Neutral Citation [2012] IEHC 104

THE HIGH COURT

[2011 No. 972 JR]

BETWEEN

AO

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL (No.3)

RESPON DENTS

JUDGMENT of Mr. Justice Hogan delivered on 3rd April, 2012

1. This is now the third judgment which I am required to give in these judicial review proceedings involving the applicant, Mr. O. In the first judgment (*AO v. Minister for Justice and Law Reform* [2012] IEHC 1) I set aside the original grant of leave to apply for judicial review by reason of material non-disclosure. In the second judgment (*AO v. Minister for Justice and Law Reform* (No.2) [2012] IEHC) I grant a limited interlocutory injunction such as would enable the applicant to apply to the District Court for access in respect of his infant daughter. The applicant now seeks to leave to apply for judicial review and, furthermore, seeks an interlocutory injunction restraining the respondent Minister from deporting him during the minority of his daughter.

2. The facts, so far as relevant, must now be briefly re-stated. The applicant is a Nigerian national who arrived in the State on a flight from Bratislava in March 2009. He was found by the immigration authorities at Dublin airport to be in possession of a stolen Nigerian passport and an Austrian identity card. The applicant subsequently pleaded guilty before the Cloverhill District Court to being in possession of stolen property whereupon he received a six month sentence.

3. The applicant had claimed asylum upon his arrival in the State. The claim was rejected by the Refugee Appeal Tribunal on 25th November 2009 on the ground that his account of likely persecution was not credible. A claim for subsidiary protection was also rejected on 9th August 2011 and the applicant was then informed that the Minister had made a decision to deport him (advance warning of this possibility having previously been communicated to him in January 2010).

4. The applicant then sought to have the deportation order revoked pursuant to s.3(11) of the Immigration Act 1999 ("the Act of 1999") on the ground that he had two Irish citizen children. One those children lives with her mother, Ms. B., in the United Kingdom, from which the applicant has been excluded by reason of an earlier conviction for dishonesty. The applicant has limited contact with that child and the position of that child can be disregarded so far as the present application for leave to apply for judicial review and injunction application is concerned.

5. The other child, Baby C., was born in December 2010. She was born to Ms. K., an Irish citizen. Ms. K. is professionally qualified and she spends approximately two weeks each month in the United Kingdom. She formed a romantic relationship with the applicant and she found herself pregnant in April 2010. There is a factual dispute as to whether the pregnancy was (or was not) planned, but it seems that the relationship foundered at this point when Ms. K. found what she claimed were compromising messages from another female on his mobile telephone.

6. While Mr. O. sought guardianship and access to the child in March 2011 , Ms. K. regards these applications as entirely opportunistic and as merely a tactic so that his paternity of the child can be used to his advantage for immigration purposes. She further maintains that the first endeavours by him to seek such access came after the publicity surrounding the decision of the Court of Justice on 8th June 2000 in Case C- 34/08 [2011] E.C.R. 1-000, a point which, if correct, tends to re-inforce her contention that Mr.O.'s endeavours in this regard are purely self-serving and tactical.

7. As things stand, therefore, there seems very little prospect that Ms. K. and Mr. O. can be reconciled, not least given that the distressing circumstances of the break-up of the relationship. Nor is there any prospect that Ms. K. would follow Mr. O. to Nigeria or that she would have any inclination to visit him there. The stark reality, therefore, is that in the event that Mr. O. were deported, Baby C. would have no contact whatever with him and there is every likelihood that she would never again see her father during her childhood.

8. It is against this general background that the applicant advances a variety of different ground s in his application for leave and an injunction. Some of these grounds relate to his own personal circumstances (such as, for example, the challenge to the subsidiary protection decision), while the majority of the arguments are directed at the question of his access to Baby C. We may now consider these arguments in turn. Having evaluated these arguments, I will then exam ine the question of whether it would be appropriate to grant an injunction.

The subsidiary protection argument

9. The applicant maintains that the Minister breached the requirements of Article 4(1) of the Qualification Directive, Directive 2004/83/EC in that he contends that the Minister was obliged to submit a draft ad verse decision to him for his comments prior to the final decision being taken. The applicant had contended that he had been engaged to a Muslim woman, but that he had fled Nigeria as a result of threats from third parties who objected to the fact that she was marrying a Christi an and that his fiancée had been murdered in the process. The Minister had rejected the claim on the basis that Nigeria had a functioning police force, but that applicant says that he did endeavour to seek police protection and that it was unavailing.

10. As the parties themselves acknowledge, this issue is likely to be determined by the outcome of the decision of the Court of Justice in Case C-277/11 *MM*. The oral hearing in that case took place on 28th March 2012 and a judgment is anticipated later this calendar year. In these circumstances, I propose to adjourn this application for leave pending the outcome of that judgment.

Article 39 of the Procedures Directive and judicial review as an adequate remedy

11. The applicant further contends that the fact that there is no right of appeal against the refusal of subsidiary protection amounts to a denial or his right to an effective remedy as guaranteed by Article 39 or the Procedures Directive. While Article 39 applies to applicants for asylum, the clear intent of the Union legislator is that these procedures should also apply to applications for international protection such as subsidiary protection: see Article 3(3). It would appear that Ireland is the only country to maintain a dual system of protection (*i.e.,* so that the applications for asylum and subsidiary protection are examined separately) so that in this particular situation Article 39 does not apply.

12. This issue was comprehensively addressed by Cooke J. in *A. v. Minister for Justice and Equality* [2011) IEHC 381 where he observed:-

> "13. ...the Procedures Directive applies only to the procedures employed by the Member States in processing claims for refugee status (asylum claims) except where, as provided for in Article 3(3), a Member State employs a form of unified procedure for the processing of joint applications for both forms of international protection. The scope of the Procedures Directive is defined in Article 3(1): "This Directive shall apply to all applications for asylum made in the territory, including at the border or in the transit zones of the Member States, and to the withdrawal of refugee status". Article 3(3) then provides:
>
> > "Where Member States employ or introduce a procedure in which asylum applications are examined both as applications on the basis of the Geneva Convention and as applications for other kinds of international protection given under the circumstances defined by Article 15 of [the Qualifications Directive] they shall apply this Directive throughout their procedure."
>
> 14. Accordingly, except where a Member State employs a single or unified procedure covering both forms of protection, the Procedures Directive imposes no minimum procedural standards in respect of the processing of applications for subsidiary protection.
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> 15. In a report to the European Parliament and the Council on the application of the Procedures Directive in 201 0 (Brussels 8/9/1 0 COM(201 0) 465 final) the European Commission pointed out that all Member States other than Ireland had put in place such a single procedure for the processing and determining of both applications for refugee status and subsidiary protection usually with a single determining authority for both. As the Court also pointed out in the above judgment, such a unified procedure is optional and Ireland has not been under any legal obligation to employ it. It follows that the "right to an effective remedy" conferred by Article 39 of the Procedures Directive applies only to appeals against decisions listed therein, all of which are decisions taken in the course of the asylum process. It is only where a single procedure for both forms of international protection is employed that Article 39 has the effect of extending the right to an appeal to the subsidiary protection procedure by virtue of Article 3.3. fn effect, what is provided for and what appears to occur in all Member States other than this one, is that the examination and assessment of the asylum claim simultaneously forms the basis of analysis and assessment of the application for subsidiary protection. Where an asylum claim is rejected because of, for example, the lack of nexus to a Convention persecution reason, the same determining authority considers whether the claim as made nevertheless qualifies for subsidiary protection. The criteria for qualification for subsidiary protection are applied to the same facts, personal history and conditions that have been found established in assessment of the asylum claim."

13. It is thus clear that Article 39 does not apply to applications for subsidiary protect ion. Even if it did, I consider that judicial review remains a perfectly adequate remedy in this context for all the reasons I set out in my judgment in *Efe v. Minister for Justice, Equality and Law Reform* [2011] I EHC 214. On a n application for judicial review, the Court can control for vires, reasonableness, rationality and material error of fact on the part of a decision maker adjudicating subsidiary protection applications.

14. Contrary to the argument advanced by Mr. O'Shea for the applicant, that conclusion is not, I think, fundamentally affected by the recent judgment of the Supreme Court in *Donegan v. Dublin City Council* [2012] IESC a case where the Court granted the applicant a declaration of incompatibility under s. 5(2) of the European Court of Human Rights Act 2003 in respect of s. 62 of the Housing Act 1966. As it clear from the terms of the section, the District Court was obliged to make the order granting a local authority possession of a dwelling "once [the District Court judge] is satisfied that the demand mention in the said subsection (1) has been duly made, issue the warrant." In *The State (0'Rourke) v. Kelly* [1983] I.R. 58 the Supreme Court confirmed that this imposed a mandatory obligation on the District Court to make the order sought once the statutory proofs were established to the Court's satisfaction. The Court, in an unreserved judgment, rejected a challenge to the constitutionality of the section on the ground that it constituted an impermissible invasion of the judicial function.

15. To modern eyes the case which was made by the applicant in 0'Rourke would seems a remarkably narrow basis on which to mount a constitutional challenge. The section seems distinctly vulnerable to challenge on a variety of other quite different constitutional grounds. How could, for example, such a rudimentary procedure allowing for the termination of a tenancy in a dwelling seem compatible with protection of the inviolability of dwelling, save in accordance with law as provided for by Article 40.5? This is especially so where the law interfering with that right must respect fundamental constitutional values and the principle of proportionality as the Supreme Court so recently confirmed in (an admittedly different) context in *Damache v. Director of Public Prosecutions* [2012] IESC 11 .One might likewise contend that this summary procedure violated the guarantee of fair procedures in that the Court was effectively precluded from taking account of a range of factors which ought objectively to have been relevant to the question of whether the tenancy ought to be summarily terminated. This might include factors such as the length of the tenancy, any improvements made by the tenant and the tenant's compliance with his or her obligations under the lease.

16. Be that as it may, the key point is that section 62 was found by the Supreme Court in *Donegan* to be inherently flawed and incapable of giving either substantive or procedural protections vis-a-vis the tenant's Article 8 ECHR rights. As McKechnie J. observed (at para. 1 28):-

> "When considering the adequacy of judicial review as a sufficient safeguard in the context it must be done by reference to the s. 62 application; the question is whether judicial review will provide a sufficient safeguard against a n interference by virtue of the provisions of that section. In this regard, it is patently clear that it could not. ..Certainly the court, on judicial review could not enter into an assessment of the facts of personal circumstances behind the application- such matters are not even within the consideration of the District Court Judge. Judicial review of s. 62 application could in no way be capable of resolving a conflict of fact between the Council and a person subject to the application."

17. By contrast, the position with regard to subsidiary protect ion is quite different. Unlike s. 62 of Housing Act, the European Communities (Eligibility for Protection) Regulations 2006 impose no such artificial limitations upon the decision maker who is required to

arrive at the decision untrammelled by any such a priori constraints. The applicant presents the case for subsidiary protection and the decision maker must take all relevant considerations into account.

18. As McKechnie J. made clear in *Donegan*, the question of the adequacy of judicial review cannot be evaluated in the abstract, but rather depends on the general statutory context against which the remedy of judicial review i s required to operate. If - as was the case with s. 62 of the 1966 Act- the statute contains in-built substantive limitations on the scope of review, then judicial review cannot (o r, at l east, is unlikely to be) a mount to an adequate remedy, since judicial review cannot, so to speak, vault over those legislative limitations. But where such limitations exist, the normal remedy is to challenge the constitutionality of the provision, see, e.g., *White v. Dublin City Council* [2004] IESC 35, [2004] 1 I.R. 545, *Blehein v. Minister for Health and Children* [2008] IESC 40, [2009] 1 I.R. 275.

19. I mention these considerations simply to show the exceptional nature of statutory provision at issue in *Donegan* and why the observations of McKechnie J. must be understood against that background.

20. Given that the 2006 Regulations contain no such in-built limitations, then I would respectfully adhere to the views I expressed in *Efe* and would venture to suggest that the conclusions which I reached in that case have not been altered so far as asylum and immigration matters are concerned by the observations of McKechnie J. in *Donegan*. It follows accordingly that I would refuse to grant the applicant leave to challenge on both the Article 39 ground and the adequacy of judicial review ground.

Whether the applicant is entitled rely on *Ruiz-Zambrano* and also to invoke the EU Charter of Fundamental Rights
21. The applicant now seeks to invoke two divergent streams of European Un ion law in order to stay the enforcement of the deportation order. The first line of argument is based on Baby C.'s citizenship of the Union as recognised by Article 20TFEU, whereas the second argument concerns Article 24 of the EU Charter of Fundamental Rights.

22. While it has to be acknowledged that this argument was not pressed strongly on this occasion at least, it seems appropriate to deal with it nonetheless. So far as Article 20TFEU is concerned, this was interpreted by the Court of Justice in Case C- 34/08 *Ruiz-Zambrano* [2011] E.C.R. I-000 as meaning that a Member State could not take action against a third party national with dependent minor children in that Member State where those children are also EU citizens and reside if this had the effect of obliging such children to leave the territory of the Un ion. As I explained at greater length in my judgment in AO (No.2), the applicant cannot realistically invoke *Ruiz-Zambrano* in the present case. Baby C. is not dependent on Mr. O. (who, in any event, has not contributed to the child 's upkeep) and, as an Irish citizen, her right (and that of her mother, Ms. Y.) to reside in Ireland derives from Article 9 of the Constitution and not at all from European Union law. Nor is there any prospect that Baby C. will be obliged to leave the territory of the Union even if Mr. O. were to be deported.

23. I n these circumstances, I do not think that Mr. O. can establish substantial grounds by which the execution of the deportation order can be stayed on *Ruiz Zambrano* grounds and I would accordingly refuse to grant leave to apply for judicial review on this ground.

24. The applicant further relies on Article 24(3) of the EU Chatter of Fundamental Rights which provides that:-

> "Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with *both* his or her interests, unless that is contrary to his or her interests." (emphasis supplied)

25. It is difficult to disagree with Mr. O'Shea's submission to the effect that if Mr.0. is deported it would be difficult to see how Baby C could maintain any personal relationship with her father or have any direct contact with him were he to be deported to Nigeria. Indeed, given the nature of the estrangement between her parents, the (relative) inaccessibility of that country from Ireland and the potentially indefinite nature of any deportation order, the stark probability is that, as we have already noted, Baby C. will never see him again.

26. Nor can it presently be said that permitting supervised access to Baby C. on the part of Mr. O. would be contrary to her interests. It is true that Mr. O. has a criminal conviction and that in the course of his ruling on the issue of access, Judge Lindsay observed that Mr. O's appreciation of honesty and truthful ness was "casual at best". Furthermore, Judge Lindsay also found that Mr. O. had made a threat to abduct Baby C. to Ms. K., even though he considered that Mr. O. did not have the wherewithal to remove her from the jurisdiction. It was for this reason- among others- that Judge Lindsay directed that any access should be supervised.

27. The fact remains, however, that Judge Lindsay did direct that Mr. O. have limited supervised access. The very fact that he did so means that this court must proceed on the basis that such contact is positively in Baby C.'s interests and, furthermore, that refusal access would not be contrary to her interests.

28. Yet it is here unnecessary to pronounce upon the exact meaning and scope of Article 24(3) of the Charter at this juncture, save to observe in passing that the words of this provision, certainly if taken at face value, might yet have considerable implications for immigration law and practice. It is unnecessary to give any concluded view on this question, because it is equally plain from the so-called horizontal provisions of the Charter determining its scope and application that Article 24(3) (like the remainder of the substantive provisions of the Charter) is triggered only where a Member State is "implementing Union law": see Article 51 (1).

29. When, therefore, is a Member State implementing Union J aw? It is impossible at this juncture to essay a complete and exhaustive definition of this term, certainly in the absence of further guidance from the Court of Justice. There i s certainly a spectrum of possibilities here, ranging from those cases where, on the one hand, a Member State exercises a discretionary power conferred upon it by Union legislation to those other cases at the other end of the spectrum where the events in dispute concerning are wholly internal to that Member State and simply concern domestic law.

30. A good example of the former category of case is supplied by the judgment of the Court of Justice in Cases C-411/10 and C-493110 *N.S.* [2011] E.C.R. I-000. Here the question was whether a Member State was "implementing" Union Jaw in the sense of Article 51 (1) in considering whether to exercise a discretionary power conferred directly on Member States by the Dublin Regulation. Perhaps not surprisingly, the Court answered this question in the affirmative:-

> "64 Article 51 (1) of the Charter states that the provisions thereof are addressed to the Member States only when they are implementing European Union law.
>
> 65 Scrutiny of Article 3(2) of Regulation No 343/2003 shows that it grants Member States a discretionary power which forms an integral part of the Common European Asylum System provided for by the FEU Treaty and developed by the

European Union legislature.

66 As stated by the Commission, that discretionary power must be exercised in accordance with the other provisions of that regulation.

67 In addition, Article 3(2) of Regulation No 343/2003 states that the derogation from the principle laid down in Article 3(1) of that regulation gives rise to the specific consequences provided for by that regulation. Thus, a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of Regulation No 343/2003 and must, where appropriate, inform the other Member State or Member States concerned by the asylum application.

68 Those factors reinforce the interpretation according to which the discretionary power conferred on the Member States by Article 3(2) of Regulation No 343/2003 forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the Common European Asylum System. Thus, a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51 (1) of the Charter."

31. Less straightforward cases present more difficulty. It may well be that where, for example, the State exercises a discretionary power pursuant to the European Arrest Warrant Act 2003 that the Charter will apply, although this matter is not at all free from difficulty, as Edwards J. acknowledged in *Minister for Justice and Equality v. D.L.* [2011] IEHC 248. Other difficult questions may possibly arise regarding the scope of application of the Charter where this is said to be triggered by the presence of possibly accidental factors of nationality and free movement in circumstances which might otherwise suggest the happening of events purely internal to this Member State. Might the Charter apply to the issues in the present case if, for example, Ms. K. happened to be a Belgian national who was exercising free movement rights in this State?

32. It is not necessary for me to examine these wider questions because, as I have already noted, the right of Ms. K. and Baby C to reside in this State derives entirely from Article 9 of the Constitution by virtue of their status as Irish citizens. Neither can the deportation power of the State be said to derive from European Union law, since as reflected in the Immigration Act 1999 - it is rather a legislative expression of the inherent right of all states under international law to regulate and control their own borders: see, *e.g.*, the comments of Keane J. and Denham J. in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26.

33. It i s, of course, true that both the Qualification Directive (2004/83/EC) and the Procedures Directive (2005/85/EC) approximate the minimum substantive and procedural rules applicable to asylum application in respect of the law of each Member State. The Immigration Act 1999 nonetheless remains an item of autochthonous legislation and, in this respect, it is, for example, quite different from the European Arrest Warrant Act 2003. While the Act of2003 gives effect to an EU Framework Decision which fundamentally re-placed all pre-existing intra-European extradition law, this cannot be said of the Act of 1999 which pre-dates both the Qualification Directive and Procedures Directive. Of course, the situation might well be otherwise if asylum and immigration matters were fully harmonised at EU level, so that national laws dealing with these matters were replaced by new legislation which operated exclusively within the confines of EU legislation and which was designed to transpose same.

34. For the moment, however, the Act of 1999 remains an item of purely domestic legislation and in exercising a discretionary power thereunder (such as the power to deport), the State is not "implementing" Union legislation in the sense envisaged by Article 51 of the Charter. If, however, the State is not implementing Union law (as I have so found), then the substantive provisions (including Article 24(3)) of the Charter can not apply. For these reasons, I have concluded that the applicant cannot establish substantial grounds in respect of this issue and I would accordingly refuse the applicant leave to app l y for judicial review on this ground.

Whether this Court has a jurisdiction to join Baby C to the proceedings and to override the views on her mother regarding her welfare?

35. Perhaps the most important question which is presented by this application is the extent to which this Court can take account of the interests of Baby C over and above the wishes of her mother and sole guardian, Ms. K. Through her solicitor, Mr. Stewart, Ms. K. has made plain her objections to Mr. O. As far as she is concerned, she was cruelly deceived by him. She maintains that she had been unaware of his illegal immigration status or the fact that he served a prison sentence for possession of a stolen passport, but that now that these facts have come to light since the break-up of her relationship she would wish to sunder all contact with him.

36. So far as these proceedings are concerned, Ms. K. insists that Mr. O.'s interests in the welfare of his daughter is entirely opportunistic and that Baby C is merely a cat's paw in a wider strategic battle on his part to avoid deportation. It is for these reasons that she has refused to give her consent to have Baby C named as a party to the proceedings. It is important to stress here that Ms. K. is the sole guardian of the child and that Mr. O. currently merely has limited (and supervised) access to the child by virtue of a District Court order.

37. The question of whether consent should be given to have a young child added to civil proceedings would normally be a matter exclusively for the parents of that child. Counsel for the applicant, Mr. O'Shea, has mentioned instances of where a child under the age of majority has been added as party to civil proceedings in circumstances where the title of the proceedings describes the child as suing through a next friend such as a relative. While this has doubtless happened on instances too numerous to mention, this is presumably with the tacit consent of the parents or guardians. In ordinary circumstances it would not be permissible for a litigant to add a child to the proceedings without such consent, since this would otherwise cut across the authority of the parents with respect to their child.

38. In the present case, therefore, Ms. K. is entitled to refuse to give such consent and this Court- as part of the judicial arm of the State - cannot interfere unless the conditions specified in Article 42.5 of the Constitution are satisfied.

39. This general question of the Court's jurisdiction to notify a child of litigation affecting his or her interests was examined at a length by Laffoy J. in an important judgment, *Z v. Y*, High Court, 23rd May, 2008. In that case a child was born to the first defendant during her marriage to the second defendant. The plaintiff claimed, however, that he was the biological father of the chi ld (called by the fictitious name of Jane in the judgment) who was now aged about 15 years, even though she had lived all her life with the defendants and considered her mother's husband to be her father.

40. The plaintiff, however, sought to have the birth certificate altered to reflect the fact of his paternity. While An tArd Chlaratheoir refused to re-register the child in the name of the plaintiff on the ground that as the child was the off-spring of a married couple, their consent to such change was accordingly necessary. The couple in question steadfastly refused to give such consent.

41. The plaintiff then proceeded to challenge the constitutionality of the relevant statutory provision (s. 22(3) of the Civil Registration Act 2004) which effectively precluded him from seeking to have the registration altered. At that point the issue arose as to whether Jane was entitled to be notified as to the existence of the proceedings which concerned her welfare and general interests. Laffoy J. held that Jane had an entitlement to such notice by virtue of her constitutional right to fair procedures.

42. Laffoy J. continued:-

> "... it is settled law that the courts have a constitutional jurisdiction to intervene to protect the constitutional rights of a child whether legislation exists or not. As a general proposition, it seems to me that a harmonious interpretation of the relevant Articles of the Constitution, Articles 40,41 and 42, would indicate that the preconditions for the exercise of the State, including the courts, of its duty under Article 40.3 to intervene against the wishes of the parents to protect the constitutional rights of a child should be no less stringent than the preconditions to the State supplying the place of the parents in Article 42.5, so that, in addition to the duty arising only in exceptional cases, there must also have been a failure on the part of the parents in their duty towards their children."

43. At an earlier stage of the proceedings a child psychologist gave evidence in 2007 to the effect that it was in Jane's best interests that she be told that there was an issue as to her paternity, but by 2008 the defendants still could not bring themselves to inform her of these issues. On this point Laffoy J. observed that:-

> "it is the defendants who have the primary right and duty to ensure that steps arc taken to enable Jane's constitutional right to information about the 2004 proceedings, so that she is given an opportunity to have her views in relation to the issues thereby raised taken into account, to be given effect to. The State, through the medium of the court, can only step in if the defendants have failed in their duty."

44. Laffoy J. went on to hold that the couple had failed in that duty by not informing Jane of proceedings manifestly affecting her welfare in circumstances where they had been advised by expert child psychologists that it was in her interests that she be so informed.

45. How, then, should the principles in *Z v. Y* be applied to the present case? Leaving aside the obvious age differential, the underlying principle nevertheless is that this Court is empowered to take steps to protect the child's best interests in respect of proceedings affecting its welfare in circumstances where the parents or parents have failed in their duty for the purposes of Article 42.5?

46. In *Z v. Y* it was (relatively) easy to hold that the parents had so failed in circumstances where the proceedings concerned something as fundamental as Jane's paternity and where they had (for whatever reason) spurned the opportunity to tell her themselves, despite having been afforded ample time by the court within which to do so and even though they had been advised that it was in her best interests that she be so informed.

47. The present case is nothing as clear-cut and, ideally, the court would have had the benefit of the views of an expert child psychologist, as happened in *Z. v. Y* Ms. K. evidently now regards Mr. O. as a disreputable scoundrel whose endeavours to assert guardianship rights and to seek access in respect of Baby C she views as purely opportunistic and tactical. One can accordingly understand why she does not wish to give these endeavours any assistance and, indeed, from her perspective, the choice is a perfectly rational one.

48. Nonetheless, viewed objectively, this choice- for all its inherent rationality cannot be regarded as being in the best interests of the child. The difficult and painful circumstances of the break-up of her parents' break-up notwithstanding, the child is entitled to know and have access to both parents, save where this would not be in her best interests. Critically, however, the District Court has taken the view that some supervised access is to be permitted.

49. For all the reasons set out by me in my judgment in *AO v. Minister for Justice and Equality (No.2),* the inter-action of Article 40.1, Article 41, Article 42.1 and Article 42.5 is such as that all children- irrespective of their marital status - have the presumptive right to the care and company of both their parents. In these circumstances, I must regrettably conclude that, viewed objectively, Ms. K. has failed in her duty to protect one of the "natural and inalienable rights of the child" (to use the language of Article 42.5) insofar as she has objected to the child having some access to her father. I should stress that this is not intended in any way as a personal criticism of Ms. K. - who, I am quite satisfied, as at all times acted with perfect propriety and great dignity in an extremely difficult personal situation- but this conclusion is simply a result of a judicial endeavour to protect the what the Constitution deems to be a fundamental feature of the rights of the child.

50. In this sort of case, nevertheless, it falls to the judicial branch of government in the first instance to ensure that these rights are appropriately protected. How the right might be protected is a matter to which I will presently return.

The lack of candour and poor conduct of the applicant

51. For the Minister, Mr. Conlan Smyth emphasised the fact that the applicant should be denied relief on discretionary grounds having regard to his general lack of candour and *bona fides*. There is no doubt but that Mr. O.'s conduct in this State since he arrived has left a great deal to be desired. Here one can point to his possession of stolen goods and the fact that I have already set aside the grant of l eave to apply for judicial review on grounds of lack of candour. To this might be added the fact that District Judge Lindsay has already animadverted to the applicant's casual attitude to truth telling.

52. One could not disagree with any of this. If one viewed the position of Mr. O. in isolation, it would have to be said that he has few, if any, personal merits and he would through his own (often deplorable) conduct have long since forfeited any entitlement to interlocutory relief. But I am not looking at the position of Mr. O. in isolation, as I am rather assessing the issues in this case rather entirely from the perspective o f his daughter, Baby C. I am not seeking to protect Mr. O's rights vis -a vis Baby C., but rather to protect her "natural and imprescriptible" right to have his care and company for the purposes of Article 42.5.

Whether the applicant ought to have applied to the Minister to revoke the order under s. 3(11) of the Act of 1999?

53. Mr. Conlan Smyth has argued forcefully that the applicant ought not to be able to seek the kind of extraordinary relief which he seeks without first having applied to the Minister under s. 3(11) of the Act of 1999 to revoke the deportation order in the light of the new circumstances. In principle, this is correct, albeit that i t is subject to important qualifications.

54. The relief which this Court can give is essentially precautionary and short- term. It would not be appropriate, for example, that this Court should be asked to give some sort of open ended injunction during the minority of Baby C, although this seems to be the

logical consequence of the argument now advanced. Here it must be recalled that all branches of the government are bound by the Constitution and the laws. It would be preferable, certainly in the first instance, if a solution to the problem at hand was first devised by the Minister. He is, after all, the person who has been vested by the Oireachtas with responsibility for immigration matters and he is plainly best placed to weigh all the competing considerations The Oireachtas has, moreover, stipulated that no non-national should be in the State save with the permission of the Minister.

55. In these circumstances, the court should refrain from devising a prescriptive remedy of long term duration, but should rather look to the executive branch for a solution of this kind. As I ventured to suggest in my judgment in *Kinsella v. Governor of Mountjoy Prison* [2011] I EHC 235, this sort of constructive engagement between the judicial and executive branches is one which is often best in harmony with the separation of powers, not least where (as here) the Minister has to balance many considerations (including the integrity of the asylum system) in devising a solution.

Conclusions
56. In conclusion, therefore, I propose to adjourn the applicant's challenge to the subsidiary protection decision insofar as it relates to Article 4 of the Qualification Directive. I will grant the applicant leave to amend his pleadings to assert the relief discussed in this judgment insofar as it concerns the rights of Baby C under Article 41 and Article 42 of the Constitution and, if needs, be, Article 8 ECHR. I will correspondingly grant the applicant leave to apply for judicial review staying the enforcement of the deportation order on this ground. It is not, however, necessary for Baby C to be made a party to the proceedings, as the Court can have regard to her best interests even without a formal joinder.

57. So far as injunctive relief is concerned, it would not be appropriate to grant the applicant the kind of open-ended relief which he seeks for all the reasons set out in this judgment. Acting, as I believe I am bound to do in order to vindicate the constitutional rights of the child under Article 42.5, I will, however, grant the applicant an interlocutory injunction restraining his deportation until June 30th 2012, but this is expressly subject to the condition that the applicant apply in the meantime to the Minister to revoke the deportation order pursuant to s. 3(11) of the Act of 1999.

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

Approved