THE SUPREME COURT

Appeal No.: 61/2019

O'Donnell J.
MacMenamin J.
Dunne J.
Charleton J.
Irvine J.

BETWEEN/

I.X.

APPLICANT/APPELLANT

AND

THE CHIEF INTERNATIONAL PROTECTION OFFICER AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS/RESPONDENTS

AND

Appeal No.: 60/2019

BETWEEN/

F.X. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND I.X.)

APPLICANT/APPELLANT

AND

THE CHIEF INTERNATIONAL PROTECTION OFFICER AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS/RESPONDENTS

AND

Appeal No.: 62/2019

BETWEEN/

X.X. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND I.X.)

APPLICANT/APPELLANT

AND

THE CHIEF INTERNATIONAL PROTECTION OFFICER AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS/RESPONDENTS

AND

Appeal No.: 57/2019

N.Y.

APPLICANT/APPELLANT

AND

THE CHIEF INTERNATIONAL PROTECTION OFFICER AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS/RESPONDENTS

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

NOTICE PARTY

AND

Appeal No.: 58/2019

J.Z.

APPLICANT/APPELLANT

AND

THE CHIEF INTERNATIONAL PROTECTION OFFICER AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS/RESPONDENTS

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

NOTICE PARTY

Judgment of O'Donnell J. delivered on the 21st day of February, 2020.

1. These cases have been heard together and concern the practice of utilising the services of a panel of independent contractors, in this case self-employed barristers, to assist in the processing of applications for refugee status under the Refugee Act 1996, and refugee status and subsidiary protection under the procedure adopted under the International Protection Act 2015. I will, where possible, refer to the person concerned as "the panel member".

2. The dispute is a narrow one. It is accepted, on the part of the appellants, that it is permitted to use panel members for some purposes in determining applications under both statutory regimes, but it is contended that the practice adopted in fact exceeds the lawful authority in each case. It is apparent therefore that, while the cases have considerable similarities, it will be necessary to consider, in some detail, both the facts in each case and the different legal regimes applicable.

The *X* cases: The Refugee Act 1996

3. The X. cases (Appeal Nos.: 61, 60, and 62 of 2019, respectively) concern a mother and two children of Albanian origin who applied for refugee status on the 29th of December, 2015. The first-named appellant, I.X. ("the mother"), attended for an interview on the 10th of June, 2016, and was interviewed by Beatrice Vance, described as an "authorised officer" with the Office of the Refugee Appeals Commissioner ("ORAC") who, it is common case, was a panel member at this time. By a letter of the 16th of August, 2016, I.X. was informed that the Refugee Appeals Commissioner was recommending refusal of the application for asylum status.

4. The letter of the 16th of August, 2016, is central to these proceedings. It enclosed two documents, the first of which was a *draft* report signed by Ms. Vance over the heading:- "Investigator", and convening a "Summary of *Draft* findings" (*Emphasis added*). The second document was in very similar terms to the first, but was signed by a Ms. Niamh

O'Neill, described as:- "Investigator", and signed for and on behalf of the Refugee Applications Commissioner by Dara Coyne. It is accepted that Ms. O'Neill was, at the relevant time, an Executive Officer in the Civil Service and I will refer to her after as the "E.O." Mr Coyne was a Higher Executive Officer ("H.E.O.") in ORAC. A formal recommendation was contained at para. 8 in the following terms:-

> "I have considered the application for Refugee Status, the documentation available to the Commissioner on file, and the analysis and findings in this case, and I am of the view that the applicant, [*redacted] [I.X*.], has not established a well founded fear of persecution if returned to Albania. Accordingly, I recommend that the applicant is not eligible for Refugee Status."

5. It is relevant to record that the application for leave to seek judicial review was initially refused in the High Court (Humphreys J.), but granted on appeal to this court by order of the 16th of May, 2018.

6. The grounds upon which leave was sought and granted were essentially that the statutory function of the Commissioner was being performed, in effect and in reality, not by a member of the staff of the Commissioner, but by the panel member. The same set of facts was alleged to give rise to two grounds, either of which, it was suggested, was sufficient to establish invalidity. There was either non-performance of a statutory function by the person authorised by statute to perform it, or the performance of a statutory function by a person not authorised by statute to do so. The legal arguments, which are the obverse of each other, are dependent on the same conclusion of fact: that it was, in reality, the panel member who conducted the investigation and, therefore, made the recommendation.

7. The grounds on which leave was sought and granted were simple:

   (i) No lawful investigation of the appellant's application for refugee status was carried out by the respondent within the meaning of the ss. 11 and 13 of the Refugee Act 1996 ("Act of 1996").

   (ii) An interview with the appellant was conducted by a person purporting to be an authorised officer under the Act. The authorised officer thereafter conducted and finalised a purported investigation under s. 13 of the Act of 1996 without lawful authority.

   (iii) A recommendation of the respondent was not in compliance with the requirements of s. 13 of the Act of 1996 by reason of the failure of the respondent to meaningfully carry out an investigation under that section in circumstances in which the authorised officer was not entitled to carry out an investigation of the appellant's claim.

(iv) No substantive investigation of the appellant's claim for refugee status, within the meaning of the Act of 1996, has been conducted by the respondents and the lawfulness of the consequent recommendation is thereby vitiated.

8. In order to understand the precise point being made, it may be useful to digress at this point and consider the relevant statutory provisions, which in this case can be reduced to the provisions of ss. 11 and 13 of the Act of 1996. S. 11 provided as follows:-

"11.(1) Where an application is received by the Commissioner under section 8 and the application is not withdrawn or deemed to be withdrawn pursuant to the provisions of section 9 or 22, it shall be the function of the Commissioner to investigate the application for the purpose of ascertaining whether the applicant is a person in respect of whom a declaration should be given.

(2) In a case to which subsection (1) applies, the Commissioner shall, for the purposes of that provision, direct an authorised officer or officers to interview the applicant concerned and the officer or officers shall comply with any such direction and furnish a report in writing in relation to the interview concerned to the Commissioner."

Under s. 1 of the Act, an "authorised officer" means a person "authorised in writing by the Commissioner to exercise the powers conferred on an authorised officer by or under this Act". It is clear from this provision, and it is not in contest in these proceedings, that it is permissible, therefore, for the Commissioner to employ an authorised officer, in this case a panel member, to interview the appellant and to furnish a report in relation to the interview. Nevertheless it was for the Commissioner, through the staff of the Office, to both investigate the claim for refugee status and make the recommendation in that regard.

9. S. 13 of the Act provides that:-

"(1) Where the Commissioner carries out an investigation under section 11 he or she shall, as soon as may be, prepare a report in writing of the results of the investigation and such report shall refer to the matters raised by the applicant in the interview under section 11 and to such other matters as the Commissioner considers appropriate and shall set out the findings of the Commissioner together with his or her recommendation whether the applicant concerned should or, as the case may be, should not be declared to be a refugee."

10. The appellant's case, in essence, is therefore that the Commissioner did not, through his staff, carry out the investigation under s. 11, or prepare a s. 13 report. Instead, it was said that this was done in substance by the authorised officer, namely the panel member. The evidence relied on was the essential similarity, and indeed near identity, of the draft report prepared by the panel member and the final report and recommendation of the officer.

11. In response, some detailed affidavits were sworn on behalf of the respondent. First, Mr. Ray Minehan, a former Assistant Principal Officer ("A.P.O") in the International Protection Office, and, prior to that, ORAC, and having responsibility for the use of panel members in the case processing unit, explained that the introduction of panel members to the case processing of refugee appeals determinations from 2015 was to assist the ORAC personnel responsible therefore. This, in turn, had followed from the introduction of panel members in the context of subsidiary protection under the European Communities (Subsidiary Protection) Regulations 2013. He confirmed that the affidavits of the individual officers concerned in this case, Niamh O'Neill and Dara Coyne, were correct insofar as they set out the processes, customs, and practice of ORAC.

12. Staff and panel members were given training by ORAC personnel and, on occasion, by representatives of the United Nations High Commissioner for Refugees ("U.N.H.C.R."). In addition to this, ORAC had compiled Guidance Notes having recourse to a number of sources, including the U.N.H.C.R. reports, to assist staff. For those purposes, he exhibited the relevant Guidance Notes as applicable to refugee status determination processes. There were four of these. The first related to the assessment of credibility. The second was a refugee status report setting out the template upon which all information is set out. A third gave guidance for the processing of applications for refugee status and citizens in the situations where the ORAC case processing panel, and the ORAC case workers are involved. The fourth, and final, Guidance Note was on the role of H.E.O. team leaders and, where appropriate, team executive officers in relation to the consideration of applications.

13. Although the contents of those Guidance Notes were based on a recorded legal advice from counsel in the Office of the Attorney General, and were accordingly privileged, Mr. Minehan confirmed that the respondents had determined, for the limited purposes of the proceedings and with a view to the court having all relevant information before it, to disclose the documents in full. Mr. Minehan states that the Guidance Note on the role of H.E.O. correctly sets out the role and function of those officers and refers to the interaction between the H.E.O., the panel member, and the case worker (the team E.O.). The function of H.E.O. is to ensure that the appropriate finding is made having regard to the facts on file and in line with the legal framework and it is the H.E.O. who makes the final recommendation. The Guidance Note states that it was to be read in conjunction with the general Guidance Note for the processing of applications which confirmed that it was the function of ORAC staff members to make formal findings and recommendations, which reflected the training given to staff members and panel members on how such applications should be dealt with.

14. However, Mr. Minehan draws attention to a provision in Guidance Note No.: 006/2015 in relation to the role of the H.E.O. which he says, viewed alone or in isolation, is neither correct nor reflective of the actual practice. The Guidance Note stated that the H.E.O. cannot reopen the investigation or go behind the findings of a panel member. He states that, both in fact and in practice, ORAC personnel were aware from their training and instruction that it was their responsibility to investigate and make findings on refugee

status determination and that only they had authority to do so. They were aware at all times that the proposed draft findings suggested by a panel member in a draft report were not final or binding on them. That was how the process operated in practice. Following consultation with the then Commissioner, he was satisfied that staff members, H.E.O.s and panel members in particular, were clear as to their functions and authority as set out in Guidance Note No.: 005/2015, and he did not believe that it was necessary to take steps to direct any amendments or changes to Guidance Note No.: 006 when he became aware of the erroneous guidance. It should be said that the appellants do not take issue with this explanation.

15. Mr. Minehan's affidavit was supported by the affidavit of Ms. O'Neill and Mr. Coyne. Ms. O'Neill, the E.O., explained that she was the case worker assigned to the investigation of the application by I.X. for refugee status. The team working on the application comprised: the H.E.O., Mr. Coyne; a panel member, Ms. Vance; and Ms. O'Neill. Ms. Vance had been designated as an authorised officer under the 1996 Act. Ms. O'Neill stated that, as the designated case worker, she had control over the investigation, was at all times conscious of that fact, and received considerable assistance from the panel member when carrying it out. She had worked many times with Ms. Vance, whom she considered very competent and experienced and that they collaborated well together.

16. Ms. O'Neill explained that she had undergone substantial training with ORAC in relation to the processing and determining of applications. Particular emphasis was laid on the principle that it was the case worker who had responsibility for the investigation and made the ultimate findings on it, not the panel member. She was familiar with the Guidance Notes dealing with the investigation of an application for refugee status, including that on credibility, the s. 13 report template, and the process for determining applications when panel members were introduced to the system.

17. In this particular case, Ms. O'Neill recorded that Ms. Vance conducted the interview of the appellant on the 10th of June, 2016, and prepared the s. 11 report, which was read back by the panel member to the appellant and signed by her. The carrying out of the interview and the preparation of the report thereon were the performance of the panel member's function as an authorised officer. Thereafter, however, a panel member could continue to assist the case worker with the investigation itself, which was a common occurrence. The introduction of panel members as authorised officers to conduct interviews and assist in the s. 13 phase of the process had, Ms. O'Neill considered, saved a considerable amount of ORAC time and freed her as a case worker to work on more cases and deal with the considerable backlog which had been building up. While she controlled any investigation, the fact that highly skilled and proficient assistance was available greatly enhanced the nature and efficiency of the decision making process.

18. Ms. O'Neill emphasised that the panel member, in assisting with the compilation of a draft report, does not work independently during that process. Interactions commence before the panel member submits a draft report or may occur afterwards. She might liaise with a panel member prior to any interview, as the panel member may require assistance with

the interview in relation to such matters as country guidance, preparation strategy, topics or questions that might be covered. A panel member might require her guidance during the course of the interview itself if issues arose, in which case the panel member would step out of interview for a short period.

19. Panel members themselves underwent extensive training in the refugee status determination process. For consistency and efficiency, the work prepared in any investigation is transcribed into a standardised template for a s. 13 report which sets out the parameters of any investigation and ensures that all elements are covered. Any panel member is aware that draft reports will undergo change and development. A number of versions of draft reports usually end up being furnished before finalisation. As already mentioned, interactions could commence before a draft report or afterwards. Follow-up action may be required to verify information, and that work may be carried out by the executive officer or the panel member on her authorisation. If either the executive officer or the relevant H.E.O. considered that a second interview was necessary, they would make that decision and direct the panel member to carry out such an additional interview.

20. Credibility was a key issue involving a focus on analysis of the material facts in order to ascertain which facts were to be accepted rather than relying on demeanour and presentation. If any issue arose requiring a further interview, then the panel member would be directed, most usually by Ms. O'Neill after consultation with her H.E.O., to re-interview the appellant. A panel member would carry out a draft analysis of credibility. However, Ms. O'Neill would examine the file, including the s. 11 interview, and review the draft before approving or adopting any of the suggested draft findings. She specifically stated she would not make such concluded findings, to use her own words:- "…unless I am happy that the credibility of an applicant is properly assessed".

21. On receipt of an initial draft, Ms. O'Neill would adopt it if she agreed with the conclusion adopted. If there were minor changes to be made, she would discuss them with the panel member and do them herself. If she did not agree, or if further research was required, or if she disagreed with any suggested analysis or proposed findings, and more significant changes had to be made, then she would discuss those with the panel member to agree them and direct him or her to make those changes in the draft report. She asked the panel member used as a courtesy, but she was aware that it is the policy of the International Protection Office to operate a consensus-based approach to decision making. If there could be no agreement, however, the H.E.O. could direct further investigations and clarification. However, at all times, Ms. O'Neill knew that the responsibility for both the investigation and final decision was hers; she did not need the consent of the panel member to make any changes. She said that she took the role of making findings on an investigation very seriously.

22. While she worked collaboratively and had never personally had a case where there was no agreement across the team in relation to the contents of the final draft report and draft findings, she had the final say in any findings arising in an investigation. She would not proceed in adopting the contents of a final draft report unless she was satisfied having

examined the file with the assessment and the proposed draft findings. When she forwarded her s. 13 report to a H.E.O. for recommendation, she considered that:-

> "the investigation of an applicant's application for refugee status and the findings set out thereon under s. 13 of the 1996 Act are mine, as happened in the within application".

23. In this particular case, a proposed draft report was submitted on the 29th of June, 2016. Ms. O'Neill made some changes to what was proposed in the draft report, particularly in the credibility section, to address more accurately what she believed was the particular credibility issue. She discussed the proposed changes with the panel member. She sought a copy of the draft and a comparison of the two drafts showed the amendments which she had made to the developing draft report. She also inserted text in the finding section and added the recommendation section. She repeated that she would not have signed the s. 13 report unless she had examined the appellant's file and agreed with and adopted the suggested draft findings of the panel member.

24. Mr. Coyne, for his part, swore an affidavit setting out that he was the H.E.O. having overall control and responsibility for the ORAC determination of the appellant's application for refugee status. He said that he made the recommendation of the Commissioner on the appellant's application having read the entire file, including the s. 13 report of the case worker and the findings made therein. In this investigation, he was also involved before findings were made as the case worker sought his advice during the investigation.

25. At para. 8 of the affidavit he stated:-

> "I have always understood my function to be that I was in overall control of the team such that the Caseworker, or the Panel Member through the Caseworker (or occasionally directly), could seek my advice or direction in relation to the application at any time. In respect of any application in which I was due to make a recommendation as the Commissioner, I would almost always be in liaison with the Caseworker in advance of such recommendation. The level of interaction would depend on the needs of the specific obligation. I knew that as my function was to make a recommendation on each application I had to be satisfied with the findings of the Caseworker and that those findings must be derived from the content of the Section 13 report."

26. While the policy of ORAC had always been to try to achieve consensus, as this increased the likelihood of a fair resilient outcome, he was always satisfied that the ultimate decision was that of the ORAC staff, not the panel member, and the findings of the case worker (E.O.) were paramount. Where the assistance of a panel member is not ultimately found useful or agreeable by the case worker or by the H.E.O., then such assistance is not followed through, although, since the approach favours consensus, such circumstances are rare. Where it did arise, however, the draft s. 13 report would be set aside and the phase leading to that report would be carried out afresh by ORAC personnel themselves.

27. In relation to the specific cases, Mr. Coyne confirmed that he reviewed the application in full, and was happy with the case worker's s. 13 report which was finalised between him and the case worker. He was satisfied with the analysis and level of detailed evidence and agreed with the arguments made and with Niamh O'Neill's findings. He confirmed that the appellant's application for refugee status was fully and comprehensively investigated and, when making his recommendation, he was fully aware of the contents of the appellant's file including the report of the interview and the s. 13 report prepared thereafter, and he agreed with the findings set out in her case. Such findings were well made on the evidence available in accordance with the practices of ORAC in considering refugee status determinations.

28. Mr. Coyne considered that panel members were well trained, highly qualified, and capable of providing a high degree of assistance in the process; their valued views would be of considerable assistance to the case worker and to the H.E.O. However, that should not be confused with independence or any decision making power. A panel member could not act independently outside the ongoing direction, supervision, and control of ORAC staff in the s. 13 process and, crucially, could not make any decided findings on any investigation.

The Guidance Notes

29. The four Guidance Notes exhibited by Mr. Minehan are impressively detailed documents. The Guidance Note on assessing credibility (001/2014) runs to 37 pages with copious references to domestic and European legislation, case law, and international material including the U.N.H.C.R. handbook. The template Guidance Note (003/2015) is 31 pages long. For present purposes, however, the most relevant note is 005/2015:- "GUIDANCE NOTE FOR THE PROCESSING OF APPLICATIONS FOR REFUGEE STATUS IN SITUATIONS WHERE THE ORAC CASE PROCESSING PANEL AND ORAC CASEWORKERS ARE INVOLVED." (*Emphasis in original)*

30. Guidance Note No.: 005/2015 sets out very clearly that ORAC may utilise ORAC panel members as an administrative mechanism to undertake interviews under s. 11 of the Act of 1996, where the panel member is an authorised officer (with the s. 13 report being prepared by an ORAC case worker). It is then provided at para. 3(b) that:- "More importantly, ORAC may utilise the ORAC Panel as an administrative mechanism to undertake interviews under section 11 of the Refugee Act 1996 and to prepare DRAFT section 13 reports with DRAFT findings" (*Emphasis in original*). At every conceivable point in the document it is emphasised that the structure of any such arrangement is the preparation of a draft s. 13 report by a panel member but the exercise of the s. 13 function "must be undertaken by ORAC staff members" (*Emphasis in original*). Again, at para. 3(g) it is stated "The DRAFT section 13 report must then be reviewed, taken over and signed off by a staff member of ORAC who thereby makes the case their own" (Capitals and underlining all in the original). Where additions or corrections are made and having made the report their own, the E.O. then signs it and passes it to the H.E.O. The obligation on the E.O./case worker to make the report their own is repeated throughout the note.

31. It is clear beyond argument, therefore, that the Guidance Note, at least, was drafted with a very clear understanding that the Act requires the s. 13 report and the recommendation to be the legal responsibility of the case worker/E.O – and H.E.O., as the case may be – on behalf of the Commissioner. Significantly, perhaps, the note also emphasises, consistently with the Guidance Note on credibility, that case workers and panel members should adopt a cautious approach to assessments of credibility in circumstances where the case worker will not have attended the s. 11 interview and should steer away from findings of adverse findings of credibility on grounds of demeanour or attitude and should focus instead, for example, on the appellant's account of events and the availability of the country of origin information supporting or undermining the account.

32. Finally, Guidance Note No.: 006/2015 deals with the position of the H.E.O. when in relation to the consideration of an application for refugee status where panel members are involved. Again, it is emphasised that the H.E.O. must read the entire file and that it is the H.E.O. who will make the final recommendation as to whether refugee status should be granted or refused. In relation to interactions between panel members and H.E.O.s, it is stated that:-

> "The advice of the Office of the Attorney General is that it would be prudent for ORAC to follow an approach whereby Panel members, when dealing with particularly complex cases, or cases that are on the borderline between negative and positive outcomes, might bring draft reports they are preparing to the attention of a Team EO/HEO TL for guidance in respect of aspects of the investigation that might require further information from an applicant, or further consideration of the law or country of origin information."

33. A mentoring approach is recommended to Team E.O.s/H.E.O. Team Leaders. It is provided that such support should help to ensure that panel members draft reports which are thorough while consulting with E.O.s or H.E.O.s on cases of particular complexity or those which require special vigilance, and should minimise situations where an inadequately considered or inadequately reasoned draft report is furnished. At para. 5.8, it is provided that if the H.E.O. Team Leader is satisfied that the panel member's submission was in error then he or she should, in setting out his or her recommendation, explain why he or she does not accept the panel members written submissions in respect of the recommendation. Finally, at para. 5.15, the Guidance Note contains the passage already referred to by Mr. Minehan that, subject to any interaction between panel members and the team E.O.s and H.E.O.s, the recommendation of the H.E.O. must follow and be consistent with the findings set out by the panel member. It is explained by Mr. Minehan that this was drawn from an earlier Guidance Note in relation to the use of panel members in respect of subsidiary protection applications. In that situation, there is no statutory requirement that the investigation and recommendation must be carried out by the Commissioner. Mr. Minehan's statement that the same basic text was included erroneously in the Guidance Note in respect of asylum applications is accepted for the purposes of these proceedings and the statement that this does not reflect the practice either in general or in this case is not challenged.

34. It may be that this highlights an important aspect of this case. The use of panel members in the context of subsidiary protection under the pre-2015 Act regime did not have to be accommodated within a pre-existing statutory template. Thus, it was possible to allow panel members to carry out the entire investigation and recommendation function subject to supervision by the staff of ORAC. At the heart of the challenge made here may lie an unspoken contention that, in effect and in reality, the same process occurs in the context of the use of panel members for the assessment of asylum applications under the Refugee Act 1996 notwithstanding the different legislative provisions and the terms of the Guidance Notes.

35. Before addressing the substance of the arguments raised, a number of preliminary observations are, perhaps, appropriate. First, it is apparent that these are in the nature of test cases. It is not suggested that the system adopted has led to a decision in any of these cases which is said to be legally or factually flawed in any other respect. It is contended, simply, that the system adopted is not in accordance with the statutory scheme. Second, the introduction of panel members was carried out with a relatively high degree of transparency. The applicant for asylum (and, therefore, his or her advisors) receives the s. 13 report together with the draft prepared by the panel member which makes it quite clear that they are very similar documents and that the case worker has adopted the report of the panel member. Further, the employment of a panel is the subject of public advertisement and the work is in no way concealed. When it became necessary to do so in defence of these proceedings, the respondents produced comprehensive affidavits exhibiting detailed Guidance Notes. Those notes were, themselves, prepared following legal advice and contained elements of that advice, which was otherwise privileged. Third, the practice of using independent contractors with professional legal qualifications either as a solicitor or barrister is itself, at least in principle, a step capable of enhancing the asylum decision making process since it brings to bear on an application a person outside the departmental structure with, moreover, a significant legal qualification. Fourth, and finally, the commencement of these proceedings has caused significant disruption to the asylum process. The appellant appealed the decision of the Refugee Applications Commissioner to the Refugee Appeals Tribunal ("RAT"), but sought to stay the further prosecution of the appeal to avoid these proceedings being rendered moot. While there is no suggestion that an appeal to the RAT under the 1996 Act, or to the International Protection Appeals Tribunal ("IPAT") under the 2015 Act, would involve any similar panel of contractors, the appellants nevertheless argued that they were entitled to a consideration at first instance in accordance with the law. The effect of this systemic challenge has, therefore, been to prevent further decisions at first instance, or at least place any such decisions under a cloud of legal uncertainty, and moreover to prevent the progress of appeals through the statutory appeals process. Whatever the outcome of this case, the unfortunate consequence will be that either the first instance hearing (if the appellants succeed) or the appellate hearing (if the State succeeds), will face a very significant backlog of cases. For this reason, the hearing of the appeal was expedited.

36. The merits of the scheme adopted, and the difficulties created by these proceedings, are not sought to be avoided by counsel for the appellants. However, he maintains simply that while there may be no objection in principle to the course adopted by the Department, and it may indeed have much to commend it, it must be carried out in accordance with law. Accordingly, it is to the legal issues raised by the appellants which it is necessary now to turn.

37. It is possible to deal relatively briefly with a number of matters touched on in the submissions of the parties. It is appears that some part of the appellant's case was a suggestion, never fully fleshed out, that there has been an impermissible delegation of a statutory function contrary to the well-known Latin maxim *delegatus non potest delegare*. Thus, at para. 7 of the written submissions it is stated that it is "beyond dispute that a statutory function may not be performed by anyone other than the person assigned by statute" citing Wade and Forsyth, *Administrative Law* (11th ed., Oxford University Press, 2014) ("Wade and Forsyth") at p. 259 for the proposition that a statutory power must "be exercised by the authority upon whom it is conferred and by no one else". The submissions also referred to the late Lord Bingham's observation in his well-known book, *The Rule of Law* (Penguin, 2011) at p. 61 that "[w]hen Parliament, by statute or statutory regulation, empowers a specific officer … or a specific body … to make a particular decision, it does not empower anyone else".

38. Since there is a degree of confusion about the extent and application of the maxim it is perhaps useful to set out a passage in Wade and Forsyth at p. 260, which clarifies the law in this respect:-

> "The maxim *delegatus non potest delegare* is sometimes invoked as if it embodied some general principle that made it legally impossible for statutory authority to be delegated. In reality there is no such principle; the maxim plays no real part in the decision of cases, though it is sometimes used as a convenient label. In the case of statutory powers the important question is whether, on a true construction of the Act, it is intended that a power conferred upon A may be exercised on A's authority by B. The maxim merely indicates that this is not normally allowable. For this purpose no distinction need be drawn between delegation and agency. Whichever term is employed, the question of the true intent of the Act remains. It is true that the court will more readily approve the employment of another person to act as a mere agent than the wholesale delegation of the power itself. But this is due not to any technical difference between agency and delegation but to the different degrees of devolution which either term can cover. The vital question in most cases is whether the statutory discretion remains in the hands of the proper authority, or whether some other person purports to exercise it. Thus where the Act said that an inspector of nuisances 'may procure any sample' of goods for analysis, it was held that the inspector might validly send his assistant to buy a sample of coffee. This might be described as mere agency as opposed to delegation. But that would obscure the true ground, which was that the inspector had in no way authorised his assistant to exercise the discretion legally reposed in himself. For similar reasons

there can be no objection to the Commission for Racial Equality using its officers to collect information in its investigations [*R. v.* Commissioner for Racial Equality ex parte Cottrell & Rothon *[1980] 1 W.L.R. 1580*]. Another example, which must be close to the boundary, is where a 'selection panel' makes a recommendation of a single candidate for appointment to the appointing body. Since the appointing body could reject the recommendation, unlawful delegation to the selection panel was not found [*citing, in this respect* R. (Reckless) v. Kent Police Authority *[2010] EWCA Civ 1277, para. 32 (Carnwath L.J.), and observing that not even the names of the other candidates on the short list were revealed to the appointing body]."*

39. It is apparent, however, that this principle is not really engaged here. There is no doubt that, on the face of the s. 13 report, the recommendation purports to have been made by the person authorised to do so (in this case the H.E.O., and therefore the Commissioner) pursuant to a recommendation of the case worker after an investigation by that person. It is argued, however, that, notwithstanding the terms of the documents and, indeed, the affidavits, it is apparent from the consideration of the evidence that, in truth, the investigation was not carried out by the case worker, but rather by the panel officer. It is apparent, therefore, that the issue in this case involves an analysis of the relevant evidence, rather than the application of any principle of law. If the court was to conclude that, in truth, the case worker had not carried out an investigation required by statute in order to allow a recommendation to be made, then the appellants would plainly succeed. It is not suggested that that statutory function was delegated to the panel member. Accordingly, the delegatus principle does not arise.

40. The appellants also raise a contention that there has been a failure to comply with the duty of candour on the part of the public authority or, in the vivid words of the Court of Appeal of England and *Wales in R. v. Lancashire County Council, ex parte Huddleston* [1986] 2 All E.R. 941, that the respondents have not defended the case "with all the cards face upwards on the table". In this regard, it is said that the respondents have failed to present any affidavit from the panel member, in this case Ms. Vance, to set out her views "as to her own role" (para. 50, submissions of the appellants). There is, perhaps, an insinuation that Ms. Vance would not accept the characterisation of the process put forward on behalf of the respondents and perhaps the witnesses.

41. I am very reluctant to engage in this type of speculative exercise. The characterisation of the process is a matter ultimately for the court since it is a matter of law. It is not suggested that there is or could be any dispute as to the facts which it has been sought to characterise in these proceedings. Indeed, if there was such a dispute, I would expect that the appellants would have sought leave to cross-examine the witnesses whose evidence they wished to challenge. Furthermore, the procedures of the court are sufficient to allow the judicial review to proceed by way of plenary hearing in which case all the mechanisms of discovery interrogatories and *subpoena* would have been available. That course was not taken and I would not be prepared to come to any conclusion as to fact on this case on the basis, simply, of the absence of an affidavit from the panel member.

42. The respondents produced very comprehensive and detailed affidavits from witnesses who were subject to the possibility of cross-examination and who exhibited very detailed documentary evidence setting out in meticulous detail the steps which were required to be taken in any decision on asylum application, material on which the appellants heavily relied. There was no replying affidavit on behalf of the appellants, and no attempt to convert the proceedings into a plenary hearing. Furthermore, and strikingly, no application was made to seek to cross-examine the witnesses, albeit that a necessary part of the appellant's case appeared to be that the affidavits presented a misleading, and perhaps even false, picture of the degree of involvement of the case worker in the decision making process. Judicial review is conducted on affidavit pursuant to statements of grounds and statements of opposition, all of which are normally drafted by professional lawyers and directed, in turn, towards issues of law. It is perhaps inevitable, therefore, that there is a tendency towards argument and presentation in the pleadings and affidavits. However, all parties to judicial review should address the matter frankly and lay before the court facts, fairly stated, which it is asserted gives rise to the legal issue which requires to be determined. I would reject any contention that there has been a culpable failure to comply with the obligation of candour on the part of the respondents in this case by not proffering an affidavit from the panel member.

43. The appellant's case amounts, in my view, to a contention that the panel member "had in reality conducted the only investigation of the claim that actually took place" and that "the involvement of the member of staff of the Commissioner was merely to 'review' and 'adopt' the results of the contractor's efforts. In light of the terms of the Act this did not constitute an investigation carried out by a member of the staff of the Commissioner" (para. 6 of the submissions). To a surprising degree, the appellant's case involved interpreting the Guidance Notes in general, and Guidance Note 005/2015 in particular, and inviting the court to prefer that interpretation to the evidence of Ms. O'Neill and Mr. Coyne. Thus, it is said the High Court judge "erred in law in his approach to the evidence, in particular the evidence of the Respondents" (para. 27 of the submissions) (*Emphasis added*). It is also suggested that the trial judge did not consider "all of the evidence adduced" and provide reasons for the acceptance by him "of portions of the Respondents' evidence and the (apparent) rejection by him of other portions of the Respondents' evidence" (*Emphasis added*). It is further argued that the trial judge erred in law in "rejecting or ignoring, or failed to give any or any adequate reasons for rejecting or ignoring, the following evidence adduced by the Respondents" (*Emphasis added*). The evidence referred to is Guidance Notes Nos.: 005/2015 and 006/2016 which Mr. Minehan had said that, subject to one caveat, correctly set out the role of the H.E.O. (in the case of Guidance Note No.: 006/2016) and confirmed the function of ORAC staff members to make formal findings and recommendations and correctly reflects the training given to staff and panel members (in respect of Guidance Note No.: 005/2015). Later it is suggested that "the Respondents' affidavit evidence firmly grounded the Appellants' claims" (*Emphasis added*) and that "[a]ny apparent contradictions between actual events and Ms O'Neill's *ex post facto* 'explanation' of her involvement in the process is a difficulty for the Respondents, not the Applicants".

44. It is perhaps useful to recall that these proceedings commenced in reliance on a short affidavit which exhibited both the draft report of the panel member and the report of the case worker including the recommendation of the H.E.O. It was apparent that the draft report and the final report were almost identical in all material respects. It is perhaps not surprising, therefore, that in consequence it was contended that no lawful investigation had been carried out. However, this case must now be approached in the light of the comprehensive affidavits and exhibits submitted by the respondents. The relevant facts have emerged relatively clearly. Ms. O'Neill maintains that she carried out the investigation which she was required to do. She had undergone extensive training. She acknowledged the assistance that panel members provide in line with cases to be worked on, and stated that:- "[w]hile I control any investigation, the fact that highly skilled and proficient assistance is available to me greatly enhances the nature and efficiency of the decision making process". The panel member did not work independently during the process. There was a considerable degree of interaction which could result in a number of drafts being submitted prior to the final draft report which is provided to the appellant. If, for example, she or her H.E.O. considered that a second interview was required, they made such a decision and directed a further interview. That was entirely at their discretion. The degree of interaction with a panel member depends on a multiplicity of factors including the ability and expertise of the panel member and the complexity or novelty of the application at issue. The assessment of credibility is particularly important and, as set out above, normally involves an assessment of the internal consistency of the appellant's account and the external consistency with what was known about the country of origin information and records on file. Before approving or adopting any suggested draft findings, she examines the file, the report of the interview and reviews the draft report. She maintains that she would not make any concluded finding unless happy that the credibility of the applicant was properly assessed. She could either direct changes to the report or make them herself. Importantly, she said at para. 16:-

> "Ultimately however, I at all times knew that as responsibility for the investigation and the final decision thereon was mine I did not need the consent of the Panel Member to make any changes to what would become the s.13 report. I took the role of making findings on an investigation very seriously."

45. Once a final draft report was agreed, she was happy to adopt the report as her findings. That was normally straightforward due to the overall involvement with the panel member in the drafting stage. She always worked collaboratively with the different panel members, but maintained that each were aware of their own respective roles and that she had the final say on any findings arising in an investigation. Again, at para. 17 she stated:-

> "I would not proceed with adopting the contents of a final draft report unless I was satisfied, on having examined the applicant's file, with the assessment evident and proposed draft findings therein. Therefore, when I forward my s.13 report to the HEO for recommendation, the investigation of an applicant's application for refugee

status and the findings set out thereon under s.13 of the 1996 Act are mine, as happened in the within application."

46. These are very clear and direct statements, and it seems unavoidable that if the appellant is to succeed the court must come to the opposite conclusion. Counsel for the appellant sought to argue spiritedly that the appellant was not obliged to cross-examine the deponents on behalf of the respondent or Ms. O'Neill in particular; he argued that it was possible to succeed in the judicial review application solely on the basis of the evidence adduced by or on behalf of the respondents. I am not convinced that this was possible in this case. This was a case, as already observed, about what the evidence in the case showed. It is possible in some cases, perhaps, to contend that, even taking the respondent's evidence at its height, that the appellant must succeed as a matter of law. But, that involves accepting all the respondent's evidence. Here, manifestly, the appellant's arguments sought to the invite the court to take a view of the affidavit evidence and, indeed, to emphasise some aspects of that evidence and disregard others. Furthermore, the appellant's argument went further and sought to invite the court to prefer the documentary evidence exhibited – or, more precisely, the interpretation of that evidence that the appellant sought to advance – to the sworn evidence of officials and, in particular, Ms. O'Neill, as set out above.

47. Insomuch as the court is invited to assess evidence, the exercise is not the creative interpretation of the works of some long dead author where there may be a premium on ingenuity or novelty, but rather the assessment of the evidence of a living person who has sworn to tell the truth. It seems to me that the appellant's argument in this court sought to establish that what was done in fact fell somewhat short of what had been asserted in Ms. O'Neill's affidavit, both in general and in the particular case. If so, then the appellant was, in my view, obliged to cross-examine Ms. O'Neill if she wished the court to accept that contention. Indeed, insomuch as this case involved the frustratingly narrow argument about the details of what was involved in the assessment of the asylum application made by the appellant, then any such argument seemed to require oral testimony which could be explored and teased out on cross-examination. Certainly, I would unhesitatingly reject the argument made that a court should somehow accept the characterisation of fact put forward by the appellant involving an interpretation of the guidelines in order to assert an incompatibility with affidavit evidence with the consequence of depreciating the value to be placed upon that testimony without hearing the witness whose evidence the court was being invited to disregard, if not disbelieve.

48. It seems to me, at any rate, that the proceedings were commenced on one view of what the process involved, derived from the clear similarity between the draft report supplied to the appellant and the final report and recommendation. However, the very detailed evidence submitted on behalf of the respondents disclosed a much more complex situation which, moreover, had been the subject of legal advice and some comprehensive guidelines. The appellant could have accepted that the evidence submitted on behalf of the respondent meant that the suspicions and assumptions upon which the proceedings had been launched were not valid. Alternatively, the appellant could have sought to

undermine the evidence adduced on behalf of the respondent either by cross-examination of the deponents or by adducing positive evidence to the contrary, or by way of interlocutory procedures such as discovery or interrogatories, or perhaps by a combination of all three. What is not possible, in my view, is to invite the court to interpret the evidence in such a way as to, in effect, reject the sworn evidence which had been submitted. Suspicion, gossip, and innuendo is the common currency of life, but the purpose of any court proceeding is to move from supposition and suspicion to proof. Innuendo is not evidence, insinuation is not proof, and suspicion is not a basis for decision. The only evidence of how the decision making process proceeds in general, and in the particular circumstances of this case, is that proffered by the respondents, and the court must, in my view, accept it at face value.

49. It remains, however, open to the appellant to argue, taking the evidence of the respondents in its own terms and, without any exercise in interpretation or characterisation, that on that evidence there has been nevertheless a failure to comply with the statutory requirements of the 1996 Act. That argument depends, however, on the proposition that if the conduct of the panel member can be accurately or properly described as an investigation it must follow that what the case worker does (or did in this case) cannot be an investigation, but must, rather, be a review of someone else's investigation. But, this, in my view, is a fallacy. It assumes there can only be one investigation. Viewed in isolation, I do not think that there is any difficulty in describing the work of the case worker as an investigation of a claim to refugee status. It is clear that the case worker seeks to ascertain whether or not the claimant has established that they have a well founded fear of persecution, and therefore is entitled to asylum. It is said, explicitly, that Ms. O'Neill considers this to be her decision and one which she takes very seriously.

50. Counsel sought to counter this by an argument which, at the level of theory, might have some attraction. He contends that this was a case of, to borrow a phrase, unknown unknowns: the case worker was dependent on the work done by the panel member and could not know what was not considered by them or at least what had been considered and excluded. In other circumstances, there might be some merit in this argument as a matter of fact, although it does not follow that it would mean that the case officer had not conducted an investigation, although it might mean that the case officer's investigation was flawed or inadequate. It is noteworthy, however, that it could not be asserted in this case, or indeed in any of the cases, that there had been any such disconnect between the work of the panel member and the conclusion of the case officer. The argument was one that applied entirely at a theoretical level.

51. In considering the argument, it must be recalled that this was not a general or unstructured investigation into a particular event. Instead, a single issue is to be determined by reference to the account given by the appellant at interview (and any other submission made) and assessed by reference to its own internal credibility and known and reliable information in relation to the conditions in the country of origin. The interview itself is carefully structured and the role of the interviewer is defined. The

interviewer is required to elicit the responses to a series of questions. The interviewer is not at large as to how that should be conducted or, indeed, what other matters may be investigated. Viewed in this way, it also makes sense why the person carrying out the interview could also be usefully employed in the assessment of the claim. The case worker is familiar with the same sources as the panel member is. If the evidence of the civil servants involved is accepted, then the collaboration between the case worker and the panel member does not necessarily or unavoidably give rise to the risk of a dislocation between the knowledge and approach of the panel member and that of the case officer. Accordingly, and without necessarily accepting that this argument comes within the grounds upon which leave was granted, I would reject it. The evidence adduced on behalf of the respondent shows, in my view, that the case worker, and therefore the Commissioner, does conduct an investigation which is moreover an investigation for the purposes of s. 11. I would, therefore, dismiss I.X.'s appeal against the decision of the High Court refusing her application for judicial review.

The *F.X.* and *X.X.* cases

52. These cases concern two daughters of I.X. While there are some small differences of fact between the manner in which the draft reports were prepared, altered, and adopted in each of the three cases, it is apparent from the manner in which I would decide the claim by I.X. that the decision does not depend upon any such distinctions. In the circumstances, there is no distinction between their cases as a matter of law. I would, therefore, also dismiss the appeals in those cases.

N.Y. v. Chief International Protection Officer and The Minister for Justice and Equality

53. The International Protection Act 2015 ("2015 Act") was introduced to provide a single statutory procedure for the assessment for claims of asylum, subsidiary protection, and leave to remain. It also contained provisions dealing with certain transitional cases, of which the appellant's was one.

54. The appellant in this case, N.Y., a national of Albania, arrived in the State on the 8th of March, 2015, and applied for asylum. He was notified on the 18th of April, 2016, that he would not be declared a refugee and an appeal was lodged on the 4th of May, 2016. The 2015 Act came into operation on the 31st of December, 2016; under the transitional provisions, a person who had an appeal under s. 16 of the Act of 1996 against the recommendation of the RAC where that appeal had not been decided was deemed to have made an application for international protection under s. 15, but deemed to be a person who should not be given a refugee declaration, and the application deemed to be one for subsidiary protection. In effect, therefore, the application for subsidiary protection proceeded under the provisions of the 2015 Act.

55. The appellant was interviewed at the International Protection Office on the 20th of March, 2018, by a panel member described as a person authorised by the Minister to interview applicants for international protection. He was asked about his marital status and said that he was engaged but nothing else was asked about it. He was notified by letter of the 14th of May, 2018, that the International Protection Officer ("IPO") had recommended that he should not be given a subsidiary protection declaration. He commenced

proceedings with a statement of grounds of the 11th of June, 2018. The complaint made was in essence the same as that made in the *X.* cases in respect of the 1996 Act procedure, albeit by reference to the new statutory procedure. The notification of the 14th of May, 2018, had enclosed a draft s. 39 report against the grant of subsidiary protection prepared by Ms. Alice Pagano, and a final s. 39 report completed by David Kehoe, an IPO. Similarly, the letter enclosed a draft s. 49 report recommending refusal of leave to remain prepared by Ms. Pagano and a final s. 49 report signed by Mr. Kehoe. In each case, it was contended that the draft was virtually identical to the final report and consequently it was clear that the decisions made followed on a "purported examination conducted by the panel member, no further substantive examination took place".

56. The grounds upon which relief was sought were as follows:

(i) No lawful examination of the appellant's application for subsidiary protection was carried out by the first respondent within the meaning of s. 34 and s. 39 of the Act of 2015, and no lawful consideration of the appellant's application for permission to remain was carried out by the second respondent within the meaning of s. 49 of the Act of 2015;

(ii) The person engaged under a contract for services conducted the purported examination under s. 34 and purported consideration under s. 49 without lawful authority. The applications are thereby not being investigated by an authorised person in accordance with law;

(iii) The recommendation and decision of the respondents are not in compliance with the requirements of s. 39 and s. 49 of the Act of 2015 by reason of the failure of the said respondents to meaningfully carry out an examination and consideration under those sections in circumstances in which the contractor was not entitled to carry out statutory functions;

(iv) No substantive examination of the appellant's application for subsidiary protection and no substantive consideration of the appellant's application for permission to remain had been conducted by the respondents and the lawfulness of the consequent recommendation and decision is thereby vitiated;

(v) The respondents purported to use the contractor to assist the IPOs through a case worker in the performance of their functions under the 2015 Act in accordance with s. 76(1) and did not authorise the said contractor to perform statutory functions pursuant to s. 76(2);

(vi) Without prejudice to the foregoing, the respondents acted in breach of the mandatory duty under statute to interview the appellant pursuant to s. 35(13)(b) of the 2015 Act and thereby failed to conduct a personal interview of the appellant so as to redress anything that would be relevant to the decision under s. 49 in circumstances where the appellant informed the interviewer that he was "engaged [*to be married*]";

(vii) Without prejudice to the foregoing, the purported recommendation of the first respondent purported to remake a recommendation that the appellant had not established a well-founded fear of persecution notwithstanding that such a finding had already been made by the Office of the Refugee Applications Commissioner and the International Protection Office and was thereby *functus officio* in this regard.

57. It may be noted at this point that the final two grounds advanced are distinct. Ground (vii) arises from the fact that the recommendation made by Mr. Kehoe was stated in terms of refusing an application for both refugee status and subsidiary protection. This was explained by him as an error caused by cutting and pasting the standard terms of a negative decision in respect of cases falling entirely under the 2015 Act. The inclusion of the reference to asylum status is surplus and would not appear to render the refusal of subsidiary protection invalid. In the event, no determination was made on this by the High Court, and the issue does not come within this appeal.

58. Ground (vi) arises from the fact that, pursuant to s. 35(13) of the 2015 Act, the report made shall comprise two parts, the first of which included anything which in the opinion of the IPO was relevant to the application for either asylum status or subsidiary protection, and the second containing anything in the opinion of the officer which was relevant to the Minister's separate decision under s. 48 or s. 49 in respect of leave to remain. It was pointed out that the report made under s. 35 did not contain any material in respect of subs. (b): that is, in respect of the Minister's decision under s. 48 or s. 49, albeit that the appellant had made reference to the fact of his engagement. On this basis, the High Court quashed the decision of the Minister pursuant to s. 49(4)(b) to refuse Mr. Y. permission to remain in the State and remitted that aspect of the decision to the Minister for fresh consideration. This issue was not appealed by the Minister and, accordingly, does not form any part of the court's consideration of this appeal. However, the part of the decision of the High Court rejecting the appellant's challenge to the recommendation of refusal of subsidiary protection was the subject of an application for leave to appeal to this court which was granted by determination of the court made on the 5th of July, 2019. Since subsidiary protection is a different, and probably more favourable, status than that of having leave to remain, the appellant has a legitimate interest in pursuing his contention that the refusal of subsidiary protection was invalid. It is apparent from the five grounds specified in the statement of grounds that the appellant's case, in this regard, is essentially identical in form to that made by the appellants in the X. cases, albeit by reference to the provisions of the 2015 Act: that is that, as a matter of fact, the draft report and report under s. 35 and s. 49 were identical to the final reports and that it followed that the statutory function of examining the application and making a recommendation upon it had been carried out by the panel member.

The International Protection Act 2015 ("the 2015 Act")

59. The 2015 Act effected a radical, and welcome, restructuring of the process for decision-making on applications for asylum, subsidiary protection, and leave to remain and other related issues. The fact that there existed three separate systems for the assessment of claims for asylum subsidiary protection and leave to remain had been criticised as

creating confusion and delay and encouraging legal challenges. One object of the legislative scheme introduced by the 2015 Act was, therefore, to provide a single decision-making process with, where appropriate, provision for appeal. In order to achieve this, the Act created the status of IPO, appointed by the Minister, who is required by the statute to be independent, and to make a recommendation on an application for asylum or subsidiary protection and which recommendation may be the subject of an appeal to an independent appeals body, the International Protection Appeals Tribunal ("IPAT"). This reflects the requirements of European law controlling applications for asylum and subsidiary protection. Leave to remain is a matter of domestic law and a matter for the discretion of the Executive, exercised in this case by the Minister, and the Act therefore constitutes the IPO as, also, an officer of the Minister for the purposes of such an application. The structure of the Act contemplates, therefore, that an IPO will be a civil servant, but it appears that it does not require that. Since the Act was drafted and enacted after the introduction of the panel system, and clearly contemplates the continued use of such a system, it might be thought it would be more difficult to argue that the involvement of panel members in the decision making process was inconsistent with the statutory scheme under the 2015 Act and, with one exception which it will be necessary to address in greater detail, that, in my view, is indeed the case.

60. S. 2 of the Act concerns interpretation and contains a number of important definitions. S. 2(1) defines an IPO as a person who is authorised under s. 74 to perform the functions conferred on an IPO by or under this Act. That section also defines "applicants", "qualified persons", "refugees", "serious harm", and other standard features of the international protection regime. S. 74 of the Act provides that the Minister may authorise in writing so many persons as he or she considers appropriate to perform the functions conferred on an IPO by or under this Act, and s. 74(4) provides explicitly that an IPO "shall be independent in the performance of his or her functions". S. 75 creates the position of Chief International Protection Officer. However, despite superficial similarity, this position is distinct from that of the Refugee Applications Commissioner under the 1996 Act. By s. 75(3), it is provided that the functions of the Chief International Protection Officer "shall include the management of the allocation to international protection officers, for examination under this Act, of applications for international protection". The effect of this is that the Chief International Protection Officer is an IPO with a function of management and allocation of work to other IPOs. Finally, and importantly in this regard, s. 76 allows the Minister to enter into contracts of service "to assist him or her in the performance of his or her functions under the Act and such contracts with such persons shall contain such terms and conditions as the Minister may, with the consent of the Minister for Public Expenditure and Reform, determine". Under s. 76(2), the Minister may authorise a person with whom the Minister has entered into a contract for services in accordance with subs. (1) to perform any of the functions of an International Protection Officer under the Act with the exception of making a recommendation under s. 39(3). That recommendation is the formal recommendation to either grant or refuse international protection whether by way of a refugee declaration or a subsidiary protection declaration.

61. The Act contemplates a preliminary interview by an Officer of the Minister whether at the frontiers of the State or within the State. Thereafter, an application for international protection may be made and the Act by s. 16 provides for an entitlement to remain in the State for the purposes of the examination of his or her application. Part 4 of the Act is headed:- "Assessment of Applications for International Protection". S. 28(1) provides that "an international protection officer shall, in co-operation with the applicant, *assess* the relevant elements of the application" (*Emphasis added*). Subs. 2 imposes the same obligation on IPAT in the case of an appeal. The elements identified in subss. (1) and (2) are set out in subs. (3) and consist of the applicant's statements, documents submitted by him or her concerning age, background, identity, nationality, country of residence, previous asylum applications, travel routes, and travel documents, *et cetera*. The assessment is carried out on an individual basis and requires that account be taken of a number of matter including, under s. 28(4)(f), the general credibility of the applicant.

62. Part 5 of the Act deals with examination of applications at first instance, which is particularly relevant to these proceedings. S. 34 provides that an International Protection Officer shall *examine* each application for international protection for the purposes of deciding whether to recommend, under s. 39(2)(b), that the applicant should or should not be given a declaration of refugee status or subsidiary protection. Strictly speaking s. 39(2)(b) refers to the obligation to include a recommendation in the statutory report – the power to make a recommendation is, it appears, contained in s. 39(3). S. 35(1) provides that "[a]s part of the examination referred to in section 34, the international protection officer *shall cause the applicant to be interviewed*, at such time and place that the international protection officer may fix, in relation to the matters referred to in that section" (*Emphasis added*). S. 35(3) provides that the Minister shall ensure that the persons who conduct the personal interviews are sufficiently competent to take account of the personal or general circumstances surrounding the application including the applicant's cultural origin or vulnerability, insofar as it is possible to do so. S. 35(12) provides that following the conclusion of a personal interviewer, the interviewer shall prepare a report in writing of the interview. That report is required to consist of two parts: that is that it shall include anything that, in the opinion of the IPO, is relevant to the application and, under s. 35(13)(b), anything that, in the opinion of the IPO, would be relevant to the Minister's decision in relation to leave to remain. It will be recalled that it was the failure of the report to include information under s. 35(13)(b) which led to the order being made quashing the decision of the Minister refusing the appellant leave to remain.

63. It is useful to pause here and consider the import of s. 35. It seems that the Act could be complied with if the IPO himself or herself interviewed the appellant, since in such circumstances there would still be compliance with s. 35(1). However, the section clearly contemplates that in the normal case interviews would be carried out by other persons of sufficient competence. It seems obvious that such persons may include persons with whom the Minister has entered into contract for services under s. 76(1), although that section is not confined to such circumstances since under s. 76(2), such contracts for services may include an authorisation to perform any of the functions of an IPO under the

Act other than the recommendation under s. 39(3). Furthermore, s. 35 clearly contemplates a significant degree of co-operation between the IPO charged with making the recommendation under s. 39(3) and the person conducting the personal interview. Under s. 35(5), a personal interview shall take place without the presence of family members of the applicant unless the IPO considers it necessary for an appropriate examination. Under s. 35(8), a personal interview may be dispensed with where, in broad terms, the IPO is satisfied that it may be dispensed with and, in particular, s. 35(13) requires that the report to be prepared by the interviewer under s. 35(12) must contain information which, in the opinion of the IPO, is relevant to the application either for asylum or subsidiary protection or a decision on leave to remain.

64. S. 39 then provides for a report of the application which will contain the recommendation of the IPO in relation to that application whether or not a refugee declaration or declaration of subsidiary protection should be made. S. 39(1) provides that, following the conclusion of an examination of an application for international protection, "the international protection officer shall cause a written report to be prepared in relation to the matters referred to in section 34". S. 34, as set out above, provides for the examination of an application for international protection by an IPO. It is significant, therefore, that this subsection refers to the IPO causing a written report to be prepared. This, on its own terms, seems to contemplate that the report may be prepared by someone other than the IPO, and most obviously the person who has carried out the personal interview and prepared the report under s. 35(12) in liaison with the IPO. If there was any doubt about this, it is reinforced by the fact that the language of "causing a written report to be prepared" echoes the terms of s. 35(1) providing that the IPO "shall cause the applicant to be interviewed" which quite clearly contemplates that the interview can, and most often will, be conducted by another person. Apart from the natural interpretation of the language used, s. 35(3) requires the Minister to ensure that the persons conducting the interviews are sufficiently competent to do so. However, for the reasons already addressed, it would seem that the IPO could prepare the report under s. 39(1) himself or herself since, while the section contemplates the possibility of the written report being prepared by another person, it does not require that course to be followed since if an IPO prepared the report it could be said that he or she had also caused it to be prepared. Put negatively, perhaps, it is clear that the Act does not require that the IPO personally prepare the report under s. 39.

65. Since the reference in the statement of grounds to the Minister's decision on leave to remain is no longer relevant in the light of the decision of the High Court, the appellant's case can be summarised as a contention that no lawful examination was carried out pursuant to s. 34 and that no lawful report was prepared pursuant to s. 39. The factual basis for that contention is the same as that made in relation to the cases under the 1996 Act that, in fact, the examination was carried out entirely by the panel member rather than the IPO and the panel member had not been authorised to carry out that function under s. 76(2) of the Act. Furthermore, and in any event, it is contended that no such authorisation could permit the making of the statutory recommendation under s. 39(3) by

the panel member unless the panel member was authorised to perform the functions of an IPO pursuant to s. 74 of the Act.

Evidence

66. The evidence in this case is very similar to that adduced in respect of the procedure under the 1996 Act. The appellant swore a short affidavit stating that he had first applied for asylum under the provisions of the 1996 Act, had attended for an interview with ORAC, and that, in a s. 13 report which had been accompanied by a "'draft s. 13 report' prepared by a contractor" (*Emphasis in original*), he had been notified that the Commissioner had recommended that he should not be declared a refugee. His appeal had not been heard by the time the 2015 Act became operational, so his case went back to an IPO for consideration of subsidiary protection. He was interviewed at the International Protection Office on the 20th of March, 2018, by a person, in his own words:- "who described herself to me as a person authorised by the Minister to interview applicants for international protection".

67. On the 14th of May, 2018, he was notified that the IPO had recommended that he should not be given subsidiary protection (and was, at the same time, notified that the Minister had considered his case for leave to remain under s. 49 and had decided to refuse that permission also). He exhibited a copy of the International Protection Office notifications letters and the s. 39 and s. 49 reports respectively and the drafts of those reports which he had been furnished with that letter.

68. The appellant stated that he had been advised, and believed, that the reports were identical in substance to draft reports signed by the panel member. He stated:-

> "It is clear from the decisions made in my case that, following on the purported examination conducted by the panel member, no further substantive examination took place. I am advised that a panel member is not entitled to conduct an examination under the Act of 2015 unless authorised to do so by the Minister".

69. In response, two detailed affidavits were sworn by Rosemary Martin, an Assistant Principal Officer in the Irish Naturalisation and Immigration Services in the Department of Justice and Equality, and an IPO for the purposes of the 2015 Act. Having set out the developments which led to the 2015 Act, she stated that, because of the volume of applications for international protection and to ensure that the functions of the Office and Minister are carried out to optimum effect, it was decided that the independent contractor panel system that had been used under the 1996 Act (as amended) to assist the Refugee Applications Commissioner should also be used to assist IPOs and officers of the Minister in processing applications and with the preparatory work for carrying out their functions. Such members were legally qualified independent contractors trained in the principles and policies relating to international protection applications and permission to remain in the State. They provided assistance to the civil servant assigned to the individual cases. However, it was the civil servant "so assigned who must and does make the recommendation in relation to International Protection or the decision in relation to Permission to Remain in the State". Ms. Martin also explained that there were four teams

within the International Protection Office, each having approximately nine civil servants, all of whom were IPOs, and there were 55 members of the independent contractor panel divided between the teams. Each panel member was assigned a team to which he or she could turn for general advice and assistance. It is clear from the evidence that the work of the panel member was conducted in close cooperation with the civil servants in the department.

70. Again, Ms. Martin explains that a draft report is prepared but, before it is finalised and signed by the panel member, the panel member will liaise with and discuss the draft report and draft findings with the case worker assigned to the case. The final draft is approved by the case worker and, in some cases, where appropriate, by a H.E.O. The report is required to be prepared by the panel member on the International Protection Office database and, accordingly, as it is reviewed and discussed it is overwritten by new drafts as they are created. The IPO can request the panel member to schedule a further interview if that is deemed necessary. The IPO is involved in the process even before the draft report is signed off by the panel member. In the circumstances, it is not unusual, therefore, that there will be minimal differences between the final draft as developed and the finalised report of the case worker since, as Ms. Martin avers, there would have been ongoing liaison between the two as the draft report was being prepared. However, in cases where there is no consensus between the panel member and the case worker, it remains the responsibility of the case worker to take control of the report to finalise it and sign it off if, referring to a H.E.O. if necessary.

71. At para. 18 of her affidavit, Ms. Martin explicitly states that while the panel member has a supporting role in assisting in the processing of the case and carrying out the interview:-

> "…it is the civil servant within the International Protection Office in his capacity as an International Protection Officer…who is responsible for the work of the Panel Member, must liaise with him/her until his/her draft reports are finalised and who must consider the entire file and all of the information and documentation therein before adopting/approving the draft reports and draft findings, signing off on his/her own reports and making the final recommendation or decision on the case as appropriate".

She states that, in this case, the panel member was a Ms. Alice Pagano and the civil servant assigned to the applicant's application was David Kehoe and that the practice outlined by her was followed in the case.

72. In a supplemental affidavit, Ms. Martin also exhibited the working draft with the Guidance Note issued to assist case workers where panel members were involved. The Note highlighted that it was the civil servant assigned to a given file who must, and does, make the recommendation in relation to international protection. She also explained that as case workers became more experienced in relation to the 2015 Act and as the volume of cases to be processed increased, the department had identified ways to further streamline processes. Case workers were provided with oral briefings by H.E.O.s within their team to inform them of changes. Nevertheless, she repeated that while processes had evolved

in a number of ways the central point in terms of responsibility had not changed: it was the civil servant (the case worker) assigned to a given trial who must and does make the recommendation in relation to international protection.

73. A further affidavit was sworn by David Kehoe, the IPO in this particular case. He states that Ms. Pagano was the panel member assigned to conduct the interview and assist in processing the application. However, he made the decision in his capacity as an IPO to make the recommendation the applicant should be refused a subsidiary protection declaration.

74. He also explained that he had been assigned as a mentor to Ms. Pagano, even before the applicant's file had been assigned to him, and that she had approached him seeking advice and directions before she began working on the draft reports. It happened that, in this case, they had a series of conversations about the file during the reviewing process. Although he was already familiar with the file, having spoken to her about it, he began by reading through the entire file carefully noting key elements and discrepancies as he went. Having completed that task, he considered the draft reports. He made some changes to the draft and added some comments. Often, these comments would be communicated by e-mail, but, at the particular time, he was sitting next to Ms. Pagano in the office and was able to discuss the changes and recommendations as he reviewed the draft report.

75. Mr. Kehoe also explained that the process of work on the draft report was an ongoing exercise and separate drafts were not necessarily saved each time a change was made or accepted. Normally all of the amending and redrafting of the report was done on the International Protection Office database system, and once tracked changes were accepted the original draft was overwritten and therefore it is not normally possible to have a copy of any of the earlier drafts preceding the final draft report presented to the case worker. However, in this particular case, there was a glitch in the system whereby the database kept crashing and so, unusually, he saved the drafts of the s. 39 report, as did Ms. Pagano. Thus, it was possible to show that there were four earlier drafts of the draft s. 39 report available. Mr. Kehoe also explained an apparent confusion about the country of origin information put on the appellant's file by Ms. Pagano. Mr Kehoe states that it was available to him online. The appellant seemed to think that he had not read this information because the access date included with the country of origin information citation on the final reports refers to the date as the 18th of April, 2018: being the date it was accessed by Ms. Pagano. However, this date referred simply to the date upon which the panel member had first accessed the relevant country of origin information and was cited to highlight that this information was available online on that date in case the information on the link became unavailable, for example, or if the information was updated and the link changed. Again, Mr. Kehoe concluded that, for the avoidance of doubt, he rejected the suggestion that Ms. Pagano carried out any of his statutory functions under the International Protection Act while she was assisting with the applicant's file, she did not. He concluded:-

"It was I, as an International Protection Officer who made the decision to recommend that a subsidiary protection declaration be refused, having considered all the information…"

76. The evidence in this case is broadly similar to and, indeed, supplements and supports the evidence in the *X*. cases above. The statutory background is, if anything, more accommodating to the panel member system than the 1996 Act since, in addition to s. 76 of the Act expressly contemplating the employment of persons under contract for services to assist the Minister, the statutory obligation relied on here is to conduct an examination of the application rather than an investigation. It would, if anything, be more difficult to contend that the process described in the detailed application sworn on behalf of the respondent did not amount to an examination of the application by the IPO concerned. For the reasons already addressed in the *X*. cases, I am satisfied that the challenge to the procedure under the transitional provisions of the 2015 Act must also fail. For these reasons, it is not necessary to consider the alternative argument put forward by the respondents, and strenuously challenged by the appellant that, in the alternative, the contract between the Minister and the panel member could be considered an authorisation by the Minister under s. 74(1).

A Further Point

77. At the hearing of this appeal, counsel raised a separate legal issue arising from the affidavit sworn on behalf of the Minister. In particular, he pointed to the statement in Mr Kehoe's affidavit at para. 4 that his "first interaction with Ms. Pagano in relation to the Applicant's file was following the section 35 interview she had conducted". Counsel contended that this was not in accordance with the statutory structure which contemplated that a case would first come to a designated IPO who could then cause the appellant to be interviewed by a panel member. If so, it was contended that the statutory procedure had not been followed in this case.

78. The argument, which was carefully developed by counsel, depended upon a close analysis of Part 5 of the Act dealing with the examination of the appellant's application at first instance. Thus, s. 34 requires that *an* IPO shall examine each application for international protection. S. 35(1) then provides that, as part of the examination referred to, *the* IPO shall cause the applicant to be interviewed. S. 35(2) has a third formulation and provides that, where necessary, an applicant being interviewed shall be provided "by the Minister or international protection officer" with the services of an interpreter. Thus: s. 34 uses the indefinite article; s. 35(1), the definite article; and s. 35(2) uses neither. S. 35(5) provides that a personal interview shall take place without the presence of family members unless *the* IPO considers it necessary. It is pointed out that s. 35 seems to contemplate an individual IPO since it refers again to *the* IPO at subss. (8), (9), and (13)(a). Again, it is to be noted that s. 39 dealing with the report of the examination of the application tends to refer to *the* IPO at s. 39(1), s. 39(2)(b), s. 39(3), and s. 39(4). Again, subss. (3), (4), and (5) of s. 40 use the definite article, but this pattern is broken in s. 40(1) which refers to *an* IPO having prepared a report. On the basis of this reading of the relevant part of the Act, it is contended by the appellant that the section specifically

contemplates a single IPO having responsibility for the overall application and, critically, being the person under s. 35 who causes the applicant to be interviewed. If so, it is suggested that Mr. Kehoe's affidavit demonstrates that there has been a failure to comply with that procedure, since he is accepted to be the IPO responsible for this applicant but states, at para. 4, that his first interaction with the panel member in this case was following the s. 35 interview which she had conducted. Accordingly, he could not be said to have caused the applicant to be interviewed which, it might be said, is a statutory requirement before a panel member could lawfully conduct such an interview.

79. Counsel argued that this did not amount to a contention that a specific individual had to be appointed the IPO for a particular case so that, if such an individual was absent, on leave, or retired, no application could be processed. In such a case, it was suggested that it would be possible for another IPO to take any statutory step on the basis that it could be said that any second IPO became *the* IPO for the purposes of the application and the statutory provision. However, it was maintained that the basic point was that the evidence seemed to suggest that the personal interview under s. 35 had been conducted by the panel member without having been caused to conduct such an interview by any IPO, and certainly not by Mr. Kehoe.

80. I cannot accept this argument. First, it is clear from the terms of para. 77 above that this point was not pleaded as a ground upon which leave to seek judicial review was sought or granted. By definition, it is a point which could only have arisen after the receipt of the affidavit sworn by Mr. Kehoe in response to the applicant's claim. It is, indeed, not clear that the point was raised at all in the High Court. It does not appear to be referred to in the judgment of the High Court judge. No application was made to add this ground and no opportunity given for the exchange of evidence upon it. These are, in themselves, strong reasons not to entertain the point. This court has emphasised on a number of occasions that judicial review is not immune from the principles which apply to all other litigation: indeed, since judicial review essentially raises matters of law, it should be expected that pleadings should be clear and comprehensive, and that the evidence submitted should be straightforward and unvarnished. There is, indeed, something more than a little unfair in taking an averment from an affidavit addressing very specific legal claims and then arguing that it exposes a legal flaw never previously asserted and to which the affidavits were not addressed.

81. It might be otherwise if an averment or exhibit revealed an incontrovertible failure to comply with a specific requirement of legislation which could be said to be of central importance to the operation of the statutory scheme. If, for example, the evidence here showed that the applicant had never been interviewed at all, or perhaps had been interviewed by a person not authorised or trained to do so, it is conceivable that a court might be disposed to entertain such a claim, perhaps upon terms. Even then, the pleadings and evidence would have to be addressed and the respondent given adequate opportunity to meet the claim both as a matter of fact and of law. But here, it is not at all clear how Ms. Pagano came to be deployed to interview the applicant (precisely because no evidential issue was raised in this regard), but what is clear is that the applicant was

interviewed by a person trained and employed to do so and the application examined by the person required by the Act to perform that procedure. It would, in my judgement, be unfair and unjustified to now quash the decision on the basis of this late-emerging argument.

82. It is not, therefore, necessary to consider in any detail the further arguments made by counsel on behalf of the respondent in this regard and I note them in this case simply to record them in the event that the matter should be raised in further proceedings. First, it is pointed out that the entire argument depends upon a very close analysis of the statutory scheme and a contention that the Act deliberately contemplates a single identified IPO directing the process of an application involving, in turn, an interview and assistance by a single identified panel member. It was observed that the statutory scheme is not entirely consistent in this regard. Furthermore, the recognition by the applicant that different individuals can perform the function of the IPO at different stages of the process may mean that all that is required is that an applicant for asylum or subsidiary protection must be interviewed by each panel member and be caused to be interviewed as such by an IPO. There is no evidence that this was not done. It was also argued that, in any event, a panel member can be authorised to perform the functions of an IPO and it was argued that the terms of the contract between the Minister and the panel member constituted such authorisation. Counsel for the appellant countered strongly that the respondent could not, in this case, assert alternative claims: either the panel member was performing a function of assisting an IPO or was performing the functions of the IPO pursuant to a lawful authorisation. For the reasons already set out, I do not consider that it is necessary to resolve that issue here or, indeed, the prior question of the interpretation capable of being given to the contract for services between the Minister and the panel member. In the circumstances, I would, therefore, dismiss the appeal.

J.Z. v. Chief International Protection Officer and The Minister for Justice and Equality

83. The appellant in this case is a national of Brazil who applied for international protection "on or about" the 14th of March, 2017. On the 3rd of April, 2018, he was interviewed by a panel member. His application was dealt with wholly by reference to the provisions of the 2015 Act. The core of the appellant's challenge was similar to that in the *X*. cases and in *N.Y.*: it was contended that no lawful examination was conducted within the meanings of ss. 34 and 39 of the 2015 Act. Counsel for the appellant, however, sensibly limited herself to adopting the detailed arguments made in this regard by counsel for the appellants in the *X*. cases and the *N.Y*. case. It follows from the foregoing judgment that this aspect of the claim must fail in the same way.

84. Counsel for the appellant sought to address separate arguments on the appeal as to the credibility assessment. She pointed out that, under s. 28 of the Act, an IPO must make an assessment of the relevant elements of an application. Pursuant to s. 28(4)(f), the IPO is required to make an assessment of the general credibility of the applicant. However, it is argued that the structure created under the Act involves a panel member carrying out an interview and, it is suggested, selecting questions to ask, what follow up

questions to address, and as, importantly, making a decision perhaps not to ask or pursue certain issues. Counsel made reference to the U.N.H.C.R. report: *Beyond Proof: Credibility Assessments in EU Asylum Systems* (U.N.H.C.R., May, 2013). That report observed that the assessment of credibility plays a central role in determining applications for asylum and subsidiary protection. This is because, often, claims made in relation to the position in certain countries would be capable of verification (or disproof) by reference to independent and reliable country of origin information. In many individual cases, the fundamental question relates to whether an applicant's account of the events in the country of origin or, indeed, even to have come from the country of origin, is credible.

85. The appellant recognises that the Guidance Note provided by the respondent explicitly advises interviewers to steer away from the use of demeanour and to focus instead on the applicant's account of events and the availability of external country of origin information supporting any such account. The U.N.H.C.R. report also observes that it is common for there to be only limited, if any, independent evidence confirming or supporting an applicant's testimony, and accordingly many decision-makers make what are described as life-or-death decisions based on a credibility assessment of the applicant's statements. The report also contains useful guidance of the perils of a reasoning process which can unwittingly be influenced by first impressions leading to a form of confirmation bias that may be particularly difficult to identify or guard against. It is argued that, in these circumstances there is, in truth, no proper or lawful performance of the statutory function imposed on an IPO to conduct an assessment of the credibility of the applicant and the applicant's account. The limitations of the role of the IPO, under the Irish system, coupled with the distorting effect that the IPO will often, if not indeed always, come to this part of his or her task with a prior conclusion of a lack of credibility made by an interviewer means, it is argued, that there had been no proper and lawful assessment carried out by the IPO under s. 28(4)(f).

86. I am prepared to accept that the assessment of credibility can become an important, if not decisive, element in the decision on an application for asylum status, subsidiary protection, and, indeed, any application for leave to remain. Asylum seekers have written and spoken vividly about the difficulty of reliving past traumas on a daily basis, coupled with the constant fear of being called into an interview and having forgotten some detail about when or where a particular incident took place with a risk of an adverse finding on credibility leading to a conclusion, difficult if not impossible to displace, of fabrication. Experience in a courtroom setting teaches the limited value of demeanour, particularly in dealing with accounts given coming from a different cultural background in a language which is not a mother tongue or where, if it is, through the medium of an interpreter. It is also the case that absolute consistency of repetition of narrative is not always the hallmark of truth any more than occasional error is an indicator of falsity.

87. I do not underestimate the difficulties posed by a system that is required to place heavy emphasis on credibility and yet provides that the personal interview will, or at least may, be carried out by someone other than the person obliged to perform the assessment of credibility. There is also a risk inherent in any assessment being carried out on paper

that the sheer volume of applications coupled with the focus on a single legal test may lead to a tendency to be sceptical of, and resistant to, accounts which, taken individually, might be recognised as traumatic. It is, however, fair to point out that the system as disclosed by the evidence in this case seeks to address these difficulties. As already observed, interviewers are specifically instructed to avoid findings based on demeanour alone. Furthermore, the structure of the interview is set out very clearly in advance and a template is provided. The interview is an opportunity to obtain a record of the asylum seeker's account rather than intended to be an in-depth interrogation of it by cross-examination. The answers to the questions posed are read back to the asylum seeker who is given an opportunity to approve the account. The evidence also shows a significant degree of interaction between panel members and the International Protection Officer involved. Indeed, it could be said that the introduction of panel members under contract for services, introduces an element of perspective and an additional point of consideration of the claim.

88. In this case, the appellant does not point to any flaw in the interview or the subsequent assessment of credibility in his cases. Instead, these points are advanced at the level of generality by reference to the structure of the system. However, in this regard, it is clear that the statute specifically contemplates that an interview will, or may, be carried out by a person other than the IPO obliged to conduct the assessment of the claim. I do not think that it can be said, therefore, that the mere fact that there is a division of function can be said to render the assessment *per se* unlawful. In this regard, I note that no claim is made that the Act is repugnant to the Constitution or inconsistent with the European Convention of Human Rights or the Charter of Fundamental Freedoms or any provision of E.U. law. In the circumstances, I would also dismiss this appeal.