressed by the Court of Appeal in the judgment of Hogan J. who formulated the first question in the following terms:

> *"... does the Minister enjoy a discretion under Section 9 of the 1996 Act to grant a work permit to a person in the position of the applicant?"*[5]

It is respectfully submitted that this is not in fact the correct question to be posed. It is clear that the Minister does not have a discretion under Section 9 of the 1996 Act to grant a work permit (*recte*: section 4 permission which can provide for an entitlement of an individual to work) to a person in the position of the Applicant. The relevant discretion is not a discretion exercised under Section 9 of the Act of 1996, but rather is a discretion exercised under Section 4 of the Immigration Act 2004 ('the Act of 2004'). It is thus necessary to examine both the Act of 1996 and the Act of 2004.

(a) Refugee Act 1996

8. Where, in the words of Section 8 of the Act of 1996, *"a person ... arrives at the frontiers of the State seeking asylum in the State or seeking the protection of the State against persecution or requesting not to be returned or removed to a*

[5] *N.H.V. v. Minister for Justice* [2016] IECA 86, judgment of Hogan J., paragraphs 14 and 21.

particular country or otherwise indicating an unwillingness to leave the State for fear of persecution", that person shall be interviewed by the immigration officer as soon as practicable after arrival and may apply to the Minister for a declaration of refugee status. Section 9(1) of the Act of 1996 provides that, subject to the subsequent provisions of the section, *"an applicant, being a person referred to in section 8(1)(a), shall be given leave to enter the State by the immigration officer concerned"*. Accordingly, in considering the position of an individual arriving at the borders of the State who intends to apply for refugee status and does not have any other basis for seeking to enter the country, the immigration officer concerned must allow the person to enter the State and the circumstances of that entry are provided for in Section 8 and Section 9(1) of the Act of 1996.[6]

9. Under section 9(4) of the Act of 1996, an applicant shall not *"seek or enter employment or carry on any business, trade or profession during the period before the final determination of his or her application for a declaration"*. Section 9(11) of the Act qualifies this by providing that subsection (4) *"shall apply only to an applicant who, but for the provisions of this Act, would not be entitled to enter or remain in the State"* (emphasis added).

10. It would appear, therefore, that, if the entitlement of an applicant to enter or remain in the State is dependent solely upon the provisions of the Refugee Act (and in particular Section 9(1)), then Section 9(4) applies. It only applies, however, to such an applicant. If an applicant for a declaration is in the State but in circumstances where they have an entitlement to remain in the State on foot of a Section 4 permission lawfully granted by the Minister under the Act of 2004, it is clear that Section 9(4) does not apply to their circumstances. The prohibition has no effect. In the judgment under appeal, Hogan J. refers to the

[6] This leave does not appear to amount to a *"permission"* within the meaning of Section 4 of the Act of 2004, but rather it is a "*temporary residence certificate*" within the meaning of S.9(2) of the Act of 1996. This would also appear clear from a consideration of Section 4(10) of the Act of 2004, whereby in performing his or her functions under subsection (6) the immigration officer must have regard to all of the circumstances of the non-national known to the officer and in particular must have regard to specific matters therein set out. This obligation would be inconsistent with the automatic entitlement of the non-national to a "*temporary residence certificate*" under the Act of 1996 and to enter the State if intending to apply for refugee status.

Minister's submission that section 9(11) has two purposes: first, it preserves the pre-existing entitlements of a person who may become a refugee *sur place* while otherwise lawfully present in Ireland and, secondly, it enables an asylum seeker to benefit from legal entitlements which might otherwise accrue to him or her while present in Ireland as an asylum seeker, for example under the IBC/05 Scheme, by virtue of the *Zambrano* judgment or as a result of marriage to an Irish citizen.[7]

11. It is indeed clear that the Act of 1996 is not confined to persons arriving at the border of the State with a view to seeking asylum status. Section 8(1)(c) of the Act of 1996 clearly envisages persons applying for refugee status who are already in the State lawfully. However, they could only be in the State lawfully if they are already in possession of a Section 4 permission under the Immigration Act 2004 or another form of permission granted prior to 2004. If such an individual is in the State lawfully, then of course they may very well be working lawfully in the State. Clearly an individual who has arrived at the borders of the State and has been granted a Section 4 permission and who is in possession of a work permit may decide, during the currency of their employment in the State, to apply for refugee status pursuant to the provisions of Section 8 of the Act of 1996. There is nothing in the Act of 1996 to suggest that the mere fact of applying for refugee status in any way involves their surrendering of their work permit or of their legal status in the State, previously established, being adversely affected or being altered by the mere fact of applying for refugee status. If such an individual, having applied for refugee status, has yet to have their application for refugee status determined by the Minister, there is nothing in the Act of 1996 or in the Act of 2004 to preclude their Section 4 permission being extended by the Minister pending the outcome of the application for refugee status. Equally there is nothing to preclude a work permit being extended or renewed during the currency of the immigration permission.

[7] *N.H.V. v. Minister for Justice* [2016] IECA 86, judgment of Hogan J., paragraph 18.

12. However, it is submitted that there is nothing in the text of either section 9 of the Act of 1996, or of the Immigration Act 2004, which limits the Minister's discretion under section 4 of the Act of 2004, to grant permission to work to those seeking asylum or subsidiary protection solely to individuals with a pre-existing entitlement to permission or to individuals with a supervening entitlement to remain by virtue of marriage to an Irish citizen, the *Zambrano* judgment or a scheme such as the IBC/05 Schreme.

(b) Immigration Act 2004

13. Section 4 of the Immigration Act 2004 provides that an immigration officer may, on behalf of the Minister, give to a non-national *"a permission"* authorising the non-national to land or be in the State. Permission under section 4 *may* be granted to *any* non-national. As submitted above, to focus on whether there is a discretion inherent in Section 9 of the Refugee Act 1996 is to misunderstand the position. Indeed if confirmation were needed of this proposition, it is provided very clearly in Section 9(3) of the Act of 1996, where it is contemplated that the granting of a *"temporary residence certificate"* is without prejudice to *"any other permission or leave granted to the person concerned to remain in the State"*. Section 9 of the Act of 1996 does not in any way trammel the Minister's broad discretion under section 4 of the Act of 2004.

14. Section 5(1) of the Act of 2004 makes clear that no non-national may be in the State *"other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister"*. Section 5(3) confirms that the section does not apply to the following categories of person: a person whose application for asylum is under consideration by the Minister; the holder of a declaration of refugee status; a member of their family to whom Section 18(3)(a) of the Act of 1996 applies; and a *"programme refugee"*. Accordingly Section 5 of the Act of 2004 is framed in negative terms. It does not give any individual a right to be in the State but merely makes it clear that, unless an individual comes within the categories outlined above, or has a relevant permission, the presence of the individual in the State is unlawful. Section 5

does not preclude the grant of a Section 4 *'permission'* to an applicant for refugee status or to a member of his family or to a programme refugee. Rather, it merely makes it clear that if such an individual does not have a Section 4 permission, they do not fall foul of the prohibition contained in Section 5(1).

15. The only categories of individuals to whom a permission under Section 4 cannot be granted are set out in Section 2(1) of the Act. Section 2(1) provides that the Act, and therefore a permission under the Act, shall not apply to certain categories of person, including persons entitled to diplomatic immunity and consular immunity under the Diplomatic Relations and Immunities Act 1967 and persons entitled in the State to privileges and immunities under any other Act of the Oireachtas or any instrument made thereunder. Section 2 also makes clear that the provisions of the Act of 2004 do not amount to a derogation from any of the State's obligations under European Union law and, importantly, also "*Section 9(1) of the Refugee Act 1996.*"[8]

16. In the Commission's submission, it follows that the Minister, or an immigration officer acting on behalf of the Minister, enjoys discretion to grant an applicant for asylum or subsidiary protection a form of permission under section 4 of the Act of 2004, which then would serve to bring the applicant outside the prohibition in section 9(4) of the Act of 1996.

17. In a system where asylum and subsidiary protection applications are processed promptly, there may be little logic or necessity for applicants for international protection to seek an alternative or parallel form of permission under section 4 of the Act of 2004. However, as the facts of the Applicant's case illustrate, this is not the case in Ireland at present where applicants for international protection may be subject to very significant delays over many years before their application is finally and lawfully determined. In these circumstances, it is entirely appropriate that applicants would be entitled to apply to the Minister for such permission, as the Applicant in this case did. Clearly the Minister will not wish to be inundated with applications for Section 4 permissions by those

[8] Section 2(2)(c), Immigration Act 2004.

whose entry into the State has been facilitated and permitted merely because they satisfy the criteria of Section 8 of the Act with their entry into the State provided for in Section 9(1). There would be nothing to preclude the Minister having a policy that only in exceptional circumstances would an application for a Section 4 permission be entertained from an individual who had entered the State pursuant to the provisions of Section 9(1). Nevertheless, exceptional circumstances do, on occasion, arise. In the Commission's submission, there is nothing in the legislation which precludes the Minister from considering, and exercising her discretion to grant, such applications where the Minister deems it appropriate.

18. In support of his conclusion to the contrary, Hogan J., in the Court of Appeal, relied upon the decision of this Court in *G.A.G. v The Minister for Justice Equality and Law Reform*.[9] This decision pre-dated the enactment of the Immigration Act 2004, and does not, accordingly, assist in the interpretation of the provisions of that Act. Further, the immigration regime in place prior to 2004 was in large measure an exercise of the executive authority of the State and was not subject to detailed provisions enacted by the Oireachtas such as those now to be found in the Act of 2004. The provisions of section 5 of the Act of 2004 make clear that, *post* 2004, the intervention of the Oireachtas has precluded the operation of a parallel system of permissions outside the ambit and scope of section 4. Indeed in this regard it might be noted that, in light of this, the decision of this Court in *Bode and Others v. Minister for Justice, Equality and Law Reform*[10] regarding the IBC/05 scheme as being an exercise of the executive power of the State outside the scope of the Immigration Act 2004, may be regarded as *per incuriam* since the provisions of section 5 of the Act of 2004 do not appear to have been brought to the attention of the Court in that case.

(c) The Double Construction Rule

[9] *G.A.G. v The Minister for Justice Equality and Law Reform* [2003] 3 IR 442.
[10] *Bode and Others v. Minister for Justice, Equality and Law Reform* [2008] 3 IR 663.

19. The Commission submits that the ordinary construction of the Acts of 1996 and 2004 supports the interpretation contended for above that the Minister enjoys discretion to grant a person in the position of the Applicant a form of permission under section 4 of the Immigration Act 2004 which would entitle the Applicant to work within the State. Moreover, the case for such an interpretation is reinforced by the need to interpret the relevant legislation in a manner compatible with the Constitution and, in particular, with the constitutional right of persons in the position of the Applicant to work or earn a livelihood.

20. Both the Refugee Act 1996 and the Immigration Act 2004 enjoy the presumption of constitutionality. As Walsh J. recognised in *McDonald v. Bord na gCon*:

> "O*ne practical effect of this presumption is that if in respect of any provision or provisions of the act two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction and a court called upon to adjudicate upon the constitutionality of the statutory provision should uphold the statutory construction*".[11]

21. In a similar vein, this Court recognised in the *East Donegal* case 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*".[12]

[11] *McDonald v Bord na gCon* [1965] IR 217, at 239.
[12] *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] IR 317, 341. See also *The State (Lynch) v. Cooney* [1982] IR 337, 380.

22. More recently, in *Montemuino v. Minister for Communications, Energy and Natural Resources*, Clarke J., referring to the applicant's argument based on the double construction rule, noted that "*the* East Donegal *principle only comes into play if a construction which might otherwise be placed on legislation would lead to that legislation being considered inconsistent with the Constitution"* but that *"the first port of call always has to be to seek to ascertain what the legislation means by reference to the ordinary canons of construction"*.[13]

23. Although the foregoing principle is uncontroversial, it is nevertheless of fundamental importance, as illustrated by this Court's judgment in *Shirley and Others v. A. O'Gorman and Company Limited and Others*.[14] This judgment concerned a constitutional challenge to certain provisions of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978. Following a Circuit Court appeal to the High Court, the High Court had determined the appeal on the basis of a particular interpretation of this legislation. The findings of the High Court Judge on the Circuit Court appeal were adverse to the interests of Shirley who thereupon, in a parallel plenary action before the same Judge of the High Court, which action had travelled alongside the Circuit appeal, challenged the constitutionality of the provisions of the Act of 1978. He was unsuccessful in so doing and appealed to the Supreme Court. Before the Supreme Court the parties, which included the Attorney General, argued the issue as to whether the provisions of the Act of 1978 were invalid having regard to the provisions of the Constitution. The Supreme Court dismissed the appeal but, in doing so, pointed out that the interpretation which it had ascribed to the Act of 1978 would have allowed Shirley to have successfully resisted the first defendant's claim in the Circuit Court appeal which thereby would have rendered unnecessary not only the appeal before the Supreme Court but also the High Court plenary action challenging the constitutionality of the Act. Accordingly, the plaintiff had no standing to challenge the constitutionality of the Act.[15] The Commission cites

[13] *Montemuino v. Minister for Communications, Energy and Natural Resources* [2013] 4 IR 120, 133.
[14] *Shirley and Others v. A. O'Gorman and Company Limited and Others* [2012] 2 IR 170.
[15] [2012] 2 IR 170, 197.

this judgment to emphasise the importance of ascribing, in so far as is possible, a constitutional interpretation to a relevant statutory provision before embarking upon a consideration of whether the said provision is invalid having regard to the provisions of the Constitution.

24. In the Commission's submission, the Court of Appeal – in concluding that the provisions of the Acts of 1996 and 2004 absolutely precluded the Minister from granting persons in the position of the Applicant a form of permission under section 4 of the Act of 2004 that would entitle the Applicant to work – did not consider whether there was another interpretation of these provisions reasonably open to it which was consistent with the right to work or earn a livelihood under Article 40.3.1˚ of the Constitution. For the reasons set out above, the Commission submits that, in light of the duty to interpret legislation in a manner compatible with the Constitution, including the constitutional right to work and earn a livelihood, this Court should interpret the relevant provisions of the Acts of 1996 and 2004 – and in particular section 4 of the Act of 2004 – as meaning that the Minister may grant a person in the position of the Applicant a form of permission under section 4 of the Act of 2004 that would entitle the Applicant to work pending the determination of the application for international protection.

(ii) Second Issue: If there is such a prohibition, is it nonetheless within the scope of governmental power to nonetheless grant permission to work pending the resolution of such an application?

25. For the reasons set out in the preceding section, the Commission's primary submission is that the Minister is not prohibited from granting a person in the position of the Applicant permission to work pending the resolution of an application for international protection: section 4 of the Act of 2004 allows the Minister to grant the Applicant a form of permission which would enable him to work pending the determination of his application. However, if the Minister were so prohibited by the relevant provisions of the Acts of 1996 or 2004, it is submitted that, in light of section 4 of the Act of 2004 and such other statutory provisions as may apply (including section 9 of the Act of 1996), there is no

longer any parallel or residual executive discretion vested in the Minister to grant permission to be in the State otherwise than in accordance with these statutory provisions.

(iii) Third Issue: if it is not within the scope of governmental power to grant permission to work pending the resolution of such an application and if section 9(4) of the Refugee Act 1996 prohibits the Minister for Justice and Equality from granting such permission, is that prohibition consistent with the Constitution?

26. If, contrary to the preceding submissions, this Court is of the view that the Minister is prohibited from granting a person in the position of the Applicant permission to work, it is submitted that this prohibition is invalid having regard to the provisions of the Constitution because it constitutes a disproportionate interference with the right to work or earn a livelihood guaranteed under Article 40.3.1° of the Constitution.

(a) Entitlement of Non-Citizens to Invoke the Right to Work or Earn a Livelihood

27. First, it is submitted that non-citizens, including persons in the position of the Applicant, may invoke and enjoy the constitutional right to work or earn a livelihood. Article 40.3.1° provides that the State "*guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen*". Although not specifically guaranteed in the text of Article 40, the Irish courts have long recognised that among the personal rights protected under Article 40.3.1° is the right to work or earn a livelihood.[16]

28. While many of the cases where this right has been invoked have involved citizens, this Court has recognised in a series of judgments that the personal rights guaranteed under Article 40.3.1° are not necessarily confined to citizens.

[16] *Murtagh Properties Ltd. v. Cleary* [1972] IR 330; *Murphy v. Stewart* [1973] IR 97; *Cafolla v. O'Malley* [1985] IR 486; *Cox v. Ireland* [1992] 2 IR 503; *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

In *Re Article 26 and the Illegal Immigrants (Trafficking) Bill*, the Supreme Court observed that the rights, including fundamental rights, to which non-nationals *"may be entitled under the Constitution do not always coincide with the rights protected as regards citizens of the State, the right not to be deported from the State being an obvious and relevant example"*. In considering this issue, the Court expressly confined itself to such rights as were relevant to the interpretation of the impugned provision, section 5 of the Illegal Immigrants (Trafficking) Bill, 1999. In this regard, the Supreme Court acknowledged the right of non-citizens *"to apply for release from custody pursuant to Article 40.4.2° on the grounds that the person concerned is not being detained in accordance with the law"*.[17] In respect of the right of access to the courts more generally, which, like the right to work or earn a livelihood, is one of the unenumerated rights recognised under Article 40.3, the Court stated as follows:

> *"It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights."*[18]

In recognising this right, the Court stated, in broader terms, that *"where the State, or State authorities, make decisions which are legally binding on, and addressed directly to, a particular individual, within the jurisdiction, whether a citizen or non-national, such decisions must be taken in accordance with the law and the Constitution"*.[19] The Court continued by affirming that similar considerations arise "*with regard to a non-national's right to fair procedures and to the application of natural and constitutional justice where he or she has applied for asylum or refugee status*".[20]

29. More recently, in *Nottinghamshire County Council v. B & Others*, the Supreme Court (*per* O'Donnell J.) observed that, although the issue of whether some or all of the constitutional provisions were limited to citizens had not been

[17] *Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360, 384.
[18] [2000] 2 IR 360, 385.
[19] [2000] 2 IR 360, 385.
[20] [2000] 2 IR 360, 385.

resolved, *"a* modus vivendi *appears to have been arrived at in which non-citizens have been permitted to invoke some provisions of the Constitution that while it is accepted that some aspects of the Constitution essentially related to voting and representational matter are nevertheless properly limited to citizens"*.[21] If the Court were called on to consider *"the related and even more complex question as to whether and if so how, a person can assert that the act of travelling to Ireland can give rise to constitutional rights or claims"*, which it was not required to do for the purposes of that case, O'Donnell J. stated that it would be necessary *"to consider carefully the constitutional text, many more decisions than were cited in this case, and a number of different fact situations including questions as to the significance of citizenship, residence, or fleeting presence in the jurisdiction"*.[22] In this connection, the Court suggested that it may be that *"regard might usefully be had to the provisions of Article 40.1 of the Constitution which does not appear to have figured significantly in the decisions or commentary to date"*.[23] Article 40.1 of the Constitution provides that all citizens shall, as human persons, be held equal before the law.

30. Relying on this case-law, Finlay Geoghegan J., in the majority judgment of the Court of Appeal on this issue, stated that, in determining whether it is contended that a non-citizen enjoys one of the fundamental personal rights under Article 40.3 of the Constitution, it was necessary *"to look at both the status of the non-citizen and also the nature of the particular right being contended for"*. The learned judge expressed the view that the Applicant's current status in the State was central to this assessment and *"[a] right to work or earn a livelihood within the State is inextricably linked to a person's status within the State"*, such right not being capable of being exercised "*in vacuo*".[24] Finlay Geoghegan J. concluded that *"such a constitutionally protected right must be considered as flowing from the social contract between the citizen and the State and is intimately connected with the citizens' entitlement to live in the State"*.[25]

[21] *In Re Nottinghamshire County Council* [2013] 4 IR 662, paragraph 84.
[22] [2013] 4 IR 662, paragraph 84.
[23] [2013] 4 IR 662, paragraph 84.
[24] [2016] IECA 86, judgment of Finlay Geoghegan J., paragraph 26.
[25] [2016] IECA 86, judgment of Finlay Geoghegan J., paragraph 28.

31. In his judgment, dissenting on this issue, Hogan J. took a broader view of the entitlement of non-citizens to invoke the personal rights guaranteed under the Constitution, stating that the relevant judgments of the Supreme Court *"concluded that non-citizens in principle enjoy the rights guaranteed by the fundamental rights provisions of Articles 40 to Article 44 of the Constitution in much the same general (but perhaps not identical) manner as citizens"*.[26] At the same time, Hogan J. recognised that there may nonetheless be *"special cases where non-citizens will not be permitted to invoke the fundamental rights provisions of the Constitution or, at least, where claims of this nature will be viewed with circumspection"*: for example, *"where non-citizens travel here for the purpose of circumventing the governing legal rules prevailing in their own State (as happened in cases such as* Saunders *and* KB*) or where their presence in the State is purely fleeting, accidental or temporary or conditional"*.[27] Hogan J. commented that, *"while the linkage between citizenship and the right to pursue certain vocations or employments is a tangible one in those cases involving the exercise of official authority, this is not true so far as the majority of occupations, trades or employment opportunities is concerned"*.[28] He continued:

> *"Here it must be recalled that employment is not just simply a means of earning a living. Employment gives dignity to what otherwise would be for many a soulless existence and for those of us fortunate to have an occupation, trade or employment, this may be said to be one of the key defining features of our lives. The protection of the dignity of the individual (and not simply citizens) is, of course, one of the objectives which the Preamble to the Constitution seeks to secure."*[29]

32. In light of the diverging approaches in the Court of Appeal on this issue, it is submitted that it is fundamentally important to distinguish between the threshold question of whether non-citizens may invoke and enjoy the right and, if they do enjoy such a right, the conditions and limitations under which certain categories of persons/non-citizens may exercise those rights. In the

[26] [2016] IECA 86, Judgment of Hogan J., paragraph 104.
[27] [2016] IECA 86, Judgment of Hogan J., paragraph 105.
[28] [2016] IECA 86, Judgment of Hogan J., paragraph 109.
[29] [2016] IECA 86, Judgment of Hogan J., paragraph 110.

Commission's submission, while the conditions and limitations under which that right are exercised will indeed be determined by one's citizenship or residence status within the State, the fundamental right itself is one which inheres in each person by virtue of his or her human personality and dignity. In contrast to the constitutional rights in respect of voting and representation matters, it is not a right which is inextricably linked with citizenship status.

33. If the majority judgment of the Court of Appeal were correct in this regard, no non-citizen – not even EU/EEA citizens or other non-nationals lawfully working in the State, in many cases for significant periods of their lives, including persons granted international protection – would be entitled to invoke the *constitutional* right to work or earn a livelihood even in cases where legislative or other measures sought to interfere with that right. Such individuals – lawfully resident in the State and forming part of our society and economy – would be subject to the law of the land in all its complexity, including the criminal law of the State and its employment and tax laws, without the concomitant protection of the Constitution insofar as those laws might interfere with their right to work and earn a livelihood. If non-citizens were automatically excluded from the enjoyment of this fundamental right, the standard of protection of the right to work under the Irish Constitution would arguably fall considerably short of the standard of protection guaranteed under European law (including in particular Article 15 of the Charter of Fundamental Rights) and international law.

34. In this regard, it is submitted that the considerations relating to the status in the State of the individual invoking the right to work or earn a livelihood, which formed a central part of the reasoning of the majority judgment on this issue, are matters which properly go to the scope and limits of the right rather than to the threshold issue of its existence and capacity to be invoked. For all these reasons, the Commission submits that the dissenting judgment of Hogan J. is more consistent with the case-law of this Court on the entitlement of non-citizens to rely on the personal rights guaranteed under Article 40 of the Constitution and should be followed by this Court if it must address this issue.

35. Furthermore, the Commission submits that the approach of the majority in the Court of Appeal, which automatically excludes non-citizens from the enjoyment of the right to work or earn a livelihood under Article 40.3.1° of the Constitution, runs contrary to the obligations of the State under international law. From the seminal statement of Article 23(1) of the Universal Declaration of Human Rights to its incorporation in binding international agreements at the regional and global levels (many of which have been cited by the Appellant), international law has recognised the right of every person to work, although the scope and contours of that right are in very many respects contested. Of direct relevance for Ireland is the incorporation of such a right in Article 15 of the Charter of Fundamental Rights of the European Union (in respect of matters falling within the scope of EU law), Article 6 of the International Covenant on Social, Economic and Cultural Rights, Article 1 of the Revised European Social Charter (ratified by Ireland on 4th November 2000), and, in matters falling within their respective scope, Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women (acceded to by Ireland on 23rd December 1985), Article 5 of the Convention on the Elimination of Racial Discrimination (ratified by Ireland on 29th December 2000), Article 27 of the Convention on the Rights of Persons with Disabilities (which has been signed but not yet ratified by Ireland but which has been concluded by the European Union on 23rd December 2010).

36. For present purposes, the Commission will focus on the right to work as enshrined in Article 6 of the International Covenant on Social, Economic and Cultural Rights ('ICESCR'), which, with 164 States Parties, is the most widely accepted statement of the right to work in international law. Article 6 provides:

> *1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*
>
> *2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full*

> *and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*

Article 6 must be understood alongside Article 2(2) of the Covenant which provides that the States Parties to the Covenant *"undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*.

37. In its General Comment No. 18, on the Right to Work, the Committee on Social, Economic and Cultural Rights has described the right to work as *"a fundamental right"* and *"essential for realizing other human rights and [forming] an inseparable and inherent part of human dignity"*.[30] It continues:

> *"Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition in the community".*[31]

Among the obligations imposed by Article 6 on States is "*the obligation to respect the right to work by, inter alia, prohibiting forced or compulsory labour and refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including prisoners and detainees, members of minorities and migrant workers*".[32] Among the core obligations of the Covenant – which are not subject to the Covenant's provision for progressive realization – is the obligation to ensure non-discrimination and equal protection of employment.[33] The Committee recognised that a State enjoys "*a margin of discretion in assessing which measures are most suitable to meet its specific circumstances*".[34]

[30] Committee on Social, Economic and Cultural Rights, *General Comment No. 18 on the Right to Work*, E/C.12/GC/18 (6 February 2006), paragraph 1.
[31] E/C.12/GC/18, paragraph 1.
[32] E/C.12/GC/18, paragraph 23.
[33] E/C.12/GC/18, paragraph 31.
[34] E/C.12/GC/18, paragraph 37.

38. The Covenant – which Ireland signed on 1 October 1973 and ratified on 8 December 1989 – is binding on the State as a matter of international law. In Ireland's most recent Country Report to the Committee on Social, Economic and Cultural Rights, the treaty monitoring body, Ireland has stated that "*the right to work and earn a livelihood is guaranteed as an unenumerated personal right under Article 40.3 of the Constitution*" and cited that provision among the measures which serve to implement the Covenant at the domestic level.[35] Insofar as the right to work and earn a livelihood constitutes, in whole or in part, Ireland's implementation of Article 6(1) ICCPR, it is submitted that that right should be interpreted in a manner compatible with the State's obligations under Article 6(1) ICCPR. For its part, the Committee, in its concluding observations, expressed its concern about "*the restrictions asylum seekers face in accessing employment, social security benefits, health-care services and education (art. 2(2))*" and recommended that the State "*take the steps necessary to improve the reception of asylum seekers with a view to ensuring that their economic, social and cultural rights and faciltitating their integration into society*".[36]

39. While the Covenant has not been specifically incorporated into Irish law, such that it is subject to the restrictions imposed by Article 29.6 of the Irish Constitution, this Court has long recognised that Irish law should be interpreted in a manner compatible with its international obligations.[37] Moreover, in interpreting the rights protected under the Constitution, this Court has often had regard to the manner in which those rights are protected under international agreements binding on the State as a matter of international law.[38] While this principle has been primarily recognised in the context of the European Convention on Human Rights, which has now been given further effect through the European Convention on Human Rights Act 2003, it applies in equal measure to other international agreements binding on the State as a matter of international law, including the Covenant. For this reason, the Commission respectfully submits that the Constitution should, insofar as is possible, be

[35] Third Periodic Report of Ireland, E/C.12/IRL/3, paragraph 492.
[36] E/C.12/IRL/CO/3, paragraph 14.
[37] *O Domhnaill v Merrick* [1984] IR 151.
[38] See e.g. *D.P.P. v Gormley*; *D.P.P. v White* [2014] 2 IR 591.

interpreted in a manner which is consonant with the State's international obligations, including its obligations under Article 6(1) ICESCR. If, contrary to the Commission's submissions, the Constitution did not extend its guarantee of the right to work and earn a livelihood to a non-citizen such as the Applicant in these proceedings, it could be argued that the standard of protection for fundamental rights of non-citizens under the Constitution would fall considerably short of that provided for under EU and international law.

(b) The Interference with the Right to Work or Earn a Livelihood

40. If the Court accepts that non-citizens, such as the Applicant, are entitled to invoke and rely on the constitutional right to work or earn a livelihood, the question arises as to whether the interference with that right – constituted by section 9(4) of the Refugee Act 1996 – can be justified. While the Commission acknowledges that the right to work or earn a livelihood is not an absolute right and may be subject to restrictions and limitations in the common good,[39] and indeed that these restrictions and limitations may be more far-reaching in the case of non-citizens than in the case of citizens,[40] any such restrictions must be proportionate.[41]

41. In this regard, the Commission submits that Article 9(4) of the Refugee Act 1996 constitutes a most grave and far-reaching interference with the Applicant's right to work. If Article 9(4) imposes an absolute prohibition (backed up by criminal sanction) on the Applicant engaging in employment pending the determination of the Applicant's application for international protection, regardless of the period of time taken to determine this application and the Applicant's individual circumstances, Article 9(4) effectively nullifies the Applicant's right to work and earn a livelihood.

42. While a prohibition on the right to work for applicants for international protection for a limited period of time may be justifiable under the Constitution

[39] *Attorney General v. Paperlink* [1984] ILRM 373 (HC).
[40] *Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360.
[41] *Heaney v. Ireland* [1994] 3 IR 593; *Cox v. Ireland* [1992] 2 IR 503.

and as a matter of international law, it is submitted that an absolute prohibition of indefinite duration, such as that found in section 9(4) of the Refugee Act 1996, cannot be justified, particularly in the context of a system for international protection which is defined by gross and inordinate delays under which very many applicants are compelled to live for many years in conditions which interfere severely with their fundamental rights.

43. In circumstances such as those of the Applicant, the threat to human dignity posed by being deprived of any opportunity to engage in employment is not abstract or theoretical. As the Working Group on Direct Provision has commented in its Final Report:

> *After length of time waiting a final decision, a right to work was the issue of most concern raised by Direct Provision residents in submissions during the consultation process. Many of the human costs associated with the ban on access to employment are similar to the negative impacts of living long term in Direct Provision. These include: boredom, isolation and social exclusion; obsolescence of skills and creation of dependency; and negative impacts on physical, emotional and mental health. The right to work has also been a priority focus of commentators, academics and NGOs, given that Ireland's position is out of line with the policy of the majority of EU Member States on this matter, including the United Kingdom*.[42]

The Commission, in its Policy Statement on Direct Provision, has observed that the denial of a right to work for asylum seekers *"has a severe impact, particularly for those who have been in the asylum process for lengthy periods of time"*.[43]

[42] Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers, Final Report ('Final Report'), June 2015, paragraph 52, available online at http://www.justice.ie/en/JELR/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf/Files/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf

[43] Irish Human Rights and Equality Commission, Policy Statement on the System of Direct Provision in Ireland, 10 December 2014.

44. Moreover, it is important to emphasize that the effect of this serious interference with the right to work and earn a livelihood is not confined to the period awaiting determination of an application for international protection. Deprivation of access to employment over a period of many years has a detrimental effect on the ability of an individual who is eventually granted asylum or subsidiary protection to access employment once they are entitled to do so. In this way, the absolute prohibition imposed by section 9(4) of the Refugee Act 1996 undermines the right to work and earn a livelihood into the future and, in particular, the rights conferred on refugees under Articles 17 to 19 of the Refugee Convention. Once again, the Working Group on Direct Provision comments on these issues in its Final Report:

> *1.64 Access to and participation in an education system are prerequisites to achieving the health benefits that education provides. Similarly, being employed is extremely beneficial for an individual's health. The prohibition against taking up any form of employment and the limited access to the education system for adults can therefore be considered among the more severe elements of the system, which can deny individuals the opportunity to support themselves or their families in any meaningful way now or in the future.*
> *1.65 Some commentators argue that the absence of any prospect of either employing pre-existing qualifications or skills or developing new ones can result in extreme boredom and isolation for adults living long term in Direct Provision. Effective integration can also be inhibited through the denial of a network of colleagues and the accompanying lack of resources necessary for participation in the community.*[44]

In a number of recent reports, the Irish Refugee Council has confirmed the very serious barriers facing refugees in seeking to access employment following lengthy periods in direct provision.[45] In this regard, it is of course important to have regard to the declaratory nature of a grant of refugee status.[46]

45. While Ireland has not opted in to the Reception Directive, which is accordingly not binding on the State, the provisions of the Directive provide a very clear

[44] See further paragraphs 1.66-1.68.
[45] Irish Refugee Council, *Counting the Cost* (Conlan, 2014); Irish Refugee Council, *Transition: from Direct Provision to life in the community: The experiences of those who have been granted refugee status, subsidiary protection or leave to remain in Ireland* (2016), pp. 53-54.
[46] *H.I.D. (a minor) v. Refugee Appeals Commissioner* [2011] IEHC 33, paragraph 58.

illustration of the availability and effectiveness of less restrictive measures than an absolute prohibition of the right to work. As the Final Report of the Working Group on Direct Provision notes, Ireland's position is out of line with the approach of most EU Member States in this regard, including that of the United Kingdom. On this basis, the Working Group recommended that provision be made in the revised legislation *"for access to the labour market for protection applicants who are awaiting a first instance decision for nine months or more, and who have cooperated with the protection process (under the relevant statutory provisions)"*.[47]

46. It goes without saying that the precise conditions and limitations on the right to work of applicants for international protection are matters of policy for the political organs of government. What is relevant for present purposes is that, as a matter of law, there is a wide range of less restrictive measures available to the Government and to the Oireachtas which would effectively serve the legitimate objectives of the State in the field without disproportionately infringing the rights of applicants for international protection such as the Applicant.

47. For all these reasons, the Commission submits that, insofar as Section 9(4) of the Refugee Act 1996 imposes an absolute prohibition on applicants for international protection from engaging in work, it constitutes a wholly disproportionate interference with the constitutional right of such persons to work or earn a livelihood.

V. Conclusions

48. For these reasons, the Commission submits:

I. Having regard to the terms of the Refugee Act 1996 and the Immigration Act 2004, interpreted in their context and in accordance with the Constitution, the Minister is not prohibited from granting a person in the position of the Applicant

[47] Final Report, note 43, 53.

permission to work pending the determination of the application for international protection.

II. If, contrary to this submission, the Minister is so prohibited, it is not otherwise within the scope of governmental power to nonetheless grant permission to work pending the resolution of such an application.

III. Applicants for international protection, such as the Applicant, are entitled to invoke the right to work or earn a livelihood guaranteed under Article 40.3.1˚ of the Constitution. Insofar as Section 9(4) of the Refugee Act 1996 constitutes an absolute prohibition on applicants for international protection engaging in employment and the Minister is not entitled to grant permission to work to such persons, section 9(4) constitutes a disproportionate interference with the Applicant's constitutional right to work or earn a livelihood and, on this basis, is invalid having regard to the provisions of the Constitution.

David Fennelly BL

Feichín McDonagh SC

27th July 2016