Neutral Citation: [2014] IEHC 30

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2012/478 J.R.

Between:

E.O. (PREVIOUSLY KNOWN AS E.A.) AND P.A. (AN INFANT, SUING BY HIS FATHER AND NEXT FRIEND E.O.)

APPLICANTS

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 30th day of January, 2014.

1. This is an unusual case characterised by an extraordinary shifting of assertions and positions where the only constant has been the relationship of a father and a son, and where the father proposes a near absolutist right to play a role in his son's upbringing as his son's constitutionally protected right. The father argues that this is a right which should prevent his deportation during his son's minority.

2. By way of background and explanation of how the case came to be in this unusual place the following facts are outlined. Eugene A., the father, is the first applicant and a national of Nigeria. He has no permission to be in the State and is a failed asylum seeker. His son is the second applicant and an Irish citizen born in this State within a marriage between his mother, a recognised refugee from Nigeria, and the first applicant. He was born in this State in 2007 to parents who married in 2006. At this time his father, the first applicant, was an asylum seeker claiming to be from Sudan. The father's involvement in the asylum process was marked with particularly egregious dishonesty. The asylum claim failed and the first applicant was deported in 2010, but some months later he re-entered the State illegally and has remained here since. The Minister refused to revoke the deportation order made against him and the order remains in force. That refusal to revoke was not challenged: instead the applicants sought an injunction restraining the father's deportation *"at this juncture"* while proceedings were brought before the District Court for access to his son following judicial separation proceedings.

3. The case first came before this Court as a substantive application for judicial review. Hogan J. had granted an injunction restraining the father's deportation until further order, together with leave to seek, by way of judicial review, a declaration that the Minister was not entitled to deport the father until his son had reached the age of majority on the basis that the child had a constitutional right to the care and company of his father during that period.

4. In December, 2012 when the substantive hearing began before this Court and further affidavits had been filed, it became apparent that the most appropriate step would be for the current proceedings to be discontinued and for the applicant to seek revocation of the deportation order under Section 3(11) of the *Immigration Act 1999*. Information which had not been put before the Minister included the fact that Eugene A. was legally separated from his wife and that he now has regular court-ordered access to the second applicant P.A., his son, with whom he had a relationship and who he would be able to support if permitted to remain. The respondents, through Mr Conlan Smyth BL, were prepared to offer an undertaking not to deport the father until the proposed application for revocation was fully determined. However, Mr O'Shea BL for the applicants declined to discontinue his proceedings insisting that as he had been granted leave to seek a declaration, he was entitled to continue with his action.

5. The Court then adjourned the hearing to allow the father to apply for revocation within a particular period of time. After some delay, the revocation application was brought in February, 2013. Notwithstanding the Court's view that there was now no utility in continuing with the action in being and, of more importance, that the declarations sought were beyond jurisdiction in that if granted they would tie the Minister's hand and exceed the competence of the Court, the applicants insisted that they had a constitutional right to proceed once leave had been granted.

6. In subsequent affidavits in these proceedings Eugene A. presented himself as Eugene O., a different person, in an effort to *come clean*, revealing more new and additional facts.

7. The hearings concluded on the 6th June, 2013, after many hours of fact finding and many hours of circular legal arguments on what was meant by the declaration sought and whether the courts could lawfully grant a declaration directing the Minister not to deport Eugene A. – who now claims to be Eugene O., a native of Nigeria who was never in Sudan – until his son P. is an adult. The applicants' arguments in this regard were based on P.'s constitutional rights to the care and company of his father during his minority and, in particular, in light of his mother's refugee status she would be unable to bring him to Nigeria to visit his father which, it is asserted, would mean that P. would never again see his father during his minority. The Court indicated that these were matters to be brought before the Minister and that the reliefs sought would be refused but that an interim injunction would be granted pending the determination of the revocation application. These are the Court's reasons.

THE ASYLUM / IMMIGRATION STAGE

8. The father claimed asylum on religious grounds in June, 2005 claiming that his name was Eugene A. and that he was a Sudanese national from West Darfur who was born in 1985 in Sudan, where he had spent all his life and where his father was a Christian Pastor and farmer. He told the asylum authorities that the Janjaweed attacked their village, his sister was raped and his father was tied up inside the family home and burned to death. The applicant himself was kidnapped and tortured but managed to escape. Both the Refugee Applications Commissioner and the Refugee Appeals Tribunal made negative recommendations to the Minister in his case. They both expressed extreme doubt as to his credibility, not least because he did not speak Arabic.

9. In June, 2006 Eugene A. applied for leave to remain in Ireland based on the same claim. In December, 2006 he married a Nigerian national who is a qualified nurse and a recognised refugee. She applied for family reunification with her husband Eugene A. in February, 2007. In October, 2007 she gave birth to their son P., the second applicant. The couple's marriage certificate and P.'s birth certificate both name the father as Eugene A. The applicant's own mother's surname is listed on that certificate as O. although she was named as A. in the asylum claim. The surnames A. and O. are found throughout this application.

10. The Minister declined to grant family reunification as he determined that the father's identity and nationality had not been sufficiently established. In this the Minister turned out to be quite correct. This was in March, 2009.

11. Additional representations were then made to the Minister by and on behalf of the father in support of his leave to remain and subsidiary protection applications on the basis of his happy marriage and the family unit. It would later emerge that this was untrue as the couple had separated and were living apart since September, 2008. In an attempt to establish his identity, his then solicitor informed the Minister that while Eugene A. had lived all his life in Sudan, he was actually born in Nigeria and was entitled to Nigerian citizenship, and a *'declaration of age'* was submitted to the Minister, which had been sworn in Nigeria by his father who had earlier been described as a Christian pastor who had been burned alive by the Janjaweed in Darfur.

12. The father's subsidiary protection application based on his experiences in Darfur was refused on credibility grounds and on the 15th December, 2009, the Minister signed a deportation order in respect of him. In January, 2010 a passport was issued to him from Abuja in the name Eugene A. and in April, 2010 he was deported to Nigeria. In December, 2010 he re-entered the State illegally.

13. Four months later in April, 2011 his current solicitors applied for permission for Eugene A. to reside and work in the State in accordance with the judgment of the CJEU in *Ruiz Zambrano (Case C-34/00)* [2012] E.C.R. I-01177, without finding it necessary to inform the Minister that he was actually in the State. This was followed in July, 2011 by an application for revocation of the original deportation order, again without informing the Minister that he was in Ireland. The Repatriation Unit advised his solicitors that Eugene A. should first apply for a visa to re-enter the State. Perhaps finding that they had no other option, his solicitors then advised the Minister in August, 2011 that Eugene A. was resident in Gort, Co. Galway. No other details about his personal circumstances were supplied. In September, 2011 the Repatriation Unit sought information as to how he had re-entered the State and for what reason. In October, 2011 Eugene A. wrote personally to the Minister saying that he felt traumatised after being deported and leaving his wife and son behind. Again, no mention was made of his separation since September, 2008 from his wife. He said he re-entered the State via the UK with the help of a friend who arranged a British passport for him. In this letter he claimed he played a "*fatherly role*" in his son's life "*and the whole family at large*". He provided a letter from his son's school in Dublin and a letter from his son's doctor in Dublin saying that the son was a patient of his practice since July, 2009.

14. These documents required some cooperation from the applicant's wife and were clearly intended to mislead as it would later emerge that the wife was in the process of obtaining an order of judicial separation from Eugene A. and less than three weeks later the Circuit Court in fact issued the decree sought. The court order records that the action was not contested, the husband did not appear and sole custody of their son was granted to his wife. This information was withheld from the Minister.

15. On the 9th March, 2012, the Minister notified Eugene A. that his *Zambrano* application had been treated as an application for revocation of the deportation order under Section 3(11) of the *Immigration Act 1999* and that it had been determined that he was not entitled to residency on the basis of *Zambrano*. It was noted that documentation furnished shows that his child lives in Dublin while he lives in Galway and that he had provided no evidence to show he had been playing any role in his child's life. The Minister therefore refused to revoke the original deportation order made in December, 2009 which remains in effect.

16. Shortly after receiving that negative decision, Eugene A. brought an application to the District Court seeking directions on the welfare of his son, which in effect was an application for access. By letter dated the 24th May, 2012, the Minister was informed of the access application and for the first time he was notified that Eugene A. and his wife had been separated "*for some time*", that they obtained a decree of judicial separation "*some time ago*" and that his wife had been granted sole custody of their son. Eugene A. sought an undertaking that the Minister would not deport him pending the determination of the District Court proceedings. The Minister's refusal to grant the undertaking sought dated the 28th May, 2012, prompted the issue of these proceedings where the reliefs sought included a challenge to the order refusing to revoke the deportation order of the 15th December, 2009, which challenge was grossly out of time.

THE PRE-LEAVE STAGE

17. On the 29th May, 2012, the father applied *ex parte* to Hogan J. seeking an injunction restraining his deportation on the basis of his relationship with his son. In his grounding affidavit, he states that he took the step of unlawfully re-entering the State because of his deep emotional bond with his son and that his estranged wife encourages their relationship. He said his son spent one month with him over Christmas in 2011 and that he sees his son at least once a week and talks to him on the phone very frequently and they are very close. He was granted an interim injunction. On the 6th June, 2012, Hogan J. heard an application for leave to seek a declaration "*that the deportation of the first applicant at this juncture would be an unlawful interference with the rights of the second applicant to the care and company of the first applicant pursuant to Articles 41 and 42 of the Constitution and / or his rights under Article 8 ECHR*" and for an interlocutory injunction. The hearing was adjourned in order for written submissions to be furnished to the Court on, first, whether the decisions in *A.O. v. Minister for Justice, Equality and Law Reform (No. 2)* [2012] IEHC 79 and *A.O. v. Minister (No. 3)* [2012] IEHC 104 are compatible with the decisions in *Alli v. Minister for Justice, Equality and Law Reform* [2010] 4 I.R. 45 and *Asibor v. Minister for Justice, Equality and Law Reform* [2009] IEHC 594 and secondly, on the possible relevance of the judgment in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 to the father's case. Hogan J. also granted liberty for the father's estranged wife to file an affidavit setting out the facts relevant to the judicial separation. In her affidavit she said they began living apart in September, 2008 and had not resided together since then.

18. On the 11th June, 2012, the District Court made an order *by consent* granting the father access to the son every second Saturday from 10am to 8pm and for two separate periods of one week during the summer school vacation. It is common case that when the leave / injunction hearing resumed on the 20th June, 2012, Hogan J. was informed that the District Court proceedings had concluded and he was informed of the outcome of the proceedings. However a copy of the court order was not formally put before him.[1]

19. In a reserved judgment delivered on the 7th September, 2012, Hogan J. granted an interlocutory injunction restraining the Minister from taking any steps to deport the father "*until further order*" (see *E.A. & P.A. (an infant) v. Minister for Justice, Equality and Law Reform* [2012] IEHC 371) and set out his reasons for granting the injunction but made no reference to the application for leave or the reliefs sought. Hogan J. held that "*in the higher interests of protecting the welfare and interests of the child*" the Court must shut its eyes to the "*illegal and deceitful*" conduct of the father. He held that "*in matters of this kind the court must, where possible, give primacy to the constitutional right of the child to the care and company of his parents in the manner envisaged by Article 42.1 of*

the Constitution". He considered that there were "*abundant grounds for suggesting that the substance of [the child's] constitutional right to the care and company of his father would be denied were his father to be deported*". He expressed his view that subsequent case law had inched away from the position set out in the judgment of this Court in *Alli v. Minister for Justice, Equality and Law Reform* [2010] 4 I.R. 45 and that there were some "*cross-currents of judicial opinion*" in relation to the Minister's power to deport the parents of citizen children.

20. The case was mentioned before Hogan J. again in early October, 2012 and on that occasion he granted leave on the following two grounds:

> *(i) The deportation of the first applicant would have the effect of unlawfully denying the second applicant of his rights pursuant to Article 40.1, 41, 42.1 and 42.5 of the Constitution to the care and company of both of his parents.*
>
> *(ii) The deportation of the first named applicant would be in breach of and incompatible with the rights of the second named applicant pursuant to Article 8 of the European Convention on Human Rights.*

21. Leave was granted to seek the following reliefs:-

> *(i) A declaration that the deportation of the first applicant at this juncture would be an unlawful interference with the rights of the second applicant to the care and company of the first applicant pursuant to Articles 41 and 42 of the Constitution and / or his rights under Article 8 ECHR;*
>
> *(ii) An injunction (interim / interlocutory) staying the further enforcement of the deportation order issued in respect of the first applicant on the 15th December 2009.*
>
> *(iii) An Order granting the applicants the costs of these proceedings.*

22. Critically, counsel for the applicants indicated to Hogan J. on the 20th June, 2012, that he was not seeking leave to apply for an order of certiorari quashing the Minister's refusal to revoke the deportation order. Hogan J. granted the costs of the interlocutory application to the applicants, to be paid forthwith.

THE POST-LEAVE STAGE

23. The substantive application comprised much court time and the deliberate lies told in the asylum claim and throughout the injunction applications and during much of the leave application was either revealed or exposed.

24. The respondents have, since the first post-leave hearing on the ***5th December, 2012***, sought to have the proceedings declared moot and further argued that the Court was being asked to make a declaration beyond its jurisdiction. This will be dealt with further below. Unable to make a decision in a factual vacuum the Court sought further information on the father's relationship with his son as even his address and means of support were unknown. The Court learned that Eugene A. living with "*a family*" who he named as 'A.E.' and 'V.E.O.', who he said were Irish citizens of Nigerian origin and his friends and they were helping and supporting him.[2]

25. The Court indicated that the appropriate route might be to apply for revocation under Section 3(11) of the *Immigration Act 1999* on the basis of additional information which emerged since the *Zambrano*-based application. The first applicant was happy to bring a Section 3(11) application, but through counsel stated that he was unwilling to withdraw the proceedings as he was did not wish to surrender the advantage he had obtained when leave was granted to seek declaratory relief . The parties took up opposing positions and much argument ensued, during which the respondents offered an undertaking not to deport the father until a reasonable time had elapsed after the decision on the Section 3(11) application if the proceedings were struck out with no order as to costs. The offer was refused. The Court then adjourned the hearing to the 13th February, 2013, and granted an injunction until that date on condition that the applicants made a Section 3(11) application.

26. No Section 3(11) application had been made by the ***13th February, 2013***, when the case was next listed before the Court. An injunction was continued on strict condition that they submit a Section 3(11) application by close of business on the 27th February, 2013.

27. The revocation application was furnished to the Minister by fax at 6.20pm on the ***27th February, 2013***. This time the father gave his address as Gort in Co. Galway. In his submission to the Minister he said that his estranged wife was anxious that he would take an active role in his son's upbringing. He advised the Minister that his surname is in fact "O.", not "A." and he apologised for not informing him at an earlier stage, saying he was advised to invent an identity for his asylum claim and was in fear of adverse consequences if he told the truth. He disclosed that his mother and sister live in Ireland and are Irish citizens and that they were close and see each other regularly. He said that if he were to be deported his family members would not be able to afford to travel to Nigeria to visit him and it was unlikely that his son would see him again until he reached the age of majority and was able to travel alone. He said it would be irrational to expect his estranged wife to return to Nigeria as she is a refugee and in addition she would not have the funds. The affidavit exhibited the following documents:-

- The 2012 district court access order and the 2011 circuit court decree of judicial separation;
- 14 bus tickets showing return trips from Galway to Dublin in 2012 and 2013 (including 5 student tickets);
- Receipts for items he says he bought for his son amounting to approx. €480;
- His mother's Irish passport which was issued in 2009;
- An undated handwritten letter from his estranged wife saying that her son loves the first applicant and that she wants him to be in her son's life;
- A letter dated the 20th January, 2013, from the manager of a cosmetics shop in Galway saying that the first applicant does voluntary work there occasionally and that a position would be available to him as a sales assistant if his immigration status was cleared;
- A research report on the needs of minority ethnic groups parenting alone in Ireland, commissioned by the One Parent Exchange Network in March, 2010; and

- An Irish Times article dated June, 2010 on poverty in one-parent families.

28. When the case was listed for mention before the Court on the ***28th February, 2013***, the respondents once again offered to grant an undertaking pending the determination of the Section 3(11) application on condition that the proceedings were withdrawn or struck out. The applicants again rejected this offer relying on their constitutional right of access to the Court and on the grant of leave to seek declaratory relief which they intended to pursue. The Court continued the injunction on condition that the applicants brought a fresh injunction application on notice to the respondents and that the father and his estranged wife and the people with whom he was living in Gort filed affidavits by the 15th March, 2013, setting out their respective domestic circumstances in Ireland and on condition that if necessary, the respondents would be permitted to cross examine the deponents on the contents of those affidavits.

29. Only one brief affidavit from the first applicant was filed for the hearing on the ***22nd March, 2013.*** No explanation was provided for the untruths presented to date in relation to which there must have been collusion between the first applicant and his extended family to conceal the relationship between Eugene A. and the O. family. There must also be a line of documents relating to marriage, birth and legal separation which contains false information if the A. family name was invented for the asylum claim. A supplementary affidavit filed by the applicants' solicitor explained why there was a delay in making the Section 3(11) application was equally lacking in particularity. The Court was asked by counsel for the applicants to adjourn the case pending the determination of the Section 3(11) application. The respondents objected and pressed the Court to either strike out the proceedings or to fix a hearing date, saying that the Section 3(11) application could take some time to determine. The Court adjourned the case for three weeks and continued the injunction on condition that more informative affidavits were filed by the 10th April, 2013.

30. On the ***28th March, 2013***, the first applicant's mother swore a very brief affidavit indicating that her son – now Eugene O. – was living with her daughter (his sister) V.E.O. and her daughter's husband in Galway. She said her son Eugene brings her grandson P. to visit her and is a very good father. The estranged wife also swore an affidavit saying that the relationship ended because her husband had cheated on her and that she intends to apply for a divorce. She said he is a very good father and has always maintained contact with their son who was living with him during the Easter holidays. She said she believed it was in the child's best interests to have a good relationship with his father. The Gort address was not explained and V.E.O., the sister, declined to swear any affidavit.

31. On the ***4th April, 2013***, the father filed a further affidavit saying that he had been living with his sister V.E.O. and her husband A.E. since he re-entered the State in 2010. It transpired that these are the people who he previously described as his "friends" to the Court on the 5th December, 2012. He did not explain his previous given address in Gort. He was equivocal about the reasons for the breakdown of his marriage saying only that his wife "believed" he had been seeing someone else. After they broke up in September, 2008 they lived apart in Limerick until June, 2009 when his wife moved to Dublin with his son. He maintained contact with his son and applied for access because his estranged wife sometimes refused him and would not answer his calls. However they now have a good relationship. He then disclosed that his correct year of birth is 1975, not 1985 as previously stated, and he said he had asked his solicitor to include this in his Section 3(11) application but this was not done. He did not explain why he had given a false date of birth to the Commissioner, the Tribunal and the Minister. No affidavit was sworn by his solicitor in this regard to confirm this assertion.

32. On the ***10th April, 2013***, the applicants' solicitor swore an affidavit saying that the first applicant's sister and her husband had refused to complete affidavits in support of his case. He also exhibited correspondence seeking papers relating to the judicial separation.

33. On the ***12th April, 2013***, the applicants brought an application for a fresh injunction restraining the father's deportation pending the determination of the Section 3(11) application. The Court indicated that a full explanation for the change of name had not been provided and was informed that he had made his "*best effort*". The applicant was cross-examined on his affidavit and he said he had disclosed his real name because he didn't want to lie anymore. On cross examination he had great difficulty in spelling his asserted Nigerian *real* name. His explanation was that he hadn't used the name for a while. He said his birth certificate showing his full name was at his mother's house. He was then directed to furnish the birth certificate to the respondents. He said a smuggler brought him to Ireland and told him to use a false name and date of birth and told him that if he said he was Nigerian he would not succeed in obtaining refugee status and that if he said he came from Darfur his chances would be better. He said that he was totally unaware that his mother and sister had left Nigeria and come to Ireland although they had left his father's house some time ago. He bumped into them at a party thrown by Africans in Galway and was greatly surprised to find them in Ireland. He said that he supports himself financially with tips he receives at a hairdresser's where he works for free. He said that he lived sometimes with his sister in Galway and sometimes with a family friend in Limerick when he and sister were not getting along. Nothing was said about the Gort address or with whom he lives / has lived there. He was unable to provide the address at which his son lives apart from its general location in Dublin. He said his wife does not permit him to go to the house and he collects his son from a pre-arranged location.

34. The estranged wife was also cross-examined on her affidavits. She was very hostile to the idea of such examination at all. She admitted that she had seen the Eugene A. / O.'s birth certificate and has been aware for some considerable time that his mother was in this State and that her husband's correct name was O. and not A.[3] and that she intends in due course to change their son's name from to P.A. to P. Eugene, i.e. taking his father's forename as his surname. She reluctantly accepted that if the father is E.O. and not E.A. then her marriage certificate, her Circuit Court action and her son's birth certificate and passport all contain false information. She was strongly supportive of Eugene A. / O.'s right to see his son saying that her son loved his father and missed him while he was away.

35. Further submissions in relation to the injunction were heard on the ***17th April, 2013***, and the Court had sight of a document purporting to be a birth certificate which is in fact a *certificate* from a hospital in Benin City, Nigeria bearing the name E.O. and the year 1975. It does not mention a middle name and although it is a large parchment type document with burn holes, it does not accord in any way with the appearance of Nigerian birth certificates frequently put before the asylum authorities and this Court.

36. With some reluctance, considering the serious doubts surrounding the veracity of any of the evidence put before the Court and previously before the Minister including the Nigerian passport in the name Eugene A., the Court granted an injunction pending the determination of these proceedings and fixed a very early date to conclude the hearing of the substantive application in order to safeguard the interests of the child with whom the first applicant probably does have a relationship. The Court also gave leave to amend the title of the proceedings to reflect the father's evidence and that of his mother in relation to his O. surname.

37. The case was unable to proceed on the ***23rd April, 2013***, or on the ***30th April, 2013***, owing to administrative difficulties. The substantive application was eventually heard on the afternoons of the ***5th*** and ***6th June, 2013***. At the close of the hearing the Section 3(11) application had not yet been determined. The Court was informed that the Department of Justice had raised queries in April, 2013 arising from new facts disclosed by the father in his affidavit and that the Minister's office was considering the responses. Neither the queries nor the responses were furnished to the Court.

PRELIMINARY ISSUES

(I) ARE THE PROCEEDINGS MOOT?

38. The respondents contend, as a preliminary issue, that the proceedings became moot on the 11th June, 2012, and should be struck out. They made this application at the start of the substantive hearing in December, 2012 and forcefully renewed the application on each of the numerous occasions that the case was before the Court. Mr. Conlan Smyth emphasised the words "*at this juncture*" in the declaration sought. In his submission the "*juncture*" in question refers to the period while the determination of the District Court family law proceedings was awaited. This, he argues, is clear from correspondence in May, 2013 from the statement of grounds and from the grounding affidavit. The District Court proceedings were determined on the 11th June, 2012 and the decision has not been appealed so the "*juncture*" had passed. Highly material facts and circumstances have now been placed before the Minister by way of a revocation application. These matters were not previously notified to the Minister and his agents are now considering them. The respondents have repeatedly offered to grant an undertaking pending the determination of a revocation application on condition that the proceedings are withdrawn, but this offer has been refused.

39. Mr. O'Shea for the applicants argued that the proceedings are not moot and he denies that the "*juncture*" referred to in the declaration sought relates solely to the District Court proceedings. When Hogan J. granted the interlocutory injunction and leave to seek judicial review, the District Court proceedings had long since concluded and he was aware of that fact even if this is not apparent from his reserved judgment delivered on the 7th September, 2012. This is implicit from the refusal of Hogan J. to grant leave to seek a separate declaration that the deportation of the father would unlawfully interfere with the applicants' right of access to the District Court. In Mr O'Shea's submission the phrase "*at this juncture*" means "*while the child remains a minor*" and declaratory relief is necessary because of the uncertainty arising from diverging judicial interpretations on the weight to be attached to the rights of the citizen child under the Constitution. The applicants must be entitled to seek clarity.

(II) IS THE RELIEF SOUGHT BEYOND THE COURT'S JURISDICTION?

40. The second preliminary argument made by the respondents was that it would be wholly improper and would have serious implications for the separation of powers if the Court were to grant the declaration sought. This is because it would involve the Court deciding that the Minister could not deport the father in circumstances where the Minister has not had an opportunity to consider the facts on which the declaration is premised. The decision to deport persons who are deemed to be unlawfully in the State falls within the exclusive jurisdiction or domain of the Minister and is not a power that can be exercised by the judicial branch of the State but rather by the executive. Here the Court is being asked to pre-empt the Minister's decision which is outside of the Court's powers and involves encroaching upon the constitutional doctrine of the separation of powers. Contrary to what is stated by the applicants, the mere fact that leave was granted is not authority for the proposition that the Court has jurisdiction to grant the relief. The decision made at the injunction stage must be looked at in the context of the approach taken by Hogan J. in *A.O. v. Minister for Justice (No. 3)* [2012] IEHC 104.

DECISION

41. This case is procedurally quite unusual in that the applicants do not seek an order quashing any decision made by the Minister which concerns them. Instead, the Court is asked to determine a stand-alone declaration and a seemingly related injunction which essentially involves a re-run of the principles addressed in the test cases of *Alli* and *Asibor* (cited above) while an unchallenged deportation order remains in existence.

42. The applicants quite understandably rely on the written decision of Hogan J. giving reasons for granting an interlocutory injunction restraining the deportation of the father, which suggests that uncertainty flows from a recent divergence of judicial opinion on the weight to be accorded to the rights of citizen children when a father is being deported and the children are remaining behind with the mother. That divergence emanates from the decisions of Hogan J. and a body of jurisprudence restated by this Court in *Alli* where the actual issue for determination was whether the insurmountable obstacles test borrowed from jurisprudence of the European Court of Human Rights (ECtHR) was the appropriate test for the Minister when considering the deportation of a foreign-national parent of an Irish child.

43. The applicants submit that declaratory relief is necessary to put an end to that uncertainty and indeed their submissions go beyond that, stating that it would be unconstitutional to deport the father because, owing to his estranged wife's refugee status and their mutual lack of funds, the effect of such deportation would be to deprive the child of the presence of the father during his minority in Ireland and make it unlikely that his son could visit him in Nigeria. However their arguments in that regard never progressed beyond that submission or beyond reliance on the reasoning behind the written decision of Hogan J. when he granted the injunction '*until further order*' in July, 2012.

44. In the first instance, the Court is not persuaded that the words "*at this juncture*" should be interpreted quite as narrowly as the respondents argue in the context of the decision for the continuing injunction granted by Hogan J. While the ordinary meaning of the words infers a temporal limitation, the words appear to have lost that meaning during the original application before Hogan J. as the injunction judgment made no reference whatsoever to the words "*at this juncture*" or to the District Court proceedings. The question which was addressed by Hogan J. in that judgment was whether the Court should shut its eyes to the father's egregious immigration behaviour and stay the deportation on the basis of the son's superior constitutional right to the company of his father during his minority.

45. The purpose of the proceedings and the injunction sought was undoubtedly, initially, to stay any deportation until the District Court application for access to the son P. were determined. However, the proceedings seem to have changed in nature after the District Court application was determined and when that fact was made known to Hogan J. His judgment, which was delivered some three months after the injunction was granted, addresses the constitutional rights of Irish children in immigration law and the perceived tension between this Court's decisions between *Alli v. Minister for Justice, Equality and Law Reform* [2010] 4 I.R. 45 and *U. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 371 and his own judgments in *X.A. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 397, *A.O. v. Minister for Justice, Equality and Law Reform (No. 2)* [2012] IEHC 79 and *A.O. v. Minister for Justice (No.* 3) [2012] IEHC 104. It did not address the leave application at all and was confined to the question of whether an injunction restraining deportation should be granted when a citizen child is involved. It seems to the Court that the "*juncture*" referred to in the declaration sought may possibly relate to the clarification of the tensions / uncertainties identified in Hogan J.'s judgment arising from diverging judicial interpretations on the weight to be attached to the rights of the citizen child under the Constitution..

46. While it is unfortunate that the injunction judgment did not address the leave application, it is clear that when the parties returned to Hogan J. in early October, 2012 this deficit was addressed. While there is disagreement on what exactly was said, it is beyond dispute that there is an order granting leave on the 5th October, 2012. There is some suggestion that the order was by consent but this matter was not fully clarified.

47. Leaving aside the ambiguity of that particular phrase "*at this juncture*" and applying basic principles, it must be recalled that declaratory relief is part of the panoply of discretionary reliefs which a Court can grant in judicial review proceedings. However, it is not common to seek stand-alone declaratory relief in judicial review proceedings relating to immigration matters in the manner utilised by the applicants. Nonetheless, Order 19, rule 29 of the Rules of the Superior Courts (RSC) provides:

> *"No action or pleading shall be open to objection on the ground that a merely declaratory judgement or order is sought thereby, and the Court may, if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed or not."*

48. In his textbook *Judicial Review*, 2nd Ed, (Dublin, 2009), Mark de Blacam states at pp. 452-3 that, "*There must be a real question of substance to be decided before a court will grant a declaration. In most cases, when making an order, the court acts only on the basis of events which have occurred and facts which have been established. A declaration will not be granted, it has often been said, if the issue raised is hypothetical or moot. […] However, […] it is clear that in an appropriate case the court may make what is, in effect, an advisory declaration*."

49. Of further relevance is Order 84, rule 18(2) RSC (as amended by S.I. No. 691 of 2011) which enables the Court in judicial review proceedings to grant a declaration or injunction if it considers that this would be "*just and convenient*" having regard to:

> *(a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition, certiorari, or quo warranto,*
>
> *(b) the nature of the persons and bodies against whom relief may be granted by way of such order, and*
>
> *(c) all the circumstances of the case.*

50. Unlike the traditional orders of prohibition, *certiorari* or *mandamus*, a declaration does not have the effect of quashing an existing decision and in reality it does not alter the position of the parties. The occasions when a declaration sought is not part of a series of reliefs to prevent the execution of an unchallenged order must be limited. In this case, it raises the unpleasant spectre of a procedural shortcut. Counsel for the applicants was unable to say what effect he hoped the declaration would have, saying, "*what the Minister does with that declaration is another matter. But all this Court is being asked by this applicant is for clarity on the law*". The Court engaged at length with counsel for the applicants during the course of these proceedings as to the appropriateness and lawfulness of the declaration sought or indeed the utility of seeking stand-alone declaratory relief in this case where the simpler and more appropriate step would be to bring a renewed application to revoke the deportation order based on the new facts presented at the commencement of the case which, it was asserted, would make it unreasonable to deport the father. It is the Minister who is the ultimate decision maker on which third country or non-EU nationals enter the State, which of them must leave and who may remain. The Court cannot decide that the applicant can remain nor can the Court declare that the Minister cannot deport the first applicant until the second applicant is an independent adult without at the very minimum first permitting the Minister to consider whether or not the deportation is appropriate in the circumstances pertaining to these applicants.

51. If the declaration sought were made, the effect would be that the Minister's deportation order would be quashed without being challenged and the Minister would effectively be prevented from considering whether Eugene O. previously known as Eugene A. should be permitted to remain. The Court is asked to determine that the parent of child whose other parent is a refugee cannot be deported to the refugee's home state and to make this determination on the basis of facts which changed with each court appearance. While in a similar case these facts might be relevant considerations or even a compelling reason not to deport, these nevertheless are matters for the Minister and not the Court. While the fact that the Minister previously refused to revoke the decision to deport when the case made was that Eugene A. was part of a happy and functioning family unit may not augur well for any application now made, particularly in the light of the mercurial nature of the *facts*, this is not a matter for this Court. Those are matters exclusively within the Minister's purview.

52. The Court takes guidance form the decision of Clarke J. in *Okunade v. Minister for Justice* [2012] IESC 49, where he says:-

> *"The entitlement of the executive of any country to exercise a significant measure of control, within the law, of its borders is an important aspect of the public interest of any state. It seems to me, therefore, that a significant weight needs to be attached to the implementation of decisions made in the immigration process which are prima facie valid. It would, in my view, be an insufficient recognition of the legitimate entitlement of the state to ensure the orderly conduct of the immigration and asylum process not to place a high weight on the need to respect orders and decisions made in that process unless and until they are found to be unlawful. The importance to be attached to the exercise by the state of its right to control its borders and implement an orderly immigration policy has been touched on by this court in a number of decisions most recently in Meadows v. Minister for Justice, Equality and Law Reform [2010] IESC 3. In Meadows Murray C.J. referred to "public policy, including the integrity of the asylum system" as being part of the balance which needed to be struck in decision making. Likewise Denham J., in the same case, noted that "the Executive has a primary role in relation to policy and immigration". While those comments were made in a case involving an assessment of substantive rights it seems to me that like considerations require that appropriate weight be attached to the orderly implementation of immigration policy in determining where the balance of justice lies at the interlocutory stage."*

53. At the Court's suggestion, the fact that the first applicant has a relationship with his son and has court regulated access, has a mother and sister in this State and has a job offer from a fellow Nigerian were put before the Minister by way of a Section 3(11) application on the 27th February, 2013. Even at that stage matters continued to evolve and no doubt will continue to develop as the first applicant's assertions are clarified. On the date on which the hearing concluded, the Minister was still raising queries relating to the averments made and no decision had issued. The fact remains that the Minister has never considered or decided upon the facts on which the applicants now assert their entitlement to declaratory relief.

54. For this reason alone, where the facts were not established with any degree of certainty, it would not be appropriate to grant a declaration in the broad terms of the order sought by the applicants. However, the Court also declines to make the declaration sought because it would be made in total disregard of the separation of powers and would be a fundamental usurpation of the exclusive decision-making powers of the Minister in relation to immigration matters. Article 28.2 of the Constitution provides that "*The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.* Article 15.2.1° provides that "*The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.*" It is for the Minister to determine, pursuant to Section 5(1) of the *Immigration Act 2004*, whether or not a foreign national has permission to remain in the State. The distinct roles of the executive and

the judiciary in immigration matters have been touched on by the Supreme Court on a large number of occasions, not least by Murray CJ in *A.O. and D.L. v. Minister* [2003] 1 I.R. 1 when he held at p. 92 that if the Minister wished to consider certain matters when conducting a balancing exercise involving the rights of the child, "*That is a matter for him*".

55. The Court is satisfied that this approach is wholly consistent with the approach taken in the judgment of Hogan J. in *A.O. v. Minister (No. 3)* [2012] IEHC 104. That case was similar to the present case in that an injunction was sought restraining the deportation of a foreign national father during the minority of his Irish citizen child *Baby C*. As in this case the relationship between the parents ended owing to suspected infidelity and it was established that the applicant / father was not a truthful person. The mother was granted sole custody but some years later the father was granted limited and supervised access to his daughter. There was no prospect of the mother moving to Nigeria with the child and no prospect of reconciliation between the parents. The father had served a prison sentence for possession of a false passport and for this and other reasons, the mother did not wish for him to be part of the baby's life and expressed her opinion that the father's "*interests in the welfare of his daughter is entirely opportunistic and that Baby C is merely a cat's paw in a wider strategic battle on his part to avoid deportation*." The fact that, contrary to the mother's wishes, the father had been permitted some access to Baby C was a matter that had not been considered by the Minister and the respondents argued that instead of seeking leave and an injunction, the more appropriate avenue was to seek revocation of the deportation order. Hogan J. accepted their argument, with the following qualifications:-

> *"53. Mr. Conlan Smyth has argued forcefully that the applicant ought not to be able to seek the kind of extraordinary relief which he seeks without first having applied to the Minister under s. 3(11) of the Act of 1999 to revoke the deportation order in the light of the new circumstances. In principle, this is correct, albeit that it is subject to important qualifications.*
>
> *54. The relief which this Court can give is essentially precautionary and short- term. It would not be appropriate, for example, that this Court should be asked to give some sort of open ended injunction during the minority of Baby C, although this seems to be the logical consequence of the argument now advanced. Here it must be recalled that all branches of the government are bound by the Constitution and the laws. It would be preferable, certainly in the first instance, if a solution to the problem at hand was first devised by the Minister. He is, after all, the person who has been vested by the Oireachtas with responsibility for immigration matters and he is plainly best placed to weigh all the competing considerations. The Oireachtas has, moreover, stipulated that no non-national should be in the State save with the permission of the Minister.*
>
> *55. In these circumstances, the court should refrain from devising a prescriptive remedy of long term duration, but should rather look to the executive branch for a solution of this kind. As I ventured to suggest in my judgment in Kinsella v. Governor of Mountjoy Prison [2011] IEHC 235, this sort of constructive engagement between the judicial and executive branches is one which is often best in harmony with the separation of powers, not least where (as here) the Minister has to balance many considerations (including the integrity of the asylum system) in devising a solution."*

56. The passage above clearly reflects the applicable law, which raises questions as to how Hogan J. came to grant leave in this case. It follows from the principle of the separation of powers that a court should generally refrain from granting relief in judicial review proceedings which ties a Minister's hands into the future and certainly before he has had an opportunity to consider the relevant facts and circumstances. As Hogan J. clarified in his conclusions in *A.O. (No. 3)*:-

> *"58. It will be for the Minister, then, to fashion the appropriate solution to the dilemma presented. Merely for the avoidance of any possible doubt in the matter, I should stress that nothing in this judgment should be taken as indicating how the Minister should deal with any such application. Even though I am formally giving leave, if the application for leave [sic] is duly made, then at that juncture these proceedings so far as they concern the welfare of and access to Baby C should be treated as being at an effective end. Should the applicant be dissatisfied with the decision of the Minister, then his remedy is to commence fresh proceedings to challenge that decision."*

57. It is self-evident that in para. 58 Hogan J. was referring not to an application for "leave" duly made but, rather, to a "revocation" application duly made.

58. As was decided by Hogan J. in *A.O. (No.3)* and in this case, the Court indicated on a number of occasions that the appropriate route was to withdraw these proceedings and await a decision on the Section 3(11) application with the benefit of an undertaking rather than to proceed with the wide declaratory relief sought even if leave had been granted.

59. Quite apart from the important principle of the separation of powers, the grant of declaratory relief is inappropriate when there is doubt on the facts asserted and doubt as to the whether a person who has lied so frequently is entitled to discretionary relief at all. While the second applicant P. is a young child, completely innocent of his father's immigration misconduct and his flagrant disregard for the laws of this State and the imperative to tell the truth in court proceedings and pleadings, his father's history raises doubt as to whether the relationship with his son is entirely *bona fide* and not one of convenience to advance his leave to remain application. The father's history of deliberate lying at every stage of his engagement with the asylum and immigration authorities does not create any confidence that what he now asserts is true. He does not know where his wife and son live; he was unable to spell the middle name which he now claims; he was unable or unwilling to say who he lives or lived with in Gort and he says he was unaware that his mother and sister were in Ireland until he met them at a party. When he entered this State he created an entirely false identity and personal history with a view to obtaining refugee status. He gave a false name, nationality and date of birth and shamefully said his father had been killed and his sister raped by Janjaweed when his father was alive in Nigeria. False information is found on his marriage certificate, his son's birth certificate, a Nigerian passport and countless affidavits. He re-entered the State seven months after being deported in breach of the State's immigration laws. He furnished false information in a *Zambrano* type application and he continued to mislead the Minister as to the family's living arrangements and the fact of his separation. Seen against the background that he played no role in the judicial separation proceedings when sole custody was granted to his estranged wife his eleventh hour District Court application for access seems opportunistic, as was the action to prevent his deportation until those family law proceedings were determined. It made no sense to this Court that parties who aver in affidavits sworn in May 2012 that the couple though separated have a good relationship, that the father has regular access to his son, that he spent 4 weeks at Christmas with him, sees him every week and has regular Skype contact and that it is in the best interests of the child for the father to be involved in the child's life, would not agree access between them without requiring Court proceedings regulating access. The wife's affidavit indicates that the father had agreed access to his son before the District Court proceedings which even more strangely led to a consent order of the District Court. In the view of the Court, the documents produced by the father dealing with his son's school and GP reports could not have been obtained without the estranged wife's assistance. The naming of the son as a party to the proceedings and the naming of the father as his next friend in the present proceedings, which issued before the District Court proceedings were determined, suggests some agreement of his estranged wife. When she was cross-examined the wife was not cooperative in answering any

questions put to her by Mr Conlon Smyth. Eugene A. / O.'s purported sister and brother-in-law declined to swear affidavits to support his case. All in all, information was slowly drip fed and reactive to Mr Conlan Smyth's uncovering of falsities and lies.

60. In the circumstances it seems to the Court that the respondents' arguments that the father and his estranged wife have been engaged in a conspiracy dating back to 2005 to deceive the various entities of the State may be completely apposite. The first applicant has failed to establish a factual basis on which a Court could grant declaratory relief. For these reasons the Court will decline to exercise its discretion to grant the relief sought.

OBSERVATIONS ON THE SUBSTANTIVE ISSUES

61. The Court wishes to take this opportunity to address some of the so called tensions or alleged inching away from principles identified in this Court's decision in *Alli v. Minister for Justice* [2010] 4 I.R. 45 and the related case of *Asibor v. Minister for Justice* [2009] IEHC 594. It was submitted that the facts of the present case differ from those cases where the Minister made deportation orders against the fathers of Irish-born children on the basis, *inter alia*, that no insurmountable obstacles existed to the families enjoying family life in their country of origin. The unique feature in this case which would distinguish the first applicant from the fathers in *Alli* and *Asibor* was said to be that P's mother is a refugee of Nigerian nationality and cannot travel to Nigeria with her son to permit him to visit his father if he were deported to Nigeria. In the applicants' submission, this means that his son will most likely never see him again during his minority. It was further submitted that there has, of late, been a move away from the principles set down in *Alli* particularly in the judgments of Hogan J. in *X.A. (a minor) & Others v. Minister for Justice* [2011] IEHC 397 and A.*O. v. Minister for Justice (No. 3)* [2012] IEHC 104 and the decision and judgments of the Supreme Court in Okunade v. Minister for Justice [2012] IESC 49.

62. The respondents consider the applicants' substantive arguments to be unstateable and argue that it remains the case that, as in the present case where *Zambrano* has no application, the Minister has a clear entitlement to deport the foreign national parent of an Irish citizen child provided that all of the circumstances are properly and fully considered and the decision is reasonable and proportionate. The respondents rely on *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1 and *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795 and this Court's judgment in *Alli v. Minister for Justice* [2010] 4 I.R. 45.

63. The circumstances of the child in *Okunade* were very different to the situation of the second applicant. The issue for determination in *Okunade* was the test applicable when considering an injunction in deportation cases when judicial review is pending. As to the supposed divergence of judicial opinion, Mr. Conlan Smyth drew attention to paragraph 37 of *K.I. v. Minister for Justice* [2011] IEHC 66, where Hogan J. accepted (albeit without enthusiasm) that the position was as set out in *Alli*. Mr. Conlan Smyth reminded the Court that the deportation order against Eugene A. / O. made in 2009 was never challenged and these proceedings must be viewed as a collateral attack on the validity of the deportation order.

64. The Court makes three observations on the issue as to whether there is a divergence of judicial opinion since the delivery of the test case in *Alli*. Those observations are prefaced by the following comment. The appropriate forum for a review of the principles identified in the Court's judgment in *Alli* must be the Supreme Court, which has not to date said that the constitutional right of a citizen child to the care and company of his father is a right superior to the right of the Minister to deport a foreign national who has no right to remain in the State.

65. *First*, the Court is not persuaded that the mother's refugee status necessarily raises the presumption that the child will *never* see his father again if he is deported. No evidence was put before the Court as to the grandmother's situation or as to the position of the child's aunt and uncle who are Irish citizens and there is no evidence before the Court to suggest they are anything but free to travel to Nigeria. No information was put before the Court on the estranged wife's family circumstances. The Court knows nothing about any family remaining in Nigeria, on the side of P's father or his mother, or what the financial circumstances of the child's extended family in Ireland are. There is nothing beyond mere assertion that the child will never see his father if he were deported.

66. Irish citizen children enjoy a presumptive constitutional right to the care and company of their parents and a right under Article 8 ECHR to respect for private and family life. Those are strong rights which are neither purely theoretical nor are they absolute and they may in appropriate circumstances have to yield to the interests of the State and the common good. The Minister is not necessarily precluded from deporting the foreign national parent of an Irish citizen child. That is a matter for the Minister to determine and for the Court to review if the decision to deport is challenged as legally frail.

67. The Court's second observation relates to its judgment in *B.S. & Others v. Minister for Justice* [2011] IEHC 417 (13th October, 2011) which has been presented in a number of judgments as a departure from the principles restated in *Alli*. At the leave stage in this case, for example, Hogan J. held that "*the subsequent case-law has inched away from the position set out in Alli v. The Minister for Justice, Equality and Law Reform. This is, I think, evident from Clark J.'s own judgment in S.*" This Court profoundly disagrees that *B.S.* was anything but a restatement and application of the principles outlined in *Alli*. This view is reinforced by the judgment of the Supreme Court in *Smith v. Minister for Justice* [2013] IESC 4 which examined the proposition that B.S. changed the status of *Alli*.

68. In Smith, the applicants argued that the Minister should reconsider a revocation application in light *inter alia* of the delivery of *B.S.* which, it was contended, had materially altered the legal framework within which consideration must be given to the rights of family members of Irish citizen children. Clarke J. thus rejected that argument:-

> *"5.13 […] Having reviewed the decision in that case, it does not seem to me that it is arguably realistic to characterise the judgment as creating a materially different legal framework within which deportation of the type arising in this case is to be considered, such as might give rise to an obligation on the part of the Minister to reassess rights previously determined in an earlier decision to deport or to refuse to revoke a deportation order."*

69. For the avoidance of doubt, the Court confirms that B.S. was in no way intended as a departure from the principles established in *Alli*. The decision in B.S. turned on the very unusual facts of that case recognised in Hogan J,'s judgment on the injunction in the present case ([2012] IEHC 371), where he found:-.

> *"31. Clark J. quashed the Minister's decision saying:*
>
> > *"The Court is driven to the conclusion that the identification of the constitutional rights involved and the significantly changed circumstances was not followed by a true examination of those circumstances nor did that examination accord with the requirements restated by Denham J. (as she then was) in Oguekwe v. Minister for Justice [2006] IESC 25, [2008] 3 I.R. 795,where she outlined the obligation to " weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision." A fair and just consideration would have included an assessment of the length of time the family had spent in the state and whether the children*

were at school here. While those facts are not determinative of rights of non-national parents, they are facts to be considered when balancing the constitutional rights of a citizen child with those of the state in order to ensure harmonious interpretation of such rights and to arrive at a proportionate decision. In the language of the Strasbourg Court, a fair balance has to be struck between the competing interests of the individual and of the community as a whole."

32. Clark J. went on to say that:

"The effect of the decision not to revoke the deportation order means that if the family are to live together in a unit, they must abandon their right to live here and uproot and go to Nigeria. In Nigeria they will return to a father who will be unable to depend on his wife's earnings in Ireland and the children will leave their education and their financial security behind them. The alternative is never to have the husband living with them apart from holidays in Nigeria. This cannot be a proportionate decision when measured against the conflicting right of the State to operate a fair immigration system. The balance in this case must fall in favour of the family's strong constitutional rights to live in the country of their citizenship. Their position as settled migrants represents the other side of the coin in the insurmountable obstacles test under Article 8 of the ECHR where it would be unreasonable and therefore disproportionate to expect this family to either live forever without the husband and father or to leave Ireland and return to Nigeria."[4]

"33. It is true that Clark J. saw the family in S. as effectively settled migrants. But by the same token in the present case Ms. O. and P. would have to be regarded as settled migrants. P., of course, is not a migrant at all, but rather an Irish citizen and Ms. O. has made her home here, having been given refuge by the Irish state." (emphasis added)

70. What was omitted from the quotation recited by Hogan J. in his judgment were the previous sentences of the judgment of this Court in *B.S.*, which stated:

"28. [….] the Court held that in the analysis of a citizen child's rights, there was no real difference between the insurmountable obstacles test and the test of reasonableness and proportionality. That is the approach which will be taken to the Applicants' original arguments relating to the alleged failure of the Minister to either address the actual issue in the application or to consider the constitutional rights of T and M as Irish citizen members of a family. These constitutional rights pre-exist any EU citizen rights and are not confined to the exercise of free movement rights nor are they constrained by economic dependence. While the application of the Zambrano decision to deportation cases has not been considered by domestic courts to date, it is fair to say that no application of EU law arose in this revocation application before the Minister. The Court refrains from making any determination on the applicability of the Zambrano ruling to this or any similar application.

29. Returning to this application, the family in question did not seek to justify the applicant B S's weak asylum history nor did it maximise the time the family had been together but rather it sought to bring – for the first time – to the Minister's attention the fact that B S had in early 2003 married a lawful resident who had been here since 1999, that he was the father of a citizen child who has lived here since he was born in July 2003 and he was step-father to another Irish citizen who was almost 10.

30. The Minister was thus presented with a very different set of facts from those previously before him when he decided to deport a young man who had demonstrated a wholly casual approach to his claim for asylum. At the very least, the new information revealed that young man was more than six years older, he had a wife and citizen son and step-son living and being educated in Ireland and most important; his wife was economically independent, she was no longer receiving social welfare supports and had applied for naturalisation. His family in Ireland were clearly settled here. In the Court's view this new information had to be viewed in the context that in 2003, nurturing parents of citizen children were generally permitted to remain in this state with their children. If the fact of the marriage and the expected birth of a citizen child had been notified to the Minister, the likelihood is that the father/husband would have been granted leave to remain and would not have been deported.

32. Regrettably, the Minister's analysis gives every appearance of affording no more than a recital of the facts outlined in the submission with no indication that the major changes in previously available information was understood. The format of the consideration of the application gives little assurance of any appreciation that this was not a challenge to his deportation or that B S was not seeking to remain on humanitarian grounds but rather, that he wished the Minister to lift the life long exclusion from Ireland which followed the deportation order. The existence of his constitutionally protected family in Ireland was not recognised as a fundamental change of circumstances since he was deported in early 2003. Considering the completely fresh set of facts presented with the entirely newly identified constitutional rights, it is almost inconceivable that the Minister is standing over the near mechanical recital those submissions received. Those identified constitutional rights deserved a more significant recognition in the purported balancing exercise which followed. It cannot be a sufficient examination of a child's constitutional rights to say that they are not absolute and that each child is entitled to Nigerian citizenship and that the child T was of an adaptable age when those children at nine and six were Irish citizens living in Ireland since their birth with their mother who had been here for ten years.

71. The context of this Court's judgment *in B.S.* is further clarified from the following passage from that judgment:

"36. The father in this case was seeking to join his family legally. The possibility that the Minister would consider revoking the deportation order so that a limited visa could be granted was simply not examined and the effect of the permanent exclusion of this father from visiting his family was not even mentioned. The finding that "there was no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own border and operate a regulation system for the control, processing and monitoring of non-nationals in Ireland" was not in fact an accurate statement. In this case, there was a less restrictive process available as Mr. S could have been given leave to re-enter for a limited period with conditions attached which could have been subject to renewal, provided he did not become a charge on the state and was of good behaviour."

72. It is important to recall that the decision in *B.S.* was quashed because the consideration given by the Minister to the rights of the family members fell very far short of what is required pursuant to *Oguekwe* and not because the Court was persuaded to move away from the legal position restated and its previous decisions.

73. The Court's ***third*** and final observation relates to the judgment of Clarke J. in *Okunade*, which the applicants submit diluted previous jurisprudence on deportation of parents of Irish citizen children. In that case, the Supreme Court was considering an appeal from the refusal of the High Court (Cooke J.) to restrain the deportation of a father until judicial review proceedings challenging the Minister's decision to refuse subsidiary protection and to make a deportation order were concluded. The appeal was selected as a test case to address the specific issue of the criteria applicable to injunctions restraining deportation while judicial review proceedings were pending. Clarke J., giving the judgment of the Supreme Court, set out a number of generally applicable considerations which he found to apply equally to immigration or deportation cases. He held that the default position is that the deportation order is upheld and an applicant will not be entitled to an injunction. However he allowed for the facts of any individual case where there could be further factors that could properly be taken into account where the deportation would cause more than 'ordinary' disruption, by reason of a particular risk to the individual or a specific risk of irremediable damage. Clarke J. continued:

> *"10.8 […] a disruption of family life which has been established in Ireland for a significant period of time is a material consideration. […] All due weight needs to be attached to the undesirability of disrupting family life involving children in circumstances where, after a successful conclusion of both the judicial review proceedings and any other process which might follow on, the children concerned might be allowed to remain in or return to Ireland.*
>
> *10.9 In that context it is important to emphasise the distinction between, on the one hand, the considerations which are appropriate for a court considering whether to grant a stay or an interlocutory injunction, and on the other hand, the considerations which apply in determining the substantive rights of parties. In A.O. & D.L v. Minister for Justice, Equality and Law Reform [2003] 1 I.R. 1, a majority of this court determined that the constitutional right of an Irish born applicant (who, at that stage, was an Irish citizen) to the company, care and parentage of its parents within the State was not absolute and unqualified. It is clear that, even in the context of Irish born infants who have the status of Irish citizens, other factors may properly be taken into account in deciding whether the undoubted entitlement of such infants to the care of their parents must be exercised in this jurisdiction. That general point remains valid even if the precise position as identified in A.O. may not remain the same as a result of developments in European law, such as the decisions of the ECJ in Zhu and Chen v. Secretary of State for Home Department, (2004) ECR 19925, Zambrano, (2011 ECR 1-0000 and, possibly also Dereci, Case 256/11.*
>
> *10.10 However, it seems to me that the situation which pertains at an interlocutory stage is different. At an interlocutory stage the court is not considering whether a relevant infant has the right to remain in Ireland as such, but rather the court has to decide where the least risk of injustice lies in formulating a temporary measure to cover the situation which is to prevail until the substantive legal rights of the infant concerned are established. The court is not, therefore, concerned with whether an infant, citizen or otherwise, who has remained in Ireland for a significant period of time, or a parent of such an infant, is entitled, as a matter of substantive right, to remain in Ireland. Rather the court has to weigh in the balance of convenience the consequences for such an infant, in all the circumstances of the case, of being deported only to find that the infant concerned may become entitled to return to Ireland if the relevant proceedings are sufficiently successful.*
>
> *10.11 It should be emphasised that the weight to be attached to any such difficulties will, necessarily, be dependent on the facts of the case. It also needs to be emphasised that any such difficulties are not necessarily decisive. They are but one factor to be taken into account with the weight to be attached to that factor being, itself, dependent on all relevant circumstances." (This Court's Emphasis)*

74. Clarke J. went on to assess whether on the facts of *Okunade* there was any sufficient countervailing factor to alter the default position that the deportation order should take its course. In that specific context he held as follows:-

> *"11. 1 […] For the reasons analysed by the trial judge it does not seem to me that the applicant put forward any significant basis for suggesting that there would be a real risk of harm on deportation […].*
>
> *11.2 However, I feel that it is not possible, on the facts of this case, to overlook the fact that one of the applicants is a child of some four years of age who has known no country other than Ireland. It is hardly the fault of that child that the substantial lapse of [time] involved in this whole process has led to such a situation. Rather that current status is a function of the lack of a coherent system and sufficient resources. As pointed out earlier a significant disruption of family life is a countervailing factor which, provided it be of sufficient weight, can be enough to tip the balance in favour of the granting of a stay or an injunction.*
>
> *11.3 On the facts of this case I have come to the view that the trial judge was wrong in failing to afford sufficient weight to that factor and was, therefore, wrong in failing to grant an injunction […]."*

75. Thus it is clear that the applicants' reliance on paragraph 11.2 of the *Okunade* judgment as a new departure from the principles restated in *Alli* is fundamentally misconceived. As he specifically clarified at paragraphs 10.9 and 10.10, Clarke J. was not dealing with the weight to be attached to the rights of the child when the Minister is assessing whether or not to deport one of the child's parents; rather, he was addressing the weight to be attached to the rights of the child when the Court is assessing whether to grant an injunction. In the view of the Court it is also misconceived to construe the remark made by Clarke J. at para. 10.09 with regard to the impact of *Zhu and Chen* (C-200/02) [2004] E.C.R. I-09925, *Zambrano* (C-34/09) [2011] E.C.R. I-01177 and *Dereci & Others* (C-256/11) [2011] E.C.R. I-11315as anything an educated *obiter* dictum in the continuing evolvement of the *Zambrano* decision in *McCarthy* (C-434/09) [2011] E.C.R. I-03375; *Iida* (C-40/11; 8th November, 2011) and *O, S and L* (C-356/11 and C-357/11; 6th December, 2012). Further evolution and clarification may be expected when the CJEU delivers its judgments in the joint cases of *O and S v. Minister voor Immigratie, Integratie en Asiel* (C-456/12 and 457/12; see the Advocate General's Opinion of the 12th December, 2013) - a reference from the Netherlands, and in *Alokpa and Moudoulou v. Ministre du Travail, de l'Emploi et de l'Immigration* (C-86/12; see the Advocate General's Opinion of the 21st March, 2013) – a reference from Luxembourg. Moreover, in contrast to *Zambrano*, there is no issue in this case that if the first applicant father is deported his Irish son would have to leave the EU, a factor which has been highlighted in judgments subsequent to *Zambrano* as a key issue in determining whether a derivative right of residence arises under EU law. The child's mother is a refugee and as such she cannot be removed to Nigeria.

Conclusion

76. The application must therefore fail and the declaration sought is refused. The respondents are entitled to their costs. There was never any utility in continuing with the proceedings once the Section 3(11) application was appropriately brought and since the Minister was willing to grant an undertaking not to deport the father pending the determination of that application, the rights of the child would have been preserved.

[1.] The applicants' solicitors took up the order but it was not formally put before Hogan J. because the respondents took the view that the outcome of the proceedings was irrelevant to the question of whether an injunction should be granted pending te determination of those proceedings.

[2.] This later turned out to be his sister and her husband.

[3.] … and therefore that he was not Sudanese and had not been attacked and tortured in Darfue.

[4.] This Court's emphasis