Appendix FF

No. 2

O. 58, r. 18(1)

SUPREME COURT

Respondent's Notice

Supreme Court record number		**2018/ 118**

[Title and record number as per the High Court proceedings]

K.J.M.	**V**	**The Minister for Justice & Equality, Ireland and the Attorney General.**

Date of filing	12 September 2018
Name of respondent	The Minister for Justice & Equality
Respondents' solicitors	The Chief State Solicitor
Name of appellants	K.J.M.
Appellant's solicitors	Burns Kelly Corrigan

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	N/A

The respondent was served with the application for leave to appeal and notice of appeal on date
On or about 1 August 2018

The respondent intends :	
	to oppose the application for an extension of time to apply for leave to appeal
	not to oppose the application for an extension of time to apply for leave to appeal
✓	to oppose the application for leave to appeal

	not to oppose the application for leave to appeal

✓	to ask the Supreme Court to dismiss the appeal

	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court

	Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	✓

Respondent's Representation

Solicitor			
Name of firm			
Email	Ross_Murphy@csso.gov.ie		
Address		Telephone no.	
		Document Exchange no.	DX 186 001
Postcode	D08 V8C5	Ref.	

How would you prefer us to communicate with you?

Y	Document Exchange	Y	E-mail
Y	Post		Other (please specify)

Counsel			
Name	Robert Barron S.C.		
Email	rbarron@lawlibrary.ie		
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name	John Gallagher B.L.		
Email	JohnPatGallagher@lawlibrary.ie		
Address		Telephone no.	

		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

How would you prefer us to communicate with you?

☐	Document Exchange	☐	E-mail
☐	Post	☐	Other (please specify)

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

Not applicable.

3. Information about the decision that it is sought to appeal

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

The Applicants' description of the decision and background to it is accepted.

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)-

* the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
* it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court
* there are no exceptional circumstances warranting a direct appeal to the Supreme Court.

1. It is suggested that the Applicant has not advanced any case specific submissions which are directed at the 'exceptionality' of this proposed appeal, other than to point to the fact that the appeal is one covered by the same certificate procedure which governs many immigration matters. Whilst it is true to say that this Court has previously indicated -

in the course of issuing its *Determinations* in *Grace & anor v. An Bord Pleanala & ors* (2016) IESCDET 28 and *Wansboro v DPP* [2017] IESCDET 115 - that "*the impossibility of pursuing an appeal to the Court of Appeal in a case where this Court was satisfied that the general constitutional threshold had been met may, at least in some cases, provide the appropriate exceptional circumstances justifying a leapfrog appeal,*" the Applicant would seem to have equated the statutory requirement to obtain a certificate and exceptionality in a far less qualified manner, an equivalence which the Respondent contends is not justified by the earlier jurisprudence of this Court.

2. Unlike the situation which pertained in *Grace*, the Applicant herein has not sought to argue that the 33rd Amendment may have given rise to a separate, unrestricted, right of appeal to the Court of Appeal or otherwise suggested that the amendment has altered the assumed operation of s.5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000. This distinction is significant, as it was the possibility of revisiting settled law concerning the operation of certificate appeals which underpinned the finding of exceptionality in *Grace*. And while in *Grace* this Honourable Court did proceed to examine the appeal issue in its substantive judgment, finding that 'leapfrog' appeals were not restricted or excluded by the statutory certification requirement in the same manner as appeals to the Court of Appeal would be, the Respondent contends that does not necessarily equate to the proposition that all cases in which a certificate have been refused are 'exceptional' cases, within the meaning of Article 34.5.4.

3. While it is necessarily accepted that an ultimate appeal on issues achieving the constitutional threshold cannot be wholly 'excluded' by virtue of a legislative provision, 'exceptionality', it is suggested, must still be demonstrated. And it would appear to be the case that the fact that an appeal to the Court of Appeal is not available is not a sufficient condition to satisfy this overriding constitutional threshold e.g. *Minister for Justice v Dzuigas* [2018] IESCDET 65. Were it otherwise, a measure (Article 34.5 of the Constitution) which was implemented to ensure that the Supreme Court and the usual Respondents were not overwhelmed by unmeritorious and/or strategically obstructive appeals, would have the perverse effect of instigating a facility for direct appeal to this

Court which was more permissive than that which pertained in respect of litigation which was not so restricted (albeit such 'ordinary' litigation would of course still be constrained by the same criteria which apply to indirect appeals). Furthermore, as a standalone factor, the Respondent contends that the fact that a particular issue or complaint may not be ventilated beyond the High Court is not, within the confines of the Irish legal system, a matter which would be considered to be 'exceptional' of itself; a particular combination of circumstances or issues could make it so.

4. Turning from the more general issue of the threshold test to the litigation at hand, the Applicant has not advanced anything to weigh in the balance in this regard. It is for the Applicant to satisfy this Court that grounds of appeal are present which are sufficient to meet the Constitutional standard. It is not sufficient to invoke the simple fact that a certificate to appeal to the Court of Appeal has been refused; all that necessarily demonstrates is that the case is not one of such importance that it meets the statutory threshold.

5. Furthermore, the present application is undermined by the fact that the outcome was alternatively and independently justified by findings that the Applicant had abused the very system upon which he sought to prevail for the rights which he now claims. In this regard the previous *Determination* of this Court in *I.K. v Minister for Justice & Equality and ors.* [2018] IESCDET 93 may have some bearing. In that case the High Court had refused on four independent grounds, including the exercise of discretion (based on her prior conduct). While the conduct findings were not appealed this Court determined that, "*even if it were included as a potential ground the nature of the High Court decision is such that there appears a significant risk that the appeal would be determined by reference to fact specific issues relating to the applicant and that this Court would not reach for determination the issue potentially identified as a matter of general public importance. In those circumstances it does not appear that the application for leave meets the constitutional threshold in Art. 34.5.4*".

6. Exceptionality is also disputed on the ground that the challenge by way of judicial review herein shares many of the characteristics of other procedural challenges to immigration and deportation procedures: it being a negation of the right to deport based on narrow or specific interpretations of an asserted procedural right. As such, and although each such challenge may be unique in terms of the particular legal aspect which is being tested, as a legal phenomenon not all of those everyday challenges could display such novel characteristics so as to justify categorisation as 'exceptional', within the meaning of Article 34.5.4.

7. Further, the existence of exceptional circumstances, should they be so found, does not entitle an applicant to a leapfrog appeal. The Supreme Court must be satisfied that those exceptional circumstances are ones "warranting a direct appeal to it". Hence, it is not simply the existence of what might be considered exceptional circumstances that must be considered, but the totality of the circumstances that exist. Is an appeal warranted? Particularly in light of the findings of the learned High Court judge concerning the conduct of the Applicant, the Respondent contends that an appeal is not warranted irrespective of how the other circumstances of this application for leave to appeal may be characterised.

8. This pleading, concerning the absence of a particularised exceptionality, is directed at all seven of the *Proposed Grounds* which have been proffered on behalf of the Applicant. Turning next to the other essential jurisdictional issues of 'general public importance' and the 'interests of justice', it is proposed to address these by reference to the headline issues advanced in the *Notice of Appeal* filed herein. In so doing, the Respondent emphasises that even if exceptionality were shown that in theory warranted an appeal, the Applicant must still show that the matter is one of general public importance or that it is in the interests of justice that there be an appeal.

First Issue – Whether these proceedings were properly captured by section 5 of the Illegal Immigrants (Trafficking) Act 2000? *(Ground 4 as formulated)*

9. The Applicant contends that an important issues arises as to whether the proceedings in which a person seeks a stay/injunction restraining the enforcement of a deportation order in circumstances where he/she is asserting a current right to remain in the State under EU law (a) amount, in substance, to a "collateral attack" on the validity of the deportation order and (b) are, as a result, "captured" by section 5 of the Illegal Immigrants (Trafficking) Act, 2000?

10. The Applicant contends that this is an issue that has the potential to affect and does affect many cases in the immigration field. In response, it is contended that this is incorrect. The issue only affects such cases in which the statutory threshold for leave to appeal is not reached. If the applicant in any case who has been refused relief by the High Court can show that the case involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken, he or she will be able to appeal. Thus, it is only in a discrete sub-category of cases (the less important ones), where the enforcement of a Deportation Order does not involve such a point of law or in which it is not desirable in the public interest that there be an appeal, that the issue could arise.

11. It is furthermore, the case that the rule that a Deportation Order, itself beyond challenge, may not be attacked by parallel proceedings is well established within the jurisprudence of this Court and the Courts below (a representative sample of such authorities is referenced in the judgment of the High Court in *Nawaz v Minister for Justice and Equality [2013] 1 I.R. 142)*. The Applicant has not offered any reason to revisit these authorities, whether by reference to some unique circumstances arising in this case or some perceived deficiency in these earlier decisions. The weight and apparent unanimity of the precedents cited in the judgment of the High Court supports the view

that a further ventilation of the same issue is not necessary for the purposes of clarifying any ambiguity in the law.

12. In so far as the substantive decision of the High Court addresses s.5 of the Illegal Immigrants (Trafficking) Act 2000, it is notable that this discussion occurs principally in respect of the other Applicant in the case, Mr. P.N.S. When the plenary proceedings bearing record number (2018/5283P) were struck out, ultimately this was upon the application of Mr. M's own counsel (albeit after the judge had indicated his views in this regard) and in effect the present Applicant did not argue this point within the hearing proper, once he had set about reconstituting the complaint as a judicial review. The jurisdictional point, therefore, was never hotly pursued in the below and this Court would have to approach it without the benefit of an exhaustive argument, such as it might otherwise enjoy; this may weigh against it being 'in the interests of justice' that an appeal proceed, on this ground at any rate. While advancing this point it is certainly conceded that the Applicant's contention was renewed at the conclusion of the case, and that a certificate for leave to appeal to the Court of Appeal was only sought in the alternative to the position that one was not required.

13. Article 34.5.4 refers to a decision (the decision against which a leapfrog appeal is sought), which involves a matter of general public importance. The decision against which the Applicant seeks to appeal is that in which judgment was delivered on 16th July 2018 refusing the Applicant the reliefs he was seeking. That decision does not in substance involve the asserted matter of public importance; it is not a decision that bars an appeal to the Court of Appeal; that is the separate later decision refusing a certificate. So far as that is concerned, the Applicant states in his Notice of Appeal to this Court that he is going to apply to the Court of Appeal and hence it will be in that application/appeal that the asserted issue may arise, if at all. Whilst the learned High Court judge did consider the application of Section 5 of the Illegal Immigrants (Trafficking) Act, 2000, it was not principally in the context of this case, the remarks

were *obiter dicta* and they are not part of the decision relating to whether this Applicant should be granted the relief he was seeking or not.

14. Finally, under this ground, the Applicant herein was not prevented from ventilating his case in the High Court by reference to any of the strictures of section 5 (as might be the case for someone who had been refused leave to apply for judicial review because their claim did not demonstrate substantial grounds, or was found to be out of time). Accordingly, the claim has been given a thorough examination by a judge of a superior court, a matter which diminishes any claim that it would be in the interests of justice that it be argued again before this Honourable Court.

Second Issue – Whether as a point of statutory construction the 'recommendation' made by the IPO can be regarded as a "decision at first instance" within the meaning of Article 2(e) of the Procedures Directive? *(Proposed Grounds 1, 2, 3, 4 & 6)*

15. The Applicant asserts that the same procedure of recommendation, affirmation and ministerial decision applies to the "general"/first application procedure under the 2015 Act and contends that in the circumstances the issue touches upon every application for international protection lodged in the State.

16. This is incorrect. Under Section 16 of the 2015 Act, every applicant shall be given permission to remain in the State for the sole purpose of his or her application, "including any appeal to the Tribunal". Accordingly, a person who has been refused refugee status by the IPO has the right to remain in the State pending the outcome of his appeal to the Tribunal. It is only persons, such as the Applicant, who have been refused readmission to the asylum system by an IPO under Section 22 of the Act, who have appealed to the Tribunal and whose appeal is outstanding, who are affected by this issue. For persons who have made a first application for refugee status and been refused by an IPO (i.e. have received a negative "recommendation"), it does not matter whether this

is considered to be a "decision at first instance" within the meaning of the Procedures Directive. Such an applicant retains the right to remain in the State for the purposes of his or her appeal.

17. Accordingly, the Respondent contends that this is not a matter of general public importance. It concerns only a small cohort of persons, being those:-

(1) who had previously applied for asylum and been refused (having exhausted all avenues of appeal and review);
(2) against whom a Deportation Order issued;
(3) who failed to comply with the Deportation Order;
(4) who made an application under Section 22 of the 2015 Act to the Minister for consent to make a further application for asylum;
(5) whose application for consent was refused in a negative "recommendation" issued by an IPO;
(6) who appealed that negative recommendation to the International Protection Appeals Tribunal (IPAT); and
(7) against whom the Minister seeks to enforce the Deportation Order in advance of IPAT reaching its determination.

18. It may also be noted that the cohort of persons who fall within the window of relevance will inevitably have had a significant and often lengthy prior access to the asylum process. Thus, the small number of applicants in the position of this Applicant (leaving aside the abuse of rights issue), are persons who have already had a myriad of applications/appeals rejected and have no *bona fide* basis for fearing the consequences of deportation either because they have made no basis to seek an injunction (the vast majority of any such cases), have not made an application to the High Court to restrain deportation or because the High Court has refused their application. Where there is an urgent, pressing or emergent issue arising on the facts of the case, which is genuine rather than procedurally opportune, this can be dealt with by way of an application directly to the Minister bringing such matters to his attention and/or by seeking an

injunction on established *Okunade* principles. Once again, this observation is directed in particular to the 'interests of justice' considerations.

Issue 3 – Whether, in circumstances where the applicant has asserted a right to remain in the State under and by virtue of EU law, such relief may be refused on a discretionary basis? (Proposed Ground 7)

19. In so far as this issue assumes the existence of an otherwise enforceable EU law right to remain, it is suggested that it could only arise as a live issue in the event that the High Court were to be overturned in relation to its principal findings on the interpretation of s.22 and is otherwise a moot.

20. As can be seen from the Applicant's written submissions to the High Court, the possible use of an adverse discretion based on prior misconduct was certainly anticipated. Yet no concerted or supported argument was mounted to the effect that such an exercise of discretion is impermissible as a matter of law – rather the argument was directed at the altogether differing question as to whether or not there were good grounds in existence for exercising the discretion against the Applicant personally (an argument which presumed the validity of the jurisdiction per se). Therefore, it may weigh against the interests of justice that such a far-reaching argument should be ventilated for the first time in the Court of Final Appeal.

21. In the event that the Applicant seeks to establish merely that the High Court had wrongly applied the law in relation to discretion (which contention is rejected), this would appear to amount to matter of little widespread significance or import – indeed it arguably would not even amount to a point of law.

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

1. For the reasons given in his judgment, the learned High Court judge was correct in holding that any right to remain in the State during the currency of a s.22 application ends after the IPO makes a recommendation. As this recommendation was correctly found to be the first-instance decision (with regard to a re-admission application), there is no specific provision of Irish statute and/or no EU law right which would impair or suspend the deportation order otherwise having effect once such a decision is made;

2. Within the framework of s.22, the 'recommendation' of the IPO possesses all of the characteristics of a 'decision' and the judge was correct to so find. This finding is supported by a purposive analysis which illustrates the role of s.22 within the wider European framework of procedural rights.

3. It is not accepted that the judge departed from the literal meaning of the word 'recommendation' as it occurred within this particular setting. In the alternative, to the extent that the meaning of the word had to be modified by its context, this exercise was done correctly by reference to well established canons of statutory interpretation.

4. The learned High Court judge did not err in his interpretation of Article 7 of the Procedures Directive, nor in the application thereof.

5. As the Appellant sought orders to the effect that the deportation order in force against him could not be validly relied upon by the Minister, the learned High Court judge was correct in holding that the proceedings were governed by section 5, Illegal Immigrants (Trafficking) Act, 2000;

6. By reference to the valid findings both of fact and law which he had made, the learned High Court judge did not err in refusing an injunction;

7. By reference to the valid findings both of fact and law which he had made, the learned High Court judge did not err in indicating that he would, in the alternative, refuse relief on discretionary grounds.

The legal principles which the Respondent advanced in support of its case on all of the above grounds, bar the last one, are well reflected in the judgment of the High Court and will not be recounted *in extenso* herein. In so far as some further summation of the State's position might be of assistance to the Court, the Respondent would refer to the *Respondent's Notice* in the related case of 'P.N.S. v Minister for Justice and Equality, wherein a summary of those arguments is given by reference to the very same grounds of appeal.

The only point *not* specifically addressed in this regard might be Ground 7 above, which was only pursued in the present form during the application for a *Certificate for Leave to Appeal* in the High Court. In meeting the argument there, the Respondent referred to a similar argument which had been advanced in *K.P. v Minister of Justice and Equality* [2017] IEHC 95 where the High Court concluded – distinguishing the authority which had been proffered in support of this position - that 'later cases make clear that the mere existence of a European Community law right is not necessarily a bar on the exercise of the court's discretion' (Woolf, Jowell, Le Seur, Donnelly and Hare, De Smith's Judicial Review , 7th ed., (London, 2013), p. 979 n. 123, citing Brown v. Secretary of State for Transport, Local Government and the Regions [2003] EWCA Civ 1170 ; R. (Rockware Glass Ltd) v Chester City Council [2006] EWCA Civ 99 ; R. (Gavin) v. Haringey LBC [2004] P.&C.R. 13).

Furthermore, the Respondent would point to the specific factors identified by the High Court judge herein, such as: procedural gaming, presentation of false personal details, and in particular an apparent delay in seeking re-admission to the s.22 process, all of which do, it will be argued, fall within established and recognised grounds for the refusal of discretionary relief.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

John P. Gallagher BL

Robert Barron SC

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

None

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions? ☐ Yes ☒ No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union? ☐ Yes ☒ No

If Yes, please give details below:

The Respondent rejects any need to refer a preliminary question to the European Court of Justice, for many of the same reasons recited above. Furthermore, the decision of the learned High Court judge regarding the meaning of the International Protection Act 2015 is principally concerned with the correct statutory interpretation of a domestic measure and does not give rise to issues which fall within the purview of the European court. The rights which arise under EU law are clear; it is only the precise meaning of

specific words which occur in the domestic context which has given rise to any controversy.

The second question proposed by the Applicant would appear to be *acte clair*, given the adjudications of the European Court in *Tall v Centre public d'action sociale de Huy* C-239/14, which was relied upon by the High Court judge herein. Further, the premise of the question is incorrect. National law does provide for the possibility of applying for temporary suspension of the return of the applicant by means of applying for a stay or injunction in the context of a judicial review challenging a deportation order or implementation of same.

With regard to the third of the Respondent's three proposed questions, it is suggested that this question – which has echoes of points made in relation to other decisions where judicial review is relied upon by the Irish State as an effective appeal mechanism - simply does not arise on the premises of this case. Within the premises of the judgment of the High Court, judicial review does not constitute the effective remedy within the s.22 setting, it is the appeal to IPAT which fulfils this purpose.

Will you request a priority hearing?	✓ Yes	No
If Yes, please give reasons below:		

As the Appellant enjoys an effective, if temporary, reprieve from removal pending the resolution of the Leave to Appeal application.

Signed: Maria Browne

Maria Browne
Chief State Solicitor
Solicitor for the respondents

Please submit your completed form to:

The Office of the Registrar to the Supreme Court
The Four Courts
Inns Quay
Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.