COURT OF APPEAL

CIVIL

Court of Appeal Record Nos. 2015/316 and 2016/147

High Court Record Nos. 2013/67JR and 2014/687JR

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/Appellants

-and-

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

-and-

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

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

I. Preliminary

1. On 29th April 2016, the Court of Appeal granted the Irish Human Rights and Equality Commission ('**the Commission'**) liberty to appear as *amicus curiae* in these appeals. In accordance with the Court's directions, the Commission relies on the following submissions in both appeals.

2. In granting the Commission liberty to appear as *amicus curiae*, the Court indicated that its Order would refer "for the avoidance of doubt and if necessary" to the inherent jurisdiction of the Court. As a preliminary matter, the Commission wishes to clarify the statutory basis on which it has applied to appear as *amicus curiae* in these proceedings. The Commission's governing legislation, the Irish Human Rights and Equality Commission Act 2014, provided for the dissolution of the Human Rights Commission and the Equality Authority and the transfer of their functions to the Commission. Section 8(h) of the Human Rights Commission Act 2000 had conferred on the former Human Rights Commission the power "to apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as *amicus curiae* in proceedings before that court that involve or are concerned with the human rights of any person and to appear as such an *amicus curiae* on foot of such liberty being granted (which liberty each of the said courts is hereby empowered to grant in its absolute discretion)". Section 60 of the Court of Appeal Act 2014 – which came into operation on 28th October 2014[1] - amended section 8(h) of the 2000 Act by inserting "the Court of Appeal" after the High Court in each place where it occurs in that provision. Section 10(2)(e) of the Irish Human Rights and Equality Commission Act 2014 provided that the Commission, like the former Human Rights Commission, had among its functions the power "to apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as *amicus curiae* in proceedings before that court that involve or are concerned with the human rights or equality rights of any person and to appear as such an *amicus curiae*

[1] S.I. No. 479/2014 - Court of Appeal Act 2014 (Commencement) (No. 2) Order 2014.

on foot of such liberty being granted (which liberty each of the said courts is hereby empowered to grant in its absolute discretion)". The Commission was established on 1st November 2014 on which date the Human Rights Commission and the Equality Authority were dissolved.[2] It was also on this date that most provisions of the Act, including section 10, came into operation.[3] By virtue of section 60 of the Court of Appeal Act 2014, the Human Rights Commission had, prior to its dissolution, express authority to apply to the Court of Appeal for liberty to appear as *amicus curiae*. Despite the failure of section 10(2)(e) of the Irish Human Rights and Equality Commission Act 2014 to make express provision for applications to the Court of Appeal, this function had nonetheless been transferred to the Commission by virtue of section 44 of the Act which provides that "[a]ll functions that, immediately before the establishment day, were vested in a dissolved body are transferred to the Commission". It is on this basis, as well as on the basis of the Court's inherent jurisdiction, that the Commission has applied for liberty to appear as *amicus curiae* in these proceedings.

3. For the purposes of these submissions, the Commission will refer to the applicants before the High Court – in *Luximon*, the respondents to the appeal, and in *Balchand*, the appellants – as the Applicants.

II. The Questions before this Court

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 in the parties' written submissions.

5. In *Luximon*, the High Court (Barr J.) certified the following questions as questions involving points of law of exceptional public importance such that it is desirable in the public interest than an appeal should be brought to the Court of Appeal:

[2] Section 43, Irish Human Rights and Equality Commission Act 2014. S.I. No. 450/2014 - Irish Human Rights and Equality Commission Act 2014 (Establishment Day) Order 2014.
[3] S.I. No. 479/2014 - Court of Appeal Act 2014 (Commencement) (No. 2) Order 2014.

(i) Is the respondent obliged to consider rights alleged to arise under the Constitution/European Convention on Human Rights Act, 2003 in applications made under section 4(7) of the Immigration Act, 2004 by or on behalf of persons whose permission to be in the State has expired where such rights must be considered by the respondent where the respondent is considering whether or not to make a deportation order in respect of the person concerned in the deportation process under section 3 of the Immigration Act, 1999?

(ii) Is there an obligation imposed in law on the respondent to publish any criteria applicable under s. 4(7) to a person in the first named applicant's position, i.e. a timed-out non-EEA student without any current residence permission at the time of the application who seeks permission to change their immigration status?[4]

6. In *Balchand*, the High Court (Humphreys J.) certified the following questions as questions involving points of law of exceptional public importance such that it is desirable in the public interest that an appeal should be brought to the Court of Appeal:

(i) whether the respondent is required in relation to an application to extend a permission in the case of a person in a position to renew the application from outside the State, to consider related private and/or family rights of such a person either under the Constitution or the European Convention on Human Rights;

(ii) whether there is an obligation imposed in law on the respondent to publish any criteria applicable under s.4(7) of the Immigration Act 2004 to a non-EEA student with a current residence permission at the time of the application who seeks a further permission to reside in the State.

[4] *Luximon & Anor v. Minister for Justice Equality & Law Reform* [2015] IEHC 383, paragraph 58.

7. In both *Luximon* and *Balchand*, the adult applicants came to Ireland from Mauritius in possession of Stamp 2 permission for the purpose of pursuing a course of study. Ms Luximon arrived in Ireland in July 2006 and was joined in Ireland by her two daughters. Ms Luximon's permission to reside in the State expired in June 2012. Following unsuccessful efforts to obtain a work permit, on 30th October 2012, Ms Luximon applied for a variation of permission to Stamp 4 conditions pursuant to section 4(7) of the Immigration Act 2004. In her application, Ms Luximon provided detailed evidence in support of her application and made specific submissions on her rights under Article 8 of the European Convention on Human Rights ('**ECHR**' or '**Convention**'). By decision dated 5th November 2012, the Minister refused the application for a variation of permission; in doing so, the Minister made no reference to the applicant's rights under Article 8 ECHR. For his part, Mr Balchand arrived in Ireland in December 2006 and, following their marriage, was joined by his wife in June 2008. In July 2009, their son was born in Ireland. On 19th December 2013, shortly before Mr Balchand's permission expired on 30th January 2014, Mr Balchand applied for a variation of permission to Stamp 4 conditions pursuant to section 4(7) of the Immigration Act 2004. On 22nd October 2014, the Minister refused his application and directed that the applicants were to leave the State after the expiry of a short transitional period. Thus, while Ms Luximon's permission to remain in the State had expired at the time of her application for a variation of permission under section 4(7) of the Immigration Act 2004 (in other words, her permission had 'timed out'), Mr Balchand's permission had not expired at the time of his application for a variation of permission.

8. While there are clearly differences between the circumstances of the applicants in the two appeals (including, as just outlined, the fact that Ms Luximon's permission had timed out at the time of her application for a change of permission while Mr Balchand's had not), which are reflected in the precise questions certified by Barr J. and Humphreys J., it is submitted that the central issue in both appeals is essentially the same. That issue is whether, at the time of and in the context of applications under section 4(7) of the Immigration Act 2004, by persons who are, or have been, lawfully residing in

the State under a student visa, the Minister must consider the Applicants' constitutional and/or Convention rights to respect for private and family life. The Commission proposes to confine its submissions to this central issue.

III. The Minister is under an Obligation to Consider Applicants' Constitutional and/or Convention rights in Decisions under section 4(7) of the Immigration Act 2004

9. The Applicants in both cases assert that the Minister was under an obligation to consider the Applicants' constitutional and/or Convention rights in making decisions on variation of permission under section 4(7) of the Immigration Act 2004. The Minister's position, as set out in the Statements of Opposition in the High Court proceedings, is that she is under no obligation to consider the Applicants' constitutional and/or Convention rights in this context but that these are matters to be taken into consideration at the stage of expulsion from the State.[5] While the Minister has noted that Ms Luximon did not refer to the provisions of the Constitution in her application,[6] it does not appear to be in dispute between the parties that the Appellants made submissions on the alleged interference with their family and personal rights in their applications under section 4(7) of the Immigration Act 2004 and that the Minister did not consider these submissions, or refer to them, in refusing their applications under section 4(7) of the Immigration Act 2004.

10. The judgments of the High Court in *Luximon* and *Balchand* arrived at different conclusions on the central issue of the obligation on the Minister to consider the Applicants' constitutional and/or Convention rights to respect for private and family life in deciding upon their applications under section 4(7) of the Immigration Act 2004. In *Luximon*, the High Court (Barr J.) concluded that:

> *....there is an obligation on the Minister, when considering an application pursuant to s. 4(7) of the Immigration Act 2004, to have regard to any*

[5] Statement of Opposition in *Luximon*, paragraph 7. Statement of Opposition in *Balchand*, paragraphs 10 and 11.
[6] Submissions on behalf of the Appellant in *Luximon*, paragraph 4.14.

constitutional and/or Convention rights of an applicant that are engaged by the decision. Moreover, the court would observe that once the Minister has taken into account the relevant considerations, the weight to be attached to each of them is properly a matter for the Minister in her discretion, subject to the principle of proportionality.[7]

11. In contrast, in *Balchand*, the High Court (Humphreys J.) arrived at a different conclusion. Referring to the judgments of this Court in *C.I. v. Minister for Justice, Equality, and Law Reform*[8] and of the Supreme Court in *P.O. v. Minister for Justice and Equality*,[9] the learned judge concluded as follows:

> *Applying C.I. and P.O., as I am required to do, I conclude that students who are admitted into the State pursuant to a scheme with a very clear seven-year maximum duration of permissions are persons who firmly fall into the "precarious" category, and in general, their private and family rights to remain in the State are minimal to non-existent and do not need to be considered by the Minister at any stage of the process, because they simply do not reach the level of significance required to engage such consideration.*[10]

12. In the Commission's submission, the passage cited above from the judgment of Barr J. in *Luximon* underlines a fundamental distinction – between the applicability or "engagement" of the rights in question, on the one hand, and the scope of, and weight to be afforded to, such rights, on the other hand – which is central to the resolution of the issues in these appeals and which has to some extent been disregarded in the judgment in *Balchand* and in the Minister's submissions in these appeals. The first question is whether the rights apply or are "engaged" in the context of the Minister's decision under section 4(7) of the Immigration Act 2004: that is, whether the Applicants enjoy the rights asserted and whether the impugned decision engages those

[7] *Luximon & Anor -v- Minister for Justice and Equality* [2015] IEHC 227, paragraph 173.
[8] *C.I. v. Minister for Justice, Equality, and Law Reform* [2015] IECA 192.
[9] *P.O. v. Minister for Justice and Equality* [2015] IESC 64.
[10] *Balchand & Ors v. Minister for Justice and Equality* [2016] IEHC 132, paragraph 21.

rights in the sense that it, at least potentially, constitutes an interference with those rights. As described by the Applicants in *Luximon*, this is the threshold issue of whether the rights in question apply at all.[11] The second – and distinct – question relates to the scope and limits of those rights, whether any interference is proportionate, and what weight should be afforded to them in the Minister's decision-making process. Of course, this second question only arises if the rights apply or are engaged in the first instance. In the Commission's submission, these appeals turn on the first question. This first question requires consideration of two issues: first, whether persons in the position of the Applicants are in principle entitled to invoke and rely on the constitutional and Convention rights in question; secondly, whether such rights apply, or are "engaged", in the context of the Minister's decision under section 4(7) of the Immigration Act 2004. The Commission will address these issues in turn.

a. The Applicants' Entitlement to Invoke Constitutional and/or Convention Rights

13. The Commission submits that the Applicants are entitled to invoke and rely on the private and family rights recognised under the Constitution and the ECHR in the context of an application for variation of permission under section 4(7) of the Immigration Act 2004.

14. Indeed, the Minister in these appeals does not appear to assert that the Applicants do not, or cannot, enjoy the constitutional and/or Convention rights to protection of private and family life. Instead, the Minister's position is that such rights do not arise for consideration in the context of applications under section 4(7) of the Immigration Act 2004 but only at a later stage if the Minister proposes to deport the Applicants.[12] While the Commission will address the issue of when these rights apply or are 'engaged' in the context of applications under section 4(7) in further detail below, it is submitted that, if

[11] Submissions of the Respondents to the Appeal in *Luximon*, paragraph 49.
[12] Submissions on behalf of the Appellant in *Luximon*, paragraph 2.3; Submissions on behalf of the Respondent in *Balchand*, paragraph 45.

the Applicants in principle enjoy these rights, there is no basis in logic or in law for having regard to these rights at the deportation stage but failing or refusing to do in the context of an application for change of status which may have very far-reaching consequences for the individuals concerned.

i. Article 8 ECHR

15. It is well-established that Article 8 ECHR 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". This right is not, of course, unqualified. Article 8(2) ECHR provides:

> *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

In its jurisprudence, including in the large body of case-law that has been cited by the parties in this appeal, the European Court of Human Rights has confirmed that non-citizens may invoke and rely on the right to respect for private and family life. [13] While the Minister has called into question the extent to which her decisions on the applications for change of status 'engage' the Applicants' rights and the timing of any consideration of those rights, the

[13] *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 EHRR 471; *Gül v. Switzerland* (1996) 22 EHRR 93; *Tuqabo-Tekle v. Netherlands* (Application 60665/00); *Uner v. The Netherlands* (2007) 45 EHRR 14, and *Omoregie v. Norway* (Application 265/07); *Da Silva v. Netherlands* (2007) 44 EHRR 72*; Jeunesse v. Netherlands* (2015) 60 EHRR 17. For a detailed examination, see Lambert, *The Protection of Aliens under the European Convention on Human Rights* (Council of Europe Publishing, 2007).

Minister does not assert that the Applicants, as non-citizens, are not in principle capable of invoking and enjoying such rights.[14]

ii. Articles 40 and 41 of the Constitution

16. The extent to which non-citizens may enjoy and invoke the personal rights guaranteed under the Constitution is not entirely settled. 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*". Article 40.3.2°, for its part, provides that the State "*shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen*". Although not specifically guaranteed in the text of Article 40.3, the Irish courts have long recognised that "*the right of privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State*".[15] For its part, Article 41.1 states:

> *1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*
> *2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.*

While Article 40.3 expressly refers to "*the personal rights of the citizen*", Article 41 is expressed in more general terms referring to the "inalienable and imprescriptible rights" of the Family.

Of course, in Article 42A, the Constitution now provides that the State *"recognises and affirms the natural and imprescriptible rights of all children*

[14] Submissions of the Respondent in *Balchand*, paragraph 15.
[15] *Kennedy v. Ireland* [1987] IR 587, 592.

and shall, as far as practicable, by its laws protect and vindicate those rights."

17. 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*".[16] In respect of the right of access to the courts more generally, which, like the right to privacy, 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.*[17]

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*".[18] The Court continued by affirming that similar considerations arise "*with regard to a non-national's right to fair procedures*

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

and to the application of natural and constitutional justice where he or she has applied for asylum or refugee status".[19]

18. 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 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*".[20] 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*".[21] 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*".[22] Article 40.1 of the Constitution provides that all citizens shall, as human persons, be held equal before the law.

19. Most recently, this Court has considered this issue in *N.H.V. v. Minister for Justice and Equality & Others* where the appellant, an asylum seeker who had spent over seven years in direct provision at the time of the appeal, argued *inter alia* that he had a constitutional right to earn a livelihood.[23] The majority judgment of this Court, delivered by Finlay-Geoghegan J., undertook a detailed analysis of the case-law, including the judgments of the Supreme

[19] [2000] 2 IR 360, 385.
[20] *Nottinghamshire County Council v. B & Others* [2011] IESC 48, paragraph 84.
[21] [2011] IESC 48, paragraph 84.
[22] [2011] IESC 48, paragraph 84.
[23] *N.H.V. v. Minister for Justice and Equality & Others* [2016] IECA 86 (under appeal).

Court in *Re Article 26 and the Electoral (Amendment) Bill*,[24] *Re Article 26 and the Illegal Immigrants (Trafficking) Bill* and the *Nottinghamshire County Council v. B & Others*. After citing the judgment of the Supreme Court in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill*, Finlay-Geoghegan J. stated that this judgment emphasized "*the requirement that where it is contended that a non-citizen has a right in the State which is claimed to be a fundamental right or a personal right protected by Article 40.3, it is necessary to look at both the status of the non-citizen and also the nature of the particular right being contended for*". [25] Applying this analysis to the appellant's claim, the Court noted that, while the appellant was not unlawfully present in the State, he was a person who was "*only permitted to remain in the State pursuant to s. 9 of the 1996 Act, while his application for a declaration of refugee status is decided*".[26] On this basis, the Court stated that it could not be concluded that a person who was in the State for this purpose and did not have any right to reside in the State as an immigrant had "*a personal right protected by Article 40.3.1 to work or earn a livelihood within the State", which right could not be exercised in vacuo and was "inextricably linked to a person's status within the State*".

20. In his dissenting judgment, 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*".[27] 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*

[24] *Re Article 26 and the Electoral (Amendment) Bill* [1984] IR 268.
[25] [2016] IECA 86, paragraph 19.
[26] [2016] IECA 86, paragraph 25.
[27] [2016] IECA 86, Judgment of Hogan J., paragraph 104.

happened in cases such as Saunders and KB) or where their presence in the State is purely fleeting, accidental or temporary or conditional". [28]

21. While the precise extent to which non-citizens may rely on the personal rights under the Constitution has not been definitively settled, in the Commission's submission, it is clear from the principles laid down in the case-law that the rights to privacy and to protection of family life guaranteed under the Constitution are among the personal rights which apply to citizens and non-citizens alike.

22. In respect of Article 41, this provision is not on its terms limited to citizens and the Irish courts have, in many cases, recognised its applicability to non-citizens. Thus, in *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform*, Murray J. observed that "*the protection afforded by the Constitution to the family is not dependent entirely on whether it counts among one of its members a citizen of the State*" and further that when a family of non-nationals is within the State "*it has all the attributes which the Constitution recognises as a 'moral institution*'".[29] While there have been, as noted by Hogan J. in his dissenting judgment in *N.H.V.*, "*disputes and arguments ….in the context of how a balance is to be struck between the interests of the State in controlling illegal immigration on the one hand and protecting the substance of the Article 41 and Article 42 on the other when invoked by non-nationals", this basic principle "has not been doubted in the subsequent case-law*". [30] Fundamental rights, recognised by the Constitution as "*inalienable and imprescriptible*", cannot be set at nought in the exercise of a statutory discretion.

23. Turning to the right to privacy, while Article 40.3 refers in its terms to the personal rights of the citizen, it is clear that the text itself is not exhaustive either in respect of the rights protected thereunder or the scope of their application to non-citizens. The Supreme Court recognised, in its judgment in

[28] [2016] IECA 86, Judgment of Hogan J., paragraph 105.
[29] *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 IR 1, 82-83.
[30] [2016] IECA 86, Judgment of Hogan J., paragraph 83.

Re Article 26 and the Illegal Immigrants Trafficking Bill, that some of the unenumerated rights guaranteed under Article 40.3 – such as the right of access to the courts and the right to fair procedures and natural and constitutional justice – apply in equal measure to non-citizens. In light of the judgment of this Court in *N.H.V.*, in considering whether the constitutional right to privacy extends to non-citizens such as the Applicants in these proceedings, it is necessary "*to look at both the status of the non-citizen and also the nature of the particular right being contended for*".

24. Insofar as the *status* of the non-citizen is concerned, while it must be acknowledged that Ms Luximon's permission to reside in the State had expired at the time of her application under section 4(7) of the Immigration Act 2004, and the Applicants' original permission to reside in the State in both cases was for a defined period of time, it is nonetheless the case that the Applicants had lawfully resided in the State for a considerable period of time prior to their applications for variation of permission. Theirs was not, to use the language of O'Donnell J. in *Nottinghamshire County Council v. B & Others*, "*a fleeting presence*" in the State. During this time, the Applicants not only studied and worked within the jurisdiction, they also developed their personal and family lives in the State, became members of the community, and contributed to Irish society and the Irish economy. It is difficult to understand how individuals such as the Applicants who spend a significant number of years in the State, often at a formative stage in their lives, could not become integrated, to a greater or lesser extent, into Irish society. By virtue of their residence in the State, the Applicants were also 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 the persons in the position of the Applicants 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.

25. Insofar as the *nature* of the right to privacy is concerned, it is clear that this right – in contrast to the right to vote – is not a right which is inextricably

linked to an individual's status in the State, such as an individual's citizenship or entitlement to remain in the State indefinitely. As recognised by Henchy J. in his dissenting judgment in *Norris v. Attorney-General*, the right to privacy – which inheres in each citizen "*by virtue of his human personality*" – is "*a complex of rights, varying in nature, purpose and range, each necessarily a facet of the citizen's core of individuality in the constitutional order*".[31] While Henchy J. addresses the position of the citizen specifically, it is clear that the nature of this right is not such as to be confined or limited to citizens; it inheres in each human person as a facet of his or her core of individuality. While a person's citizenship or residency status may limit the precise scope of the right, it is submitted that all persons in the State – and certainly all persons lawfully entitled to be in the State even if only for a finite number of years – are entitled to respect for their private and family life. Denial of such rights to non-citizens such as the Applicants would be to deprive those individuals of an important facet of their dignity, individuality and personhood. It would run contrary to the concept of the State, based on the rule of law, established under the Constitution. In one of the seminal cases on the right to privacy, *Kennedy v. Ireland*, the High Court (Hamilton P., as he then was) recognised that, although the second named plaintiff was "*not a citizen of this state*", he was "*entitled to the same personal rights as if he were*".[32] Moreover, in *Digital Rights Ireland*, the High Court recognised that the right to privacy extends to legal persons, such as a limited company.[33] Having regard to this case-law, it is submitted there is no reason in principle why a non-citizen, who is or has been lawfully resident in the State, should not be entitled to invoke the constitutional right to privacy.

26. Finally, while the Convention does not directly form part of Irish law, the Supreme Court has long recognised not only that Irish law should be interpreted in a manner compatible with its international obligations[34] but also that, in interpreting the rights protected under the Constitution, it is

[31] *Norris v. Attorney General* [1984] IR 36, 71.
[32] *Kennedy v. Ireland* [1987] IR 587, 593.
[33] *Digital Rights Ireland v. Minister for Communications, Energy and Natural Resources & Ors* [2010] 3 IR 251, paragraph 56.
[34] *O Domhnaill v Merrick* [1984] I.R. 151.

appropriate and desirable to have regard to the ECHR and the jurisprudence of the Strasbourg Court which has developed thereunder.[35] If, contrary to the Commission's submissions, the Constitution did not extend its guarantees for the protection of private and family life to non-citizens such as the Applicants 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 the ECHR. For this reason, in approaching the central issue in these appeals, the Commission respectfully submits that the Constitution should, insofar as is possible, be interpreted in a manner which is consonant with the State's obligations under the ECHR.

27. For these reasons, it is submitted that the Applicants are in principle entitled to invoke the protection of the privacy and family rights protected under Article 40.3 and Article 41 of the Constitution.

b. The Decision of the Minister under section 4(7) of the Immigration Act 2004 engages the constitutional and Convention rights of the Applicants

28. If, as the Commission submits, the Applicants do indeed enjoy the constitutional and Convention rights to respect for private and family life, it is submitted that such rights are engaged, and require to be considered, in the context of an application for variation of permission under section 4(7) of the Immigration Act 2004. Insofar as the Minister contends that such rights fall for consideration at the deportation stage, but not in the context of a section 4(7) application, the Commission submits that there is a fundamental tension, if not contradiction, in the Minister's position.

29. Section 4(1) of the Immigration Act 2004 provides that "*an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription,*

[35] See e.g. *D.P.P. v Gormley*; *D.P.P. v White* [2014] IESC 17.

authorising the non-national to land or be in the State". Section 4(6) allows the immigration officer to attach conditions to the permission granted to a non-national. In performing this function, section 4(10) requires the immigration officer to have regard to all the of the circumstances of the non-national concerned including, under subsection 10(c), "*any family relationships (whether of blood or through marriage) of him or her with persons in the State*". Section 4(7) provides as follows:

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

This provision thus allows a non-national, who has been granted a permission to land or be in the State, to apply for its renewal or variation and confers on the Minister, or an immigration officer acting on her behalf, a discretion to grant such a renewal or variation of permission.[36]

30. It is settled law that, in the exercise of a statutory discretion, a Minister must act in accordance with the Constitution. In this regard, it is submitted that Barr J. in his judgment in *Luximon* correctly relied upon the seminal statement of principle of Walsh J. in the Supreme Court in the *East Donegal Co-operative* 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*".[37] Barr J. also referred the well-known *dictum* of Henchy J. in the Supreme Court in *The State (Lynch) v. Cooney*:

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[36] In this regard it might be noted that the decision of the Supreme Court in *Bode & Ors. v Minister for Justice* [2008] 3 IR 663 should arguably be regarded as *per incuriam* as the Courts attention does not appear to have been brought to s.5 of the Immigration Act 2004, the terms of which precluded the possibility of an extra-statutory scheme such as that designed by the Minister and upheld by the Court in that case.

[37] *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] IR 317, 341.

> *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.*[38]

31. 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*.[39] While the first and second applicants in *O'Leary* were Irish citizens, the fundamental principle remains 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 her behalf, is obliged to act in accordance with the Constitution.

32. In addition to the requirements of the Constitution, under section 3(1) of the European Convention on Human Rights Act 2003, subject to any statutory provision or rule of law, the Minister or an immigration officer acting on her behalf, as an organ of the State, "*shall perform its functions in a manner compatible with the State's obligations under the Convention provisions*". Thus, the discretion conferred on the Minister under section 4(7) of the Immigration Act 2004 must also be exercised in a manner compatible with the State's obligations under the provisions of the ECHR, including the provisions of Article 8 ECHR.

[38] *The State (Lynch) v. Cooney* [1982] IR 337, 380.
[39] *O'Leary & Ors v. Minister for Justice* [2012] IEHC 80.

33. As the facts of the Applicants' cases themselves illustrate, decisions of the Minister under section 4(7) of the Immigration Act 2004 have significant implications for applicants for variation of permission. In effect, for persons in the position of the Applicants, 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.

34. For her part, the Minister has submitted that "*the right to have such issues considered at the Section 4(7) stage is a very different matter to the position obtaining in an application for what is referred to colloquially as 'humanitarian leave to remain' under Section 3 of the 1999 Act*". According to the Minister, where there is no suggestion of any sundering of the family unit, no entitlement to be in the State, and the family unit is comprised exclusively of non-nationals, "*no family rights can be engaged under the Constitution as a matter of principle at this juncture requiring a necessity for the [Minister] to consider the rights asserted to exist under the Constitution and the Convention during the course of an application for a change of residence permission such as in the present case*".[40] Seeking to distinguish the *da Silva* case, the Minister has submitted that the position of the Applicants in the context of a refusal of an application for a change of status is not analogous to a '*point of exit*' case where a person is faced with an expulsion decision:

> *As the decision impugned before the High Court did not constitute an exclusion order or a refusal to grant a family reunification in the State, the appropriate time for considering the alleged family rights under Article 8 ECHR had not yet arisen.*[41]

Yet, while asserting that a refusal to consider the rights asserted by the Applicants did not alter their legal position, the Minister in *Luximon*

[40] Submissions on behalf of the Appellant in *Luximon*, paragraph 4.13
[41] Submissions on behalf of the Appellant in *Luximon*, paragraph 4.20.

acknowledges that the Applicants "*may leave the State as they are obliged to do or otherwise the [Minister] may decide to consider initiating the deportation process under section 3 of the Immigration Act, 1999*".[42] Thus, in circumstances such as those of the Applicants, where such a decision determines the question of their entitlement to remain in the State, the refusal of a change of status under section 4(7) of the Immigration Act 2004, corresponds, for all practical purposes, to a '*point of exit*' situation. Notwithstanding such differences as may exist between Irish and Dutch law, it is submitted that Barr J. was correct to conclude that the position of the Applicants was analogous to that of the applicant in *da Silva v. Netherlands*.[43] It is clear that a decision to refuse a change of status under section 4(7) is liable to interfere with the private and family rights of the Applicants under the Constitution and the Convention.

35. In this regard, the Commission submits that the reasoning of the High Court in *Luximon* is persuasive and should be upheld on appeal. Barr J. stated that he could not accept that the fact that any constitutional or Convention rights would be considered in the section 3 deportation process "*absolves the Minister of any obligation to consider such rights at the s. 4(7) stage*".[44] He reached this conclusion for a number of reasons: first, the applicants "*might never enter the s.3 process*"; secondly, the applicants "*have no control over their entry into the s.3 process, or its initiation*" which was entirely a matter for the Minister; thirdly, it would be "*a curious situation*" if, in order for an applicant to have any constitutional or Convention rights considered, "*the applicant would have to breach the State's immigration laws by remaining illegally in the State beyond the end of her permission*"; fourthly, the Court stated that the jurisprudence of the Strasbourg court showed that Article 8 rights are capable of being engaged in circumstances where the refusal of a

[42] Submissions on behalf of the Appellant in *Luximon*, paragraph 6.3. See also submissions on behalf of the Respondent in *Balchand*, paragraph 47 where it is confirmed that, on account of these proceedings, the Minister has refrained from issuing proposals to deport them under s. 3 of the Act of 1999.
[43] *Luximon & Anor -v- Minister for Justice and Equality* [2015] IEHC 227, paragraph 147. *Da Silva v. Netherlands* (2007) 44 EHRR 72.
[44] *Luximon & Anor -v- Minister for Justice and Equality* [2015] IEHC 227, paragraph 167.

residence permit would require an applicant to leave the state.[45] Indeed, even in *Balchand*, while the Court took the view that the relevant applications could be made from outside the State (a position with which, for the reasons set out at paragraph 40, the Commission disagrees), 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"*.[46] It would be a source of grave concern to the Commission if the Applicants were compelled to place themselves in a position of illegality in order to have their constitutional and Convention rights considered by the Minister.

36. Insofar as the judgments of the European Court of Human Rights in *Yildiz v. Austria*[47] and *Mazlov v. Austria*[48] are concerned, it is submitted that these judgments are not authority for the proposition that an applicant's Convention rights are required "*only to be taken into account where a removal decision becomes final*".[49] 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).

[45] *Luximon & Anor -v- Minister for Justice and Equality* [2015] IEHC 227, paragraphs 168-172.
[46] *Balchand & Ors v. Minister for Justice and Equality* [2016] IEHC 132, paragraph 37.
[47] *Yildiz v. Austria* (Application No. 37295/97, 31 January 2003).
[48] *Maslov v. Austria* (Application No. 1638/03, 23 June, 2008).
[49] Submissions of the Respondent in *Balchand*, paragraph 45.

37. While it is accepted that the language of '*engaging*' rights may be apt to confuse where it is used to describe not only whether rights in principle apply in a given situation but also whether they have been unlawfully interfered with,[50] the Commission submits that, for the purposes of the first questions certified in these appeals, the real issue is whether the Applicants' rights are engaged in the sense that those rights apply in a given situation and the relevant conduct of the State – in this case, the decisions of the Minister under section 4(7) – may in principle constitute an interference with those rights. It is *not* about the scope or substance of those rights, whether such interference is proportionate or disproportionate or the weight to be afforded to such rights in a decision requiring a balancing exercise among many diverse considerations, including the legitimate interest 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, it is for consideration in the first instance by the primary decision-maker (in this case, the Minister).

38. Bearing these considerations in mind, the Commission submits that the learned High Court judge in *Balchand* erred in his conclusion that the private and family rights of the Applicants therein to remain in the State "*are minimal to non-existent and do not need to be considered by the Minister at any stage of the process, because they simply do not reach the level of significance required to engage such consideration*".[51] The judgments in *C.I.*[52] and *P.O.*[53] – upon which the High Court relied in support of this conclusion – relate to individuals (in both cases, failed asylum seekers) in very different circumstances to those of the Applicants. Moreover, they relate to decisions where, in contrast to those challenged by the Applicants herein, the Minister had indeed given consideration to the applicants' rights under Article 8 ECHR. In the passages of *P.O.* relied upon by the learned judge, neither

[50] See e.g. *Regina v. Secretary of State for the Home Department ex parte Razgar* [2004] UKHL 27; *C.I. & Ors v. Minister for Justice Equality and Law Reform* [2015] IECA 192.
[51] *Balchand & Ors v. Minister for Justice and Equality* [2016] IEHC 132, paragraph 21.
[52] *C.I. & Ors v. Minister for Justice Equality and Law Reform* [2015] IECA 192.
[53] *P.O. v. Minister for Justice and Equality* [2015] IESC 64.

MacMenamin J. nor Charleton J. in fact described the applicants' rights under Article 8 ECHR as "*minimal*"; in considering the Minister's assessment of those rights, and the High Court's review thereof, the Supreme Court was certainly not concluding that the applicants' rights were of such a minimal or non-existent nature as not to require consideration at all in the decision-making process.

39. In a similar way, the Commission submits that the learned High Court judge in *Balchand* erred in considering factors which are relevant to the substantive assessment of the Applicants' Article 8 rights (such as the characterisation of their status in the State, whether there would be a 'sundering' of the family and whether an application could be made from outside the State) in determining the threshold issue of whether those rights were in principle applicable, particularly in circumstances where the Minister had not undertaken any substantive assessment of the Applicants' Article 8 rights in the decision under challenge. The jurisprudence of the Strasbourg Court – from *Gül v. Switzerland* to *Jeunesse v. Netherlands* [54] – 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*".[55] In this regard, the Court continued:

> *Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion.*[56]

[54] *Gül v. Switzerland* (1996) 22 EHRR 93; *Jeunesse v. Netherlands* (2015) 60 EHRR 17.
[55] *Jeunesse v. Netherlands* (2015) 60 EHRR 17, paragraph 106.
[56] *Jeunesse v. Netherlands* (2015) 60 EHRR 17, paragraph 106.

Each case must therefore be assessed on its individual merits. Without a detailed consideration of the individual merits of the Applicants' cases, which has not taken place, it is neither possible nor appropriate to dismiss the position of Applicants in these appeals, as being '*precarious*', as not being '*settled migrants*' or as not involving '*exceptional circumstances*'. These are considerations which clearly go to the weight to be afforded to the rights in question as opposed to the threshold issue of whether those rights in fact apply in a given situation. In this regard, as the Appellants' submissions in *Balchand* make clear, the Applicants are not asserting an absolute right to remain in the State but rather an entitlement to have their personal and family rights considered in a decision which effectively determines whether or not they are entitled to remain in the State.[57]

40. Finally, insofar as the judgment in *Balchand* concluded that there was nothing to prevent the Applicants in that case from making an application for permission to return to the State from their home country,[58] it is submitted that such a conclusion ignores the practical reality of the Applicants' situation and, in particular, the consideration that a requirement to leave the State, even if solely for the purpose of making such an application remotely, may itself cause considerable disruption to the private and family lives of the Applicants (for example, in the context of employment and education).

41. In conclusion, it is submitted that the Minister's refusal of the applications for change of status/permission under section 4(7) of the Immigration Act 2004 has potentially far-reaching implications for the Applicants, 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 this 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

[57] Submissions on behalf of the Appellants in *Balchand*, paragraph 54.
[58] *Balchand & Ors v. Minister for Justice and Equality* [2016] IEHC 132, paragraph 23.

Applicants' constitutional and/or Convention rights until such time as the Applicants may become subject to the rigours of the deportation process.

IV. Conclusion

42. 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 Applicants (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 Applicants and, in particular, the right to privacy and the right to respect for family life.

David Fennelly BL
Feichín McDonagh SC
26th May 2016