Neutral Citation: [2016] IEHC 289

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 299 J.R.]

BETWEEN

K.R.A. and B.M.A. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND K.R.A.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 12th day of May, 2016

1. The first named applicant was born in Nigeria in 1975. She married Mr. F.A., and had three children. In early 2008, she came to Ireland while pregnant leaving her husband and those children behind in Nigeria.

2. On 10th March, 2008 the first named applicant sought asylum in the State. This was in due course rejected by the Refugee Applications Commissioner.

3. On 14th March, 2008, the second named applicant was born to the first named applicant in Ireland.

4. On 27th March, 2009, she was notified by the Minister of an intention to make deportation orders. Solicitors on her behalf applied for subsidiary protection on 29th April, 2009. That application was rejected on 9th November, 2009.

5. Deportation orders were made against both applicants on 18th November, 2009, and the first named applicant was required to present herself to the Garda National Immigration Bureau (G.N.I.B.) on 8th December, 2009. This she failed to do, and instead went into hiding from the G.N.I.B. for almost five years.

6. On 23rd October, 2014, while evading the G.N.I.B., she made a s. 3(11) application for revocation of the deportation orders. She was informed on 28th October, 2014 that this would not be considered until she presented herself. She then did so but was arrested and detained. That detention continued until her release pursuant to Article 40 of the Constitution, by Eagar J.: *A. v. Governor of the Dóchas Centre* [2014] IEHC 643 (Unreported, High Court, 19th December, 2014), on the grounds that the Minister was not entitled to imposed such a condition on the consideration of the s. 3(11) application. I might pause to observe that rule of law considerations might suggest that the more significant illegality in the case, that one might have thought needed to be addressed prior to favourably considering any such application, was the disregard by the first named applicant of her legal obligations, but the correctness or otherwise of the aforementioned decision does not fall to be considered in the present application.

7. On 28th April, 2015, Article 42A of the Constitution came into force.

8. Shortly, thereafter on 18th May, 2015, the Minister decided to refuse to make an order under s. 3(11).

9. On 3rd June, 2015, the applicant was granted leave to bring the present proceedings by Faherty J., who also granted an injunction restraining deportation.

Is the respondent entitled to make a delayed pleading objection having failed to do so in a timely manner?

10. I must begin by recording certain pleading objections taken at a very late stage on behalf of the respondent. This arose in the following manner. At the hearing of this matter, Anthony Moore B.L. represented the respondent. After Ms. Rosario Boyle S.C. (who appeared with Mr. Anthony Lowry B.L., for the applicant) had outlined her submission, she says that I asked Mr. Moore whether there was any pleading objection being taken with any of the points sought to be raised and I was told that there was not. I accept her account of the matter which accords with my own recollection and to reinforce that conclusion, her solicitor has a note to that effect. It turns out that the respondent's solicitor also has a note consistent with that conclusion, albeit that it is said to record that there was no pleading objection to the Article 42A argument being made. Furthermore, Mr. Moore did not positively disagree with this account, and indicated merely that as some time had passed since the hearing he could not specifically recall. Nor did he recall making any pleading objection during the hearing (quite understandably, since none was made). After all matters had been argued, judgment was reserved. In the course of preparing judgment I identified some additional materials that had not been opened at the hearing and I listed the matter for mention, having first, through my judicial assistant, given the parties a list of materials which were under consideration as well as a list of the questions which appeared to arise. The intention was to assist the parties in giving specific notice of any such material. Whether such an approach is in fact necessary or appropriate may be a matter of opinion and at best is a matter of degree. The one thing that such an approach does not amount to is an invitation to re-argue the case. No such list of material could be exhaustive in any event because further cases may come to the court's attention between the furnishing of such a list and the giving of judgment. One cannot be obliged to engage in an endless iterative process. Any such information to parties is given in a spirit of assistance rather than obligation.

11. When the matter was listed for mention, I was informed on behalf of the respondent that Mr. David Conlan Smyth S.C. was now leading Mr. Moore that a further two hours were requested for additional oral submissions. I did not consider that such an expenditure of time was appropriate in the circumstances and afforded a somewhat shorter period for oral submissions on 9th May, 2016. I do not think that the respondent has been in any way disadvantaged by having to comply with such time limits. I was also given supplementary written submissions by both sides. In the respondent's submissions, objection was taken for the first time to a number of the applicant's points on the grounds that they did not come within the order granting leave, made by Faherty J., in particular that the applicants were not entitled to rely on the failure to consider the right to free primary education and the failure to consider the

child's application separately.

12. On further discussion, Mr. Conlan Smyth accepted that the latter complaint is in fact pleaded (ground I) and withdrew that objection. The objection regarding the alleged omission to plead a failure to consider the right to free primary education was maintained.

13. There is a distinction between a party making a belated substantive submission as to the law (for example, by unearthing an important authority which it had overlooked) and a party making a belated pleading objection to a point which has already been argued in the case. The former may sometimes be acceptable, even appropriate. The latter is in a different category.

14. If a party has a pleading objection, it must make that objection in a clear and timely manner so that a clear ruling can be made and the hearing can proceed on a definite basis. No such objection was made during the original hearing. The fact that I have afforded the parties a brief opportunity to say anything further in the light of additional materials does not set everything at nought and allow a second bite of the cherry on any and all issues. It is far too late to take any pleading objection at such a late stage, even if there had been no positive representation by the respondents during the hearing. To allow such an objection at a late stage when it was never made or pressed before would be to create a potentially significant obstacle to the procedure adopted in this case, namely the opportunity given to the parties to comment on a list of cases and questions. Even in the absence of the express representation which was given to me at the hearing in this case, this is certainly a situation where silence at the hearing as to any objection amounts to acquiescence (see e.g., R. v. Szypusz [2006] EWCA Crim 1552 (20th June, 2006) as discussed in Szypusz v. U.K. (Application no. 8400/07) European Court of Human Rights, 21st September, 2010: no objection by counsel (para. 14) was equated to "consent" (para. 32)).

15. Furthermore in this particular case, the respondent had plenty of notice of the points being made by reason of their being outlined in e.g., para. 29 of the applicants' written legal submissions (undated, but replied to by undated respondent's submissions, also undated, but filed on 3rd February, 2016). Including a point in submissions does not mean it does not have to be pleaded, but the fact that written notice is given in submissions can only reinforce an obligation on respondents to make a pleading objection in a timely manner. Mac Eochaidh J., in *O.I. v. Refugee Appeals Tribunal* [2015] IEHC 408 (Unreported, High Court, 17th June, 2015) was of the view that procedural objections by respondents to judicial review applications should be brought to a head rapidly rather than simply being pressed at the hearing. But as I pointed out in *B.W. v. Refugee Appeals Tribunal* (No. 1) [2015] IEHC 725 (Unreported, High Court, 17th November, 2015), going somewhat further than that, even if an objection is taken in replying submissions, the very fact that the respondent is thereby on notice of the substantive point is itself capable of negativing any prejudice to a respondent that might otherwise arise.

16. The eleventh-hour objection made in this case to the applicants' pleadings is not one I can accept for a number of reasons:-

(i) If the court during a hearing seeks to identify if there are any pleading issues, this is a step in pursuit of its obligation of case management. The reply to that question puts in place a framework for any subsequent steps, such as determining whether any objection is well founded and if so dealing with any consequential applications. For a party to reserve to itself the right to launch a pleading objection after the end of the hearing is not compatible with the court's case management function.

(ii) No challenge was made during the hearing on behalf of the respondent to the entitlement of the applicants to advance any of their points. The hearing proceeded and concluded on that basis. Whether one characterises it as based on estoppel, waiver, or otherwise, it is simply not open to a party to launch such a challenge after the end of the hearing.

(iii) *A fortiori*, it is not open to a party to launch such a challenge where it has positively represented during the hearing that there is no pleading objection, as here.

(iv) The supplementary submissions launched by the respondent after the hearing were in a context where I had given the parties an opportunity to make any final comment on a list of cases and questions, shortly prior to judgment, not for the purposes of re-opening the hearing generally in order to launch radically new points or pleading objections which could have been taken earlier. A facility offered by the court should not be used for a purpose for which it was not and could not have been intended.

(v) Those supplementary submissions curiously did not acknowledge that the respondent had not made a pleading objection during the hearing.

(vi) No real explanation for the change of course was put forward by the respondent.

(vii) By failing to take a pleading objection in a timely manner, a party induces the other party and the court to take certain steps in reliance on that omission. Submissions are made and replied to, the court engages in a sometimes lengthy process of reading, research and contemplation, a draft judgment is prepared, and on occasion (as here) it becomes apparent to the court that a point or points in the case also have relevance to other cases pending before the court. In the latter event, the giving of judgment becomes part of a wider series of steps which affect other cases, and the timescale for judgment may be dictated or made more urgent accordingly. That is what happened in this case. It is one thing for a party to belatedly raise a point of substantive law, which may be excusable, permissible, or even necessary in a particular case. But for a party to belatedly raise a previously unmade pleading objection is somewhat like seeking to take back a move in chess; it is to seek, shortly before the court intends to give judgment, to revisit a basic assumption put in place during the hearing itself and thereby to put in question such arrangements and the steps taken by the court since the hearing concluded.

(viii) The fact that in the present case this objection was first made only a matter of days before the court intended to give judgment deprived the applicants of any meaningful opportunity to apply to amend the pleadings if such were necessary. I have to conclude that such an approach would be exceptionally unfair to the applicants and clearly constitutes irremediable prejudice. It is not open to a party to take a step which causes injustice to another party even if it *prima facie* has a legal right to do so.

(ix) I pointed out the difficulty to the respondent on 9th May, 2016, but the objection was persisted in. In what turned out to be a futile attempt to give the respondent a graceful way out, I invited the respondent to consider the matter overnight and listed it again for 10th May, 2016, when again I was told that following instructions, the objection was being maintained. I could not ascertain any clear reasons for this course being taken other than that the respondent thought the objection was a good point. I hope I am not simplifying to the point of doing an injustice to the respondent but the stance being taken is not far short of an assertion of a right to say what one likes, when one likes. There is no such right. An approach that assumes an entitlement on a party to launch pleading objections after the conclusion of the hearing is not compatible with the obligation of the court to conduct the proceedings in an ordered manner, and in particular its entitlement to clarify the scope of the issues by way of management of the hearing, and to

invite the parties to comment on particular further authorities without thereby exposing the case to being re-opened de novo.

(x) Before the hearing the respondent did in fact take a pleading objection to one initial point made by the applicants which was not pursued, relating to non-publication of policies (see pp. 1 to 4 of the respondent's submissions filed on 3rd February, 2016). That is the only matter to which a pleading objection is taken. It is not permissible to "drip-feed" objections to other elements of the case pleaded by launching them at a later stage of proceedings.

17. It is not the case that this approach is unduly unfavourable to respondents. It cuts both ways. An applicant may, it is true, think of a new point on the morning of a hearing that it has not flagged in pleadings or written submissions, but so may a respondent.

18. As regards pleading objections, those too cut both ways. A respondent may object that an applicant has not pleaded a particular submission, but an applicant may also object that a ground on which the application is resisted was not pleaded in the statement of opposition.

19. A requirement that pleading objections be made at the latest during the hearing itself (and preferably at the outset of the hearing) is neutral as between the parties.

20. It is true that the court may sometimes come to a point at a late stage, even after a hearing has concluded. In *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473 (13th December, 2011), Hogan J. took an important point of his own motion after having reserved judgment, and reconvened the hearing to invite further submissions on it. The court has to be given more latitude than the parties given its distinct role, and indeed given that the parties have been living with the case for some time whereas the court comes relatively new to it. The parties are not entirely shut out either, for example if a party discovers an authority that is directly in point after judgment has been reserved, it can and normally should bring that to the court's attention. If there is a significant change in circumstances, such as an intervening legal development (D.P.P. v. Murphy [2015] IECA 300 (Court of Appeal, Birmingham J, 5th November, 2015), the party may also seek to re-open the hearing. The categories in which this can be done are not closed. But they apply to both sides, so there is no discrimination against respondents in this regard. However wide such categories are, they do not and could not include a situation where a party simply changes its mind as to whether to press a pleading objection, or even has mistakenly failed in a timely manner to press a pleading objection which it originally intended to press.

21. In any event, even if the pleading objection had been properly before me, I would have rejected it. The educational rights of the second named applicant are pleaded. Reference is made in the grounds to both Article 42 (ground V) and 42A (grounds II, III and V). These provisions necessarily encompass the right to free primary education.

Does s. 5 of the Illegal Immigrants (Trafficking) Act 2000 apply?
22. An issue immediately arises as to whether this application comes within the scope of s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

23. Prior to the amendment of that section in 2014, there was no question but that a refusal to revoke an order under s. 3(11) of the Immigration Act 1999 was not covered by s. 5: *Cosma v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 133 (McCracken J. (Kearns and Macken JJ. concurring)).

24. Section 5(1)(m) of the 2000 Act as amended by s. 34 of the Employment Permits (Amendment) Act 2014, now provides that the procedures of that section apply to proceedings challenging *"an order under s. 3(11)"*. This issue was first identified (so far as I am aware) by Mr. Michael Conlon S.C. late last year in another case before me but in the end did not have to be decided in that case. However, I must address it now (rather than leave it to the Court of Appeal to decide in the first instance) because I need to know whether I can or should entertain any application for leave to appeal at the suit of the losing party in the present proceedings.

25. The respondent in supplementary submissions submits (for the first time) that this issue does not arise as leave has already been granted. This unfortunately misses the point that the entertaining of an application for, and the grant or otherwise of, leave to appeal, is a matter for the High Court. This is an issue that requires a decision from this court. Mr. Conlan Smyth suggests that there might not be an appeal so the matter is as he puts it "*moot*". Ms. Boyle submits, correctly, that it would essentially be unfair to the losing party not to know whether a leave requirement applies, as one could not fully evaluate the next move otherwise.

26. I accept the submission that it would be unfair to the losing party not to clarify this matter in this decision. But the respondent is in any event estopped from taking such an eleventh-hour objection on the separate ground that during the hearing Mr. Moore made an issue of the scope of s. 5, did the running on it, invited the court to decide on the issue of whether s. 5 applies in a manner favourable to the respondent, and did not press any suggestion that the matter was "moot". Indeed he delivered a 7-page written submission on the issue of s. 5 (undated) which does not contain any suggestion that I should not decide the issue. The eleventh-hour complaint being made by Mr. Conlan Smyth that this point is "*moot*" is just radically inconsistent with the way the State approached this matter at the hearing.

27. In *Smith & Ors. v. Minister for Justice and Equality* [2013] IESC 4 (Unreported, Supreme Court, 1st February, 2013), it seems to have been assumed rather than decided that s. 5 did not apply to a challenge to a s. 3(11) refusal (see judgment of Clarke J. at para. 1.3). The principle of "a point not argued is a point not decided" applies. The point is therefore in my view res integra.

28. The appropriate approach to interpreting s. 5(1)(m) of the 2000 Act is dictated by s. 5 of the Interpretation Act 2005, which, leaving aside "penal" cases, provides that if the provision *"on a literal interpretation would … fail to reflect the plain intention of … the Oireachtas",* then *"the provision shall be given a construction that reflects the plain intention of the Oireachtas … where that intention can be ascertained from the Act as a whole".* That section to some extent reflected pre-2005 caselaw which also allowed a departure from a literal interpretation where the parliamentary intention would otherwise be defeated (see *Luke v. Inland Revenue Commissioners* [1963] A.C. 557*; Nestor v. Murphy* [1979] I.R. 326 (Henchy J. (Kenny and Parke JJ. concurring)).

29. It seems to me that the terms of s. 5 of the 2005 Act require a four stage process, in which the court must ask the following questions:

(i) What is the literal interpretation of the provision?

(ii) Can the plain intention of the Oireachtas be ascertained from the Act as a whole?

(iii) If so, does the literal interpretation fail to reflect the plain intention of the Oireachtas?

(iv) If so, can the provision be given a construction that reflects that intention?

30. I will now therefore address those questions in sequence.

What is the literal interpretation of the provision?
31. One must begin with the literal meaning of the Act, which remains the "*primary rule of statutory interpretation*" (*National Roads Authority v. Celtic Roads Group (Dundalk) Ltd*. [2011] IEHC 71 per Kelly J.) even after s. 5 of the 2005 Act, as that section itself envisages. One can only go on to consider the impact of s. 5, if any, after first establishing the literal meaning.

32. Refusal to make an order is not "*an order*": see *E.A.I. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 334 (Unreported, High Court, Cooke J., 9th July 2009). "*Order*" in this context is a term of art and connotes a particular type of statutory instrument, not an administrative decision (see the definition of "*statutory instrument*" in s. 1(1) of the Statutory Instruments Act 1947; definition of "*instrument*" in s. 1 of the Statute Law Revision Act 2015). In this regard, the decision of Hardiman J. (Denham, Murray, McGuinness and Fennelly JJ. concurring) in E*.M.S. v. Minister for Justice, Equality and Law Reform* [2004] 1 I.R. 536 (holding that refusal of an application for permission to make a second asylum claim was a "*refusal under section 17*" within the meaning of s. 5(1)(k) of the 2000 Act) lends some support to the use of a literal interpretation in the context of s. 5 of the 2000 Act, although that was a case in which the Interpretation Act 2005 did not feature.

33. On a literal interpretation, it is therefore clear that s. 5 would only apply to a challenge to the making of an order, rather than to a challenge to a refusal to revoke a deportation order. While it is tempting and indeed generally more comfortable to stop there, s. 5 of the 2005 Act requires the court to go on to consider whether that literal interpretation should be departed from.

Can the plain intention of the Oireachtas be ascertained from the Act as a whole?
34. It is important to distinguish between to senses of what is meant by "*the plain intention of the Oireachtas*" in this context. The wider sense is to ask what is the intention of the Oireachtas regarding s. 5 of the 2000 Act as a whole. The narrower, and for present purposes more relevant question, of what is meant by s. 5(1)(m) in particular.

35. Starting *de bene esse* with the parliamentary material (albeit that a perusal of such material is not in principle necessary to ascertain the parliamentary intention: *Molyneaux v. Ireland* [1997] 2 I.L.R.M. 241 at 244 per Costello P.), the current s. 5 was introduced by way of Dáil report stage amendment to the Employment Permits (Amendment) Bill 2014. It therefore did not feature in any manner in the Explanatory Memorandum to the Bill as initiated. When moving the amendment, the Minister in charge of that Bill did not, from an examination of the Dáil Debates, have occasion to explain the object and purpose of the provision, or indeed say anything whatever beyond formally moving it. Rightly or wrongly (but certainly unhelpfully from the point of view of ascertaining the parliamentary intention), Dáil procedure permits even major amendments to be simply formally moved without the necessity for discussion or explanation (even in written form, which could be added to the official report). Not only did the Minister not set out details of the amendment but no other members contributed to the debate on the amendment either. There is therefore at that level a complete absence of material that could assist the court.

36. More broadly, s. 5 is so riddled with what appears to me to be omission and arbitrariness that it is not possible to discern a coherent policy from the section as a whole. If one contrasts the scope of the section with, for example, the High Court Practice Direction HC56 which requires that "*[a]ll proceedings by way of judicial review directed at decisions, proceedings or measures in the areas of asylum, immigration, nationality and citizenship (including European Union citizenship)*" should be brought in the Asylum List, one can more readily appreciate the difficulties involved in a highly specific list as opposed to a more purposive category as set out in the practice direction.

37. Subject to hearing further argument in any given case in which an issue might arise, s. 5 does not appear to capture a host of decisions similar to those that are included such as the following:-

(i) decisions under the European Union (Dublin Systems) Regulations 2014 (S.I. No. 525 of 2014);

(ii) decisions in relation to visas;

(iii) decisions in relation to naturalisation under s. 15 of the Irish Nationality and Citizenship Act 1956;

(iv) decisions in relation to permissions under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006), or residence cards under reg. 7 therein;

(v) decisions in relation to restricting rights of residence under regs. 19 or 22 of the 2006 regulations;

(vi) decisions under reg. 21 of the 2006 regulations to review a decision as to an entitlement to enter or reside in the State;

(vii) decisions under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) corresponding to those under the 2006 regulations that are not covered by s. 5;

(viii) decisions on family reunification under s. 18 of the Refugee Act 1996;

(ix) decisions on family reunification under regs. 25 and 26 of the European Union (Subsidiary Protection) Regulations 2013 (S.I. 426 of 2013);

(x) decisions on attachment of conditions to or amendment of the terms of a permission, as distinct from a refusal of permission under s. 4 of the Immigration Act 2004 (see my decision in *Saleem v. Minister for Justice and Equality* [2016] IEHC 99 (Unreported, High Court, 15th February, 2016 at paras. 3 and 4);

(xi) decisions in relation to notices under s. 14 of the Immigration Act 2004.

38. In addition, s. 5 is silent as to the extent to which it requires leave to appeal the following elements of a decision of the High Court, leaving those matters (for unclear reasons) to judicial determination:-

(i) orders in actions seeking to stay the effect of a decision (as opposed to challenging its validity);

(ii) interlocutory injunctions;

(iii) decisions on extension of time (which do not require leave to appeal: *A.B. v. Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 296 at 303 to 304, per Keane C.J. (Denham, McGuinness, Geoghegan and Fennelly JJ. concurring);

(iv) grant or refusal of amendments;

(v) decisions on motions to dismiss proceedings pursuant to the inherent jurisdiction of the Court (which do not require leave: *A. v. Minister for Justice and Equality* [2013] 2 I.L.R.M. 457 (Denham C.J. (Murray and Clarke JJ. concurring)));

(vi) decisions on costs (which require leave to appeal: Browne v. Kerry County Council (Unreported, Supreme Court, ex tempore, 25th March, 2014); *Rowan v. Kerry County Council* [2015] IESC 99 (Unreported, Supreme Court, 18th December, 2015, Dunne J. (McKechnie, MacMenamin, Laffoy and Charleton JJ. concurring)));

(vii) other interlocutory or ancillary decisions.

39. I should emphasise that the mention of a particular category of order on this list is not an indication that compliance with s. 5 is not required. It is simply an indication that the Oireachtas has not seen fit to expressly clarify whether or not s. 5 applies.

40. It is simply not possible to discern a clear policy rationale that would make sense of the section as a whole having regard to the significant omissions in it.

41. However, that is not the end of the matter because the real question is what is the intention of the Oireachtas in relation to s. 5(1)(m) in particular. The one thing that the measures included in the section have in common is that they are all negative decisions affecting non-nationals. Many of them could also have the effect of seeking to hold up the removal of non-nationals from the State. The section falls within the well-established public policy objective that issues regarding the validity of administrative decisions should be determined promptly (Re *Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 392 per Keane C.J., for the court). The categories of decision concerned do not generally apply to non-nationals whose applications have been granted (Illegal Immigrants (Trafficking) Bill 1999 at p. 401). The decisions covered by s. 5 are those "*taken for the purpose of controlling the State's borders*" (*T.D. v. Minister for Justice, Equality and Law Reform* [2014] IESC 29 (Unreported, Supreme Court, 10th April, 2014) per Murray J. (Denham C.J., O'Donnell and McKechnie JJ. concurring) at para. 134).

42. Read in that light, the intention of s. 5(1)(m) is plain. It can only be intended to apply to a negative decision which would have the effect of holding up the removal of a non-national, the subject of a deportation order, from the State.

Does the literal interpretation fail to reflect the plain intention of the Oireachtas?

43. The only circumstance in which an "*order*" under the provision would realistically be challenged if the Minister made an order amending a deportation order, to which an applicant did not agree. This would presumably be something of a rarity. An order under s. 3(11) (that is, normally speaking, an order revoking a deportation order made under s. 3(11)), would generally be favourable to an applicant and thus unlikely to be challenged. The Supreme Court in the *Illegal Immigrants (Trafficking) Bill* 1999 case made the point that the section did not generally impinge on persons who were lawfully in the State (p. 401).

44. To afford para. (m) a literal interpretation would achieve no useful purpose. It would mean that the almost unheard-of situation of an amended deportation order would be the only decision under this heading which could be subject to the section. Refusal to revoke a deportation order would be subject to the usual three-month leave period with an unfettered right of appeal. Such an interpretation would deprive para. (m) of any real purpose or effect.

45. To that extent, and despite the lack of a coherent policy discernible in s. 5 as a whole, the conclusion that the wording of sub-s. (1)(m) on a literal interpretation fails to reflect the plain intention of the Oireachtas is inescapable.

Can the provision be given a construction that reflects that intention?

46. The respondent submitted that in the circumstances I should depart from the literal meaning in order to give effect to the plain intention of the Oireachtas.

47. It is important to bear in mind that there are limits to what can legitimately be done under the heading of construction or interpretation and that process cannot be pursued to breaking point. An acute discussion of how far a court can go by way of creative interpretation was presented in *King v. Burwell* 576 U.S. __ (2015), where Scalia J. (dissenting, with whom Thomas and Alito JJ. agreed) took the view that for the majority of the U.S. Supreme Court in that case to read the words "established by a state" as meaning "*not established by a state*" (slip op. at p. 1) was a step too far. However that was a case where the statute as a whole would have been severely impaired, possibly to the point of collapse, as Roberts C.J. emphasised, if a literal approach were taken. To that extent it seems to me that the interpretation favoured by the majority was broadly consistent with the approach mandated in this jurisdiction by the 2005 Act. Furthermore, it seems to me that the criticism made by Scalia J. was not altogether justified in that the majority read the words as meaning in substance "*established by a state or the federal government*", which is not quite a complete negative of the original.

48. Under this heading, it is important to bear in mind the point made by Clarke J. (MacMenamin J. concurring) in *Kadri v. Governor of Wheatfield Prison* [2012] 2 I.L.R.M. 392 at para. 3.4 that the court can "*engage in construction or interpretation rather than rewriting" and that in particular therefore that "it not only is necessary that it be obvious that there was a mistake in the sense that a literal reading of the legislation would give rise to an absurdity or would be contrary to the obvious intention of the legislation in question, but also that the true legislative intention can be ascertained. There may well be cases where it may be obvious enough that the legislature has made a mistake but it may not be at all so easy to ascertain what the legislature might have done in the event that the mistake had not occurred*" (para. 3.6). The court cannot therefore "*use (or perhaps abuse) a section which mandates a sensible or purposive construction to, in effect, rewrite the legislation by inserting a series of detailed measures to which the Oireachtas did not address its mind"* (para. 3.10).

49. Is this such a case? I think not. The purposive interpretation which would uphold the intention of the Oireachtas is quite clear. It is to read the words "*order under section 3(11)*" as meaning "*decision under section 3(11)*". This does not constitute a re-writing of the section in the Kadri sense although of course any departure from literal meaning can at one level be accused of being a re-writing. As Lord Reid recognised at p. 577 of Luke, any departure from the literal meaning "*must do some violence to the words*". For that reason, it is not an answer to the application of s. 5 of the 2005 Act to say that it involves a "*re-writing*" of the legislation, because all departure from literal interpretation does that. I do not read the brief mention of re-writing in Celtic Roads as suggesting

otherwise, because that was in a context where the literal meaning was held not to create an absurdity and not to engage s. 5 of the 2005 Act at all.

50. Therefore, reading s. 5(1)(m) of the 2000 Act as applicable to any "*decision*" under s. 3(11) rather than an order *stricto sensu* is the interpretation of the provision which s. 5(1) of the 2005 Act requires (rather than permits) me to adopt ("*the provision shall be given a construction…"*, emphasis added).

51. It is true that, the context here is the constitutional right of appeal from any decision of the High Court to the Court of Appeal under Article 34.4.1°. Any restriction of that constitutional right should be in clear terms (see *People (Attorney General) v. Conmey* [1975] I.R. 341 *per* O'Higgins C.J. at 354 and per Walsh J. at p. 360; *People (D.P.P.) v. O'Shea* [1982] I.R. 384 *per* O'Higgins C.J. at p. 403; *Hanafin v. Minister for the Environment* [1996] 2 I.R. 321 *per* O'Higgins C.J. at pp. 403 to 404; A.B. at p. 303. However despite that context, the mandatory terms of s. 5 of the 2005 Act apply and it seems to me that the court is required to depart from the literal meaning of s. 5(1)(b) of the 2000 Act in the circumstances. A similar conclusion underlies the Supreme Court decisions in *Browne* and *Rowan* referred to above. I therefore hold an action to challenge a refusal to make a s. 3(11) order, such as this action, is covered by s. 5 of the 2000 Act. As the applicants submit, relying on *G v. An Bord Uchtála* [1980] I.R. 32 *per* Finlay P. at 45, statutory interpretation must make the provision amenable to the Constitution. But the Constitution admits of exceptions to and regulation of the right of appeal. In my view it was clearly intended that a decision on a judicial review of a refusal to make a section 3(11) order was such an exception or subject to such regulation.

52. The application of s. 5 of the 2005 Act in any given case cannot be an occasion for celebration. A need to depart from the literal meaning is a recognition of a failure in the drafting process, notable mainly by reason of its rarity given the extremely high quality of work done by legislative drafters. Any such failure which inherently arises whenever s. 5 of the 2005 Act is brought into play should be corrected by the Oireachtas at an early opportunity in order to bring the literal and applied meanings into harmony. An omission to do so promptly can only mislead future readers of the Act who may not be aware of the caselaw on its interpretation.

53. Finally, I hope I might be forgiven for wondering, in the light of the foregoing, if it is too much to hope for that the scope of s. 5 of the 2000 Act overall might be subject to an examination in the reasonably near future with a view to introducing greater consistency, or at least clarity, in its operation, having regard to the matters discussed.

Are the applicants entitled to pursue by way of judicial review of a refusal to revoke a deportation order an issue which also arose at the deportation order stage?

54. Ms. Boyle very ably contended that the second named applicant has a fundamental natural and constitutional right to education, and that this would be interfered with by the decision to deport because of the inadequate educational system in Nigeria. She submits that in accordance with the Supreme Court decision in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 (particularly per Murray C.J. at p. 724), such an interference requires substantial countervailing considerations, and that there is an absence of such substantial countervailing considerations in this case.

55. However, her argument under this heading is unfortunately based on a false premise, namely that it is open to her to challenge the refusal to revoke the deportation orders on a ground which was available to her as a potential basis to challenge the original deportation orders. Those orders were made in November 2009, and were not challenged. The time for doing so has long since expired. The clock cannot be artificially restarted simply by the expedient of making an application to revoke the orders on grounds which were previously available and then launching judicial review within 28 days of the decision refusing to revoke the deportation orders.

56. The whole issue of comparison of the adequacy of Irish and Nigerian education systems was available to the applicants in 2009. Of course a child would be at a different and obviously earlier stage of education when a deportation order is made as opposed to when it is sought to be revoked. But the principle of any ultimate potential educational impact of deportation arises from the outset.

57. The whole process of enforcement of deportation orders would be undermined if s. 3(11) were to be read as giving a legal basis to challenge decisions based on a re-hash of points which either were made, or could have been made, at the time of the original deportation order. Without there being an exact analogy with *Henderson v. Henderson* (1843) 3 Hare 100, there is nonetheless a limitation on the use of s. 3(11) in that it is confined to new circumstances, albeit that this test can be read broadly to include new legal circumstances (see *Smith v. Minister for Justice and Equality* [2013] IESC 4 (Unreported, Supreme Court, 1st February, 2013) per Clarke J. at paras. 5.12 and 5.17). This requirement of a "*change of circumstances*" (*Irfan v. Minister for Justice* [2010] IEHC 422 (Unreported, High Court, Cooke J., 23rd November, 2010) or a "*significant feature, not present when the original deportation order was made*" (*Okunade v. Minister for Justice* [2013] IESC 4 (Unreported, Supreme Court, 1st February, 2013) per Clarke J. at para. 5.4) is fundamental to the s. 3(11) procedure, unless all deportation orders are to be up for permanent renegotiation and the time limits in s. 5 of the 2000 Act are to be set at nought.

58. In the absence of the enactment of Article 42A making any significant difference to the legal position of the applicants (which I consider below), there is nothing new in the claim that deportation could interfere with the education of the second named applicant. This point was well within the scope of submissions or potential submissions in 2009, despite the tender years of the second named applicant at that stage and the fact she had not commenced primary education. Such commencement was perfectly foreseeable and, as an issue related to the prospective rights of the applicants, a legitimate subject both for submissions by them and for consideration and decision by the Minister as of the time of making the original deportation order. This is not a new point, and it is therefore inappropriate for the court to either quash the decision to affirm the deportation order, still less restrain the deportation, on the basis of a point which could have been litigated in 2009. To allow a deportation order to be challenged or upset by reference to such historic points would nullify the time limits enacted by the Oireachtas in s. 5 of the 2000 Act. An applicant cannot, by challenging a later decision, seek in substance to nullify an earlier decision contrary to the system of time limits set out in s. 5 of the 2000 Act: this would be "*to permit the first decision to be attacked obliquely, after the time limited for a direct challenge had expired"* (E.M.S. at p. 542). Likewise, in B.M.J.L. v. Minister for Justice and Equality [2012] IEHC 74 (Unreported, High Court, 14th February, 2012), Cross J. took the view (at para. 3.18) that it was not open to an applicant to attack a deportation order on grounds that "'*collaterally'* impugn the validity of the RAT decision" (the reference in that case to this being done "*by way of an appeal*" appears to refer not to an appeal *stricto sensu* but to an application to the Minister by way of representations for leave to remain).

59. Such an approach was taken to s. 3(11) applications by Peart J. in *Mamyko v. Minister for Justice* (Unreported, High Court, Peart J., 6th November, 2003) where nothing new had been put forward in correspondence seeking revocation and no information was available, which could not have been made known to the Minister prior to the making of the original order. Peart J. said that an applicant should not be permitted to "*drip feed*" grounds from time to time. This approach was referred to approvingly by MacMenamin J. (in refusing even leave to challenge a s. 3(11) decision) in *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603; and by Birmingham J. in *G.O. v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 19.

60. The planning context has a similar statutory scheme for judicial review, and in that context similar issues of form versus substance have been considered. In *Goonery v. Meath County Council* [1999] 7 JIC 1501 (Unreported High Court, 15th July, 1999) Kelly J., as he then was, dealt with a situation where declaratory relief was sought which had the logical effect of attacking a previous grant of permission contrary to the statutory scheme restricting such challenges. Kelly J. said that *"[counsel] says that nowhere in the reliefs sought by his client did he question the validity of the planning permission granted by Meath County Council. I do not agree. Relief No. (4) seeks a Declaration that Meath County Council did not properly determine the application for planning permission for the installation … Relief No. (11) seeks a Determination that … Meath County Council could not have made a valid decision on the planning application ... [These reliefs] plainly seek to impugn the validity of the decision to grant permission. If these reliefs were granted, they would undoubtedly mean in practical terms that the decision of the Meath County Council was invalid. This is particularly so in the case of relief No. (11). The mere fact that an Order was not sought quashing the permission in question does not mean that the validity of the permission was not being questioned. It was, and so the provisions of the section [i.e., s. 19 of the Local Government (Planning and Development) Act 1992] applied and were not complied with since the application was moved … ex parte and not on notice as the section requires"* (pp. 17 to 18). In *Kinsella v. Dundalk Town Council* [2004] IEHC 373 (Unreported, High Court, 3rd December, 2004), Kelly J. as he then was, dealt with a subsidiary decision of a council which fell outside the statutory procedures for planning judicial reviews, but which was being challenged in order to attack the substantive planning decision. Kelly J., as he then was, said in that respect: *"it was quite clear that the whole thrust and ambition of these proceedings was to quash the decision of 3rd August, 2004. As the applicant was quite plainly questioning the validity of the decision to grant planning permission he could not avoid or evade meeting the necessary threshold of proof required under s. 50 of the Planning and Development Act, 2000. Indeed as I pointed out in giving my ruling on this topic, if the applicant were correct in his submission in this regard an absurd result could be achieved which would be entirely contrary to the letter and intent of s. 50".* (See also Harrington v. Environmental Protection Agency [2014] 2 I.R. 277 (Barrett J.) on these issues).

61. It is not open to an applicant to obtain relief by way of judicial review of a decision refusing to revoke a deportation order on grounds that could have been, or were unsuccessfully, advanced when the order was originally made.

Is the decision invalid by reason of a failure properly to consider the constitutional right of the child to free primary education in accordance with Article 42A and the Meadows decision?

62. Article 42A, on which the applicant relies, is not an answer to this problem. The issue of where educational best interests lie did not spring into existence with the enactment of Article 42A. Indeed the best interests requirements in Article 42A.4 does not apply to immigration decisions (*Dos Santos v. Minister for Justice and Equality* [2015] IECA 210, [2015] 2 I.L.R.M. 483 (30th July, 2015) per Finlay Geoghegan J. at para. 18). The obligation to protect the natural and imprescriptible rights of "all children" in Article 42A.1 applies to all decisions, and therefore to immigration decisions in particular, but the main thrust of this section appears to be to provide for a greater recognition of the extent of such rights, to be enjoyed without discrimination or exception. The reference to "*all children*" strongly smacks of a requirement of non-discrimination in terms of the rights of children, on grounds such as the martial status of their parents. The express recognition of the natural and imprescriptible rights of children is also strongly suggestive of an intention to broaden the range of rights so recognised, particularly in respect of matters of special relevance of children rather than persons generally, such as the right to the society of both parents.

63. Given that the right to education, or at least to primary education, was expressly recognised prior to the enactment of Article 42A, it is not clear to me that the enactment of Article 42A.1 makes any material difference in this regard to the second named applicant's educational rights, unless it were to be suggested that she does not enjoy the constitutional right to free primary education under Articles 40.3, 41 and 42, a proposition which I would not accept. Subject to any countervailing legal considerations, a child has a natural right to have his or her welfare safeguarded pursuant to Article 40.3 (*G. v. An Bord Uchtála* per Walsh J. at p. 69), which includes educational welfare (see also *Dowse v. An Bord Uchtála* [2006] 2 I.R. 507 at para. 77). It would be an affront to the norms of a democratic society to exclude a child from the entitlement to free primary education, and allow him or her to go uneducated, simply because of a lack of Irish nationality or even legal status. International human rights law would provide little support by way of persuasive authority for such a proposition. The right to education (not limited to primary education) is guaranteed by art. 2 of Protocol No. 1 to the ECHR, and therefore is subject to the non-discrimination guarantee of art. 14. In addition, the right to education (primary (which is to be free), secondary and higher, with certain qualifications) is also protected by art. 28 of the International Convention of the Rights of the Child and art. 13 of the International Covenant on Economic, Social and Cultural Rights, a right to be enjoyed without discrimination as to race, national origin or birth (art. 2(2) of the ICESCR) albeit that nationality and legal status are not specified as prohibited grounds of discrimination.

64. The respondent makes the trite point that the Covenant is not part of Irish law, but that is completely irrelevant. International human rights instruments do not have to be part of Irish law in order for them to be of persuasive authority in interpreting the scope of natural rights, any more than English decisions after 1922 have to be part of Irish law for them to be of interest and, from time to time, of value. The submission made is characteristic of a wider reflex response that borders on phobia towards, if not repulsion from, international human rights material, or even international material more generally. Oddly one rarely hears English material dismissed on the basis of amounting to a "Cook's tour". Perhaps 94 years on from independence, and making due allowances for the precept of nolumus mutari, it is time to take a more accepting approach to the persuasive relevance of international material, even if it comes from unfamiliar territory beyond the borders of the U.K. as that entity stood in 1801.

65. In my view, the right to an education, including in the case of a child of primary school age, to free primary education, is one of the natural and imprescriptible rights of the child, whether citizen or not, and therefore to be enjoyed by every child pursuant to Articles 40.3, 41, 42 and 42A of the Constitution without discrimination as to nationality or even legal status while in the country, or as to other grounds such as marital status of the child's parents.

66. In saying that, I of course seek to implement the approach laid down in *N.H.V. v. Minister for Justice and Equality* [2016] IECA 86 (Unreported, Court of Appeal, 14th March, 2016) (under appeal at time of writing (see *N.H.V. v. Minister for Justice and Equality* [2016] IESCDET 51) which clearly establishes that all constitutional rights are not to be viewed as in general and automatically to be applied to non-citizens, but rather that "*certain non-citizens may be entitled to certain constitutionally protected fundamental or personal rights"* (per Finlay Geoghegan J. at para. 19).

67. International human rights instruments generally apply to all persons under the jurisdiction of contracting parties, rather than merely those parties' citizens (see e.g., art. 1 of the ECHR which is a commitment by the parties to secure the rights of "*everyone within their jurisdiction"*). That principle is of some relevance to cases where an approach of extending constitutional rights was taken, such as *Northampton County Council v. A.B.F.* [1982] I.L.R.M. 164 (Hamilton J., 2nd November, 1981); *Oxfordshire County Council v. J.H.* (Unreported, High Court, Costello J., 19th May, 1988); *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795 per Denham J. (as she then was, Murray C.J., Fennelly, Kearns and Finnegan JJ. concurring) at p. 881; K.*I. (a minor) v. Minister for Justice and Equality* [2014] IEHC 83 (Unreported, High Court, McDermott J., 21st February, 2014); *Omar v. Governor of Cloverhill Prison* [2013] 4 I.R. 186 (Hogan J.).

68. To that position there are two important qualifications, consistent with the *N.H.V.* decision.

69. Firstly, constitutional rights are not generally absolute; the point that seems to underlie the Supreme Court decision in *Saunders v. Mid-Western Health Board* (Unreported, Supreme Court, Finlay C.J., 11th May 1987). In the context of a right to education, it is possible to envisage circumstances where the provision of this right, or its provision to the fullest extent, is not practicable or possible. Even a child with severe or profound intellectual disability retains a right to education (*Sinnott v. Minister for Education* [2001] 2 I.R. 545) but one could not rule out on an *a priori* basis that there could be a condition such that meaningful or full education is not a practical possibility, or perhaps even where the cost of providing full bespoke education to a particular child in particular circumstances imposes an extraordinary financial or operational burden on the State, well above that involved in the *Sinnott* case. To acknowledge the theoretical possibility of exceptions is not in any way to suggest that every effort should not be made to ensure that every child receives appropriate education.

70. Secondly, as Denham J. points out in *Oguekwe*, and as O'Donnell J. (Denham C.J. and Macken and Fennelly JJ concurring) noted in *Nottinghamshire County Council v. K.B.* [2011] 4 I.R. 662 (while otherwise leaving the extent of non-nationals' rights open), certain rights are reserved to citizens alone. That latter point is important because it must not be assumed that non-nationals are to enjoy any and all rights that are available to citizens. This is clearly not the case. The right to work is an example, as *N.H.V.* illustrates, as is the right to vote (other than, by statute, in local elections).

71. On this latter point, Stewart J. said in Mathews v. Diaz, 426 U. S. 67, at 79-80 (1976) that "[*i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens… The fact that an Act of Congress treats aliens differently from citizens does not, in itself, imply that such disparate treatment is "invidious." In particular, the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all alien. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that, as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence*." (See also *Demore v. Kim* 538 US 510 (2003) per Rehnquist C.J. at p. 521).

72. Each right must be considered on a case-by-case basis, and if necessary on a category-of-applicant by category-of-applicant basis. In my view however, the right of the individual to education (and in particular, that of a child to free primary education) is of such a nature as to clearly belong properly to all children irrespective of their legal status (even independently of Article 42A). It would be contrary to our conception of a democratic society to fail to secure for a child a right to an education, while the child is present in the State.

73. However the entitlement to a right to education while for the time being present in the State does not thereby create an entitlement not to be removed from the State if unlawfully here, even if such removal is to a country with an inferior educational or social system. As the Minister correctly noted in the decision under review, "*aliens subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social and other forms of assistance provided by the expelling state" (N. v. Secretary of State for the Home Department* [2005] UKHL 31 per Lord Nicholls of Birkenhead at para. 15, summarising ECHR caselaw in the context of art. 3 of that instrument, a proposition which is relevant by analogy).

74. In that regard, Ms. Boyle relies strongly on the judgment of Eagar J. in *C.O.O. (Nigeria) v. Minister for Justice (No. 1)* [2015] IEHC 139 (Unreported, High Court, 4th March, 2015), in which he states (obiter) that under Article 42A, the analysis of rights of a child in the deportation context "*would change remarkably*" and the Minister "*will have to give far greater consideration to the welfare of an applicant child"* than applied under *R. (Razgar) v. Home Secretary* [2004] 2 A.C. 368, which itself was an attempt to set out the test under art. 8 of the ECHR (para. 35 of C.O.O.).

75. It is clear from para. 38 of C.O.O. that Eagar J. was relying on the best interest test in Article 42A.4.1º of the Constitution in this regard. C.O.O. was decided on 4th March, 2015, after the High Court decision in Dos Santos but before the judgment of Finlay Geoghegan J. on appeal to which I have referred. In the light of the latter judgment, it is clear beyond argument that, as the wording of Article 42A.4 expressly states, the best interest test applies to certain types of decision in which immigration matters are not included. It follows that the *obiter* comments of Eagar J. in C.O.O. should be re-appraised, having regard to the subsequent decision by the Court of Appeal in Dos Santos. Article 42A.4.1º simply does not apply to immigration decisions.

76. Insofar as it might be argued alternatively that the obligations of the Minister to conduct a balancing test would change by virtue of Article 42A.1 (rather than, as Eagar J. suggested, Article 42A.4.1º), as compared with her obligations under art. 8 ECHR as construed in Razgar, I see no basis for that view, given that the right to free primary education was already provided for within the Constitution at the time of the adoption of Article 42A. Furthermore, Article 42A.1 is primarily addressed to extending the recognition and enjoyment of rights and to the upholding of such rights on a non-discriminatory basis, rather than to require in a prescriptive manner that immigration decisions must be conducted on the basis of a different weight to be attached to rights already recognised.

77. While it was Eagar J.'s view that it "[*was] clear that" the Minister "will have to give far greater consideration to the welfare of … children"* (para. 37), no reasons are discernible from these remarks as to why this is the case, or indeed why it is "*clear*" that this is the case, and in the absence of such reasons and having regard to the matters above, I do not consider that Article 42A.1 has the effect of requiring far greater (or any greater) consideration for the rights of the child in the deportation context than would obtain under art. 8 ECHR, as suggested. It is hard to see why Article 42A would have been intended to have a radically different effect to established norms of international human rights law in any event. The right of a non-national child to be or remain in the State is not a natural and imprescriptible right and therefore does not fall within the scope of Article 42A.1.

78. The applicants also rely on *Sivsivadse v. Minister for Justice and Equality* [2015] 2 I.L.R.M. 73 per Murray J. (Hardiman, Clarke, O'Donnell and MacMenamin JJ. concurring) at para. 31, where the court declined to dismiss an appeal as an abuse of process having regard to the objective interests of children that were involved, in the context of Article 42A.1. The reliance on Article 42A.1 here was in the context of the exercise of the court's discretion to dismiss an appeal as an abuse of process. It was not a substantive application of the Article as a mechanism to enhance the rights of children in the deportation context.

79. Indeed if Article 42A.1 is to be interpreted as creating a significant (or any) threshold or obstacle to be overcome before a child can be deported to a country with a lesser educational system or perhaps any lesser system of social protection, then a rational immigration policy will become impossible. While Ms. Boyle sought to suggest that the (alleged) weaknesses of the Nigerian educational system were only relevant to this particular applicant and would only arise in future on a case-by-case basis, this does not strike me as a particularly credible way in which I could find for the applicant without also finding for every other child applicant from an economically disadvantaged country. Indeed, the notion I could quash the affirmation of the deportation orders on the basis

that the decision did not show sufficiently substantial grounds to override the entitlement of the second named applicant not to be sent back to an allegedly significantly inferior educational system, while at the same time asserting that there are no major implications in such a finding because any other applicant must be judged on *"a case-by-case basis"*, only has to be stated for its implausibility to be apparent.

80. This is the fallacy behind the applicants' argument that the decision is invalid because the Minister did not expressly consider the educational rights of the child, whether under Articles 40.3, 41, 42 or 42A (para. 27 of second supplemental submissions). It is one thing to say that the second named applicant must be afforded educational rights while in the State. It is quite another to say that those rights are a barrier to deportation. They are not. Therefore the decision could not be invalid because of any failure by the Minister to accept that such constitutional rights were a militating factor against removal of an illegal immigrant, or a child born to such an illegal immigrant, from the State.

81. In terms of its effect on the educational or social rights of children (leaving aside family rights in this context), Article 42A makes no, or no significant, difference to the entitlement of the State to deport children who are unlawfully in the State, and is not a basis to obtain relief by way of judicial review of the refusal to revoke a deportation order, or to surmount the difficulty that any claim as to social or educational rights or interests of a child could have been the subject of representations and challenge at the time of the original deportation order.

82. It is not a fatal objection to the Minister's decision that it does not tease out the position in terms of the wording of Article 42A of the Constitution. The issue is whether an applicant's rights have been considered in substance (see *B.I.S. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 398 (Unreported, High Court, Dunne J., 30th November, 2007). The educational position of the second named applicant clearly was considered. But it does not confer on her a right not to be deported.

83. I should finally note under this heading that despite Mr. Moore fully dealing with this matter at the hearing, Mr. Conlan Smyth sought at the eleventh hour to argue that the applicants had not properly relied on the right to free primary education in the application to the Minister and so were disentitled from making the point now. I would reject this objection. Firstly it comes too late in the day. The objection is much closer to a pleading-type objection than a new point of substantive law. In any event, the applicants' submissions do raise educational considerations and best interests. Even if not phrased as fully in terms of legal analysis as has been done in argument, those essential issues were before the Minister and were replied to and addressed.

Was the Minister's decision irrational?
84. The Minister took the view in the considerations for the decision that there was a functioning educational system to which the child could have access. Ms. Boyle criticises this as irrational given the material which the Minister had before her. Unfortunately I cannot agree with this submission as it appears to me that such a conclusion is within the spectrum of decisions that were reasonably open to her on the material she had.

Is the decision invalid by reason of a failure to consider the child's application separately?
85. The applicant relies, under this heading, on the decision of Eagar J. in *C.O.O. (No. 1*) at para. 33 that *"[i]t is in my view not sufficient for the first named Respondent to make a determination to consider the situation of a child born in Ireland (although not an Irish citizen) in conjunction with that of his mother".* To quash a decision because the child's situation was considered "in conjunction with" the mother's situation appears to involve an assertion of a legal obligation on the Minister to make a distinct adjudication as to the application on behalf of the child, separate from that of the mother. But what exactly does "*in conjunction with"* mean? This is not altogether made clear in *C.O.O.*

86. The general rule is of course that a court should follow previous decisions at the same level. To that general rule there are a number of exceptions, and I discussed the circumstances in which a court could depart from a previous decision in my judgment in *R.A. v. Refugee Appeals Tribunal (No. 1*) [2015] IEHC 686 (Unreported, High Court, 4th November, 2015) at paras. 60 and 61, which set out five broad situations where such departure may be justified. I can attempt to summarise those grounds as follows:

> (i) Where the decision was not a formally binding authority in the first instance, for example, because it is distinguishable on the facts or because the decision was persuasive only, such as where particular comments of the court in the previous case are properly to be regarded as obiter;
>
> (ii) Where the previous decision overlooked an important legal provision which could have been determinative, such as a statutory provision or a crucial decided case that was not brought to the court's attention; in other words, that the previous decision was arrived at per incuriam;
>
> (iii) Where the relevance or authority of the previous decision has been undermined by a change in the law since it was delivered, either by way of a change of positive statutory or constitutional law or a development in national (or possibly, where indirectly incorporated into Irish law, international) jurisprudence, or where the relevance of the decision has been undermined by some change in factual circumstances which were assumed or found to exist in the original case, such as for example, where a statutory provision is upheld on the basis of a particular social need, but at a later date, the court's assessment is that society has clearly and significantly changed in the meantime. A decision may potentially be departed from under the "*change of circumstances*" heading where it rests on a finding or assumption as to certain facts, but where a later court receives new and better evidence as to those facts which might cast the legal issues in a clearly different light;
>
> (iv) Where there is a contradiction identified by the court between two or more previous decisions on a particular issue by courts of equal jurisdiction;
>
> (v) Where the later court is of the view that the earlier decision was clearly wrong. While In re *Worldport Ireland Ltd.* [2005] IEHC 189 (Unreported, High Court, 16th June, 2005, Clarke J.) refers to the need to normally follow the decision of another judge of the same court unless there are "*substantial reasons*" for believing that the initial judgment was incorrect, he identifies as one of those substantial reasons, a case where "*there is a clear error in the judgment*", which I am taking as equivalent to the principle established in *Irish Trust Bank Limited v. Central Bank of Ireland* [1976-77] I.L.R.M. 50 per Parke J. that one ground from departing from a decision of a court of equal jurisdiction is that the judgment in question departed in some way from the proper standard to be adopted in judicial determination. Unlike the first four headings (which could potentially, although hopefully not too regularly, arise in relation to a decision of a higher court than that asked to review the previous decision), any departure from a previous decision under this fifth heading is, of course, confined to a previous decision of a court of equal jurisdiction.

87. With the greatest possible respect to the learned judge, there are a number of features of the *C.O.O.* decision that would militate against it being regarded as a decision that should be followed. I will endeavour to summarise these as follows:-

(i) There is a certain opacity in the decision itself insofar as the asserted unlawfulness of deciding a child's case "*in conjunction with*" the mother's case does not relate to any specifically defined steps taken or omitted by the Minister;

(ii) No reasons are given in the judgment for the assertion contained in the quoted passage. In the absence of reasons, a decision does not have precedential status because a *ratio decidendi* is by definition absent;

(iii) Article 42A could not have been of relevance, even potentially, as it was not in force at the time;

(iv) The attention of the learned judge does not seem to have been drawn to *J.O. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 478 (Unreported, High Court, 28th October, 2009) where, at para. 8, Cooke J. accepted that the requirement for individual assessment did not necessitate a distinct inquiry into the child's personal circumstances where the child's claim was based on that of the parents. While that decision was arrived at in the asylum context, it would have to be persuasive as regards the analysis of a child's case in the immigration context. That decision was followed by Clark J. in P.*I. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 368, another case that does not appear to have been drawn to the court's attention in *C.O.O.*;

(v) There is no logical reason why a child's case must be given separate consideration as long as it is considered in substance, for the purposes of s. 3(6) of the Immigration Act 1999;

(vi) The statement of grounds in *C.O.O.*, which has been produced to me, does not allege that the decision was invalid because the child's case was considered in conjunction with the parent's. It alleges (ground 3) that "*The Respondent fails and omits (sic) to consider the Applicants (sic) Constitutional rights; in breach of the law as found in Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] IESC 25". This appears (although I may be misconstruing it) to be a complaint that the applicants' rights were not considered at all; or possibly that they were not lawfully considered; it does not naturally read as a complaint that the child's case was considered in conjunction with the parent's;

(vii) The applicant's written submissions in *C.O.O.,* which have also been produced to me, contend that "*In the case of the child born in Ireland .. there is no examination of his interests undertaken at all; his case being subsumed completely into his mothers (sic)".* Again, and making allowances for the possibility that I may be misconstruing it, this seems to be an allegation of a failure to consider the child's case at all, rather than of having given it consideration, but in conjunction with that of a parent;

(viii) The point on which the case was decided was not addressed in the written submissions of the respondents in *C.O.O.,* which have also been furnished to me by the State as part of their submission that I should not follow this decision;

(ix) The respondents state that not only was this point not raised by the parties but it was not raised at the hearing at all. Mr. Daniel Donnelly B.L. appeared for the State in *C.O.O.*, and while of course not involved in the present proceedings, was present in court when this point arose in the present case. It is the duty of any counsel whether briefed in a particular case or not to assist the court and Mr. Donnelly has very properly volunteered his recollection of the hearing. He stated that the hearing took in the region of 35 minutes with Senior Counsel for the applicant addressing the court in a very summary manner for about 2 minutes (not raising this point) and with the remaining time being given to the respondent to reply. He says there was no further reply on behalf of the applicant;

(x) Mr. Donnelly says that it is the State's position that the first appearance of the point in the case was when it emerged in the judgment as the decisive point on which the relief was granted against the respondents. Mr. Donnelly says that this came as a "*complete surprise"* to the State;

(xi) In the written submissions seeking leave to appeal (which have also been furnished to me), the respondents specifically made the point that the issue regarding the need for separate consideration of parent and child *"was not, indeed, argued in the present case, and that they did no therefore, have the opportunity of answering it before this Honourable Court delivered its judgment".*

(xii) The submissions on leave to appeal also sought leave on the basis that *"the judgment of this Honourable Court has created uncertainty as to the manner in which representations on behalf of parents with young children should be made and the manner in which the First Named Respondent must consider such representations… If correct, the decision of this Honourable Court will have serious consequences for the First Named Respondent… the decision of this Honourable Court will have adverse implications for the Respondents in a large number of pending cases";*

(xiii) The element of the application for leave to appeal relating to the submission that the point had not been argued in the case itself is curiously not recorded in the decision on the application for leave to appeal, *C.O.O. v. Minister for Justice and Equality (No. 2)* [2015] IEHC 329 (Unreported, High Court, Eagar J., 21st May, 2015).

(xiv) In that decision, Eagar J. refused such leave to appeal on this point by reference to what appears to be an assumption that Article 42A would copperfasten his approach and remove any doubt in the matter (paras. 6 and 7);

(xv) As noted above, that analysis of Article 42A (which appears to underlie the refusal of leave to appeal the point which the State says was never argued) is inconsistent with the subsequent decision of the Court of Appeal in Dos Santos.

88. As mentioned above, in *Irish Trust Bank v. Central Bank of Ireland* [1976-77] I.L.R.M. 50 it was held by Parke J. that an earlier decision at the same level as that of a later court may be regarded as not binding if it *"departed in some way from the proper standard to be adopted in judicial determination*" (at p. 50). In context, that is an assessment that cannot be confined to appellate fora and must be made by the High Court in assessing whether to follow another High Court decision. For the reasons I have set out, or any number of them, I unfortunately have to conclude, again with the greatest possible respect to the learned judge, that the decisions in *C.O.O.* (No. 1) and *C.O.O.* (No. 2) are decisions that must be regarded as meeting that test and therefore as decisions not to be followed. In any event they are inconsistent with the subsequent decision of the Court of Appeal in *Dos Santos*. It is lawful for the Minister to consider a child's situation in conjunction with a consideration of that of a parent.

Consequence of the foregoing for the injunction
89. As noted above, an injunction restraining deportation was granted at the leave stage. Having found that the applicants' claim lacks substance and must be dismissed, the basis for that injunction is removed. In the interests of orderly management of the proceedings however I will continue the injunction until the date to be fixed for any consequential applications in order to enable the parties to consider the position in the light of this judgment.

Summary of principles involved
90. I will conclude by attempting to summarise the principles discussed in this judgment as follows:

(i) a party that fails to take a pleading objection in a timely manner, and *a fortiori* a party that fails to take such an objection at the hearing, is precluded from doing so at a later stage;

(ii) s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies to a decision refusing to revoke a deportation order under s. 3(11) of the Immigration Act 1999;

(iii) an applicant is not entitled to relief by way of judicial review challenging a decision refusing to revoke a deportation order on a ground which could have been available to him or her at the time the original order was made, in the absence of a change of circumstances or of *refoulement* arising;

(iv) the right to education including to free primary education is a natural and imprescriptible right of the child to be enjoyed without discrimination on grounds such as nationality, legal status or marital status of parents by any child within the jurisdiction;

(v) such a right only applies while the child is present in the State and does not confer any right not to be removed, even to a country with an inferior social or educational system;

(vi) the right of a non-national child to be or remain in the State is not a natural and imprescriptible right and therefore does not fall within the scope of Article 42A.1;

(vii) insofar as it relates to social or educational rights (leaving aside family rights), Article 42A does not represent an obstacle to deportation of a child and does not require express consideration by the Minister for Justice and Equality, and insofar as it suggests otherwise, or implies a position which amounts to requiring more detailed consideration of the deportation of a child on such grounds, the C.O.O. decision is in my view incorrect;

(viii) it is rationally open to the Minister to conclude that Nigeria has a functioning educational system;

(ix) there is no obligation on the Minister to consider the deportation of a child (or revocation of a deportation order) separately from that of a parent: the C.O.O. decision in this regard is in my view incorrect.

Order
91. For the foregoing reasons I will order:

(i) that the application for *certiorari* be dismissed;

(ii) that, having regard to the finding that leave to appeal to the Court of Appeal is required, the matter be adjourned to a date to be fixed in order to facilitate any application in that regard, and that if the applicants intend to so apply, advance written notice be given of the text of the proposed questions of law grounding such application accompanied by written submissions in support of that application; and

(iii) that the injunction granted in these proceedings will continue until the date fixed for any leave to appeal application, and will then stand discharged unless continued by further order.