AN CHÚIRT UACHTARACH
SUPREME COURT

Record Nos. 2017/09 and No. 2017/10

Between:-

DANIYBE LUXIMON AND PRASHINA CHOOLUN

(A MINOR SUING BY HER MOTHER AND NEXT FRIEND DANIYBE LUXIMON)

Applicants/Respondents to the Appeal

-and-

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent/Appellant

-and-

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

-AND-

Between:-

YASWIN BALCHAND, CHANDRIKA GOPEE AND CIERON LAKSH BALCHAND

(A MINOR SUING BY HIS FATHER AND NEXT FRIEND YASWIN BALCHAND)

Applicants/Respondents to the Appeal

-and-

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent/Appellant

-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. On the 12th July 2017, the Court granted the Irish Human Rights and Equality Commission ('**the Commission'**) liberty to appear as *amicus curiae* in these appeals. The Commission previously appeared as *amicus curiae* in the proceedings before the Court of Appeal. For the purposes of these submissions, the Commission will refer to the applicants before the High Court and the respondents to these appeals as the Respondents.

2. In its determinations in *Luximon*[1] and *Balchand*,[2] this Court has decided that the following points of general public importance require to be determined in this appeal:-

    (a) Whether, in the light of the procedural history of these proceedings, the Minister is now entitled to rely on the issues sought to be argued by the Minister in this appeal?

    (b) Whether, under s.4(7) of the Immigration Act, the Minister was under a duty to consider constitutional family rights, or Article 8 ECHR rights, either generally, or in the circumstances of this case?

    In accordance with its application for leave to appear as *amicus curiae* in these appeals, the Commission proposes to confine itself to the second point identified by the Court. This second point reflects the first question certified by the High Court (Barr J.) in *Luximon* and by the High Court (Humphreys J.) in *Balchand* as involving a point of exceptional public importance warranting an appeal. The two cases were heard together in the Court of Appeal and, in view of the fact that the issues in the appeals are so closely connected, this Court has directed that the appeals would travel together.

3. In the Commission's submission, the Minister is obliged to consider the private and family rights of persons such as the Respondents to these appeals, under the Constitution and Article 8 of the European Convention on Human

[1] *Luximon & Others v. Minister for Justice and Equality* [2017] IESCDET 55 ('*Luximon*').
[2] *Balchand & Others v. Minister for Justice and Equality* [2017] IESCDET 56 ('*Balchand*').

Rights ('ECHR'), in determining applications made by them under Section 4(7) of the Immigration Act 2004.

4. The Commission does not propose to address the detailed factual and procedural background to the appeals which has already been set out in detail in the judgments of the High Court and the Court of Appeal and in the parties' written submissions.

II. The Minister is Obliged to Consider the Respondents' Right to Private and Family Life in Exercising His Discretion and Making Decisions under Section 4(7) of the Immigration Act 2004

5. The Respondents assert that the Minister is obliged to consider their rights to private and family life, as protected under the Constitution and the ECHR, in exercising his discretion and in making decisions on applications for variation of permission under section 4(7) of the Immigration Act 2004. The Minister's position is that he is not under an obligation to consider the Respondents' rights in the context of the application under section 4(7) but that *"such asserted rights"* would be considered in the context of the deportation process under section 3 of the Immigration Act 1999.[3] Thus, the question at the heart of this appeal is whether, by virtue of the fact that the Respondents' rights would be taken into account *if* the Respondents become subject to the deportation process, the Minister can lawfully refuse to consider those rights in the context of applications for a variation of permission under section 4(7) of the Immigration Act 2004. In the Commission's submission, the answer to this question is clearly in the negative.

A. The Right to Private and Family Life of the Respondents is Protected under the Constitution and the ECHR

[3] Minister's submissions in *Luximon*, paragraph 4.5, and in *Balchand*, paragraph 4.11.

6. In its judgment in *Luximon*, the Court of Appeal noted that the Minister "*did not assert in these proceedings, as a ground of opposition, that the applicants did not have rights to private life or family life capable of protection either by the Constitution or Article 8 of ECHR"*.[4] In *Balchand*, the Court of Appeal found that the conclusion of the High Court – that the private and family rights of the Respondents were *"minimal to non-existent"* and *"do not need to be considered by the Minister at any stage of the process"*[5] – was stark and went beyond the Minister's position in the notice of opposition.[6] Although reference is made to the *"asserted rights"* and *"such rights, insofar as they exist,…"*[7] of the Respondents, the Minister has confirmed in his submissions before this Court that he is not seeking to argue that the constitutional or ECHR rights contended for by the Respondents *"did not exist"*.[8]

7. In light of the High Court judgment in *Balchand*, which purported to rely on this Court's judgment in *P.O. v Minister for Justice and Equality*,[9] and the Minister's reference to *"asserted rights"* and *"such rights, insofar as they exist…"* in his submissions to this Court, the Commission considers it important to reaffirm, as a preliminary matter, the entitlement of non-citizens to enjoy and rely on the constitutional and Convention rights to respect for private and family life.

8. The circumstances of the Respondents in these cases underline the rationale for, and importance of, guaranteeing and respecting the constitutional and Convention rights of non-Irish citizens. While the Respondents have come to the State on the basis of an immigration permission of limited duration, it is nonetheless the case that they have resided in the State for a significant period of time. Theirs was not, to use the language of O'Donnell J. in *Nottinghamshire County Council v. B & Others*, "*a fleeting presence*" in the

[4] *Luximon & Others v. Minister for Justice and Equality* [2016] IECA 382, paragraph 15.
[5] *Balchand & Others v. Minister for Justice and Equality* [2016] IEHC 132, paragraph 21.
[6] *Balchand & Others v. Minister for Justice and Equality* [2016] IECA 383, paragraph 19.
[7] Minister's submissions in *Luximon*, paragraphs 4.5 and 4.12, and in *Balchand*, paragraphs 4.11 and 4.19.
[8] Minister's submissions in *Luximon*, paragraph 4.5, and in *Balchand*, paragraph 4.11.
[9] *P.O. v Minister for Justice and Equality* [2015] IESC 64.

State.[10] During this time, the adult Respondents have not only studied and worked within the jurisdiction; they, with their children, have also developed their personal and family lives in the State. They have become members of the community and have contributed to Irish society and the Irish economy. Having spent a significant number of years in the State at a formative stage in their lives, the minor Respondents have in particular become integrated, to a greater or lesser extent, into Irish society. By virtue of their residence in the State, the Respondents have also been subject to the law of the land in all its variety, including the criminal law of the State, its employment and tax laws, and indeed, insofar as it may have been relevant, the family and child laws of the State. If they are subject to these laws, it is submitted that they must be entitled to the concomitant protection of the Constitution insofar as those laws may interfere with their rights. Denial of the protection of fundamental rights (such as the right to private and family life) to non-Irish citizens such as the Respondents would deprive those individuals of an important facet of their dignity, individuality and personhood. It would fail to recognise their equality as human persons. It would run contrary to the concept of the State, based on the rule of law, established under the Constitution, as well as to the State's international obligations.

9. While there may be complex questions as to the precise nature and scope of the Respondents' rights to private and family life under the Constitution and the ECHR, in the Commission's submission, it is clear that the Respondents in principle enjoy such rights both under the Constitution and the ECHR and are entitled to rely on such rights in their dealings with the State, including in the context of applications under section 4(7) of the Immigration Act 2004 which engage or interfere with such rights.

10. With respect to the Constitution, it is clear that non-Irish citizens may enjoy and invoke the rights to privacy and family life insofar as they are protected under Articles 40 and 41 of the Constitution. In its recent judgment in *N.V.H. v. Minister for Justice and Equality*, this Court, interpreting Article 40.3 in

[10] *Nottinghamshire County Council v. B & Others* [2013] 4 IR 662, paragraph 84.

light of Article 40.1, has confirmed that non-Irish 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.[11] While *N.V.H.* was concerned with the constitutional right to work, the Court's statement of principle applies *a fortiori* to the right to private and family life which is so closely connected with the dignity and freedom of the individual. Article 41, for its part, refers to the Family's *"inalienable and imprescriptible rights, antecedent and superior to all positive law"*, while Article 42A recognises and affirms *"the natural and imprescriptible rights of all children"*. The entitlement of non-citizens to enjoy the right to private and family life has of course been recognised in very many judgments of this Court concerning the rights of non-Irish citizens who are subject to the immigration and, in particular, the deportation machinery of the State.[12]

11. Similarly, with respect to the ECHR, it is well-established that Article 8 of the Convention applies to non-citizens. 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"*. For its part, Article 8(1) ECHR provides that *"everyone"* has *"the right to respect for his private and family life, his home and his correspondence"*. In its jurisprudence, including in the large body of case-law that has been cited by the parties in this appeal and as reflected in the judgments under 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. In the legal submissions submitted on his behalf in these appeals, the Minister has acknowledged that it *"is not in question that the ECHR applies to citizens and non-citizens of the State alike"*.[13]

[11] *N.V.H. v. Minister for Justice and Equality* [2017] IESC 35, paragraph 11.
[12] See e.g. *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 IR 1; *Meadows v. Minister for Justice* [2010] 2 I.R. 701.
[13] Minister's submissions in *Luximon*, paragraph 4.31, and in *Balchand*, paragraph 4.37.

B. The Minister's Decisions under Section 4(7) of the Immigration Act 2004 Are Capable of Engaging, or Interfering with, the Respondents' Rights to Private and Family Life

12. It is clear that the decisions of the Minister under section 4(7) of the Immigration Act 2004 refusing to vary the Respondents' permission to be in the State are decisions which are capable of engaging or interfering with the Respondents' rights to private and family life. As the facts of the Respondents' cases illustrate, decisions of the Minister under section 4(7) of the Immigration Act 2004 have significant implications for applicants for variation of permission. In truth, for persons in the position of the Respondents, the decision effectively determines whether or not they are entitled to remain in the State, whether they are able to continue their activities in the State (whether in the form of study or employment), to maintain their private and family lives and, more generally, to remain part of the community and society in which they have lived for a significant period of time.

13. In the judgments under appeal, the Court of Appeal noted the confusion arising from the use of the terminology around 'engaging' Article 8 rights, which term appeared to be used in more than one sense in the case-law. Thus, in *Luximon*, the Court expressed the view that, where an applicant's right to family or private life within the meaning of Article 8 ECHR is relied upon in support of or to contest a proposed decision by a public authority, the nature of the decision is such that it has the potential to interfere with the applicant's rights. In such a situation, Article 8 rights *"are only "capable of being engaged" or "potentially engaged" or as is sometimes put the decision is "within the scope of Article 8""*.[14] The Court continued:

> *It follows from that potential engagement by reason of the nature of the decision to be taken that the applicant is entitled to an assessment of whether the proposed decision will have consequences of such*

[14] *Luximon & Others v. Minister for Justice and Equality* [2016] IECA 382, paragraph 48.

> *gravity for the applicant's private or family rights such that Article 8 is engaged in the second sense that term is used. That second sense means that the public authority is bound to make the assessment required by Article 8(2) prior to taking the decision.*[15]

In its judgment in *Balchand*, the Court of Appeal reviewed the use of this terminology in its earlier decision in *C.I. v. Minister for Justice* and in this Court's judgment in *P.O.*, noting that the references to engaging Article 8 rights in these cases meant that it had been determined *"that the proposed decision of the Minister has consequences of such gravity for the applicant that it constitutes an interference with his right to respect for private or family right within the meaning of Article 8(1) and, hence, unless justified in accordance with Article 8(2) will constitute a breach by the State of Article 8"*.[16] In both judgments, the Court of Appeal recognised that decisions of the Minister on section 4(7) applications are capable of engaging the Respondents' rights to private and family life or, in more neutral terms, fell within scope of Article 8 ECHR.

14. While the judgments of the Court of Appeal provide some clarity around the use of the terminology of engaging rights in this context, the Commission submits that, for the purposes of this appeal, the essential question is whether the decision of the Minister under section 4(7) may in principle or potentially constitute an interference with the Respondents' right to private and family life under Article 8 ECHR or Articles 40 and 41 of the Constitution. In other words, it is concerned with the threshold issue as to whether the rights are in principle applicable in these circumstances. It is *not* about the scope or substance of those rights, whether any interference is proportionate or disproportionate nor the weight to be afforded to such rights in a decision requiring a balancing exercise taking into account diverse considerations, including the legitimate interests of the State in controlling entry to, and residence in, the State. These issues only arise for consideration if the rights are applicable in a given situation and, where they arise for consideration,

[15] *Luximon & Others v. Minister for Justice and Equality* [2016] IECA 382, paragraph 48.
[16] *Balchand & Others v. Minister for Justice and Equality* [2016] IECA 383, paragraph 25.

they are for consideration in the first instance by the primary decision-maker, in this case, the Minister, subject only to judicial review.[17]

15. In the Commission's submission, the decisions of the Minister under section 4(7) of the Immigration Act 2004 clearly had the potential to interfere with the Respondents' rights to private and family life. As the Court of Appeal made clear in *Luximon*, the consequence of refusal of the Respondents' applications to renew or vary the permission, in circumstances where the permission had expired or was shortly to expire, was that the Respondents, on the expiry of the permission, would be unlawfully present in the State.[18] If the Respondents wished to abide by the law of the land, they would have to leave the State. If they were to remain in the State, the Minister had expressly stated that it was intended to issue a notification proposing to deport under section 3(4) of the Immigration Act 1999. It is thus clear that the Minister's decisions on the Respondents' applications under section 4(7) had significant and potentially far-reaching consequences for the Respondents and, in particular, for their private and family lives.

C. In accordance with well-established principle, the Minister is Obliged to Consider the Respondents' Rights in Making Decisions under Section 4(7) of the Immigration Act 2004

16. In the Commission's submission, it follows, as a matter of well-established principle under both the Constitution and the European Convention on Human Rights Acts 2003 – 2014 ('ECHR Act 2003'), that the Minister was required to consider the Respondents' rights to private and family life in exercising his discretion and making decisions on their applications under Section 4(7) of the Immigration Act 2004. While the application in *Luximon* referred solely to the applicants' rights under Article 8 ECHR, the application in *Balchand* relied on both Article 8 ECHR and Articles 40 and 41 of the Constitution. In both cases, the basic principle leads to the same conclusion:

[17] *Luximon & Others v. Minister for Justice and Equality* [2016] IECA 382, paragraphs 50 and 59.
[18] *Luximon & Others v. Minister for Justice and Equality* [2016] IECA 382, paragraph 38

the Minister must have regard to the Respondents' fundamental rights when exercising his discretion and making decisions which may affect the exercise and enjoyment of those rights.

17. In accordance with the seminal statement of principle of the Supreme Court in the *East Donegal Co-operative* case:

> "*…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*".[19]

18. In a similar vein, Henchy J. in the Supreme Court in *The State (Lynch) v. Cooney* 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.*[20]

[19] *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] IR 317, 341.
[20] *The State (Lynch) v. Cooney* [1982] IR 337, 380.

19. In the Commission's submission, the Court of Appeal was correct in concluding that, in accordance with these judgments, it cannot be disputed but that the Minister *"must exercise the discretion given her by s. 4(7) in a manner which would be in conformity with the Constitution"* and, more specifically, in a manner consistent with respecting and upholding an applicant's constitutional rights.[21] This principle is of general application and has been applied in the context of section 4(7) of the Immigration Act 2004, including in the case of *O'Leary & Ors v. Minister for Justice*.[22] While the first and second applicants in *O'Leary* were Irish citizens, the basic principle is clear: in the exercise of a statutory discretion provided for in section 4(7) of the Immigration Act 2004, the Minister, or an immigration officer acting on his behalf, is obliged to act in accordance with the Constitution.

20. Similarly, insofar as the ECHR is concerned, section 3(1) of the ECHR Act 2003 provides that, subject to any statutory provision (other than this Act) or rule of law, *"every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention's provisions"*. Once again, in the Commission's submission, the Court of Appeal was correct in concluding that: first, there was nothing in section 4 of the 2004 Act which precluded the Court from interpreting or the Minister from exercising the statutory powers conferred by it in a manner compatible with the State's obligations under Article 8 of the Convention; secondly, in exercising the discretion under section 4(7), the Minister *"must do so* inter alia *in a manner compatible with the State's obligations under Article 8 of the Convention"*.[23]

21. While the Minister accepts that such rights would fall for consideration at the deportation stage, the Minister denies that they must be considered in the context of applications under section 4(7) of the 2004 Act. In the Commission's submission, there is a fundamental tension, if not contradiction, in the Minister's position. If the Respondents in principle enjoy

[21] *Luximon & Others v. Minister for Justice and Equality* [2016] IECA 382, paragraph 43.
[22] *O'Leary & Ors v. Minister for Justice* [2012] IEHC 80.
[23] *Luximon & Others v. Minister for Justice and Equality* [2016] IECA 382, paragraph 46.

and are entitled to rely on these rights in decisions affecting them, there is no basis in law or in logic for failing or refusing to have regard to them in the context of an application for change of status with significant implications for the exercise and enjoyment of those rights but considering them at the deportation stage *if* the Respondents become subject to that process.

22. The Minister's submission in this regard is based on the problematic premise that the Respondents will, as a matter of course, become subject to the deportation process. However, the very purpose of the Respondents' applications for change of status is to ensure their continued lawful residence in the State. While the weight to be afforded to the Respondents' rights is a matter for the Minister subject only to judicial review, if those applications were successful after a proper consideration of their rights to private and family life, the question of deportation would not, of course, arise. Even if the Respondents' applications were not successful after a proper consideration of their rights to private and family life, it cannot be assumed that the Respondents would unlawfully remain in the State and thereby become subject to the deportation process under section 3 of the 1999 Act. Yet the Minister's position is based on the assumption that the Respondents – who have at all times (with the exception of a short period of time in the case of Ms Luximon which the Minister has not relied upon in arriving at his decision) been lawfully resident in the State – would remain in the State unlawfully in the event that the applications, after proper and lawful consideration by the Minister, were refused. The effect of the Minister's position is thus that, in order to have their constitutional and/or Convention rights considered with a view to remaining in the State, persons in the position of the Respondents would be compelled to place themselves in a position of illegality.[24] Any application to remain, rooted in the Respondents'

[24] Even in *Balchand*, while the High Court took the view that the relevant applications could be made from outside the State (a conclusion which was not upheld by the Court of Appeal), Humphreys J. nonetheless recognised the principle that *"it would not be appropriate to hold that, in order to obtain a remedy, the applicants must first put themselves in an unlawful position whereby they would become liable to a proposal to deport"*. According to Humphreys J., *"[l]egality is a seamless requirement, and the State cannot in effect require a person to act unlawfully in order to claim a benefit to which he or she should be entitled"*: *Balchand & Ors v. Minister for Justice and Equality* [2016] IEHC 132, paragraph 37.

fundamental rights, would be made from a materially different, and detrimental, position insofar as the Respondents are concerned. In the Commission's submission, the Minister's position in this regard cannot be reconciled with the concept of the State, based on the rule of law, established under the Constitution.

23. In setting out the relevant legal context and seeking to justify this position in his submissions, the Minister has invoked the traditional power of the State to control immigration and the entitlement of the Minister to frame and apply a policy in respect of particular categories of immigrant such as the Respondents in this case. However, neither of these considerations justifies the Minister exercising his discretion and making decisions otherwise than in accordance with the Constitution and the State's obligations under the Convention. It is not a question of the Respondents seeking to *"trump"* the entitlement of the Minister to frame and apply a policy in respect of a particular category of immigrants. It is a question of the Minister, in performing his functions, acting lawfully and having regard to all proper considerations, including the relevant fundamental rights of persons such as the Respondents. The existence of a policy does not relieve the Minister of his duty to act in a manner compatible with the Respondents' constitutional and Convention rights. At paragraph 4.26 of his written submissions the Minister, relying on the emphasised text taken from the judgment of Lord Scarman in *Re Findlay*[25] makes the uncontroversial point that a Minister must have a wide discretion in developing policy. Of critical importance to the text emphasised by the Minister, however, is the preceding statement of Lord Scarman to the effect that a Minister can adopt a policy: "*provided always that the adopted policy is a lawful exercise of the discretion conferred on him by statute*". It is the latter principle that is at the heart of this appeal.

24. In the submissions delivered on his behalf, the Minister has also placed heavy reliance on the jurisprudence of the European Court of Human Rights which, he contends, supports the contention that Article 8 rights need only be

[25] [1985] AC 318

considered in expulsion or 'point of exit' cases. Before considering the relevant case-law, it must be observed that, under the terms of the Minister's own letters, the consequence of the refusal to renew or vary the Respondents' permission is that the Respondents must leave the State. It is only *if and in the event that* the Respondents do not do so voluntarily that it would be necessary for the Minister to proceed to notify his intention to deport the Respondents under section 3 of the Immigration Act 1999. Thus, the refusals at issue in these appeals constitute, on their own terms, 'point of exit' decisions.

25. Turning to the case-law of the Strasbourg Court, it is clear that decisions to refuse residence permits, such as the Minister's decisions on the Respondents' section 4(7) applications, do indeed fall within the scope of Article 8 ECHR. The Commission submits that both the High Court and the Court of Appeal in *Luximon* were correct in their conclusions, based in particular on the judgment of the Strasbourg Court in *da Silva v. The Netherlands*,[26] that the right to private and family life was capable of being engaged when the Minister was considering applications for renewal of permission under section 4(7). First, while the first applicant in *da Silva* had a long and complex immigration history in seeking to regularise her status in the Netherlands, there can be no dispute but that her complaint under Article 8 ECHR related specifically to the refusal of the Dutch Minister for Justice to grant her a residence permit and that the Court found that this refusal, in the exceptional circumstances of the case, constituted a violation of Article 8. It thus related to a decision analogous to those of the Minister on the section 4(7) applications in these cases. The Minister has sought to distinguish *da Silva* on the basis that, under Dutch law and in stark contrast to Irish law, *"the decision refusing to grant residence also constitutes the decision to expel the person concerned"*.[27] While the Court refers to *"the refusal of a residence permit and the expulsion of the first applicant"* and *"the far-reaching consequences which an expulsion would have"* on the applicants, it is by no means clear that the relevant Dutch law is any different from Irish

[26] *da Silva v. The Netherlands* (2007) 44 EHRR 34.
[27] Minister's submissions in *Luximon*, paragraph 4.35, and in *Balchand*, paragraph 4.41.

law in this respect.[28] Moreover, insofar as the Minister seeks to rely on the more recent judgment in *MRA v. Netherlands* to the effect that the Dutch authorities were entitled to exclude consideration of Article 8 when assessing a particular type of application for a residence permit, in fact that judgment makes it clear that, in the context of applications for residence permits (in other words, applications akin to those made under section 4(7) of the 2004 Act), arguments based on Article 8 ECHR were properly raised and entertained.[29]

26. Insofar as the judgments of the European Court of Human Rights in *Yildiz v. Austria* and *Maslov v. Austria* are concerned,[30] it is submitted that these judgments are not authority for the proposition that an applicant's Convention rights are required *"to be taken into account only where a removal decision becomes final"*.[31] Rather, the Court's statement – for example, at paragraph 34 of *Yildiz*, that *"the question whether the applicants had established a private and family life within the meaning of Article 8 must be determined in the light of the position when the residence ban became final"* – must be understood against the background of the Respondent State's concession that there had been an interference with the applicants' Article 8 rights and its unsuccessful argument that these rights fell to be considered at the time the residence ban against the applicants issued (in that case, 27 September 1994) rather than at the time the residence ban became final (4 December 1996, by which time the third applicant had been born and the first and second applicants had been cohabiting during the intervening period).

27. The Minister relies on the Strasbourg Court's judgment in *Abuhmaid v. Ukraine* in support of the argument that Article 8 ECHR does not impose a positive obligation on the State to consider the rights in the context of a section 4(7) application and that the deportation process offers the

[28] See, in particular, *da Silva v. The Netherlands* (2007) 44 EHRR 34, paragraph 22.
[29] *MRA v. Netherlands* (Application No. 46586/07, Judgment of 12th January 2016), paragraph 93.
[30] *Yildiz v. Austria* (Application No. 37295/97, 31 January 2003); *Maslov v. Austria* (Application No. 1638/03, 23 June, 2008).
[31] Minister's submissions in *Luximon*, paragraphs 4.33-34, and in *Balchand*, paragraphs 4.39-40.

Respondents an effective procedure through which their Article 8 rights would be considered.[32] In the Commission's submission, the facts and legal context of *Abuhmaid* bear little if any similarity to those of the Respondents' cases. While the Court ultimately found on the facts of that case that there had been no violation of Article 13 ECHR taken in conjunction with Article 8 ECHR, the Court recognized that those provisions entailed *"a positive obligation on the respondent State to provide an effective and accessible procedure or a combination of procedures enabling him to have the issues of his further stay and status in Ukraine determined with due regard to his private-life interests"*.[33] If, as the Minister contends, the Respondents were compelled to place themselves in a position of illegality in order to have issues regarding their residence and status in the State determined with due regard to their fundamental rights, the Commission submits that this would not comply with the positive obligation recognised by the Strasbourg Court to provide an effective and accessible procedure or combination of procedures under Articles 8 and 13 ECHR.

28. In summary, the Commission submits that the case-law of the European Court of Human Rights, properly understood in its context, does not support the Minister's submission that Article 8 rights need not be considered in the context of an application to vary or renew permission under section 4(7) of the 2004 Act. On the contrary, the Court's judgments, in cases such as *da Silva*, make it clear that Article 8 rights must be considered in the context of applications for residence permits akin to those made by the Respondents under section 4(7).

29. Even if it were otherwise and the case-law of the Strasbourg Court did not require consideration of Article 8 rights in the context of applications of the type at issue in these proceedings, it is submitted that, as a matter of Irish constitutional law, the Minister must in any event exercise his discretion and make decisions under section 4(7) of the 2004 Act in a manner compatible

[32] *Abuhmaid v. Ukraine* (Application No. 31138/13, Judgment of 12th January 2017).
[33] *Abuhmaid v. Ukraine* (Application No. 31138/13, Judgment of 12th January 2017), paragraph 119.

with the Respondents' constitutional rights. This flows inexorably from the fundamental principles laid down by this Court in its judgments in the *East Donegal* case and *The State (Lynch) v. Cooney*.

30. In support of his argument that he is entitled to defer consideration of constitutional rights until the deportation process under section 3 of the 1999 Act is engaged, the Minister relies on a passage from the judgment of Denham J. (as she then was) in *Bode v. Minister for Justice* to the effect that there is *"no free standing right"* to apply for residence and that the appropriate procedure is section 3 of the 1999 Act which permitted, in subsection 11, applications to revoke deportation orders.[34] However, in the Commission's submission, the comments in *Bode* must be understood in light of the particular facts and legal context of that case: the second applicant had made an application for residency under a non-statutory scheme in circumstances where he was not lawfully in the State and indeed was the subject of a deportation order. The position of the second applicant in *Bode* was thus materially different to that of the Respondents who applied for a change or renewal of residence under a specific statutory provision permitting such applications – that is, section 4(7) of the 2004 Act – during or following a significant period of lawful residence in the State. Put simply, the fact that the Respondents' rights may fall once again to be considered *if* the Respondents become subject to the deportation process does not relieve the Minister of his duty to consider those rights in the context of applications affecting the Respondents' rights such as the application under section 4(7).

31. The Minister also submits that it was open to the Respondents to avoid becoming illegally present in the State by leaving it and applying to re-enter it from outside its territory, relying in this regard on this Court's judgment in *GAG v. Minister for Justice*.[35] The Court of Appeal rejected this argument, observing in its judgment in *Balchand*:

[34] Minister's submissions in *Luximon*, paragraphs 4.42-45, and in *Balchand*, paragraphs 4.48-51.
[35] Minister's submissions in *Luximon*, paragraph 4.49, and in *Balchand*, paragraph 4.54.

> *It is of course, correct to say that the Minister may require that certain applications from non residents be made from outside the State. However, s. 4(7) of the 2004 Act expressly entitles an application to be made by a person to renew a permission to be in the State and empowers the Minister to consider and if appropriate grant such a renewal of permission. In the context of s. 4 this clearly envisages an application being made from a person who is within the State. For the reasons more fully set out in the judgment being delivered in* Luximon*, the Minister is obliged to consider and determine an application received from a person in the State to renew their permission to be in the State in accordance both with constitutional principles and by reason of s. 3 of the European Convention of Human Rights Act 2003, in a manner consistent with the State's obligations under the European Convention on Human Rights.*[36]

The Commission submits that the Court of Appeal's reasoning on this point is correct and should be upheld on appeal. Not only would a requirement to make such applications from outside the State be difficult to reconcile with the specific statutory scheme established under section 4 of the 2004 Act, but such a requirement – which ignores the practical reality of the Respondents' situation – is likely, in itself, to cause considerable disruption to the private and family lives of the Respondents (for example, in the context of employment and education).

32. Finally, in submitting that the Minister had no duty to consider the Respondents' rights in the context of their applications under section 4(7), the Minister lays emphasis on the *"highly qualified"* status of the Respondents, the fact that they possessed no inherent right to enter and reside in the State and that the Minister had permitted them to reside in the State *"in a generous exercise of the State's powers…for a specific purpose ….and for a finite*

[36] *Balchand & Others v. Minister for Justice and Equality* [2016] IECA 383, paragraph 30.

period".[37] This amounted to *"the conferral of a very significant privilege on that person and carries with it no expectation that such a person will be permitted to remain long-term in the State once his course of studies has concluded"*.[38] In the Commission's submission, these considerations may very well be relevant to the Minister's substantive assessment of the scope of, and weight to be afforded to, the Respondents' rights to private and family life in the context of section 4(7) applications. The jurisprudence of the Strasbourg Court – from *Gül v. Switzerland* to *Jeunesse v. Netherlands* – makes it clear that, in cases involving family life as well as immigration *"the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest"* and that each case must therefore be assessed on its individual merits.[39] However, the fundamental problem in these cases is that the Minister has refused to undertake any such substantive assessment of the Respondents' rights. The Commission submits that the refusal of the Minister can be justified neither under the Constitution nor the European Convention on Human Rights.

33. In conclusion, it is submitted that the Minister's refusal of the applications for variation/renewal of permission under section 4(7) of the Immigration Act 2004 has potentially far-reaching implications for the Respondents, including in their personal and family lives, in circumstances where they have lived in the State for a considerable period of time. In the ordinary way, the Minister, in the exercise of his statutory discretion, must act in accordance with the Constitution (including the personal rights guaranteed thereunder) and in a manner compatible with the State's obligations under the Convention. There is no sound basis in law or in logic for deferring the consideration of the Respondents' constitutional and/or Convention rights until such time as the

[37] Minister's submissions in *Luximon*, paragraph 6.3, and Minister's submissions in *Balchand*, paragraph 6.3.
[38] Minister's submissions in *Luximon*, paragraph 4.23, and Minister's submissions in *Balchand*, paragraph 5.3.
[39] *Gül v. Switzerland* (1996) 22 EHRR 93; *Jeunesse v. Netherlands* (2015) 60 EHRR 17, paragraph 106.

Respondents may have become illegally present in the State and subject to the rigours of the deportation process.

III. Conclusion

34. For all these reasons, the Commission submits that, in considering applications for a variation of permission under section 4(7) of the Immigration Act 2004 by persons in the position of the Respondents (including persons whose permission to remain in the State has expired prior to making such an application), the Minister is under an obligation to consider the constitutional and/or Convention rights relied upon by the Respondents and, in particular, the right to privacy and the right to respect for family life. This being so, the Commission submits that the appeals should be dismissed.

David Fennelly BL

Feichín McDonagh SC

11th July 2017

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