THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 123

[2016 465]

Peart J.
Edwards J.
Whelan J.

BETWEEN/

O.O.A. AND O.P.O.O.O.A.A. (A MINOR SUING BY HER FATHER AND

NEXT FRIEND O.O.A.)

APPELLANTS/APPLICANTS

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Michael Peart delivered on the 22nd day of February 2019

1. This is an appeal by the above-named applicants against an order of the High Court (Humphreys J.) dated the 10th October, 2016.

2. By his order, the High Court judge refused to quash the respondent's decision of the 22nd July 2014, by which the respondent rejected an application under s.3(11) of the Immigration Act 1999 to revoke the deportation order made in respect of the first named applicant.

Background

3. On the 28th December, 2006, the first named applicant arrived in Ireland and claimed asylum. His claim was rejected by the Refugee Applications Commissioner on the 3rd January, 2007.

4. On the 4th July 2007, the first named applicant married Ms. A.A., a British national. The second named applicant was born to the couple on the 2nd December 2007. The first named applicant applied for residence on the basis of asserting EU Treaty rights. This application was refused on the 24th October, 2008. A second application was refused on the 5th October 2010 and again on appeal on the 17th May, 2011. On the 20th February 2012, a third application for residence, this time based on the decision in *Ruiz Zambrano v. Office National de l'Emploi* (Case C-34/09) [2012] Q.B. 265, was refused.

5. On the 23rd December, 2013, a deportation order was made in respect of the first named applicant pursuant to s.3 of the Immigration Act 1999, which was not challenged.

6. In February 2014, shortly after the issue of the deportation order, and in circumstances where the marriage between the couple had broken down, the first named applicant applied to the District Court for access to the second named applicant. At the same time, he made an application under s.3(11) of the Immigration Act 1999 for revocation of the deportation order which had been made against him.

7. On the 19th March, 2014, a consent order was made by the District Court, which permitted the first named applicant access to his son for two hours every second Friday, and made provision for the payment of maintenance in the sum of €15 per week.

8. On the 22nd July, 2014, the application for revocation of the deportation order was rejected. On the 4th September, 2014, the instant proceedings, which challenge that refusal, were initiated.

Reliefs claimed

9. By an order of the High Court (Baker J.) dated the 5th September 2014, the applicants were granted leave to apply for judicial review. They did so by notice of motion dated the 10th September 2014, by which they sought the following reliefs:

> (i) an order of *certiorari* quashing the respondent's decision of the 22nd July 2014 refusing to revoke the deportation order;
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> (ii) an order of *mandamus* compelling the respondent to reconsider the first named applicant's application seeking the revocation of the deportation order;
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> (iii) such further or other order as the Court may deem fit; and
>
> (iv) the costs of the proceedings.

High Court judgment

10. For reasons explained in his judgment of the 29th June, 2016, Humphreys J. in the High Court dismissed the application in its entirety.

11. First, the High Court judge dismissed the argument advanced in the submissions of the applicants, relying upon the decision of Barr J. in *Luximon v. Minister for Justice and Equality* [2015] IEHC 227, that the first named applicant has no procedure by which his family rights can be recognised outside of the deportation process. This argument was rejected on the grounds that it fell outside the scope of the pleadings, although the High Court judge stated that in any event he considered that the first named applicant would not be entitled to a procedure of the type claimed.

12. Second, it was submitted on behalf of the applicants that the impugned decision did not properly identify and accord weight to the rights of the second named applicant as a child, and especially his right to the society of his father, and also was disproportionate having regard to these rights. It appears that particular reliance was placed upon Article 8 of the European Convention on Human Rights and Article 41 of the Constitution in this regard.

13. These submissions were rejected by the High Court judge, who noted that, per the judgment of Finlay Geoghegan J. in *C.I. v. Minister for Justice and Equality* [2015] IECA 192, it would require "wholly exceptional circumstances" to engage Article 8 rights for persons who have no permission to reside in the State, such as the first named applicant. In addition, the High Court judge considered that there was "no compelling reason to take the view that Article 41 confers a greater right on the first named applicant, even recognising the somewhat stronger language of Article 41 as compared with Article 8."

14. More generally, the High Court judge emphasised that an assessment as to whether the legitimate entitlement of the State to operate an orderly immigration control system outweighed the above-mentioned rights of the child was "primarily a matter for the Minister". He continued, at para. 18 of his judgment, to state that for the court to quash the impugned decision, on the basis of its own view as to what was proportionate, "would amount to an usurpation of the constitutional function of the executive power of the State, and a substitution, for the Minister's view, of the court's 'two cents' as to how the immigration system should be managed". Indeed, he concluded at para. 21 that to quash such a decision, proof of a "clear illegality" would be required, which was absent in the case before him insofar as there was little proof of a significant involvement on the part of the first named applicant in the life of his child, and certainly nothing which would reach the level required for a decision to be placed in the category of the unreasonably disproportionate.

15. Third, the applicants sought to rely upon the decision in *Ruiz Zambrano v. Office National de l'Emploi* (Case C-34/09) [2012] Q.B. 265, and in particular upon the proposition that the rights to free movement of an EU citizen under Article 20 of the Treaty on the Functioning of the European Union (TFEU) may be engaged where a person on whom the citizen is dependent is deported. The High Court judge found that, while there was modest evidence of dependency in this case, anything proved fell "well short of the level of dependency that would, in practice, have the effect of impairing the EU law rights of the second named applicant", thus failing the test laid out in *Nicolas v. Minister for Justice and Equality* [2014] IEHC 526. This was especially so in circumstances where the second named applicant remained in the custody of his mother, who was perfectly entitled to remain in the State.

16. Fourth, finally, and perhaps most relevantly for the purposes of the present appeal, the High Court judge considered the submission of the applicants that, by virtue of Article 8 of the Convention, the respondent was under an obligation to consider the best interests of the child as "a primary consideration". It was the contention of the applicants that the respondent had failed in this obligation in the impugned s.3(11) decision, in which she had not considered or even identified the best interests at stake.

17. While the High Court accepted that the best interests of the child in a case such as the one before him must be a primary consideration, he held that those interests could not be decisive. As he noted at para. 30 of his judgment, it is one thing to say that the deportation at issue will be unfortunate for the child, but it is quite another to say that it is unlawful. At paras. 32-33, he suggested that the essence of the respondent's decision was not that the best interests of the child lay in the deportation of his father; of course, they presumptively lay in having the society of both parents. The essence of the respondent's decision, according to the High Court judge, was that those best interests were in this case "outweighed by the importance of giving effect to the immigration control system". It was held that this balancing exercise was a matter for the judgment of the Minister, and the court could only intervene if the decision was clearly unlawful.

18. The High Court judge held that, when considering the lawfulness of the impugned decision, he was required to read the decision "in the round", and that it should not be "reduced to a box-ticking exercise". Having read it as such, he found that it was clear that the best interests of the child were considered, and then held to be outweighed by the requirements of the immigration system. Further, he noted at para. 35 that the applicants themselves had not raised the issue of best interests in their prior submission to the respondent dated the 5th February 2014. On the facts before him, Humphreys J. concluded that the decision was not unlawful.

19. Accordingly, the High Court judge dismissed the application and ordered that the respondent be discharged from any undertaking not to deport the first named applicant.

Grounds of appeal

20. By notice of appeal dated the 19th October 2016, the applicants/appellants seek:-

> (i) an order setting aside the order of Humphreys J. of the 10th October 2016;
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> (ii) an order of *certiorari* quashing the respondent's decision of the 22nd July 2014 to refuse to revoke the deportation order; and
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> (iii) the costs of the within proceedings.

21. In essence, the appellants appeal on the grounds that the High Court judge erred in law and/or in fact:-

> (i) in finding that the impugned decision was lawful in circumstances where it did not identify the best interests of the child; and/or did not treat those interests as a primary consideration; and/or did not have regard to new information affecting that consideration;
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> (ii) in finding that the impugned decision gave due consideration to the constitutional and Convention rights of the child as required by the prevailing Irish jurisprudence; and
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> (iii) in inferring his own reasons and rationale into what was an opaque decision in breach of the appellants' constitutional

right of access to the courts, and thus conducting a merits-based appeal of the decision.

Appellant submissions
22. In their written submissions, the appellants contend that the High Court judge mischaracterised the proper relationship between the courts and the executive power where a case affecting the fundamental rights of a child is concerned. In doing so they rely upon the judgment of this Court in *NM (DRC) v. Minister for Justice, Equality and Law Reform* [2016] IECA 217, which quotes with approval the statement of Hogan J. at p. 819-820 of his decision in *Efe v. Minster for Justice* [2011] 2 I.R. 798 that, in judicial review proceedings such as these, "the substance and essence of constitutional rights will always be protected against unfair attack, if necessary through the application of a *Meadows* style proportionality analysis". The appellants submit that in the impugned decision the respondent did not give full consideration of the "nature and meaning of the constitutional rights engaged". In particular, they allege that the constitutional and Convention rights of the appellants were conflated, that there was no express reference to the Article 8 rights of the second named appellant, and that the substance of the constitutional rights of the child under Article 42.1 was not dealt with in any way.

23. The appellants submit that, in circumstances where it is alleged that the impugned decision is disproportionate or fails to respect fundamental rights, the starting point for the High Court judge hearing the judicial review proceedings should not be an assumption of validity of the decision. They rely upon a passage from the decision in *ISOF v. Minister for Justice, Equality and Law Reform (No. 2)* [2010] IEHC 457, where Cooke J. stated that where fundamental rights were concerned the starting point must be "the decision itself", and that it was the duty of the court to assess the proportionality of the decision in the sense of irrationality or unreasonableness, per the *Keegan/O'Keeffe* test. Accordingly, the appellants conclude that Humphreys J. was wrong in determining that the impugned decision could only be quashed where there was a clear illegality.

24. It must be said that, notwithstanding that she professed reliance on the entire of her written submissions at the oral hearing before this Court, counsel for the appellants, Ms Sunniva McDonagh SC, almost exclusively focused her oral submissions on the ground of appeal in relation to the best interests of the child.

25. The starting point for this argument is the decision of the Supreme Court in *Oguekwe v. Minister for Justice* [2008] IESC 25, and in particular the holding of Denham J. at para. 56 of her judgment that, in a deportation context, an Irish citizen child has "a right to have his/her welfare considered in the sense of what is in his/her best interests in decisions affecting him/her", which flows from their personal rights under Article 40.3.1 of the Constitution. The appellants submit that this requirement was ignored by the respondent insofar as the impugned decision was made without any regard or reference to the best interests of the child, let alone any attempt to identify what those interests might be.

26. In particular, in her oral submissions Ms McDonagh emphasised strongly her argument that, when considering the s. 3(11) application, the respondent failed to give due consideration to the fact of a District Court order in respect of access and maintenance which had arisen subsequent to the original deportation order. She alleges that, at the time of the first deportation decision, the lack of an existing access or maintenance order was identified by the respondent as being a factor leading to the conclusion that there was limited evidence that the second named appellant was financially or emotionally dependent on his father, which in turn led to a conclusion that he would not be adversely affected by the deportation of his father. Subsequent to this decision, but prior to the decision now under challenge, counsel submits that a District Court order was obtained by the first named appellant which grants him access to his son once a fortnight, and makes provision for a maintenance payment in the sum of €15 per week. Counsel's key submission in this respect is that, although the respondent noted this new fact on her consideration of the s. 3(11) application, the respondent failed in reality to accord any consideration to it in the context of determining the best interests of the child. Thus, it is submitted that, in spite of the respondent's representation in the initial deportation decision that the lack of an access or maintenance order was relevant to the issue of best interests, the respondent failed to consider the changed circumstances when re-considering the issues upon the s. 3(11) application.

27. The appellants further rely upon the judgment of Lady Hale in the UK Supreme Court in *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] 2 A.C. 166 as authority for the proposition that the respondent was under an obligation to consider the best interests of the second named appellant. They again insist that these interests were neither identified nor considered, and in fact what occurred was that the High Court judge at para. 38 of his judgment simply read conclusions regarding these interests into the respondent's decision which were not otherwise present. In this respect, the appellants cite the decision in *Rawson v. Minister for Defence* [2012] IESC 26, and submit that the duty to give reasons is a necessary pre-requisite to a lawful decision, such that if its reasoning is opaque or open to multiple interpretations it breaches an applicant's constitutional right of access to the courts. They complain that the High Court judge, in the absence of clear reasons as might have been provided by the respondent, inferred his own reasons and rationale into the decision, in particular in relation to the best interests of the child. Consequently, rather than reviewing the lawfulness of the decision, they say that he has conducted his own merits-based appeal of the decision, in violation of the prevailing principles regarding judicial review.

Respondent submissions
28. The respondent emphasises that the deportation order in respect of the first named appellant was not challenged by him, and the court was thus obliged, *per Okunade v. Minister for Justice* [2012] 3 I.R. 152, to afford significant weight to it. The respondent submits that, whereas the appellants were obliged to put before the court proof that the decision not to revoke the deportation order was wrongly made having regard to Article 8 of the ECHR and Article 41 of the Constitution, little evidence is adduced regarding the actual relationship between the appellants. Moreover, the respondent contends that, in circumstances where the first named appellant has no permission to be in the State, he is required to establish "wholly exceptional circumstances" in order to establish a breach of his article 8 rights. In the light of this fact, the respondent contends that the High Court judge was correct to find that the decision made by the respondent was neither manifestly unreasonable, nor was it one which no decision-maker, armed with all of the relevant facts, could have arrived.

29. The respondents submit, again relying upon Okunade, that the High Court judge was entitled to accept the *prima facie* validity of an unchallenged deportation order. They suggest that much of the authority which the appellants seek to rely upon regarding the correct "starting point", including *ISOF v. Minister for Justice (No. 2)* [2010] IEHC 457, concerns direct challenges to deportation orders, whereas in the instant case the decision under challenge is that which refused to *revoke* the deportation order and not the deportation order itself. Further, the respondent contends that the appellants, in asserting that the decision was disproportionate, have failed to demonstrate precisely why the balancing exercise undertaken was unlawful.

30. On the issue of the best interests of the child, the respondent submits that the conclusion drawn in the initial deportation decision was not that the deportation would be in the best interests of the child, but that the applicants had failed to adduce

sufficient evidence to establish the existence of a relationship between the applicants warranting a finding that the child's best interests would be adversely affected by the deportation. Counsel for the respondent, Ms Nuala Butler SC, argues that there were a number of strands to this analysis, of which the lack of an access order was only one. She submits that, beyond lack of an access or maintenance order, the first named applicant has produced no evidence of the actual contribution he makes to the life of his child, whereas in a case such as this one might expect to see significant evidence attesting to the support he provides his son from, for example, his son's teachers.

31. The respondent, who maintains that the onus to prove a sufficient relationship was at all times on the applicants, relies upon the judgment of Denham J. in *Oguekwe* where it is stated at para. 85.2 that "[t]he Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances." In this respect, while it is acknowledged that the District Court order was brought to the attention of the respondent prior to the determination of the s. 3(11) application, the respondent notes that there was no suggestion that this order was deemed to be decisive as a determination of the best interests at stake; indeed, it was not even expressed that the impact of this order, whatever it might be, should be analysed in the context of best interests.

32. In her submissions, Ms Butler emphasised that only seven months had passed between the initial deportation decision and the determination of the s. 3(11) application, and that the same decision-maker had been responsible for both decisions. Consequently, she suggests, the decision-maker was alive to the facts of the case and to the issue of best interests which received express analysis in the initial decision. Counsel submits that, given the similar facts at issue, it is possible to view the two decisions together, and conclude that the analysis in the original decision could be said to still apply to the second.

33. Further, counsel rejects any suggestion that the District Court order of itself makes a qualitative difference to the relationship between the appellants. She contends that, insofar as the first named appellant has long maintained that he sees his son on a once-fortnightly basis, it is unclear how an access order in those terms has any effect beyond formalising an existing arrangement. Accordingly, counsel submits that the respondent is entitled to maintain that the analysis contained in the initial decision, where that same level of access was deemed insufficient to demonstrate the existence of significant family ties, continues to apply. It is further submitted that the respondent, having had regard to all of the material facts, is entitled to engage in the balancing exercise described at para. 85 of the judgment of Denham J. in *Oguekwe* and conclude that whatever evidence of family ties has been adduced is outweighed by the State's interest in ensuring the maintenance of its economy and a regulated immigration control system.

34. The respondent approves of the approach of the High Court judge, who, citing a passage from my judgment in *T. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 287, held that the respondent's decision must be viewed "in the round", and not be parsed word by word. Seen as such, it was clear, the respondent submits, that the best interests of the child were considered a primary consideration but were not judged to be decisive in this case. Indeed, in her oral submissions Ms Butler suggests that the only issue which the appellants seem to take with the impugned decision is that the respondent did not expressly use the phrase "best interests", in circumstances where it is clear that these interests were in reality considered.

35. The respondent rejects the attempt of the appellants to rely upon the *Tanzania* case, which is said to be distinguished, first, due to its significantly different facts, and second, on the basis that the decision was made with reference to the unique statutory context of UK childcare law. In any event, the respondent maintains that in the instant case the best interests of the child were treated as "a primary consideration", as would be required by the judgment of Lady Hale.

36. Finally, in response to the submission that the decision of the respondent was opaque or open to different interpretations, the respondent replies that, without prejudice to its view that it was in no way opaque or indeterminate, this argument has not been raised at any previous stage. It is submitted that this argument must be excluded as the appellants are attempting to raise it for the first time on appeal, in circumstances where it was not raised either in the grounds on which they were granted judicial review or in the judicial review proceedings themselves.

Discussion

37. When this matter came before the High Court, it is important to note that what Humphreys J. was considering was not whether the respondent was correct to make the deportation order against the first named appellant, but whether the decision of the respondent to refuse to revoke that order was wrong or unlawful and should be quashed. At the time he considered this matter, there existed a valid deportation order made against the first named appellant, as remains the case to this day, which was not subject to challenge when made. Subsequently, the first named appellant has made an application under s. 3(11) of the Act of 1999 to have this deportation order made against him revoked, which was refused. It seems to me to be of some relevance that it is this decision, rather than the initial deportation decision, that is challenged, insofar as an existing and validly made deportation order which is *prima facie* valid ought to carry significant weight, per the judgment of Clarke J. (as he then was) in *Okunade v. Minister for Justice* [2012] 3 I.R. 152.

38. The appellants have sought to argue that where fundamental rights are engaged within judicial review proceedings, the court is faced with a particularly strong obligation to protect the substance and essence of these rights. However, it appears that in circumstances where the first named appellant has no right to reside in the State, there must be a significant restraint on the rights protection which he is owed. In this respect I find myself in agreement with the High Court judge who quoted with approval the finding of Finlay Geoghegan J. in *CI v. Minister for Justice and Equality* [2015] IECA 192 that it would require "wholly exceptional circumstances" to engage Article 8 rights for persons who have no permission to reside in the State. Moreover, any obligation of the court to protect the substance and essence of rights engaged cannot relieve the appellants of their obligation to put evidence before both the decision-maker and the court to demonstrate that rights are so engaged. In this case, at least insofar as the appellants sought to rely upon various iterations of family rights as a basis for revocation, it was crucial for them to demonstrate the existence of family ties between them; however, it is evident that the respondent was unsatisfied with the evidence produced to support the existence of these ties. I agree with the respondent in her assessment of the evidence produced, which I find to be rather thin on the ground having regard to the rights protection which is claimed.

39. Taking the case at its highest, the appellants identify three mistakes which they say that the respondent made when analysing the rights engaged, and which were overlooked by the High Court on review. First, it is claimed that the respondents failed to make reference to the Article 8 rights of the second named appellant. However, when one reads the initial deportation decision made against the first named appellant, it is clearly accepted that the deportation will constitute an interference with the right to respect for family life within the meaning of article 8, although of course the respondent considers it a legitimate interference. It should be clear that on any reasonable reading this analysis carries over to the subsequent s.3(11) decision; the mere fact that the Article 8 rights of the second named appellant are not expressly mentioned in this later decision is not sufficient to prove that they were not considered. Second, it is said that the respondent has conflated rights which arise under the Convention with those which arise under the Constitution. However, as was accepted by the Supreme Court in *Oguekwe*, it is simply unavoidable that in this context these

rights will overlap, and at para. 85.7 of her judgment in that case Denham J. states that Convention rights "may be considered together with the constitutional rights." Accordingly, I can again find no fault with the approach of the respondent. Third, the appellants submit that the respondent in the impugned decision failed to consider the substance of the rights of the child which arise under Article 42.1 of the Constitution. However, it is clear that reference is made to the Article 42.1 rights of the second appellant in the impugned decision. While it is true that these rights are not singled out for substantial discussion by the respondent, it is clear that they are considered as part of the balancing exercise undertaken. It seems that what in reality the respondent objects to is the result of this balancing exercise, which is that the Article 42.1 rights are considered to be outweighed by specified interests of the State. However, this objection does not establish that the respondent failed to consider the Article 42.1 rights engaged, as it would have to in order to have any traction on review. It cannot be disputed that the respondent was perfectly entitled to balance the various interests at stake and arrive at a conclusion that the weightier interests in this case were those of the State in ensuring the wellbeing of its economy and the integrity of its immigration control system, which is precisely what occurred in the s.3(11) decision.

40. Notwithstanding that she professed reliance on the above arguments which appeared solely in her written submissions, at the oral hearing of this matter Ms McDonagh for the appellants placed almost exclusive emphasis on her ground of appeal in relation to the best interests of the child, to which I will now turn.

41. In the original deportation decision of the 23rd December 2013, the respondent acknowledged, *inter alia*, the submission of the first named appellant that he sees his son every second weekend. However, the respondent went on to state that:-

> "The above information notwithstanding, little documentary evidence has been submitted to indicate that [the first named appellant] plays a substantial role in the upbringing of his child. Certainly, there do not appear to be any formal child care, maintenance or access orders in place at the current time. Furthermore, with the exception of lodgement slips in a junior savings account in the name of [the second named appellant] (one of which is addressed care of Michael J. Carter – the applicant's solicitor), no evidence has been adduced to demonstrate that [the second named appellant] is financially or emotionally dependent on the applicant's continued presence in the State. The existence of any significant family ties between the applicant and his family in Ireland has not been demonstrated, and it is therefore reasonable to conclude that the applicant's relationship with his son is limited at best."

Subsequently, under a heading labelled "Balancing Rights", the respondent concludes that "the applicant has not established that his child's best interests would be adversely affected by a decision to deport him".

42. In the course of her oral submissions, counsel for the appellants contended that in this original deportation decision the respondent had found that the best interests of the second named appellant lay in the deportation of his father. Having regard to the above passage, I do not find this to be a correct interpretation of the decision. Rather than making a positive determination that a deportation order would be in the best interests of the second named appellant, it is clear that the respondent was expressing a finding that the appellants had failed to adduce sufficient evidence to establish that the deportation order would adversely affect the best interest of the child. The better understanding, therefore, is that whatever evidence had at that point been put before the respondent was considered insufficient for the purposes of establishing familial ties which were sufficiently significant to prove that the best interests of the child would be adversely affected by the deportation.

43. It is moreover clear from the above-quoted passage that, in the view of the High Court judge, this evidence suffered from not one but in fact several deficiencies. In her submissions, counsel for the appellants argues that in the impugned decision of the respondent it is suggested that the absence of a formal access or maintenance is the sole, or at least a crucial, factor leading to the determination that the familial ties are, in the words of the respondent, "limited at best". I do not accept this characterisation. Reading the above passage from the decision, it is apparent that the respondent was wholly unsatisfied with the "little documentary evidence" which was offered, and the lack of formal orders was merely presented as an example of the deficiency of the evidence. There is certainly no suggestion that the existence of an access order would be transformative to the relationship between father and son. At best the respondent could be understood as pointing out that an access order would be a rather basic formal proof that a relationship exists, and noting that not even that was adduced.

44. The key argument of the appellants is that, given that the first named appellant subsequent to the issue of the deportation order obtained an access and maintenance order from the District Court, he was entitled to have that considered upon his s. 3(11) application, in circumstances where its importance had already been noted by the respondent in the first decision. Counsel for the appellants submits that the District Court order involved a determination by an organ of the state, i.e. the court, that the best interests of the second named appellant lay in seeing his father, and that the respondent was obliged to consider in her decision the impact this would have for the child's best interests. However, counsel contends that, whilst the respondent under the heading of "New Information" acknowledged the existence of the new fact of the District Court access order in her s. 3(11) decision, the respondent did not in fact proceed to give the order any consideration in the context of best interests.

45. Before considering this argument, I should first note that, while counsel for the appellants initially represented that an order in respect of access and maintenance had been made by the District Court, upon some probing at the oral hearing it emerged that in fact no order had been made. It seems that what occurred is that an access and maintenance arrangement was agreed on an interim basis between the first named appellant and his estranged wife, which was then handed in to the court. This agreement was apparently reviewed on the 14th May 2014, but no further order has been made and the agreement has continued on the same terms by consent. Clearly, there is a distinction which could be drawn between this interim agreement between the parties, and an order of the District Court. However, it is also fair to note that the respondent has not taken up this issue and instead all parties have proceeded on the basis that there was an order of the District Court. Thus, whilst for completeness I note the absence of an order of the District Court, I shall proceed to consider this matter as if one had been made.

46. Taking the argument as such, and even assuming that the hypothetical order would not have been made if it were not in the best interests of the second named appellant, the question remains as to whether the respondent failed to consider how this order would impact best interests in such a manner as to render the impugned decision unlawful.

47. In this regard it is surely of significance that, as is pointed out by the respondent, in the submissions he made to the respondent upon making his s. 3(11) application the first named appellant did not raise any suggestion that the new access order should be considered to impact the best interests of his child. In the light of the comment of Denham J. in *Oguekwe* that "[t]he Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances", an immediate problem arises for the appellants in that the sum total of their submissions to the respondent regarding the order upon which they seek to place significant reliance amounts to a copy of the interim agreement plus two solicitor's letters, neither of which raise the issue of best interests. It is in tension with the basic principle that a party must raise before a decision-maker issues which it wishes to be determined that, in circumstances where the appellants in their own submissions to the respondent did not explicitly

consider the order in the context of the best interests of the child, they in essence seek to impugn the respondent for failing to do precisely that in her decision. In this respect I would endorse the comment of counsel for the respondent that the respondent when considering the s. 3(11) application was charged with conducting an assessment, but not an investigation.

48. In any event, at its height the access and maintenance order could have been considered by the respondent to determine that the best interests of the second named appellant lay in seeing his father once every two weeks. Not only is this a relatively low level of access, but, crucially for the present appeal, it is precisely the same level of access which existed prior to the formal access order. This is evident from submissions made by the first named appellant himself; in the initial deportation decision reference is made to a personal letter from 2011 in which the first named appellant submitted that he saw his son every second weekend. In the intervening period it would appear that the level of access that the first named appellant enjoys to his son has not increased, and thus it must be concluded that the access order provided him with no additional access to his son but simply recognised and formalised that which already existed.

49. This level of access – one visit per fortnight – had plainly already been considered by the respondent in her initial deportation decision, and had been determined to be an insufficient basis for ties such as would establish that the best interests of the child would be adversely affected by the deportation. In this context, even if one were to accept that the respondent gave no consideration to how the best interests of the second named appellant could be impacted by the access order, it is difficult to understand how she could have erred in so doing in circumstances where it is not even suggested that the said order made a *qualitative difference* to the relationship between father and son. Again, it is difficult to criticise the respondent for failing, if she did, to consider how the access order impacted the best interests of the child when one considers that the first named appellant did not even submit that the access order would have a qualitative impact on his ties to his son.

50. I accept the submission made by counsel for the respondent that the initial deportation decision and the subsequent decision not to revoke it may be read together. The decisions were made by the same decision-maker, only seven months apart. It is reasonable to conclude that the facts relevant to the appellants' case were still fresh in the mind of the decision-maker, and thus that when it came to the second decision they were alive to the issue of the best interests of the child which they had already considered in the first, notwithstanding that they did not give same express discussion in that second decision. Accordingly, my interpretation of the impugned decision is that the decision-maker, having found in the first decision that it was not established that the best interests of the second named appellant were adversely impacted by the deportation, found no reason why the new District Court order, which, again, merely formalised an existing state of affairs, should displace the existing finding of no adverse impact.

51. It is fair to say that in an ideal world it would have been preferable that the respondent would have expressly analysed the impact of the District Court order in the context of best interests in the impugned decision. Indeed, the appellants are in no sense wrong to say that the best interests of the child are a consideration of great importance, not least in a deportation context in which they are likely to come under threat. Accordingly, it is fair to say that the respondent should as a matter of best practice have discussed the change in circumstances and expressly rejected the notion that they in reality altered the best interests of the child.

52. On the other hand, as I have said previously in *T v. Minister for Justice, Equality and Law Reform* [2007] IEHC 287, it is undesirable that decisions such as that made by the respondent "be parsed and analysed word for word in order to discern some possible infelicity in the choice of words or phrases used… unless the matters relied upon have been clearly misunderstood or mis-stated by the decision-maker." In the light of my above analysis regarding the correct interpretation of the impugned decision, I consider that what counsel for the appellants in essence seeks to do is to home in exclusively on the issue of "best interests" and whether or not each element was expressly considered with reference to it. In doing so she fails to read the decision "in the round", as one is required to do. I agree with the submission of counsel for the respondent at the outset of her oral submissions that it seems that, when pared down to its core, the complaint of the appellants is that the respondent failed to say the phrase "best interests" when considering the appellants' case. It is otherwise clear that the respondent in the impugned decision found that nothing had been adduced to alter the previous finding that the deportation order had not been shown to adversely affect the best interests of the second named appellant.

53. Accordingly, I am not of the view that the absence of express analysis rejecting the notion that the District Court order would affect best interests in the impugned decision should defeat the clear overall reasoning of that decision. The respondent evidently took the view, as I believe she was entitled to, that there was insufficient evidence before her to warrant a conclusion that the best interests of the child would be adversely affected. To whatever extent that they would naturally be affected by the removal of a family member from the jurisdiction, the respondent clearly concluded that these interests were outweighed by the legitimate interests of the State in safeguarding its economy and maintaining a regulated immigration control system. I endorse the reasoning of the High Court judge at para. 38 of his judgment where he states as follows:-

> "Reading the decision in the round, it is clear that the child's interests were considered, and held to be outweighed by the requirements of the immigration system. That approach was reasonably open to the Minister. A finding that best interests can be outweighed is compatible with a finding that they are a primary consideration, because the latter does not preclude the former."

54. Finally, I note the reliance of the appellants on the judgment of Lady Hale in *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] 2 A.C. 166, where it was stated that in a deportation context a decision-maker is obliged to consider the best interests of the child as "a primary consideration".

55. It appears to me that there is good reason why, both on its facts and on the basis of the different statutory context in which it occurs, the *Tanzania* case may be distinguished. In any event, so far as the ratio in that case is concerned, as I have stated in the foregoing paragraph, it should be evident that I have concluded that the respondent did in fact treat the best interests of the child as a primary consideration, notwithstanding that the respondent held that it had not been established that they would be adversely affected on the facts presented, and that whatever interests the second named appellant had in the continued presence of his father in the State were outweighed by the legitimate interests of the State. This approach is entirely consistent, and I am not satisfied that the best interests were treated other than as a primary consideration.

56. For all of the reasons that I have stated, I would dismiss the appeal.