Neutral Citation [2016] IEHC 478

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 436 J.R.]

BETWEEN

I.R.M., SARAH JANE ROGERS AND S.O.M. (A MINOR SUING BY HER FATHER AND NEXT FRIEND, I.R.M.)

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of July, 2016

1. The first named applicant is a national of Nigeria. The second named applicant is an Irish citizen. The third named applicant is the child of the first two applicants, and is also an Irish citizen. The first two applicants are not married to each other but are in a relationship which appears to be ongoing.

2. The first named applicant arrived in the State in December 2007 and applied for asylum. This was refused by the Refugee Applications Commissioner. He appealed to the Refugee Appeals Tribunal, and on 30th June, 2008, was notified that his appeal had been refused. He applied for leave to remain on 9th September, 2008, and made a subsidiary protection application on 24th November, 2008, both of which applications were refused.

3. In the course of his asylum application he had stated that he had a partner in Nigeria and a son who was five years old at the time.

4. A deportation order was made against him on 30th October, 2008, and sent to him on 6th November, 2008. No judicial review proceedings were launched in respect of the validity of the deportation order.

5. Despite his illegal presence in the State, the first named applicant has worked unlawfully here. The deportation order in this case was followed in a depressingly predictable manner by the applicant's marriage to a Czech national on 12th August, 2009. This marriage appears to have lasted only a few months. The applicant has not obtained a divorce. On 13th May, 2010, he applied for residency in the State based on marriage to an EU national. This was rejected on 4th November, 2010, due to a lack of necessary evidence.

6. He made further representations as to his position in the State in 2014, and sought an update, although this did not constitute a formal application.

7. He became involved in a relationship with a Cameroonian national in 2014, which resulted in the birth of a child in Ireland on 10th July, 2015. The Cameroonian national was subsequently granted Irish citizenship. He represented himself to the Department of Social Protection as residing with the mother of this child.

8. In or about September, 2014, the first named applicant began a relationship with the second named applicant. Mr. Michael Conlon S.C., who appeared (with Mr. Paul O'Shea B.L.) for the applicants, accepted that the second named applicant was aware of the first named applicant's (lack of) legal status at the time the relationship began.

9. On 21st May, 2015, the applicant applied under s. 3(11) of the Immigration Act 1999, for the revocation of the deportation order.

10. Ms. Rogers had become pregnant in late 2014, and in the run up to her due date of delivery, a major issue arose as to the entitlement of the first named applicant to remain in the State pending the birth of his child.

11. On 28th April, 2015, Article 42A of the Constitution was enacted.

12. The present proceedings were brought before the court by way of *ex parte* application for leave on 27th July, 2015. The court directed that the application be made on notice to the respondents. An interim injunction staying the execution of the deportation order was granted on 31st July, 2015.

13. In an *ex tempore* judgment delivered on 1st August, 2015, Mac Eochaidh J. granted an injunction restraining execution of the deportation order until further order (*I.R.M. v. Minister for Justice and Equality* (Unreported, High Court, *ex tempore*, Mac Eochaidh J., 1st August, 2015) (I*.R.M. (No. 1)*)). The leave application was adjourned for separate consideration. It came before Stewart J. on 6th August, 2015 and was further adjourned, ultimately coming before me. Mac Eochaidh J. also gave liberty to amend the statement of grounds.

14. The third named applicant, S.O.M., was born on 21st August, 2015.

15. Following the birth, the applicant sent the department an application for residency based on parentage of an Irish citizen child (referred to as a "Form 1"). That application remains outstanding as of the date the hearing commenced. The letter submitting this application, dated 19th November, 2015, made clear that it should be "*treated as superseding*" the s. 3(11) application, and Mr. Conlon clarified at the hearing on 19th January 2016 that the s. 3(11) application was thereby intended to be withdrawn.

Procedural Matters

16. It will be noted immediately that the application has a complex and somewhat unusual procedural history. When the matter came before me on 20th November, 2015, it was originally listed as a hearing of a leave application only. One of the complaints made by Ms. Denise Brett S.C., who appeared for the respondents, in the course of her very able submission, was that the issue of leave and that of the injunction should not have been separated in the manner that arose in the *I.R.M. (No. 1*) judgment. The respondent relies in this regard on *B.O. v. Minister for Justice, Equality and Law Reform* [2006] IEHC 162 (Unreported, High Court, Herbert J., 24th May, 2006) at para. 17. To my mind, that complaint is water under the bridge. Mac Eochaidh J. split the issues on the basis of an issue clearly identified in his judgment in *I.R.M. (No. 1)*, namely that the injunction was more urgent than the leave application, and that decision seems to me to have been entirely logical if I may respectfully say so.

17. Of immediate concern to me was the fact that the question of telescoping the hearing had not been raised by the parties. Where the hearing of a leave application on notice will take up significant time and will run the risk of creating a duplicated hearing at a later stage, the question of telescoping the application may fall to be considered by the court *motu proprio*. (Of course there are other circumstances where telescoping may be appropriate – for example if a determination of the substantive issue is unsuitable to be delayed because it is especially urgent or could otherwise be determined rapidly.) I canvassed the question of telescoping the hearing with counsel at an early stage. Mr. Conlon stated that he had no objection to telescoping the hearing. Ms. Brett originally said she was not agreeable to this but after some reflection and the taking of instructions said it was something that the court could do as long as she was not disadvantaged in terms of her entitlement to be notified as to what the applicants' precise claims were; and I appreciate the practical approach ultimately taken by her. I therefore made an order under the jurisdiction conferred on the court *motu proprio* by O. 84, r. 24(2), irrespective of the views of the parties, having regard to the need for efficient case management (see *Talbot v. Hermitage Golf Club* [2014] IESC 57 (Unreported, High Court, 9th October, 2014) *per* Denham C.J. (Hardiman and Charleton JJ. concurring) at para. 13; and *per* Charleton J. (Denham C.J. and Hardiman J. concurring) at paras. 46 to 48) that the application for leave be treated as the hearing of the action. In order to ensure that the respondents were not prejudiced, I adjourned the hearing for a period of time after Mr. Conlon had completed his submissions so that the State would have a full opportunity to consider its reply to those submissions as requested by Ms. Brett.

18. A further issue arose in relation to the question of whether the applicants' statement required further amendment. When the hearing opened, three versions of the statement were put before me, the original statement, the first amended statement dated 6th August, 2015, following the ruling in *I.R.M. (No. 1),* and a second amended statement dated 31st August, 2015, which appeared to have arisen from complaints on behalf of the respondents that the amendments originally made were not the appropriate ones.

19. On 20th November, 2015, on hearing further arguments and submissions as to the need for further amendment, and Mr. Conlon stating that such need arose from oversight or mistake on the part of the applicants' lawyers, I allowed further amendments to be made in accordance with the Supreme Court decisions in *Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570 *per* Fennelly J. (O'Donnell and McKechnie JJ. concurring) at paras. 29 and 47, and *O'Neill v. Applebe* [2014] IESC 31 (Unreported, Supreme Court, 10th April, 2014) *per* O'Donnell J. (McKechnie and Laffoy JJ. concurring) at para. 14, as applied by me in *B.W. v. Refugee Appeals Tribunal (No. 1)* [2015] IEHC 725 (Unreported, High Court, 17th November, 2015), the relevant ones for present purposes being:-

(i) to add S.O.M. as a third named applicant; and

(ii) to particularise and amend the statement of grounds in accordance with the oral submissions made.

20. I directed that the parties should liaise and cooperate to ensure that the amended form of statement of grounds was finalised in a form that would be agreed to encompass the points actually made by Mr. Conlon in his submission. I also gave directions as to time limits for the service of the further amended statement and for the service of a statement of opposition.

21. The question of the injunction also arose at the hearing on 20th November, 2015. On that date, the Minister gave an undertaking not to deport the first named applicant pending the determination of his application for residency based on the parentage of the Irish born child, which application was made on 19th November, 2015. The Minister also undertook to give seven days' notice of an intention not to continue the undertaking. In any event, so that if such notice had not already been given prior to the determination of the application, the undertaking would continue until the seven days notice was subsequently given.

22. An amended statement of grounds was filed, dated 7th December 2015, and a Notice of Opposition (headed, incorrectly, "Intended" notice of opposition) dated 3rd December, 2015 was filed in reply, even though dated as of a date prior to the amended statement.

23. When the matter came back before me on 19th January, 2015, a further issue arose as to the form of relief actually being sought in the light of the withdrawal of the s. 3(11) application. Liberty to amend the proceedings further in order to seek amended declarations was sought by the applicant. After some discussion this was allowed without objection from the respondents and I am again grateful to Ms. Brett for taking a practical approach in this regard. The purpose of the final form of reliefs sought, which replace the original declarations and injunctions on the s.3(11) issue, is to frame the relief in a manner that is capable of being granted or refused at this stage, as opposed to that which would have been appropriate at an earlier point. The matter was then adjourned again to allow a further exchange of amended pleadings.

24. As will be seen from the above narrative, the case has involved an unusual degree of procedural complication but I am reasonably happy that the final form of the pleadings reflects the points that both sides actually wish to make and that the court can reasonably be asked to decide upon, even bearing in mind the essentially retrospective nature of the exercise the court is engaged in in this particular case.

25. A further procedural issue related to the question of anonymity for the first named applicant. Given that the disposal of the present application requires reference being made to his asylum application, it seems to me that he should be entitled to continued anonymity under s. 19 of the Refugee Act 1996. No legal basis for anonymity for the second named applicant has been pressed upon me. I do not consider that there is any evidence that identifying her will lead to the identification of the first named applicant to anyone who is not already aware of his identity. In the case of the third named applicant, however, I consider that as she is a minor, sharing the same surname as the first named applicant, and perhaps erring on the side of caution, I should make an order under s. 45 of the Courts (Supplemental Provisions) Act 1961, restraining her identification.

Mootness

26. I have already adverted to some of the unusual features of the case. Another unusual feature that made itself apparent at an early stage was that much of the argument set out in written submissions related to the legal position of the unborn, bearing in mind that the third named applicant had that status as at the time of institution of the proceedings. Normally, the court would simply be

able to pass on from arguments based on previous facts or situations and address the position of the parties in the light of the facts as they now stand.

27. Curiously and for reasons which I hesitated to inquire too deeply into, Ms. Brett submitted that "*the issues identified regarding the unborn need to be determined*" and requested me to do so. Mr. Conlon's position was that his solicitor had previously, on 18th August, 2015, written to the State indicating that if the proceedings were treated as a test case, that could be done with the applicants' agreement and no issue of mootness would be advanced.

28. Given the, to say the least unusual, positions adopted by the parties in this case, I would be prepared to consider the issues that I have been asked to examine, even though at one level they are now moot. The rights of the unborn child in this context seem to fit into the category of short term matters which are "*capable of repetition yet evading review" (Southern Pacific Terminal Co. v. Interstate Commerce Commission* 219 U.S. 499 (1911) at p. 515 cited by Blackmun J. in the context of pregnancy in *Roe v. Wade* 410 U.S. 113 (1973) at p. 125).

29. In *Goold v. Collins* [2004] IESC 38 (Unreported, Supreme Court, 12th July, 2004), Hardiman J. commented in relation to the U.S. formulation that *"[a]s might be expected from that formulation, such cases have tended to focus on time limited events such as election campaigns, pregnancy, (as in* Roe v. Wade) *and time limited court orders especially in the domestic violence area"*.

30. In *Lofinmakin v. Minister for Justice and Equality* [2013] IESC 49 (Unreported, Supreme Court, 20th November, 2013) Denham C.J. discussed this issue of exceptions to the general rule that moot issues can nonetheless be heard as a test case, citing *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2007] 1 I.R. 328 (Murray C.J.), *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152 (Clarke J.) and *Irwin v. Deasy* [2010] IESC 34 (Unreported, Supreme Court, Murray C.J., 14th May 2010).

31. A court can proceed to determine an issue that is strictly moot if the interests of justice so require. In this case there are two factors so requiring; firstly the particular suitability of issues arising from pregnancy as a basis to depart from the normal mootness doctrine, and secondly the consent of the parties.

32. Given that the respondents were requesting that this matter be determined, they expressly waived any objections regarding delay, discretion, or the inappropriateness of declaratory relief, and I am, yet again, grateful to Ms. Brett for the sensible approach adopted in this regard.

The substantive questions

33. The proceedings and amended pleadings raise the following three key issues:

> (i) whether the first named applicant is entitled to notice of the date and time of his intended deportation (a point which is not moot in any event);
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> (ii) whether it would have been unlawful for the Minister to deport the first named applicant without first deciding on the s. 3(11) application; and
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> (iii) whether, when the Minister came to consider the s. 3(11) application prior to the birth of the third named applicant, she could limit herself to a consideration of the family rights of the applicants by reference to the right to life of the unborn only or whether she was obliged to consider the substantive *prospective* family rights as between all of the applicants that would arise on the birth of the third named applicant.

Would the enforcement of the deportation order breach the applicant's right of access to the court in circumstances where he is not given notice of the precise date he is to be deported?

34. The applicant contends that he is entitled, as a matter of law, to a minimum period of notice of the actual date of deportation; be that seven days, as contended for by him, or 72 hours as is the law in the United Kingdom. In *I.R.M. (No. 1)*, Mac Eochaidh J. was of the view that this point was unstateable (para. 30); although very generously, he left it open for argument at the leave stage. In *K.A. (Nigeria) v. Minister for Justice, Equality and Law Reform* [2015] IEHC 82 (Unreported, High Court, 18th February, 2015), Eagar J. rejected a similar application on the ground that *"there is no evidence at the moment that the enforcement of deportation orders is taking place at any time soon after deportation order is made"* (para. 45).

35. On the assumption that at least 28 days have passed from the notification of the deportation order (thus allowing time for challenge), by the time the actual effecting of a deportation becomes imminent, an applicant will already have had quite a considerable number of opportunities to challenge the lawfulness of procedures being invoked against him by the time he reaches the point of being actually deported. An adverse asylum decision can be appealed to the tribunal and then challenged by way of judicial review, and a negative subsidiary protection decision and deportation order can be similarly challenged. The streamlining of the process by the International Protection Act 2015 still allows a number of opportunities to an applicant to make his or her case. In some cases, subsequent applications may be made, whether under s. 3(11) of the 1999 Act or s. 17(7) of the 1996 Act, some of which may result in further judicial review proceedings. If the applicant is taken into custody, he has the remedy of application under Article 40.4 of the Constitution. There is no legal basis for holding that there exists any obligation on the State to give the applicant, on top of all of these procedures, a further notice of the precise time and date at which it is intended to deport him. I would, therefore, hold that the applicant is not entitled to this relief, because the process itself has sufficient safeguards to make this additional proposed safeguard unnecessary.

36. The Supreme Court in *Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360 at 391 stated that "*whether a person is entitled to remain within the State for a minimum period of time in order to exercise a constitutional right to bring judicial review proceedings, is a matter to be determined in appropriate proceedings in the High Court concerning the powers of deportation deriving from the Act of 1999"*. This section was also quoted by Denham J. in *Adebayo v. Commissioner of An Garda Síochána* [2006] 2 I.R. 298 at 304.

37. While I have no argument with the conclusion of Eagar J. in K.A. that this point cannot be sustained, he seems essentially to have reserved his position on what the position would be if deportation was effected very soon after the deportation order, or impliedly so soon after it that there had not been time to challenge it (within the period of 28 days) (see *R. (Medical Justice) v. Secretary of State for the Home Department* [2011] EWCA Civ 1710). Obviously this applicant does not have standing to raise that point. I would answer that implied question by saying that provided that the limitation period to challenge the deportation order (i.e., 28 days since

its making) has expired, there is nothing unlawful in the rapid if not immediate effecting of the actual deportation thereafter without further notice (see *A.G.A.O. v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 492 *per* MacMenamin J. (High Court) at 504).

Is the implementation of the deportation order unlawful prior to the determination of a section 3(11) application?

38. Section 3(11) provides a necessary power for the Minster to revoke or amend any deportation order. Its exercise would normally only arise in relatively unusual circumstances. However, the s. 3(11) application has become something of a cottage industry. Such an application can be made by any proposed deportee at any time, largely free from time limits applicable to the original deportation order. It can be made where the original order was unchallenged. Any fact or representation may be grist to the mill of such an applicant, without having to show that such matter could not have been, or was not, considered when the original order was made. The s. 3(11) application can be made right up to the deportation, when the applicant is in custody (thus presumably forming a basis for a further application for injunctive relief, or release under Article 40 or otherwise, or both); even when the plane is on the tarmac awaiting departure. In numerous cases it has provided a vehicle for an applicant who is liable to deportation to effect a further long delay as a result of a judicial review challenging a refusal of such an application. The potential for the integrity of the immigration system to descend into unworkability is clearly enormous. The court must therefore take a very restrained approach to the degree to which it is prepared to intervene in deportations despite an outstanding s. 3(11) application or a judicial review challenging a refusal or even seeking mandamus to have a decision made.

39. It is clear that a s. 3(11) application does not have suspensive effect: see *Okunade* and *P.B.N. (D.R. Congo) v. Minister for Justice and Equality* [2014] IESC 9 (Unreported, Supreme Court, Laffoy J., 21st February, 2014)

40. It follows irresistibly from that conclusion that the Minister is not obliged as a matter of law to determine a s. 3(11) application prior to effecting deportation.

41. Having said that, like any administrative application, the Minister is obliged to determine the application within a reasonable time. What is a reasonable time depends on the circumstances. Such a decision should not be postponed indefinitely, even if an applicant is deported between the making of the s. 3(11) application and its determination. But failure to make a decision, even after an excessive period of time, does not render the deportation unlawful.

42. It should be emphasised that the fact that the Minister is not obliged to determine the s. 3(11) application does not relieve her from the obligation to act lawfully, an obligation which may overlap with some of the matters contained in any particular s. 3(11) application (for example, by reference to the prohibition on *refoulement*). But as long as the Minister continues to be lawfully satisfied that no legal rights would be infringed by the deportation, that deportation may proceed despite the existence of an undetermined s. 3(11) application (even where the Minister has delayed for an excessive time in determining that application).

What must the Minister consider in an application to revoke a deportation order?

43. The essential positions adopted by the parties were that the Minister considered that where an individual was the parent of an unborn child, the only rights of that child that should be considered is the right to be born. On the other hand, the applicant contended that the Minister was obliged to consider a wider suite of rights of an unborn potential Irish citizen, not limited to his or her present rights, but also future rights in the context of a deportation order.

44. Before getting too deeply into this question it is important to address the question of what issues the Minister must consider in any s. 3(11) application, and then the question of the application of that test to the case of the prospective birth of a child of a person whose deportation is in issue.

45. It is clear from *Sivsivadze v. Minister for Justice and Equality* [2015] 2 I.L.R.M. 73 (Murray J. (Clarke, O'Donnell, MacMenamin and Hardiman JJ. concurring) that s. 3(11) is not confined to a change of circumstances. The approach taken in *M.A. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Cooke J., 17th December, 2009) was that the Minister was obliged under s. 3(11) to consider carefully and fully the reasons put forward by an applicant for the revocation and to verify that no change in circumstances had occurred to bring into play the statutory prohibitions on deportation. This was followed in *Irfan v. Minister for Justice, Equality and Law Reform* [2010] IEHC 422 (Unreported, High Court, Cooke J., 23rd November, 2010) at para. 7 and upheld by the Supreme Court in *P.O. & S.O. v. Minister for Justice and Equality* [2015] IESC 64 (Unreported, Supreme Court, 16th July, 2015) *per* MacMenamin J. (Laffoy and Charleton JJ. concurring) at para. 16.

46. It is equally clear from *Sivsivadze* at para. 83 and *P.O. & S.O.* at para. 15 that rights under the ECHR should be considered in the context of s. 3(11) application. I note in passing that a similar finding was made by Barr J. in the context of the Immigration Act 2004 in *Luximon v. Minister for Justice and Equality* [2015] IEHC 227 (Unreported, High Court, 20th March, 2015), at para. 143 (currently under appeal to the Court of Appeal); although see my decision in *Balchand v. Minister for Justice and Equality* [2016] IEHC 132 (Unreported, High Court, 4th March, 2016) (also under appeal). The view was also taken by Hogan J. in *Efe v. Minister for Justice, Equality and Law Reform* [2011] 2 I.R. 798 that s. 3(11) provided an effective remedy under art. 13 of the ECHR (at pp. 826 to 827) and to vindicate constitutional rights (at p. 822) in the context of a change of circumstances. See also *Chikwamba v. Secretary of State for the Home Department* [2008] UKHL 40 (Lord Brown of Eaton-under-Heywood).

47. I recently considered the question of the matters to be considered in the s. 3(11) context in *K.R.A. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 289 (Unreported, High Court, 12th May, 2016). Unless deportation would be unlawful (for example by reason of refoulement), I took the view in *K.R.A. (No. 1)* that there is a limitation on the use of s. 3(11) in that it is confined to new circumstances, albeit that this test can be read broadly to include new legal circumstances (see *Smith v. Minister for Justice and Equality* [2013] IESC 4 (Unreported, Supreme Court, 1st February, 2013) per Clarke J. at paras. 5.12 and 5.17). This requirement of a "*change of circumstances*" (*Irfan v. Minister for Justice*) or a "*significant feature, not present when the original deportation order was made*" (*Okunade* at para. 5.4) is fundamental to the s. 3(11) procedure, unless all deportation orders are to be up for permanent renegotiation and the time limits in s. 5 of the 2000 Act are to be set at nought. An applicant cannot, by challenging a later decision, seek in substance to nullify an earlier decision contrary to the system of time limits set out in s. 5 of the 2000 Act: this would be "*to permit the first decision to be attacked obliquely, after the time limited for a direct challenge had expired*" (E.M.S. at p. 542) (see also *B.M.J.L. v. Minister for Justice and Equality* [2012] IEHC 74 (Unreported, High Court, 14th February, 2012), Cross J. at para. 3.18; *Mamyko v. Minister for Justice (Unreported, High Court,* Peart J., 6th November, 2003, referred to with approval by MacMenamin J. (in refusing even leave to challenge a s. 3(11) decision) in *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603; and by Birmingham J. in *G.O. v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 19; see also my decision in *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 (Unreported, High Court, 24th June, 2016) at para. 63.

48. Having regard to the foregoing decisions, the submission made by Ms. Brett at the hearing in this case that s. 3(11) is "*entirely a discretionary issue*", and moreover that "*any limitation on that discretion by the court would be an interference with the separation of powers*" is simply misconceived. It is not an interference with the separation of powers to require that the Minister consider a s. 3(11) application in accordance with law.

49. That is not to say that a high level of scrutiny must apply to such a decision. Rather, the reverse is the case, given that by definition the applicant will have already gone through a previous process leading to the making of a deportation order. Only a clear departure from indispensable legal requirements would justify the intervention of the court (see *e.g., Sivsivadze, Dada v. Minister for Justice, Equality and Law Reform* [2006] IEHC 166 (Unreported, High Court, MacMenamin J., 31st January, 2006), *Animasaun v. Minister for Justice, Equality and Law Reform* [2003] IEHC 14 (Unreported, High Court, Peart J., 5th June, 2003), *M.R.J. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court*, ex tempore*, Mac Eochaidh J., 22nd January, 2014)). In *Kouaype v. Minister for Justice, Equality and Law Reform* [2011] 2 I.R. 1 at 11, Clarke J. said that it would require very special circumstances to challenge a deportation order unless there was a failure to consider s. 5 of the 1996 Act, or the Minister could not reasonably have come to the view she did, or did not afford the opportunity to make submissions, or fail to consider such submissions. A similar approach was also taken in *P.E. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 238 (Unreported, High Court, Hedigan J., 16th May, 2007); see also *U.I. v. Refugee Appeals Tribunal* [2007] IEHC 72 (Unreported, High Court, Murphy J., 23rd January, 2007).

50. In my view it follows from the caselaw I have referred to that the matters which the Minister must consider in the context of a s. 3(11) application are the foregoing:

> (i) any representations by the applicant; and
>
> (ii) any change of circumstances since the original decision which engages a legal provision which would have the effect of rendering the deportation unlawful by reason of an actual or prospective breach of rights. Such unlawfulness could arise under one of the following headings:-
>
> > (a) a change in the legal status of the person so as to deprive the Minister of jurisdiction to effect deportation (for example, the acquisition of EU citizenship or other EU rights);
> >
> > (b) an actual or prospective threat to the life of freedom of the person, either on Convention grounds under s. 5 of the Refugee Act 1996 or in a manner that would infringe arts. 2 or 5 of the ECHR;
> >
> > (c) an actual or prospective risk of torture or inhuman or degrading treatment under to s. 4 of the Criminal Justice (United Nations Convention Against Torture) Act 2000 and arts. 2 and 3 of the ECHR;
> >
> > (d) any other actual or prospective breach of the rights (whether legal, constitutional, EU or ECHR) of the applicant or another person that would arise if the deportation was effected.

51. The prohibition on *refoulement* in the 1996 and 2000 Acts is forward looking and considers prospective risks. There is no reason in logic, consistency or principle as to why an analysis of any other threat to the rights of an applicant should not also be forward-looking. In particular, there is no reason (or even explanation, other than what seems to be a remarkably deep-seated aversion to acknowledging the position of the unborn child), to hold that forward looking threats to the prospective position of the applicant such as those of persecution, torture or inhuman or degrading treatment must be considered but this doctrine does not apply to the prospective position of the unborn, and the unborn alone. Mr. Conlon submits, correctly, that no system of jurisprudence can call itself sophisticated unless prospective rights are considered. Prospective rights are considered in many other legal contexts such as the *quia timet* injunction. A rational and appropriate analysis of the applicant's rights in a deportation context that takes into account the substance of human rights rather than a literal snapshot as to the current position must also consider such rights.

Would it be a breach of the rights of the applicants to deport a prospective parent so that the mother would not have her partner present for the birth?

52. Should the rights (such as they are) of the applicants *inter se* include any threat to the mental well-being of the mother that could be caused by deporting her partner in the very final stage of pregnancy? While an injunction was granted on the basis of that argument (see *I.R.M. (No. 1)* at paras. 20 to 21), Mac Eochaidh J. acknowledged that the tenability of the point might not survive more detailed consideration. In my view there is no basis to elevate the desirability of having one's partner present for the birth into a constitutional right that can be asserted in the deportation context. It is no doubt unfortunate and distressing for an expectant mother to have her partner deported in such circumstances, but there is no constitutional right to be protected from stress or anxiety. To elevate the fluctuating requirements of an individual's personal mental health and peace of mind into a positive constitutional right, moreover one that requires affirmative action to be taken to alleviate one's distress, absent proof of psychiatric injury, would be to put a premium on sensitivity and special pleading that would be destructive of any ordered system of government, of equality before the law, and ultimately of the human dignity of the individual, who must accept unfortunate events as the inevitable price of existence and not as an aberration that can be legislated or litigated away. Stress or anxiety is not a legally actionable wrong in the absence of psychiatric injury (*Murray v. Budds* [2015] IECA 269 (Unreported, Court of Appeal, Peart J. (Finlay Geoghegan and Hogan JJ. concurring), 19th November, 2015); *Hegarty v. Mercy University Hospital Cork Ltd.* [2016] IECA 24 (Unreported, Court of Appeal, Ryan P. (Hogan and Peart JJ. concurring), 10th February, 2016)). Having said that, it might be felt that *ad misericordiam* humanitarian considerations could perhaps on occasion militate in favour of holding off on deportation of a partner in the final days of pregnancy, but that is a matter for the Minister and not for the court.

53. There is no constitutional right to have one's partner present in the State for a birth if the partner has no legal entitlement to be present in the State at all.

Is the Minister obliged to consider the prospective family rights of the parties including the prospective rights of a child who is unborn at the time of the making of a s. 3(11) application?

54. In one sense, in the light of the foregoing discussion, the question as to whether a rational consideration of the human rights of the applicants including their prospective rights must also consider the position of the third named applicant on birth virtually answers itself.

55. The Minister's position that the only relevant right of the unborn to be considered was the right to life appeared to derive primarily from Article 40.3.3º which of course provides for the protection of the right to life of the unborn and obliges the State to protect that

right, as far as practicable.

56. That subsection was enacted in the wake of a number of judicial decisions to the effect that the rights of the unborn were in any event protected by Article 40.3: *G. v. An Bord Uchtála* [1980] I.R. 32 per Walsh J. (Henchy and Kenny JJ. concurring) at p. 69; *McGee v. Attorney General and the Revenue Commissioners* [1974] I.R. 284 per Walsh J. (Budd, Henchy and Griffin JJ. concurring) at p. 312; *Finn v. Attorney General and the Minister for the Environment* [1983] I.R. 154 *per* Barrington J. (High Court) at p. 160. The Minister's position, which I do not accept, is that Article 40.3.3° was intended to sweep away all such decisions and to embody in one subsection the totality of the rights of the unborn. Even a statute would not be read this way, and in any event the Constitution should not be read as if it were statutory law. The unacceptability of such an interpretation is only enhanced by the reliance being placed on doctrines such as "*specialia generalibus non derogant*" and "*lex specialis*" which have simply no application to the necessarily overarching, flexible and evolving concepts embodied in a written constitution. Ms. Brett in argument acknowledged, perhaps hesitantly, that "*medical*" rights of the unborn could be deemed to be included, but such grudging expansion of Article 40.3.3° seems contradictory to the alleged principle that the subsection is an exhaustive statement of the rights of the unborn, unless, contrary to the human dignity of the unborn, one confines those medical rights to those essential to its live birth and not to its physical health. In any event, the rights of the unborn are not so easily cabined. The acknowledgement of any right at all carries with it further necessary and consequential rights – of access to the court to ensure its vindication, for the appointment of a guardian *at litem*, to an effective remedy under art. 13 of the ECHR, to non-discrimination *vis a vis* others similarly situated. For these amongst other reasons I would reject the suggestion by Cooke J. in *Ugbelase* at p. 249 that Article 40.3.3° could be reduced to a statement of the rights of the unborn "*on an exclusive basis*", any more than it could be suggested that the insertion of Article 28A on local government was intended to state the rules for local government "*on an exclusive basis*" without regard to other provisions of the Constitution limiting or controlling the exercise of powers conferred on organs of state; or that Article 42A states the rights of children "*on an exclusive basis*" to the extent that children would no longer benefit from any other rights conferred by any other provision of the Constitution; or that Article 40.4.7° of the Constitution which provides for refusal of bail on a particular ground should be held to state the grounds for such refusal "*on an exclusive basis*" thereby annihilating any other ground that could otherwise be constitutionally permissible, and so on and on, *ad infinitum*. Unless, that is, that by some perverse form of hostility to the rights of this particular category of human entity, combined with idiosyncratic techniques of construction that would have appealed to Lewis Carroll if not Lord Atkin, we are to have some sort of special principles of constitutional interpretation that apply to the disadvantage of the unborn and the unborn alone. Indeed the idea that Article 40.3.3° is self-contained is fatally undermined from the outset by the fact that it acknowledges a right to travel, a right which is not expressly contained in any other provision of the Constitution. The subsection itself therefore acknowledges other unenumerated rights, albeit in the case of travel, rights of the mother.

57. In addition to these rights, other significant rights of the unborn child are recognised, acknowledged or created by common law or statute, in turn reflecting inherent natural and constitutional rights of the unborn which are implied by the constitutional order. Since we were all unborn at one point, it is illogical to be dismissive of the natural, human and biological reality that there is continuity between the rights to be enjoyed before birth and those after birth.

58. Apart from any other considerations, in the present case the unborn child was a potential citizen, and is now a citizen. Curiously enough, the respondents did not furnish Ms. Brett with instructions to enable her to tell me why it particularly mattered to the Minister to be able to disregard the prospective rights of the unborn child, or why it would be a huge problem for her to consider such rights before making a decision. After all, those rights are not necessarily decisive in the decision to deport or not to deport, but are a factor to be taken into consideration together with other factors, which may in certain cases outweigh them. If a party does not want to explain to the court of first instance, being the forum in which any contention to be advanced at any later stage must first be made, why its position particularly matters, then it probably should not be too surprised if that court does not conclude that there is any overwhelmingly pressing reason for that position.

59. The recognition of rights for the unborn is not some peculiarity of Irish or even of common law. Preambular paragraph 9 to the UN Convention on the Rights of the Child provides that the states parties adopt the convention *"[b]earing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'"* (emphasis added).

60. The right to succeed to property while *en ventre sa mère* arises at common law. In *Elliott v. Joicey* [1935] A.C. 209, it was held that a child *en ventre sa mère* can be considered as born for the purposes of receiving a benefit, which he or she would have been entitled to had he or she been born at the time of the testator's death, provided a gift to the child was the intention of the testator. This principle, that a child, unborn at the time of the testator's death, that is thereafter born alive can inherit property also has a statutory footing in s. 33 of the Wills Act 1837, as now amended in the U.K. by s. 19 of the Administration of Justice Act 1982.

61. In Irish law, s. 3(2) of the Succession Act 1965 provides for the same principle. Section 98, which provides for gifts to persons who leave issue at the time of the testator's death, has been held to be subject to the principle in s. 3(2). In *Gregory & Anor. v. McCarthy* [2015] IEHC 311 (Unreported, High Court, 17th April, 2015), Hunt J. held that in light of s. 3(2) of the 1965 Act, the term "issue" must be interpreted in those terms and as such, a child conceived, but not yet born must be considered as issue for the purposes of the interpretation of a will. Furthermore, he stated that *"[m]ore recent constitutional provisions also suggest that the unborn are regarded as capable of possessing legal rights, which in an appropriate case, may include the right to succeed to property*".

62. Statutory recognition of a power to deal with property on behalf of the unborn in particular contexts is contained in s. 75 of the Public Works (Ireland) Act 1831, in s. 19 of the Shannon Navigation Act 1839, in s. 7 of the Lands Clauses Consolidation Act 1845, and s. 40 of the Glebe Act 1851.

63. In the special case of succession to titles of nobility and the crown in particular, there are examples in both the common law and civil world of the unborn being given recognition in this context. A prominent example, which remains in force, is art. 6 of the Constitution of Norway adopted at Eidsvoll in 1814, providing for succession of the unborn to the crown of that country.

64. As regards actions in tort, s. 58 of the Civil Liability Act 1961 allows an unborn child, once born alive, a right of action in tort for injuries that occurred while it was in the womb.

65. *Burton v. Islington Health Authority and DeMartell v. Merton & Sutton Health Authority* [1992] EWCA Civ 2 follows a similar approach. While U.K. law does not envisage rights of action prior to birth, Dillon L.J. in the Court of Appeal in that case referred to the fact that in certain contexts "*English courts have adopted as part of English law the maxim of the civil law that an unborn child shall be deemed to be born whenever its interests require it - or as put by Lord Westbury in* Blasson v. Blasson *2 De G.J. & S. 665*: 'Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipsius partus quaeritur ...'" [An unborn child is taken care of just as much as if it were in existence, in any case in which the child's own advantage comes into question; though no-one

else can derive any benefit through the child before its birth (Digest of Justinian, Book I, Title V, section 7)].

66. In Canada, the Supreme Court in *Montreal Tramways v. Leveille* [1933] 4 D.L.R. 337 held that to refuse relief in such cases would be to allow a wrong for which there is no remedy. In that case, the child's mother was injured when she fell from a tram on to the street while pregnant with the plaintiff, who was later born with an injury.

67. In *Watt v. Rama* [1972] V.R. 353, the Victoria Supreme Court in Australia held that injury to an unborn child created *"a potential relationship capable of imposing a duty on the defendant in relation to the child if and when born. On the birth the relationship crystallized and out of it arose a duty on the defendant in relation to the child"*.

68. Health and welfare of the unborn must also be an actually effective right. Indeed the Child and Family Agency acknowledges that concerns relating to the welfare of the unborn are a ground for intervention by it: Child Protection and Welfare Practice Handbook (HSE, 2011) p. 4: *"The child protection and welfare concerns for the unborn may need to be considered during pregnancy"* (emphasis added).

69. The statutory right of the unborn to an identity also arises under ss. 28 to 30 of the Civil Registration Act 2004 (re-enacting provisions originally put in place by the Stillbirths Registration Act 1994) insofar as stillborn children under the age of 24 weeks gestation are concerned (see s. 2). The registration of such stillbirths allows for the recognition of a name and therefore an identity and legal recognition for such children despite their never having been born alive.

70. In the criminal context, in England, the House of Lords recognise that the unborn child may be the object of an unlawful act (see Attorney General's Reference (No. 3 of 1994), 24th July, 1997). In *Whitner v. State* 492 S.E.2d 777, the Supreme Court of South Carolina distinguished between homicide statutes and those for the purpose of protection against child abuse in finding a mother guilty of neglecting her child by taking crack cocaine during the last trimester of her pregnancy (referred to in Gerard Casey, "Pregnant Woman and Unborn Child: Legal Adversaries?" (2002) 8(2) *Medico-Legal Journal of Ireland* 75)

71. The enforcement of the foregoing rights, insofar as they are actually enjoyed by the unborn during pregnancy, may require recourse to the courts. The right of the unborn to litigate has been recognised, not least by the Supreme Court in *Baby O. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 169, *per* Keane C.J. (Denham, Murray, Murphy, McGuinness JJ. concurring) where an action was taken by a woman and her unborn child seeking to restrain the mother's deportation because to deport her would contravene the right to life of her unborn child under Article 40.3.3º given the inadequate levels of ante-natal care available in her native Nigeria. The Court held that Article 40.3.3º only prevents the legalisation of abortion in Ireland, the State was not seeking to force the mother to have an abortion and the fact that ante-natal care might not be available in Nigeria was irrelevant to the issue of her deportation (p. 169). The right to litigate in that case was an actually effective right as opposed to one which was enjoyed provisionally and crystallised on the birth of the child.

72. A statutory right for the unborn to litigate was contained in s. 19(3) of the Registration of Title Act 1964: *"In any proceeding under this section the court shall, if so requested by the Registrar, and may in any case, if necessary, appoint a guardian or other person to represent any infant, person of unsound mind, person absent from the State, unborn person or person as to whom it is not known whether he is alive or dead…"*. Similarly, an application may be made to court for the benefit of the unborn while unborn, for the variation of a trust: see s. 24 of the Land and Conveyancing Law Reform Act 2009 and the definition of "relevant person" in s. 23.

73. The U.S. position is that *"all States—by statute, court rule or case law—permit a guardian ad litem to be appointed to represent the interests of an unborn child in various matters including estates and trusts"* (Paul Benjamin Linton, "The Legal Status of the Unborn Child under State Law", (2011) 6 *St. Thomas Journal of Law and Public Policy* 141 at 154, an article which also discusses the rights of the unborn in a number of other contexts including as protected by criminal law). Such an approach of permitting litigation by the unborn would have to be followed in any event in order to give life and substance to the rights of the unborn child.

74. *P.P. v. Health Service Executive* [2014] IEHC 622 (Unreported, High Court, 26th December, 2014) (Kearns P. (Costello and Baker JJ. concurring)) was another recent case in which the court heard counsel for the unborn in the context of an application in relation to continued medical treatment being afforded to the mother whose body was at that point being kept alive. Costs were ultimately awarded *inter alia* to the legal representatives of the unborn.

75. The question at hand was fully considered by Irvine J. in *O.E. v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R 760 from p. 774 onwards. It is manifest from the comprehensive and compelling analysis carried out by Irvine J. that the submission by the State that the Minister is only required to consider the right to life of the unborn, and no other rights or potential rights, is entirely without merit for a series of reasons, as identified by Irvine J., which include the following:-

> (i) Such an approach is arbitrary and would make the substance of rights dependent on the happenstance of the date of birth;
>
> (ii) It is clearly established in case law that the unborn child enjoyed significant rights under the Constitution even prior to the adoption of Article 40.3.3°;
>
> (iii) The interpretation offered by the State would, as Irvine J. points out, at p. 777: *"place the rights of the unborn child, from a constitutional perspective, at a much lower level than the rights afforded to the unborn child at common law".*

76. Organs of the State must take rights seriously and address the reality and substance of the human situation of both citizens and other persons within the State. To decline to consider the wider rights of the unborn child is to deliberately shut one's eyes to reality and to future situations which are likely to exist and therefore should properly be considered as a matter of rationality.

77. The decision in *East Donegal Cooperative Livestock Mart Limited v. Attorney General* [1970] I.R. 317 (Walsh J.) acknowledges that prospective threats to rights need to be guarded against, the Supreme Court holding in that case that the courts are entitled "*not merely to redress a wrong resulting from an infringement of the guarantees [of rights by the Constitution] but also to prevent the threatened or impending infringement of the guarantees and to put to the test apprehended infringement of these guarantees*" (p. 338). It is irrational, and therefore unlawful, for the Minister to ignore the likely potential situation of an unborn child if to do so would be to fail to give consideration to that child's likely rights.

78. Since Irvine J's decision in *O.E.,* Article 42A of the Constitution on the rights of the child has been adopted. Section 1 of the Article provides that: *"the State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as*

practicable, by its laws protect and vindicate those rights" (emphasis added). The reference to "*all*" children is striking and grammatically unnecessary, and must therefore have very significant substantive content and intention. As well as smacking of non-discrimination, on grounds such as the marital status of parents, it must, in my view, be given a wide interpretation and should include the child before birth.

79. Reference to the unborn as a "child" goes back over 200 years to the Malicious Shooting Act 1803 (also known as Lord Ellenborough's Act), which prohibits abortion where the pregnant woman is "*quick with child*".

80. The unborn is referred to as an "unborn child" in a large number of EU and national instruments, for example, reg. 5 of the Factories Act 1955 (Manual Labour) (Maximum Weights and Transport) Regulations 1972 (S.I. No. 283 of 1972), the European Communities (Social Welfare) Regulations 1994 (S.I. No. 312 of 1994), the European Communities (Dangerous Substances and Preparations) (Marketing and Use) Regulations 2003 (S.I No. 220 of 2003), the European Communities (Classification, Packaging, Labelling and Notification of Dangerous Substances) Regulations 2003 (S.I. No. 116 of 2003), the European Communities (Classification, Packaging and Labelling of Dangerous Preparations) Regulations 2004 (S.I. No. 62 of 2004), the Safety, Health and Welfare at Work (General Application) Regulations 2007 (S.I. No. 299 of 2007), and reg. 7 of the European Communities (Classification, Packaging, Labelling and Notification of Dangerous Substances) Regulations 2008 (S.I. No. 272 of 2008).

81. Section 58 of the Civil Liability Act 1961 provides that the law relating to wrongs shall apply to "an unborn child" subject to the born alive rule.

82. The fact that the term "unborn child" was part of the statute law of the state on the date of the adoption of Article 42A, and the use in that Article of the striking phrase "all children", lends support to the conclusion that the term "child" includes the unborn child.

83. In my view, an unborn child is clearly a child and thus, protected by Article 42A. Any other conclusion would fly in the face of the ordinary meaning of language, the use of the term "child" in numerous statutory contexts prior to the adoption of Article 42A, and the sheer social, biological and human reality that an unborn child is, indeed, a child. Ask any happily expectant parent.

84. That is not to say of course that Article 42A necessarily was intended to have a significant, or perhaps even any, effect on deportation proceedings as such: I do not consider that it was, but that is a separate matter. Nor is it to say that the rights of the unborn can or should be equated with those of the born child in every respect if for no other reason than that many of them are not capable of being exercised. But it is facetious to offer the rationale of non-exercisability, as the State in substance attempted to do in this case, as a simplistic and almost sneering basis to diminish or dismiss the status of the unborn child. Consider likewise the born child who may perhaps suffer from profound disability and therefore may not be able to meaningfully enjoy a large number of constitutional rights either such as freedom of expression, association, assembly, correspondence, religion or education, or to rights in the social, cultural and economic field. That does not detract from his or her status as a child and entitlement to rights.

85. Ms. Brett argues unconvincingly that if this were so then Article 40.3.3° would have referred to the unborn "child" rather than the unborn. By the same logic, "the infirm … and the aged" under Article 45.4.1° are not citizens or even human persons because they would have been so described. Again, the end-point of the logic (if that is not an over-dignified term in this context) of the State position is either to dismantle constitutional rights more generally, or alternatively (and this is what I think is intended) to adopt a bespoke system of constitutional interpretation aimed at cutting back the rights of the unborn and only the unborn, not valid in any other context. Like the "*restricted railroad ticket, good for this day and train* only" referred to in *Smyth v. Allwright*, 321, U.S. 649, 669 (1944) (Roberts J. (dissenting)) and cited by Murray J. (dissenting) in *The People (D.P.P.) v. J.C.* [2015] IESC 31 (para. 1), the submissions of the State in this case that the rights of the unborn are set out on an "exclusive basis" because they are mentioned in a particular context, and that the unborn is not a "child" because that word is not used, are good for this officially disfavoured category of human person and not otherwise; they are not meant to be taken seriously as the inevitable result of valid and broad principles of constitutional interpretation, but are simply a pragmatic fix to tidy away the problem of the unborn. Having done their job, those interpretative techniques (one hesitates to call them "principles") can be quietly retired without further ado.

86. As distinct from the view of Irvine J. in *O.E.,* Cooke J. took a different view of the obligations to the unborn in *Ugbelase v. Minister for Justice, Equality and Law Reform* [2010] 4 I.R. 233 (and *Kangethe v. Minister for Justice, Equality and Law Reform* [2010] IEHC 351 (Unreported, High Court, Cooke J., 7th October, 2010)). However, I find his analysis considerably less compelling than that of Irvine J. For example, he suggests that the common law "*did not operate however to enable justiciable rights to be asserted by or on behalf of the unborn child prior to birth*" (p. 244). As a matter of history this appears to be completely incorrect. Property may be vested in or held by or on behalf of an unborn child, or indeed, left to an unborn child by means of a will. It appears to be entirely incorrect to suggest that justiciable rights could not be asserted on behalf of the unborn child prior to birth.

87. He went on to say (at p. 252) that "*…the only right of the unborn child as the Constitution now stands which attracts the entitlement to protection and vindication is that enshrined by the amendments in Article 40.3.3 namely, the right to life or, in other words, the right to be born and, possibly, (and this is a matter for future decision) allied rights such as the right to bodily integrity which are inherent in and inseparable from the right to life itself*". It is hard to understand on what basis the rights of the unborn have been pitched so low in this regard other than by reference to an extremely literal reading of Article 40.3.3° and sheer assertion that it is an exhaustive statement of the entirety of the rights of the unborn. This passage suggests that it is seriously open to argument, to be reserved to a future case, that an unborn child does not have a constitutional right not to be subjected to injury, and in particular does not have a right not to be injured as long as such injury can be separated from a threat to the life of the child. It would be an understatement to call this proposition unattractive. Insofar as the Constitution upholds the values of humanity and decency inherent in a democratic state, such an argument is wholly unacceptable.

88. In *X.A. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 397 (Unreported, High Court, 25th October, 2011), Hogan J. briefly refers to the matter and largely follows the observations of Cooke J. with no reference to the previous, and to my mind, manifestly preferable, decision of Irvine J. in *O.E. X.A.* could not, in any event, therefore, be said to constitute detailed consideration of the issue. Hogan J. did comment at para. 12 that Article 40.3.3° was not intended to have an effect on immigration law, an observation with which I would be inclined to agree. However, for the reason I have mentioned above, that proposition is a straw man. The issue is not that in considering a deportation issue, the Minister must consider Article 40.3.3°, and errs in law in failing to do so. The issue is whether in considering a deportation decision, the Minister should consider the prospective situation which is likely to unfold, and particularly such rights arising from a child's status as a citizen as are likely to exist, rather than the state of affairs as it exists as a snapshot on the date on which the Minister's decision is made in isolation from matters which are imminently prospective as a matter of likelihood. The proposition that Article 40.3.3° was not intended to affect deportation matters is just simply not an answer to this question. The need to consider the imminently probably state of affairs, whatever that might be likely to be, would exist even if Article 40.3.3° had never been enacted, or if it were hypothetically repealed or reworded.

89. For the reasons stated, I would propose not to follow *X.A.* or *Ugbelase*, and would instead follow the approach set out by Irvine J. in *O.E*. Ms. Brett rather faintly argued that as *Ugbelase* had considered and rejected *O.E.*, the principles of *stare decisis* required me to follow *Ugbelase*. That is an untenable submission if for no other reason that it affords much more deference to a decision that itself did not follow a prior decision, than it does to the first decision. It would afford a strange form of priority based merely on the date of the decision as opposed to the inherent force of the argument, such as it is. The position simply is, as in *R.A. v. Refugee Appeals Tribunal (No. 1)* [2015] IEHC 686 (Unreported, High Court 4th November, 2015), that two positions are in conflict and I must choose one. I have no hesitation in following Irvine J. for the numerous reasons I have referred to.

90. The consequence of that approach to my mind is that when the Minister is presented with an application based on the prospective parentage of an Irish child who is unborn at the date of the making of the application, the Minister must address the application on the basis that appropriate consideration should be given to the rights which that child will probably enjoy into the future in the event of being born, insofar as such prospective rights are relevant to the deportation issue.

91. It follows that the applicants were entitled to assert the position of a child unborn at the time of an application, both before the Minister and in these proceedings. As I have made clear above, to put the capacity of the first and second named applicants to raise issues relating to their child beyond doubt, Mr. Conlon applied for liberty to amend his proceedings to add the child as an applicant, and I acceded to that application, as Mac Eochaidh J. previously made clear he would have done.

92. The upshot of the foregoing is that the prospective legal rights and (where raised in submissions) interests that a child will acquire on birth are matters that the Minister must consider when an application is made under s. 3(11) by reference an unborn child. However she is not under any obligation to automatically allow such an application. Ms. Brett submits that to allow relief to the applicant would be to give an entitlement to remain in the State pending the birth of the child. There is no such entitlement, or at least not as a matter of automatic generality.

93. As a general proposition in line with *East Donegal* principles, the Minister is obliged to consider the constitutional, statutory, EU and ECHR rights of each of the applicants *inter se* when making her decision on a s. 3(11) application, if such are raised in submissions or constitute a legal bar to deportation (such as s. 5 of the Refugee Act 1996).

94. The Minister may also consider any other factors that are appropriate, even *ad misericordiam* matters. However, that is not to say that the constitutional and ECHR family rights of the applicants are necessarily particularly strong insofar as concerns the deportation issue, given the precarious status of the first named applicant at the time he entered into the relationship.

95. A crucial factor, particularly in cases where the Minister has already considered, and rejected, family rights is that the art. 8 rights of applicants who are present unlawfully, or on a precarious basis, are either non-existent or minimal: see *Dos Santos v. Minister for Justice and Equality* [2015] 2 I.L.R.M. 483 *per* Finlay Geoghegan J. (Ryan P. and Peart J. concurring) at p. 492, para. 27; my decisions in *Li v. Minister for Justice and Equality* [2015] IEHC 638 (Unreported, High Court, 21st October, 2015) and *Leng v. Minister for Justice and Equality* [2015] IEHC 681 (Unreported, High Court, 6th November, 2015); and *P.O. v. Minister for Justice, Equality and Law Reform* [2015] IESC 64 (Unreported, Supreme Court, 16th July, 2015) *per* MacMenamin J. (Laffoy and Charleton JJ. concurring) at para. 26, and *per* Charleton J. (MacMenamin and Laffoy JJ. concurring) at paras. 34 to 35. By definition, that must include the art. 8 rights *inter se* of parents and children where one of those parties is unlawfully or precariously present.

96. Bearing in mind that the art. 8 rights of such persons as the applicant, who is present unlawfully or on a precarious basis, are minimal or virtually non-existent, a court might well also take the view that their family rights *vis a vis* children are correspondingly weakened.

97. I should also emphasise that the fact that a right, risk, representation or other matter needs to be considered is absolutely distinct from any requirement that it receive narrative consideration: see *R.A. (No. 1).* It is generally sufficient for the Minister to note that she has considered the relevant elements of the s. 3(11) considerations without having to engage in detailed, or any, particular narrative analysis beyond giving a reason sufficient to satisfy the test in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701. Such reason does not have to contain narrative discussion.

98. The response of the State in this case to this issue – which was that the first and second named applicants enjoyed no rights under Article 41 because they were not married, that they enjoyed no rights under art. 8 of the ECHR because their situation was precarious, and that there were no rights of the child, other than to life, because there was no born child – was, *mutatis mutandis*, a submission that would not have been out of place in the socially-repressive Ireland of the 1950s. As McKechnie J. said in *G.T. v. K.A.O.* [2008] 3 I.R. 567, speaking in 2007 of the position of the father in an established cohabiting non-marital family: *"…even in the past decade, such relationships have multiplied and continued to so do. In any event, where the above described circumstances exist, could anyone possibly object to what Finlay C.J. said in* J.K. v. V.W. *[1990] 2 I.R. 437 at p. 447 where he described such a situation as 'bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed'? If, as I respectfully suggest, our society, which is governed by a Constitution which declares the principles of prudence, justice, charity and human dignity, might in its maturity so agree, should there not be a greater recognition of the type of father whom I mention?"* Nearly 10 years on from the expression of that view, the State's submissions are still mired in the middle of the last century while its citizens are voting with their feet and continuing to engage in a much wider range of family relationships than the State is prepared to acknowledge as having constitutional rights.

99. Previous decisions on the lack of rights for the non-marital family are largely creatures of their time, and society has transformed beyond all recognition since that chain of authority was put in motion. More fundamentally, the constitutional framework within which such decisions were generated has been subjected to massive transformation. Even since the decision in *G.T.*, the 28th amendment has *require*d (rather than, as previously phrased, *permitted* – a fundamental change in entrenchment of European values at constitutional level) a commitment to membership of the European Union, which necessarily involves recognition at constitutional level of the wider family rights recognised by arts. 7 and 33 of the EU Charter of Fundamental Rights, albeit in the context of the State's implementation of EU law. The 31st amendment recognises the natural rights of "*all*" children, which in context must have particular reference to the enjoyment of those rights without regard to the marital status of their parents. The 34th amendment has extended the availability of marriage to a range of same-sex relationships in contexts that would have been unthinkable when the Constitution was adopted. To regard this as a mere technical extension of the category of persons who may marry, rather than a quantum leap in the extent to which the Constitution is oriented towards respect and protection for a diversity of private family relationships, is to artificially separate literal wording from history, culture and society. Any one of these developments, and certainly all of them taken together, as well as the fundamental shifts in society since the adoption of the Constitution, in my respectful view warrant a recognition that members of a non-marital relationship, and non-marital parents of both sexes in particular, enjoy acknowledgement of inherent constitutional rights in relation to their children and each other on a wider basis than has been recognised thus far.

100. For completeness I should say that I have considered the full range of injunction cases cited to me but since an injunction is no longer being sought, there does not seem to be any need to address these in the judgment especially as different issues arise at the injunctive stage than at the final substantive stage.

Summary of principles involved

101. Before concluding, I can endeavour to summarise the principles discussed in this judgment as follows:

(i) A court can proceed to determine an issue that is strictly moot if the interests of justice so require. In this case there are two factors so requiring; firstly the particular suitability of issues arising from pregnancy as a basis to depart from the normal mootness doctrine, and secondly the consent of the parties.

(ii) An applicant is not entitled to a minimum period of notice of the actual date of deportation, at least where 28 days have passed from the notification of the deportation order (thus allowing time for challenge).

(iii) As long as the Minister continues to be lawfully satisfied that no legal rights would be infringed by a deportation, that deportation may proceed despite the existence of an undetermined s. 3(11) application (and even if an excessive time has elapsed since the making of that undetermined application).

(iv) The matters which the Minister must consider in the context of a s. 3(11) application are (a) any representations by the applicant; and (b) any change of circumstances since the original decision which engages a legal provision which would have the effect of rendering the deportation unlawful by reason of an actual or prospective breach of rights.

(v) Absent the extraordinary case of proof of psychiatric injury, it is not a breach of the rights of a prospective mother to deporting her partner in the very final stage of pregnancy, even if such deportation causes significant stress and anxiety.

(vi) The unborn child enjoys significant rights and legal position at common law, by statute and under the Constitution, going well beyond the right to life alone. Many of these rights are actually effective rather than merely prospective.

(vii) Article 40.3.3° of the Constitution is not a statement of the legal position of the unborn child on an exclusive basis, such as to oust the other rights and legal consequences attaching to such unborn child. That the provision was not intended to confer immigration rights does not displace such other rights and legal consequences.

(viii) Insofar as Article 42A of the Constitution protects "all" children, such protection covers the child both before and after birth. Again, that the Article was not intended to confer immigration rights does not displace any legal consequences flowing from the prospective position of the unborn child.

(ix) Having regard to the need to consider prospective illegality in the s. 3(11) context, the prospective legal rights and (where raised in submissions) interests that a child will acquire on birth are matters that the Minister must consider when an application is made under s. 3(11) by reference to an unborn child. However she is not under any obligation to automatically allow such an application.

(x) The adoption of the 28th, 31st and 34th Amendments as well as the fundamental shifts in society since the adoption of the Constitution warrant a recognition that members of a non-marital relationship, and non-marital parents of both sexes in particular, enjoy inherent constitutional rights in relation to their children and each other on a wider basis than recognised prior to those developments.

Order

102. In the light of the foregoing, I will order:-

(i) that leave be granted in accordance with the latest amended statement of grounds;

(ii) that there be a declaration that the Minister, in considering an application under s. 3(11) of the Immigration Act 1999, is required to consider the current and prospective situation of the applicant concerned insofar as relevant to that application, including the prospective position, likely to arise on birth, of any child of the applicant unborn at the time of the application;

(iii) that the remaining reliefs sought be refused; and

(iv) that the respondents' undertaking not to deport the first named applicant continue until withdrawn in accordance with its terms, and that there be liberty to apply in the event that the respondents seeks to so withdraw it.