Neutral Citation: [2014] IEHC 508

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 333 J.R.]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

SHAHEEN JAVED

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA AND HUMAN RIGHTS COMMISSION

NOTICE PARTIES

JUDGMENT of Mr. Justice Barr delivered the 1st day of October, 2014

Background

1. The applicant was born on 2nd February, 1960 and is a Pakistani national. She arrived in Ireland on foot of a C-Visit Visa on 22nd May, 2011. Her visa lasted for 90 days and covered the period from 29th April, 2011, to 28th July, 2011. The applicant's daughter, son-in-law and two granddaughters live in Cork. Her granddaughters are Irish citizens and were born on 28th May, 2010, and 4th June, 2011, respectively. The applicant's daughter suffers chronic back and leg pain which makes caring for her two young daughters difficult. She therefore requires the applicant's help to look after her two children.

2. The applicant applied to have her permission to remain extended on five occasions between June 2011 and October 2012. Her first application for extension of permission to remain was made by letter dated 14th June, 2011, wherein the applicant's solicitor requested an extension of her visitor's permission to 22nd November, 2011. This request was made on the grounds that the applicant's daughter had experienced health problems during pregnancy and was finding it difficult to cope with her two young children; she therefore needed her mother's assistance. The letter also quoted from the judgment of Hogan J. in *R.X. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 447. It was asserted that as a result of this judgment, the position of the grandparents is now protected by Article 41 of the Constitution. A medical report was submitted on 22nd June, 2011, in support of the applicant's case.

3. By letter dated 23rd June, 2011, the Minister, having considered the application, granted the applicant a three month extension of her visitor's permission, i.e. she was permitted to remain in the State until 30th September, 2011. However, the applicant had already acquired a return ticket to Pakistan and she returned to that country on 20th July, 2011.

4. The applicant was subsequently granted a single C-Visit Visa and re-entered the State on 17th November, 2011. By letter dated 2nd December, 2011, the applicant's solicitor requested an extension of the applicant's permission to remain in the State. This was requested on the basis that the applicant's daughter was suffering from health problems, including significant leg and back pain. The decision of Hogan J. in *R.X.* was again quoted and it was asserted that this judgment meant that the grandparents now had rights under Article 41 of the Constitution. A medical report was furnished by letter dated 7th December, 2011. By letter dated 16th January, 2012, the Minister, having considered the applicant's case, granted as an exceptional measure permission to remain for three months from the date of the letter on Stamp 3 conditions.

5. The applicant's third application for extension of permission to remain was made by letter dated 23rd March, 2012. The applicant applied to have her permission to remain extended and to have her permission changed from Stamp 3 to Stamp 4. This application was made pursuant to s. 4(7) of the Immigration Act 2004. The reason for this application was the applicant's wish to remain in Ireland to help and support her daughter and grandchildren. The letter restated the applicant's daughter's medical conditions and explained that the applicant had a very close bond with her youngest granddaughter; it was noted that the youngest child even called her "*mama*". A medical report was furnished in support of this application.

6. By letter dated 25th April, 2012, the Minister extended the applicant's permission to remain for a third time for a period of three months from 25th April, 2012, until 27th July, 2012. However, the applicant's application for a change of status from Stamp 3 to Stamp 4 was refused.

7. The applicant made a fourth application for extension of permission to remain by letter dated 25th May, 2012. The applicant's solicitors wrote requesting that the applicant's permission be extended long-term. The letter reiterated that the applicant's daughter, due to ongoing back pain, was finding it difficult to care for her two young children. Reference was made to the circumstances of grandparents in light of the judgment of Cooke J. in *O'Leary v. Minister for Justice & Ors* [2012] IEHC 80, and a copy of the judgment was enclosed. The letter explained that the applicant desired a longer term solution to her situation and that she wanted to travel to and from Pakistan to be with her family in Ireland as the need arose. A medical certificate was subsequently submitted by letter dated 8th June, 2012, in support of the application. A further medical certificate was submitted by letter dated 27th July, 2012. These certificates essentially restated the applicant's daughter's medical condition and emphasised what a great help her mother was to her in the care of her two young children.

8. The applicant's solicitors thus requested that the applicant be given a yearly Stamp 3 so that she could come and go to Pakistan as her husband was still living there. By letter dated 31st July, 2012, the Minister granted permission to remain for a further three months from the date of the letter until 31st October, 2012. No reference was made in the letter to the applicant's request for a longer term solution to her situation.

9. The fifth application for extension of permission to remain was made on 23rd October, 2012. Again the applicant's solicitor requested a three month extension to the applicant's visitor's visa. No reply seems to have been sent in response to this letter. The applicant therefore repeated her request on 20th February, 2013. These requests were refused by the Minister by letter dated 22nd March, 2013. In his letter, the Minister stated:-

> *"An examination of the documents in relation to Ms. Shaheen Javed's case indicates that she entered the State for the purpose of a short-term visit on 22nd May, 2011, and was granted visitor's permission on four different occasions over the past year and most recent of which was 31st October, 2012.*
>
> *A visitor stamp should be read as indicating that the Immigration Officer at the port of entry was told by the Non-EEA national that she was coming for a visit of a duration of not more than 90 days and should leave at the end of the permitted period."*

10. The applicant was instructed to make arrangements to leave the State since her visitor's permissions expired on 31st October, 2012. The letter further required that the applicant should provide the Minister with evidence of her departure from the State e.g. a copy of Pakistan Re-entry Stamp, by 15th April, 2013. The letter then continued:-

> *"If evidence of your client's departure from the State is not received by the due date it is the intention of this office to issue a notification under the provision of s. 3(4) of the Immigration Act, 1999 (i.e. a proposal to deport) in respect of Ms. Shaheen Javed."*

11. A report was prepared by the Minister on 20th March, 2013, in relation to the applicant's application for permission to remain under s. 4(7) of the Immigration Act 2004. In this report, the Minister noted the particulars of the applicant's case including her family circumstances and her reason for being in the State. The report stated:-

> *"The decision to refuse Ms. Javed visitor's permission in the State under s. 4(7) of the Immigration Act 2004, does not interfere with any rights which she may have under the Constitution or Article 8 of the European Convention on Human Rights. In any subsequent proposed decision where such interference may arise, please note that full and proper consideration will be given to these rights."*

12. The report continued:-

> *"All representations made on behalf of Ms. Shaheen Javed in support of her application for an extension of visitor's permission have been fully considered. Ms. Shaheen Javed's position is not one which would warrant an extension of her visitor's permission."*

13. It is thus the case that while the Minister had regard to the circumstances of the applicant's case, he did not give consideration to any rights the applicant may have under the Constitution or the European Convention on Human Rights; instead he assured the applicant that any interference with those rights, if such arose, would be given full and proper consideration at a later stage. The Minister was referring to the process under s. 3 of the Immigration Act 1999.

14. By letter dated 17th April, 2013, the Minister, not having been furnished with evidence of the applicant's departure from the State as requested, proposed to make a deportation order against the applicant under s. 3 of the Immigration Act 1999. The reason for the Minister's proposal was that the applicant's permission to remain had expired on 31st October, 2012; that she had remained in the State since that date without the Minister's permission; and that she was, consequently, unlawfully present in the State. The letter outlined the three options open to the applicant under s. 3, including the option to submit written representations to the Minister within 15 days. The letter explained:-

> *"You may also make written representations to the Minister, within 15 working days of the date of this letter setting out reasons as to why a deportation order should not be made against you.*
>
> *You can submit written representations against the making of a deportation order on the enclosed form or in a similar format. Please note that the completed form must be signed by you personally or in the case of a minor, by a parent or guardian.*
>
> *You can attach any additional letters or documents from other people in support of your case when you fill in the form. Please contact us immediately if any of the details you have stated in your representations change after you submit them.*
>
> *If you chose this option it is very important that you understand the following.*
>
> *The Minister will proceed to decide on your case in accordance with the provisions of s. 3 of the Immigration Act 1999 (as amended). If the Minister decides to make a deportation order in respect of you, you will no longer have the option of leaving the State voluntarily i.e. without a Deportation Order.*
>
> *…If a deportation order is made in respect of you, this will place a legal obligation on you to leave the State and to remain outside the State. If no response is received to this letter within 15 working days, it will be assumed that you do not wish to return home voluntarily and that you do not wish to make written representations against the making of a deportation order. In such circumstances, the Minister will proceed to consider your case under s. 3 of the Immigration Act 1999 (as amended) on the basis of the information already on your file."*

Commencement of Proceedings and Reliefs Sought

15. The applicant did not avail of any of the options given to her by the Minister in his letter of 17th April, 2013. Instead, she launched the present proceedings. The notice of motion was lodged on 1st May, 2013. The reliefs sought are, *inter alia*:-

(i) An order of *certiorari* quashing the first named respondent's proposal to make a deportation order in respect of the applicant and communicated to her by notification dated 17th April, 2013, and received by the applicant on 19th April, 2013.

(ii) A declaration that the first named respondent is obliged to put in place a procedure whereby the applicant may make representations that she is entitled to reside in the State on the basis of her rights under the Constitution and the European Convention on Human Rights without risking being permanently excluded from the State should those representations be unsuccessful.

(iii) If necessary, a declaration that s. 3 of the Immigration Act 1999, is repugnant to the Constitution insofar as it provides that a person whose representations for leave to remain in the State are unsuccessful may not elect leave voluntarily within a reasonable time without a deportation order being made against that person (or, if necessary, the entire section).

(iv) A declaration that s. 3 of the Immigration Act 1999, is incompatible with the European Convention on Human Rights and Fundamental Freedoms insofar as it provides that a person whose representations for leave to remain in the State are unsuccessful may not elect to leave the State voluntarily within a reasonable time without a deportation order being made against that person (or, if necessary, the entire section).

16. The particulars of repugnancy and incompatibility with the Constitution and the European Convention on Human Rights are stated as follows:-

(i) The applicant can avoid the risk of deportation being made in respect of her by not making representations and voluntarily leaving the State notwithstanding that she has *bona fide* representations to make.

(ii) The applicant entered the State lawfully and wishes to leave the State without an indelible stain on her character should her representations to the first named respondent be unsuccessful.

(iii) The applicant will be denied the opportunity of leaving the State voluntarily should her *bona fide* representations be rejected.

(iv) Having a deportation order against her will prevent the applicant from re-entering the State to see her daughter, son-in-law and grandchildren.

(v) Having a deportation order against her will disproportionately interfere with the rights to family life of the applicant and her family and will not be in the best interests of the applicant's grandchildren.

(vi) A deportation order will be of force and effect for the remainder of the applicant's life.

(vii) No good reason is served by not giving the applicant the opportunity to leave the State without a deportation order being made against her if her representations are rejected by the first named respondent.

Family Rights

17. Both parties agree that the court does not have to determine the substantive human rights issue, i.e. whether the applicant has family rights such as to entitle her to reside in the State. Counsel for the applicant submitted that he was referring to the substantive family rights claim "*merely in order to show that the applicant has a bona fide right to remain in the State*". He added that to "*have locus standi the applicant must show there is some merit in the case she wishes to make*".

18. The applicant argues that she has family rights pursuant to Article 41 of the Constitution and Article 8 of the European Convention on Human Rights. She bases this assertion on the particular circumstances of her case: the fact that she has an integral role in the care and upbringing of her grandchildren and has, essentially, taken over many parental responsibilities to the extent that the youngest child calls her "*mama*" and calls for her grandmother, the applicant, when she is upset. The applicant's involvement in the family life of her grandchildren goes far beyond the role ordinarily played by grandparents. In this regard, the applicant relies on the judgment of Hogan J. in *R.X. v. Minister for Justice* [2010] IEHC 446, where the learned judge stated:-

"39. In the present case, therefore, the question which first arises is whether the guarantees of family life and the protection of the marriage which are contained in Article 41 can potentially extend to grandparents and to siblings. It is true that Article 41.3.1 commits the State to the protection the institution of marriage 'upon which the family is founded'. But that does not mean that the grandparents and siblings cannot, at least, for certain limited purposes and in certain special situations, come within the ambit of the protection of the family for the purposes of Article 41."

19. Having reviewed and analysed the relevant case law in detail, Hogan J. held:-

"47. The facts of the present case may be thought, however, to provide a paradigm example of where, exceptionally, perhaps, it would be appropriate to regard a grandparent and an adult sibling as coming within Article 41. The first named applicant, Ms. RX, came to Ireland in September, 2004. As the Refugee Appeal Tribunal found in its decision of 6th September, 2005, granting her refugee status, she was enslaved, raped and brutally treated by marauding clans. She managed to flee to Ethiopia and travelled on from there to Ireland. At the time she was forced to leave her three young children (then aged 5 and 2 and nine months respectively) in the care of her mother and sister in Addis Abba. While the mother and sister have no income - they are themselves Somali refugees living in Ethiopia - it is not in dispute but that the children were cared for by the mother and sister while being in receipt of remittances from Ireland from the children's mother, Ms. RX , during the period from 2006 to 2009. During this period, the children must have regarded their grandmother and aunt as their de facto parents.

48. Against this particular and special background, I am of the view that the grandmother and aunt came within the scope of Article 41. Even if I am wrong on this point, it is incontestable that the grandmother and the adult sibling would form a family for the purposes of Article 8 ECHR: see, e.g., the judgment of Edwards J. in M and that of Hedigan J. in G.O. & Ors v. Minister for Justice, Equality and Law Reform [2008] IEHC 190. In that case, Hedigan J. accepted that family life within the meaning of Article 8 of the Convention did exist between the first named applicant and her

grandchildren, having regard to the circumstances of that case."

The Legal Provisions
20. Before turning to the applicant's submissions, it is appropriate to set out Article 41 of the Constitution and Article 8 of the European Convention on Human Rights.

21. Article 41 of the Constitution provides:

> *1 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*
>
> *2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.*
>
> *2 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.*
>
> *2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.*
>
> *3 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.*
>
> *2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –*
>
> > *i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,*
> >
> > *ii. there is no reasonable prospect of a reconciliation between the spouses,*
> >
> > *iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and*
> >
> > *iv. any further conditions prescribed by law are complied with.*
>
> *3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.*

22. Article 8 of the European Convention on Human Rights provides:

> ***Right to respect for private and family life***
>
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The Applicant's Submissions
23. The central issue in this case is whether the absence of a gap in the s. 3 process between the Minister's rejection of representations and the making of a deportation order amounts to an interference with the applicant's constitutional right to make representations.

24. The applicant submits that she has a right to make representations to the Minister and that this right is ancillary to the substantive Article 41 and Article 8 rights asserted and/or is a freestanding right under Article 40.3.1 of the Constitution. The applicant points out that in *Bode v. Minister for Justice* [2008] 3 I.R. 663, the Supreme Court (Denham J.) held that:-

> *"The appropriate process within which to consider constitutional or convention rights of applicants is the process under s. 3 of the Act of 1999. This is the relevant statutory scheme."*

25. However, the price of advancing a human rights claim under s. 3 is the risk of a deportation order. This risk can only be avoided, in the applicant's submission, by choosing the option of leaving the State voluntarily under section 3(4)(b). Because a deportation order would prevent Ms. Javed from seeing her grandchildren for the foreseeable future, and would disrupt her family life enormously, she does not want to risk a deportation order being made. However, the applicant would like to make her case to the Minister without risking a deportation order.

26. The applicant submitted that the point was raised and considered by the Supreme Court in *Haq Nawaz v. Minister for Justice* [2012] IESC 58, which came before the court on a procedural point as to whether the challenge to s. 3 should have been brought by plenary summons or by judicial review subject to the requirements of s. 5 of the Illegal Immigrants (Trafficking) Act 2000. The Supreme Court accepted the Minister's contention that a person challenging the section is in substance challenging each of the steps taken under s. 3 and so s. 5 applies. Clarke J. held that any of the steps taken under s. 3 is open to challenge together with a

challenge to the validity of the section:-

> *"6.9 I can see no reason why, on the facts of this case, a single challenge, brought by judicial review, to any of the measures adopted or to be adopted under s.3 of the 1999 Act coupled with a challenge to the validity of that section could not have been brought. For example a judicial review proceeding in which a declaration was sought that the Minister was obliged to provide for a suitable gap between the notification of an adverse decision on humanitarian leave and the making of a deportation order could have been brought. Such a proceeding could have sought a declaration that any deportation order made without providing for such a gap would be invalid. The application could further have suggested that a constitutional construction of s.3 required that such a gap necessarily be implied but that if, contrary to that assertion, the section mandated that no such gap be allowed, the section was inconsistent with the Constitution. Variations on that theme could also, of course, have been contemplated. "*

27. The reference to a declaration that the Minister be obliged to provide for a gap arose out of discussion in *arguendo* during the hearing of the appeal. However, it does not appear possible to give s. 3 a compliant construction while remaining faithful to the language of the section.

28. The applicant submitted that she was the grandparent and carer to two Irish citizen children. She stated that she was part of their household together with her daughter and son-in-law. The applicant contended that she was part of the family unit with rights protected under Article 41 of the Constitution and Article 8 of the Convention.

29. The applicant relied on the following paragraph from the judgment of Hogan J. in the *R.X.* case:-

> *"46. Thus far we have been dealing with the question of whether there was any a priori rule of constitutional interpretation by which grandparents (and, by extension, adult siblings) were excluded from the scope of the family life envisaged by Article 41. For such persons to come within the scope of the constitutional protection, it is, however, necessary to demonstrate that they have such ties of dependence and inter-action with other family members that they would come within the rubric of that family and that the family itself is based on marriage. This normally pre-supposes that a person such as a grandparent would share the same house as the other family members in question and that they would have an active role in the comings and goings of the family in question. A grandparent could not, for example, be regarded as a family member simply by reason of ordinary social courtesies or even by reason of regular visits to the grandchildren's family home. While each case must turn on its own facts, something further than the ordinary inter-action between a grandparent and a grandchild or other family member would generally be required. This, as it happens, is also the position of the European Court of Human Rights with regard to Article 8 ECHR: see, e.g., Marckx v. Belgium (1979) 2 EHRR 330, Boughanemi v. France (1996) 22 E.H.R.R. 228."*

30. The applicant wishes to make representations to the Minister that she fulfils the criteria as set out in *R.X.* and that her rights can be vindicated only by permitting her to reside in the State.

31. The applicant submitted that it was settled law that the Minister is not obliged to consider an immigrant's constitutional and convention rights until representations are made under section 3. That proposition was set down by the Supreme Court in *Bode v. Minister for Justice* [2008] 3 I.R. 663 as follows:-

> *"92. The appropriate process within which to consider constitutional or convention rights of applicants is the process under s. 3 of the Act of 1999. This is the relevant statutory scheme…*
>
> *95. Consequently, it is my view that there is no free standing right of the second applicant to apply to the Minister. The appropriate procedure is under s. 3 of the Act of 1999, as amended, with the potential right to apply under s. 3(11) in the future if the need to make such an application should arise…*
>
> *99. The Oireachtas has established a statutory scheme providing that the Minister, in considering the situation of foreign nationals, shall have regard to a wide range of issues when making a decision under s. 3 of the Immigration Act 1999, as amended. Constitutional and Convention rights are appropriately considered at that stage. If there is a change of circumstances then an application may be made to the Minister to consider further matters under s. 3(11) of the Immigration Act 1999, as amended."*

32. The applicant submitted that under s. 3(3)(a) where the Minister proposes to make a deportation order, he must notify the immigrant of that proposal. Section 3(4) requires the notification to give the immigrant the following three options:-

> (a) make representations to the Minister within 15 working days;
>
> (b) leave the State before the Minister decides the matter; and
>
> (c) consent to the making of a deportation order.

33. Where the applicant makes representations, the Minister must consider them in the light of the factors set out in section 3(6). The Minister will either be persuaded to alter his original proposal to deport, or he will not and if not, he proceeds to make the deportation order.

34. The applicant submitted that s. 3 does not allow for a gap between the rejection of representations even those based on human rights considerations, and the making of the deportation order. She submitted that the section could not be read so as to allow for a gap between the rejection of representations and the making of the deportation order. If the Minister was not persuaded by the representations to alter his course, he would proceed to make the deportation order. Therefore, it was argued the price of advancing a human rights claim was the risk of a deportation order. That risk can be avoided only by electing for the option contained in s. 3(4) (b) of voluntarily leaving the State without having the human rights claim considered.

35. It was submitted that the effect of a deportation order for the applicant was that she would be unlikely to see her grandchildren again, because her son-in-law lacked the funds to bring his family to Pakistan. Her absence would disrupt the family unit as she was a member of the family and was the primary carer for her granddaughter, Samreen. It was stated that the applicant did not wish to risk a deportation order being made, but she also wanted to make her case to remain on human rights grounds to the Minister.

36. The applicant submitted that she must establish that she has a right inhering in the Constitution and/or the Convention to have

her human rights–based application considered. That is because the court is not concerned with whether or not she should succeed in an application to the Minister to remain on human rights grounds; that is a matter for the Minister. What the court is concerned with is the alleged infirmity in s. 3 insofar as it imposes what the applicant describes as an unnecessary impediment on the right to apply to the Minister, i.e. by failing to provide a gap between the rejection of the representations and the making of a deportation order.

37. The applicant contended that she had a right inhering in the Constitution and the Convention to apply to remain based on human rights grounds:-

> (a) in order to render the substantive right to family life effective; and/or
>
> (b) as a freestanding right under Article 40.3.1 of the Constitution.

38. The first alternative is that the existence of a substantive right carries with it a right to apply to the appropriate forum to vindicate that right. In the case of the Convention, the principle of effectiveness is expressly guaranteed by Article 13. The case law of the European Court of Human Rights provides many examples of the application of the principle of effectiveness. In *Airey v. Ireland* [1979] 58 ILR 624, for example, the court emphasised the principle of effectiveness of the exercise of a right when it held:-

> *"The Government contend that the application does enjoy access to the High Court since she is free to go before that court without the assistance of a lawyer. The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily."*

39. On this basis, the applicant submits that the guarantee of family life in Article 8 of the Convention implies a right to apply to the appropriate forum to vindicate that right.

40. The Constitution does not contain an express guarantee of effectiveness and the case law on the right at issue in *Airey* – access to the courts – has been determined under the rubric of unenumerated rights guaranteed by Article 40.3.1 of the Constitution, rather than on the principle of a right to an effective remedy. Nonetheless, the case law whereby the courts will grant injunctions to restrain the breach of constitutional rights shows that the substantive rights will be rendered effective. This was expressly considered by Hogan J. in *Sullivan v. Boylan* [2012] IEHC 389, who echoed the language in *Airey* in holding that the courts must craft the appropriate remedy to make constitutional rights effective and not merely illusory:-

> *"21. While the courts are generally reluctant to grant injunctions to enforce the criminal law (cf. the judgment of the Supreme Court in Attorney General v. Lee [2000] IESC 80, [2000] 4 I.R. 65), different considerations obtain where that illegal conduct violates the constitutional rights of a private individual: see, e.g., the judgment of the Supreme Court in Lovett v. Gogan [1995] 3 I.R. 132 and, by analogy, the judgment of Macken J. in Pierce v. Dublin Cemeteries Committee (No.1) [2009] IESC 47, [2010] 2 I.L.R.M. 73. The fact, moreover, that Mr. McCartan unblushingly continued with his practice of harassing the plaintiff even after the Gardaí had spoken to him points to the objective necessity for judicial intervention if the plaintiff's right to secure the protection of her person (Article 40.3.2) and her dwelling (Article 40.5) is to be effective and not merely illusory."*

41. On this basis the applicant submitted that her rights under Article 41 and Article 8 implied a right to apply to the appropriate forum (the Minister) to consider those rights. Additionally, the applicant contends that she has a right under Article 40.3.1 to apply to the appropriate forum in order to vindicate her rights, be they constitutional or Convention rights.

42. The cases on rights ancillary to court proceedings are relevant to the applicant's situation because in each type of case there is a forum for the determination of rights but an impediment to accessing it.

43. Before *McCauley v. Minister for Post and Telegraphs* [1966] I.R. 345, the fiat of the Attorney General was required to commence actions against Ministers of State. The requirement was challenged in that case. Kenney J. summarised the plaintiff's argument as follows:-

> *"The plaintiff's argument was that the requirement of the fiat for an action against a Minister of State is a denial of or is an unnecessary interference with the right of the citizens to have recourse to the Courts to vindicate their rights."*

44. Kenny J. held that the requirement of the *fiat* as an unconstitutional fetter on the right of access to the courts. He held:-

> *"That there is a right to have recourse to the High Court to defend and vindicate a legal right and that it is one of the personal rights of the citizen included in the general guarantee in Article 40, sect. 3, seems to me to be a necessary inference from Article 34, sect. 3, sub-sect. 1, of the Constitution which provides:—'The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.' If the High Court has this full original jurisdiction to determine all matters and questions (and this includes the validity of any law having regard to the provisions of the Constitution), it must follow that the citizens have a right to have recourse to that Court to question the validity of any law having regard to the provisions of the Constitution or for the purpose of asserting or defending a right given by the Constitution for if it did not exist, the guarantees and rights in the Constitution would be worthless."*

45. The applicant submitted that in *McCauley* the substantive right claimed was not a human right, it was an entitlement to have a telephone connected speedily. Nonetheless, the existence of a forum to determine that right gave the plaintiff a right under Article 40.3 of access to that forum. In *McCauley*, the forum was the High Court (hence the reference to Article 34); in the present applicant's case it is the Minister. *McCauley* is authority for the proposition that Article 40.3.1 gives a right of access to the appropriate forum.

46. This is amplified by *O'Donoghue v. Legal Aid Board* [2006] 4 I.R. 204, in which the right to a prompt decision on an application for legal aid was "*based primarily on Article 40.3 of the Constitution".* The applicant also opened *The State (Healy) v. Donoghue* [1976] 1 IR 325. This was not a case concerning the right of access to the decision making forum but one of an impediment to putting the best case forward. As O'Higgins C.J. stated:

> *"Facing as he does the power of the State which is his accuser, the person charged may be unable to defend himself adequately because of ignorance, lack of education, youth or other incapacity."*

47. The Supreme Court held that a person cannot be "*shut out*" of the opportunity of putting his best case forward and declared a right to legal aid as a means of vindicating that right. Henchy J. held:-

> *"There is a guarantee that a citizen shall not be deprived of his liberty as a result of a criminal trial conducted in a manner, or in circumstances, calculated to shut him out from a reasonable opportunity of establishing his innocence; or, where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances."*

48. Finally, there is no impediment to non-citizens relying on rights protected by Article 40.3.1. In *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360, the Supreme Court held:-

> *"It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights. In Murphy v. Greene [1990] 2 I.R. 566 at p. 578 Griffin J. observed 'it is beyond question that every individual, be he a citizen or not, has a constitutional right of access to the courts. Stated in its broadest terms, this is a right to initiate litigation in the courts …'"*

49. The applicant contends that the principles concerning the right of access to the courts to litigate a rights based claim are in substance the same as those governing the right of access to the Minister to advance a human rights based application.

50. Therefore, the applicant contends that she has a right inhering in the Constitution (as ancillary to Article 41 and/or under Article 40.3.1) and under the Convention (under Article 8 and/or Article 13) to have access to the Minister to make her case for leave to remain based on her human rights under Article 41 and Article 8.

51. Although not opened to the court by either party in this case, regard should also be had to the decision of the Supreme Court in *Dellway Investments v. National Asset Management Agency* [2011] 4 I.R. 1. This case recognised that the constitutional right to fair procedures encompasses a right to make representations to a decision maker who is going to make a decision affecting a person's rights or interests. Therefore, "*the right to apply*" or the "*right to access*" a public decision maker (in this case, the Minister) has already been found by the Supreme Court to be a constitutional right, under the umbrella of fair procedures in the form of a right to make representations. The applicant was thus correct in his submission that there is a constitutional right to make representations.

52. The issue arising in *Dellway Investments* was whether the applicant borrowers were entitled to be heard before NAMA decided to acquire the applicants' loans pursuant to s. 84 of the National Asset Management Agency Act 2009. Section 84 did not expressly give borrowers, whose loans were being acquired, an opportunity to make representations to NAMA prior to a decision to acquire being made. NAMA proposed to make a decision on this issue without hearing from the applicants at all. The Supreme Court held that the constitutionally guaranteed right to fair procedures encompasses a right to make representations to a public decision maker who is taking a decision that affects one's rights or interests and that the procedures under s. 84, in order to conform to constitutional justice, must be read as including a right to be heard.

53. Hardiman J., at para. 299 of the report, quoted with approval the following passage from De Smith's internationally used work on judicial review of administrative action (6th Ed. 2009, Sweet and Maxwell) by Woolf, Jowell and Le Sueur:-

> *"The term 'natural justice' has largely been replaced by a general duty to act fairly which is a key element of procedural propriety. On occasion, the term 'due process' has been invoked. Whichever term is used, the entitlement to fair procedures no longer depends upon the adjudicative analogy, nor whether the authority is required or empowered to decide matters analogous to a legal action between two parties. The law has moved on; not to the state where the entitlement to procedural protection can be extracted with certainty from a computer, but to where the courts are able to insist upon some degree of participation in reaching most official decisions by those whom the decisions will affect in widely different situations, subject only to well established exceptions"*

54. The learned judge held that this passage represented the law in Ireland. Hardiman J. further held that the trigger for the right to fair procedures is that "*the person claiming them is a person 'affected' by the decision*" or has "*an interest in the outcome*". Having reviewed the relevant case law, Hardiman J. held that this has been the trigger for fair procedures in Ireland for at least 40 years.

55. The learned judge concluded that a person "*affected*" by the exercise of a discretionary power by a public authority is entitled to be notified and heard before the power is exercised in a manner to which he takes exception. Hardiman J. went on to endorse the judgment of Hamilton C.J. in *Haughey v. Moriarty* [1999] 3 I.R. 1, as follows:-

> *"[332] Although not cited to us on the hearing of this appeal, my colleagues Fennelly and Macken JJ. have attached considerable importance to the decision of this court in Haughey v. Moriarty [1999] 3 I.R. 1 and, on reflection, I agree with what they say and would adopt the portions cited by them. This case was, of course, grounded in a context quite different to the present one. The applicants complained that a tribunal of inquiry had infringed their constitutional rights by addressing orders for wide ranging discovery to a number of financial institutions with which they did business without notice to them. Hamilton C.J., in giving the judgment of this court said at p. 75:-*
>
> > *'Fair procedures require that before making such orders, particularly orders of the nature of the orders made in this case, the person or persons likely to be affected thereby should be given notice by the Tribunal of its intention to make such order, and should have been afforded the opportunity prior to the making of such order of making representations with regard thereto.'*
>
> *[333] The similarity in phrasing, in defining the class of persons whose rights to a hearing were triggered, is manifestly very similar to the 'affected person' language used in the other cases cited."*

56. Fennelly J. held at para. 460 of his judgment:-

> *"[460] It does not appear to me that it has been established that the right to be heard before a contemplated decision is made depends on establishing interference with a specific and identifiable legal right. It is difficult to discern a*

principled basis for restricting the right in that way. The courts have never laid down rigid rules for determining when the need to observe fair procedures applies. Everything depends on the circumstances and the subject matter. The fundamental underlying principle is fairness. If a decision made concerning me or my property is liable to affect my interests in a material way, it is fair and reasonable that I should be allowed to put forward reasons why it should not be made or that it should take a particular form. It would be unjust to exclude me from being heard."

57. *Dellway Investments* is authority for the proposition that there is a constitutional right to fair procedures in the making of a discretionary decision by a public official or officials, based on the status of the person claiming such fair procedures as a person who is or may be 'affected' or 'adversely affected' by such a decision, and that right encompasses the right to be heard. It is not necessary to establish that the decision at issue will affect legal or constitutional rights in order for the right to fair procedures to be triggered. The applicant, consequently, does not have to show that she has family rights; it is sufficient that she is a person who will be "*affected*" by the Minister's decision under s. 3. The applicant clearly is such a person. Accordingly, she has a constitutional right to fair procedures and that right encompasses the right to make representations.

58. The applicant submitted that the Minister was entitled to restrict the right to make even a human rights based application where it is proportionate with the end to be achieved. Where it is not proportionate, a restriction on the right will render the enactment repugnant to the Constitution and/or incompatible with the Convention.

59. The test on proportionality was set out in the judgment of Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593:-

"In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (see, for example Times Newspapers Ltd. v. United Kingdom (1979) 2 E.H.R.R. 245) and has recently been formulated by the Supreme Court in Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right as little as possible, and

(c) be such that their effects on rights are proportional to the objective."

60. *King v. Minister for the Environment (No. 2)* [2007] 1 I.R. 296, is a recent example of a statutory provision being struck down for being a disproportionate interference with a constitutional right. The impugned provision contained a requirement that a non-party candidate for election must marshal 30 nominators to sign his nomination papers. There is no constitutional right to have a particular mode of nomination for election. However, there is a constitutional right to run for election and the plaintiff contended that the restriction contained in the enactment impeded him from exercising that right. It was not impossible for him to gather the nominators, but it was difficult. The Supreme Court agreed that the impediment was disproportionate. Murray C.J. held:-

"62. The court is also satisfied that this aspect of the statutory provisions, imposed by virtue of s. 46(4B) carries a real risk of impeding a candidate from lodging validated nomination papers within a reasonable time after the first date for the lodgment of such papers. There is a further real risk that a potential candidate would have to devote a disproportionate amount of time over a disproportionate period of the election campaign to making such arrangements. The court considers that such an imposition is prima facie disproportionate to the particular objective to be achieved, namely the due authentication of the nomination papers. There was evidence tendered by the State in the High Court to the effect that the designation of the local authority headquarters as the office at which such nomination papers had to be authenticated was necessary in order to carry out such authentication in a secure manner since that is the location not only of the electoral register but the only place at which an updated version of the electoral register is to be found. Considering that this aspect of the measures in question is prima facie disproportionate to the objects sought to be achieved, that provision must be considered incompatible with the Constitution in imposing an undue impediment on the otherwise lawful right of the candidate to be nominated unless the State can establish there are objective reasons why this is necessary. Notwithstanding the evidence given on behalf of the State the court is not satisfied by that evidence that there are no other administrative arrangements which are significantly less onerous regarding the verification of a signature on a nomination paper. It is not for the court to designate what other form of administrative arrangements might be provided for in legislation."

61. In the present case, the impediment that the applicant complains of is the absence of a gap between the rejection of representations and the making of the deportation order. The applicant contends that there is no good reason for that absence and so it is arbitrary and unfair. They submit that it impairs the right to make representations significantly by making her decide whether to gamble on not seeing her grandchildren in the foreseeable future for the possibility of having her representations accepted by the Minister. The applicant submitted that it is difficult to apply the test at (c) in *Heaney* because it is not easy to discern an objective for the absence of the gap.

62. Finally, the applicant dealt with the assertion made by the respondent that the proceedings were premature because a deportation order had not been made in respect of the applicant and may never be made. The applicant stated that this was the opposite position to that taken by the Minister in *Haq Nawaz v. Minister for Justice* [2012] IESC 58. In that case, the Minister contended that Mr. Nawaz was in breach of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, by not having challenged the notice of intention to deport issued under s. 3(3). The Supreme Court noted:

"5.7 In the context of the argument as to whether it was possible to separate a decision under s. 3(3)(b)(ii) from a deportation order counsel for the State relied on Lelimo v. Minister for Justice, Equality and Law Reform [2004] 2 I.R. 178, where Laffoy J. held that the making of a deportation order cannot be challenged by impugning its execution. Execution was, it was pointed out, a purely administrative act in which the Gardaí have no discretion. Similarly, counsel for the Minister submitted that the notification to deport and the deportation order itself are inseparable as the deportation flows naturally from the notification."

63. The Supreme Court agreed. Clarke J. held:-

> *"6.9 I can see no reason why, on the facts of this case, a single challenge, brought by judicial review, to any of the measures adopted or to be adopted under s.3 of the 1999 Act coupled with a challenge to the validity of that section could not have been brought."*

64. The applicant submitted that she had complied with that direction. She brought a challenge to the first measure adopted under s. 3, i.e. the service of the notice of intention to deport coupled with a challenge to the validity of that section. Section 5(1)(a) of the 2000 Act makes the notice of intention to deport reviewable. Had she not adopted this course, she would have been vulnerable to the same argument made by the State in *Nawaz*.

The Respondents' Submissions

65. The respondent submitted that the notion of "*family*" under the Constitution had traditionally been interpreted by reference to the marital family, given the importance of marriage to the constitutional definition of the family. Article 41.1.1 of the Constitution provides:-

> *"The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law."*

66. Article 41.3.1 provides:-

> *"The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."*

67. The respondent submitted that the notion of "*family*" and "*marriage*" are intertwined under the Constitution. They submitted that in *Murray v. Ireland* [1985] I.R. 532, Costello J. defined "*marriage*" as a Christian notion of a "*partnership based on an irrevocable personal consent given by both spouses which establishes a unique and very special life-long relationship*". Traditionally, this was understood to mean that only the nuclear family based on marriage fell within the definition of "*family*" for the purposes of Article 41. The respondent pointed out that in the judgment of Hogan J. in *R.X. v. Minister for Justice* [2011] 1 ILRM 444, the learned judge did not find that all grandparents fell within Article 41 of the Constitution. While he acknowledged the possibility that grandparents could form part of the family for the purposes of Article 41, he specifically linked this to the particular circumstances of the family members involved. He stated that the fact that marriage was and is regarded as the bedrock of the family contemplated by the Constitution, does not mean that other close relatives could not, at least under certain circumstances come within the scope of Article 41.

68. The respondent submitted that relying on Article 8 case law, Hogan J. went on to state that grandparents would not always fall within the definition of "*family*". This judgment was influenced by Article 8 case law and the respondent submitted that it was by no means clear that it was permissible to interpret the Constitution by reference to that case law.

69. The respondent stated that there was binding Supreme Court authority in the *State (Nicolaou)v. An Bord Uchtála* [1966] I.R. 657, *J.K. v. K.W.* [1990] 2 I.R. 43, and *WOR v. E.H. (Guardianship)* [1996] 2 I.R. 248, to the effect that non-marital mothers do not have rights in relation to their natural children by virtue of Article 41. However, these mothers clearly would enjoy "*family life*" within the meaning of Article 8, so the scope of the articles are not equivalent and it was submitted that an incorrect approach to the interpretation of Article 41 was adopted in *R.X.* It was submitted that the definition of the family which flows from those Supreme Court decisions is binding on this Court.

70. It was submitted, furthermore, that even if the Article 8 case law were relevant to the interpretation of the particular provisions of Article 41, it should be noted that the learned judge did not consider the impact of the unlawfulness or precariousness of the presence of a family member in the State and how these factors would affect the rights of the illegal immigrants in light of the undoubted entitlement of the State to regulate the entry and stay of non-nationals.

71. These issues were also considered in *O'Leary v. Minister for Justice* [2012] IEHC 80, where Cooke J. stated at para. 10 that he accepted that the core value enshrined in Article 41 was the entitlement of the family to order its own internal life and affairs without interference from the State unless such interference is objectively justified in the interest of the individual members of the family and were necessary in the overriding public interest. He went on to state:-

> *"For the purpose of assessing the protection to be afforded by Article 41, what is important is the context in which the family relationship falls to be assessed, not how it is defined. For the State to intervene to remove a new-born child from its mother and father is clearly a potentially serious interference in that newly created family relationship requiring compelling justification. For the State to intervene justifiably to prevent, on the other hand, the reunification of an adult with his or her parents, falls to be assessed differently from the point of view of the proportionality of that interference. The legality of the State's intervention depends upon the evaluation of the matrix of the circumstances of the individuals concerned in each case and the State's justification for its intervention."*

72. It was submitted that the learned judge made it clear that he was basing his assessment on the Article 8 case law. The respondent submitted that this failed to recognise the express link between the family and marriage in Article 41. They stated that it was difficult to see how the relationship between adult children and their parents could fall to be assessed by reference to family rights pursuant to Article 41, when that article stresses that marriage is the basis of the family to which reference is made in that article.

73. The respondent submitted that it was important to stress that the issue did not really call for consideration in this case. This applicant was permitted to enter the State on a visitor's visa and had been in the State unlawfully since 31st October, 2012. Prior to that she enjoyed only short term permissions to remain in the State. Her status was that of a visitor and it was never represented that she was entitled to reside in the State. The respondent submitted that in those circumstances, the matters referred to by Cooke J. in *O'Leary* were all matters which were required to be considered under s. 3 of the Immigration Act 1999, in any event, as both "*family and domestic circumstances*" and the common good, including the legitimate interest in immigration control, had to be considered by the Minister pursuant to s. 3(6) before any deportation order could be made. Dunne J. has stated in *BIS v. Minister for Justice* [2007] IEHC 398, that the requirement in s. 3 to consider "*family and domestic circumstances*" constituted "*respect*" for family life as required by Article 8.

74. It was notable that the learned judge expressly rejected the argument that the adult child of a family composed of a married couple and a number of minor siblings, including an Irish citizen child, did enjoy "*family life*" with either his minor siblings or his parents. This was despite the fact that he was still very young and had only recently attained his majority.

75. The respondent submitted that in this case, the Minister had not yet been given an opportunity to consider any of the family and domestic circumstances of the applicant. As a result, the substance of the applicant's alleged rights under Article 8 and Article 41 is not in issue in the within proceedings and any challenge based on her "*rights*" under the Constitution or Convention remained to be determined. In the circumstances, it was submitted that any challenge on this basis must be regarded as being premature.

76. The respondents then turned to look at the adequacy of the procedure under s. 3 of the Immigration Act 1999. They submitted that the second issue in the proceedings which, in their view, was the only one which truly arose at this point, was the claim that the s. 3 procedure did not adequately vindicate the applicant's "*human rights claim*" as the applicant could only avoid the risk of a deportation order by abandoning her human rights claim and leaving the State.

77. The respondents accepted that s. 3(3) of the Immigration Act 1999, created the situation where if representations made pursuant to that section did not persuade the Minister not to make a deportation order, he would then immediately proceed to make one. The applicant contends that an additional layer or administrative procedure should be interposed at this point. However, that is not what the section provides for. Section 3(3) provides as follows:-

> *"(a) Subject to subsection (5), where the Minister proposes to make a deportation order, he or she shall notify the person concerned in writing of his or her proposal and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that he or she understands.*
>
> *(b) A person who has been notified of a proposal under paragraph (a) may, within 15 working days of the sending of the notification, make representations in writing to the Minister and the Minister shall—*
>
> > *(i) before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and*
> >
> > *(ii) notify the person in writing of his or her decision and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that the person understands."*

78. The respondent submitted that from subs. (3) alone, it was relatively clear that the procedure which was in question in this case was a simple proposal to make a deportation order, with a consideration of representations. The key decision, and indeed the only decision which is being made, is whether or not to make a deportation order pursuant to s. 3 of the Act of 1999. It is, of course, the practice of the Minister if the decision is not one to make a deportation order, to grant an actual permission to remain in the State, as otherwise the person the subject of the proposal letter would be in the State unlawfully. The Minister grants leave to remain so as to regularise the position of the non-national if, having considered all of the matters in s. 3(6), he decides to refrain from making a deportation order.

79. In doing so, the Minister is complying with s. 3(4) which provides that a notification of a proposal shall include a statement that the person concerned may make written representations within 15 working days, or they may leave the State before the Minister decides the matter or they may consent to the making of a deportation order.

80. The respondent submitted that s. 3 is concerned with the making of deportation orders. It confirms a power to make such orders and identifies the classes of persons in respect of whom they can be made. It also identifies the procedures to be employed and, in line with the principles identified in *East Donegal Co-Op v. Attorney General* [1970] IR 317, those provisions are supplemented by such procedures as are required to observe the principles of natural and constitutional justice. Otherwise, the situation is covered by the statute in question.

81. It would, therefore, appear that the practice for granting permission to remain in the State flows from the general position that no non-national may be in the State without permission of the Minister: see ss. 4 and 5 of the Immigration Act 2004. The nature of what is in fact under consideration in the s. 3 procedure was described by Hardiman J. in *F.P. v. Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164, as follows:-

> *"The applicants had been entitled…to apply for asylum and to remain in Ireland while awaiting a decision on this application. Once it was held that they were not entitled to asylum, their position in the State naturally falls to be considered afresh, at the respondent's discretion. There was no other legal basis on which they could then be entitled to remain in the State other than as a result of a consideration of s. 3(6) of the Act of 1999. In my view, having regard to the nature of the matters set out at sub-paras. (a) to (h) of that subsection, the decision could be aptly described as relating to whether there are personal or other factors which, notwithstanding the ineligibility for asylum, would render it unduly harsh or inhumane to proceed to deportation. This must be judged on assessment of the relevant factors as, having considered the representations of the person in question, they appear to the respondent. These factors must be considered in the context of the requirements of the common good, public policy, and where it arises, national security.*
>
> *To put this another way, each of the applicants was, at the time of making representations, a person without title to remain in the State. This fact constrains the nature of the decision to be made. The legislative scheme is that such a person may be deported. If this were not so, such persons would be enabled in effect to bypass the normal system of application for entry into the country, made from outside."*

82. The respondent submitted that the net issue, therefore, was whether a person who had remained in the State unlawfully, was entitled, in the context of the s. 3 procedures, to a two-stage procedure. The applicant had submitted that this flowed from the constitutional and/or Convention rights.

83. The respondents pointed out that as stated by Dunne J. in *BIS v. Minister for Justice* [2007] IEHC 398, Article 8 of the European Convention on Human Rights does not prescribe any particular domestic procedure by reference to which Article 8 must be vindicated. A similar view has been taken of Article 41 rights in *Bode v. Minister for Justice* [2008] 3 I.R. 663. In both cases, the court was satisfied that the s. 3 procedure was adequate to respect and/or vindicate the rights in question. The respondent submitted that the applicant had misstated the effects of *Bode* in her written submissions; that decision does not state that s. 3 is the only procedure by reference to which Article 41 rights may be considered. However, it does state that the s. 3 procedure is adequate for that purpose. That case concerned an infant citizen and the Supreme Court explicitly rejected the suggestion that the constitutional rights of the child must be considered in a prior application for permission to remain in the State before the deportation order process could be engaged in.

84. It was submitted that that case is therefore authority for the proposition that, in order to vindicate constitutional rights under Article 41 (and these were undoubtedly engaged in that case because the child might have been separated from his parents, who were non-national and subject to a deportation order) it would be perfectly adequate to consider those rights in the context of the s. 3 procedure. The respondent submitted that that authority was binding on the court and it disposed of the issue raised in the within proceedings.

85. In summary, the respondent submitted that reliance on the applicant's alleged constitutional or convention rights as a grandmother was premature given that the Minister had not been given a chance to consider the "*family and domestic circumstances*" of the applicant as part of the deportation process, a process which the Supreme Court has said is adequate to vindicate the constitutional rights of Irish citizen infants when it is proposed to deport their non-national parents.

86. The respondent submitted that the facts of this case demonstrated clearly why the s. 3 process, which presents the Minister with the alternatives of granting permission to remain or making a deportation order is constitutional and fair. Immediately prior to the sending of the s. 3 proposal which is challenged in the within proceedings, the applicant was refused leave to remain in the State. That decision was made on 22nd March, 2013, and has never been challenged. It was pointed out that the applicant had been unlawfully in the State since 31st October, 2012, but she nevertheless had the advantage of an application to remain prior to service of the proposal letter.

87. The respondent submitted that it was not the case that such a procedure was necessary in every case. However, the applicant was afforded that procedure and her complaint in relation to s. 3 amounts to a complaint that notwithstanding that she has never challenged the outcome of that application for leave to remain, she is entitled to go through that process all over again.

88. The respondent submitted that the s. 3 procedure was lawful, constitutional and indeed fair and the applicant's assertion of constitutional and Convention rights is premature as the s. 3 procedure is adequate to vindicate any rights which she may enjoy by virtue of her status as a grandmother.

89. In *Bode v. Minister for Justice* [2008] 3 I.R. 663, the second applicant applied to the Minister for permission to remain in the State, as the father of an Irish born child, the first applicant. The first applicant's mother, the third applicant, had previously been granted such permission. The second applicant applied under the IBC 05 Scheme. This scheme was a revised set of administrative arrangements for the consideration of applications from parents of Irish born children who were born in Ireland before 1st January, 2005, for permission to remain in the State.

90. The IBC 05 Scheme was introduced after a constitutional amendment to change the law to exclude a child born to parents, neither of whom was entitled to Irish citizenship at the time of the child's birth from automatic Irish nationality and citizenship. Applications were accepted for a limited period of time between January and March 2005. A general policy was adopted of granting applications provided certain conditions were fulfilled, one of which was proof of continuous residence in the State since the birth of the child. Most applications were disposed of by simply verifying that the person qualified within the terms of the scheme and had submitted the appropriate documentation, rather than engaging in a substantive analysis of the legal rights of the Irish citizen child or the foreign national parent.

91. In *Bode*, however, the Minister had refused the second applicant's application on the grounds that he had not provided sufficient evidence of continuous residency in the State since the birth of his Irish born child. The respondent generally sent a letter to applicants who had omitted to supply documentation or information but failed to do so in this case. The applicants brought judicial review proceedings seeking, *inter alia*, an order of *certiorari* quashing the respondent's decision and a declaration that the respondent's refusal to grant the second applicant permission to reside in the State was in breach of his rights under the Constitution and the European Convention on Human Rights.

92. The relevant issue in *Bode* for present purposes is the applicant's argument that their constitutional and Convention rights were at issue in the IBC 05 Scheme. Denham J. held that this argument, which had been accepted by the High Court, was misconceived. The learned judge explained:-

> *"78. I am satisfied that the scheme was an exercise of executive power by the Minister. It did not purport to address, nor did it address, constitutional or Convention rights. It was a scheme with clear criteria. On the face of the documents the criteria were applied to the second applicant, and he failed to meet the criteria.*
>
> *79. As the IBC 05 scheme did not address constitutional or convention rights, applicants who were not successful were left in exactly the same position as they had been prior to their application. There was no interference with any constitutional or convention rights. Consequently, it was an error on behalf of the High Court to consider the application of the scheme as an arena for decision making on constitutional or convention rights, whether they be as considered by the High Court: (1) the rights of the child under Articles 40.3 and 41 of the Constitution; (2) rights under article 8 of the European Convention on Human Rights; or (3) rights under article 14 of the Convention or other rights. It follows, also, that in establishing the criteria for judicial review, the High Court took too expansive an approach. Neither constitutional nor convention rights were in issue, at issue was whether or not the Minister acted within the stated parameters of the executive scheme."*

93. Denham J. went on to hold in respect of s. 3:-

> *"82. The fact that the applicant failed on his IBC 05 scheme application does not mean that constitutional or convention rights will not be considered. The IBC 05 scheme is entirely separate from the Minister's function under the Immigration Act 1999, as amended, where a decision may be made as to whether or not a deportation order should be made in respect of a foreign national.*
>
> *83. In making a deportation order the Minister must comply with s. 3 of the Immigration Act 1999, as amended. The Minister is required to have regard to a wide range of matters in s. 3(6) of the Immigration Act 1999. This section states:-*
>
> > *'In determining whether to make a deportation order in relation to a person, the Minister shall have regard to –*
> >
> > *(a) the age of the person;*

(b) the duration of residence in the State of the person;

(c) the family and domestic circumstances of the person;

(d) the nature of the person's connection with the State, if any;

(e) the employment (including self employment) record of the person;

(f) the employment (including self employment) prospects of the person;

(g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);

(h) humanitarian considerations;

(i) any representations duly made by or on behalf of the person;

(j) the common good; and

(k) considerations of national security and public policy, so far as they appear or are known to the Minister.'

84. Thus, bearing in mind the case law of this court, the Minister is required to consider in this context constitutional and convention rights of the applicants. This statutory process provides a forum for consideration of the relevant rights. The s. 3 process is sufficiently wide ranging for the Minister to exercise his duty to consider constitutional or convention rights of the applicants. This has yet to be done in this case as the pre-existing deportation order has been quashed on consent."

94. The learned judge further held at paras. 92 – 95 of her decision:-

"92. The appropriate process within which to consider constitutional or convention rights of applicants is the process under s. 3 of the Act of 1999. This is the relevant statutory scheme.

93. In addition, within the statutory scheme there is provision to revoke a deportation order, see s. 3(11) of the Act of 1999, which states:-

'The Minister may by order amend or revoke an order made under this section including an order under this subsection.'

94. Thus, a person, such as the second applicant, could notify the Minister of any altered circumstances since the making of a deportation order, such as the birth of an Irish born child. On such notification the Minister would have a duty to consider the new information to determine whether to revoke a deportation order. As the statutory scheme makes this provision for such an application, there is no need to seek a further process for a right to apply. The integrity of the system should be maintained, as long as it protects the rights of the applicants, which it does in this case.

95. Consequently, it is my view that there is no free standing right of the second applicant to apply to the Minister. The appropriate procedure is under s. 3 of the Act of 1999, as amended, with the potential right to apply under s. 3(11) in the future if the need to make such an application should arise."

95. In *Bode*, the Supreme Court clearly held that the s. 3 process is appropriate and adequate for the consideration of any constitutional and convention rights which the applicant may have.

Conclusions

96. I am satisfied that there is a constitutional right to make representations to the Minister in advance of his making a decision to issue a deportation order. The applicant has a right under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights to have her circumstances considered by the Minister prior to making a deportation order. This is catered for in s. 3 which provides that a person can make written representations within 15 days of receiving notification that the Minister intends making a deportation order. In the *Bode* case, the Supreme Court made it clear that the making of representations pursuant to s. 3 of the 1999 Act was the appropriate forum to have such representations considered by the Minister.

97. The fact that if the applicant is unsuccessful in her representations, the Minister will then go on to make a deportation order without any further option allowing the applicant to voluntarily leave the State is not an impediment to the applicant's right to make representations to the Minister. While it is a possible consequence of the making of representations, and while it may operate as a deterrent to some applicants and may be a deterrent to the applicant in this case, it is not an unconstitutional or unlawful interference with the exercise of her constitutional right to make representations to the Minister as to why a deportation order should not be made in her case.

98. The situation is similar to the exercise by a plaintiff of his right of access to the courts to litigate a civil claim. If he is unsuccessful in the action, he may suffer an award of costs against him. This is a possible consequence that he may face. It is something that he must weigh up when deciding whether or not to commence litigation. It may well be a deterrent to his mounting of the action, but it is not an interference with the exercise of his right of access to the courts.

99. Accordingly, I am of the view that the scheme provided for in s. 3 of the Immigration Act 1999, safeguards the right of the applicant to make representations to the Minister prior to any deportation being made. It is a sufficient protection to the applicant to make representations under Article 41 and Article 8. The absence of a gap between the considering of the representations and if unsuccessful the making of the deportation order is not a breach of the applicant's constitutional rights or rights under Article 8 of the ECHR. I refuse the applicant's application for the reliefs herein.