NEUTRAL CITATION NUMBER [2012] IEHC 371

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 478 J.R.]

BETWEEN/

E.A. AND P.A. (AN INFANT SUING BY HIS FATHER AND NEXT FRIEND E.A.)

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered the 7th day of September 2012

1. This application for an interlocutory injunction presents again in acute form the difficult dilemma which has confronted both officialdom and the courts on numerous occasions in the last decade or so, namely, how should the constitutional rights of a young child to the care and company of his parents be weighed against the interests of the State in effective immigration control and the general integrity of the asylum system?

2. The first named applicant, E.A, ("Mr. A."). is the father of the second named applicant P.A. ("P"). Mr. A. entered the State on the 7th June, 2005 and applied for asylum on the following day. He was later to marry a fellow Nigerian national, Ms.E.O. ("Ms. O.") in the State on the 19th December, 2006. Ms. O. was previously given a declaration of refugee status on the 4th April, 2005 and is a qualified nurse. Mr. A. and Ms. O. are the parents of P., who was born in the State on the 5th October, 2007 and who is an Irish citizen.

3. In his asylum application Mr. A. had claimed to be a Sudanese national and he further claimed his father was dead, but that his mother and siblings were resident in the Sudan. He had contended that he had fled from the Janjaweed militia who had attacked his village on several occasions and as a result of which his father had died. The asylum claim failed before the Refugee Applications Commissioner and on appeal before the Refugee Appeals Tribunal. In the course of the appeal the Tribunal member had expressed serious reservations about the credibility of the claim with regard to Sudanese nationality and found that it was unlikely that the first named applicant was Sudanese.

4. It is hardly a surprise that against that background the Minster refused to grant Mr. A. a declaration of refugee status, but the applicant then applied for subsidiary protection and for application for leave to remain pursuant to the Immigration Act 1999. It then emerged in correspondence emanating from the applicant's solicitor in September 2009, that Mr. A. was in fact born in Nigeria and is entitled to Nigerian citizenship. While Mr. A. had claimed that his father was a Sudanese national and that he feared that his father was dead, the declaration supplied by Mr. A's father to the Minister not merely shows that these fears were not well founded, but that Mr. A.'s father is in fact also a Nigerian national. On that basis, therefore, that application for subsidiary protection was rejected in December 2009. Mr. A. was actually deported from the State on the 28th April, 2010. It now seems that he re-entered on the 5th December, 2010, and claims that he returned via the United Kingdom using a British passport arranged with the help of a friend.

5. The parents have been separated since September 2008 and a formal decree of judicial separation was granted by the Circuit Court in November 2011. P lives with his mother in Dublin and Mr. A resides in Galway. At the same time, Mr. A. claims that he has a close bond with his son and they meet at least once week. Indeed, the presence of his son in Ireland is the reason why Mr. A. states that he took the wholly unlawful step of returning to Ireland in open defiance of the deportation order which excluded him from this State. At the same time, it would not appear that Mr. A, is in a position lawfully to support his son financially. Nor can there by any realistic suggestion that P will leave either Ireland or, for that matter, the territory of the European Union, were his father to be deported afresh. After all, Ms. O has refugee status and P. is himself an Irish citizen.

6. A further consideration is that Mr. A. has engaged in a manifest deception of the Minister and his officials. Although the couple separated in September 2008, the Minister was not informed of his fact. On the contrary, Mr. A. frequently represented to the Minister that they were living together as a family unit. Thus, for example, on 20th April 2009 the applicant's solicitors wrote to the Minister informing him that the "couple and their son live together as a family unit." It is not disputed but that Mr. A. engaged in such egregious deception because he thought that he would have a better chance of securing a more favourable decision from the Minister.

7. There is no question at all but that if one looked at this matter from the perspective of Mr. A.. his outrageous conduct would have plainly disentitled him to any prospect of relief. There is no doubt whatever but that the State's interest in deterring such unlawful behaviour is very high. Here again, however, the court must, unfortunately, shut its eyes to his illegal and deceitful conduct in the higher interests of protecting the welfare and interests of the child: see, e.g., my own judgments in *Oboh v. Minister for Justice, Equality and Law Reform* [2012] IEHC 102 and *AO v. Minister for Justice and Equality (No.2)* [2012] IEHC 79. While the preservation of the integrity of the asylum system and, indeed, the integrity of the judicial process are of vital importance, in matters of this kind the court must, where possible, give primacy to the constitutional right of the child to the care and company of his parents in the manner envisaged by Article 42.1 of the Constitution. But before considering this issue, it is necessary first to consider the arguments advanced based on the decision of the Court of Justice in Case C-34/00 *Ruiz-Zambrano* [2011] E.C.R. I-000.

The arguments based on *Ruiz-Zambrano*

8. In *Ruiz-Zambrano* the applicants were a Columbian couple residing in Belgium, the second and third of whose children were Belgian. Their asylum application in Belgium had been unsuccessful, although the Belgian authorities could not return them to Colombia by reason of the risks to their safety presented by the on-going civil conflict in that country. Although the father of the children had

previously been working and had paid social security contributions in Belgium, he was refused unemployment benefit by reason of his illegal status. Critical to the issues in the case was that the second and third children had Belgian citizenship and, accordingly, were European citizens for the purposes of Article 20 TFEU. The applicants argued that if the father could not obtain the benefit of social security contributions, the children would be obliged to leave Belgium and, indeed, the territory of the Union itself, thus setting at naught one of the essential elements of European citizenship, namely, the right to live in the territory of the Union.

9. Following a reference from the Belgian courts, the Court of Justice held as follows:-

> "41. As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States... .
>
> 42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union....
>
> 43. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.
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> 44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.
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> 45. Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

10. As I pointed out in *AO v. Minister for Justice, Equality and Law Reform* [2012] IEHC 79 *Ruiz-Zambrano* turns on factors:

> "Such as dependency, residence in the territory of the Member State in question and the right of European citizens to enjoy one of the real benefits of that citizenship, namely, the right to reside within the territory of the Union. In the context of *Zambrano*, the rights in question are those of the citizen child and insofar as a third country national parent of such a child has any rights in this regard, they are entirely derivative from that of the child."

11. So far as the present case is concerned, it cannot be said that there is any real prospect that P. will be obliged to leave the territory of the Union were his father to be deported. Recalling here that the parents are separated and that the child resides with its mother in Dublin, there would seem to be little reason why Ms. O. would agree to have the child moved to Nigeria with its father. Ms. O., after all, has refugee status and the child is an Irish citizen. The overwhelming likelihood is that the mother and child will remain in Ireland for the foreseeable future.

12. In these circumstances, just as was the case on the facts of *AO (No.2)*, the applicant cannot lay claim to any *Zambrano* rights. Counsel for the applicant, Mr. O'Shea, argued forcefully that my interpretation of *Zambrano* as set out in *AO (No.2)* was incorrect and should not be followed. While aspects of *Zambrano* may well be clarified by the Court of Justice in the coming years, the key aspect of the decision is perfectly plain, namely, that the non-national parent (or parents) of a EU national dependent child cannot be deported if the practical effect of that decision would be likely to result in that child having to leave the territory of the Union. In effect, the Court held that a Member State cannot indirectly bring about a situation where an EU citizen is effectively deprived of the substance of one of the key incidents of that right of citizenship, namely, the right to reside in and be brought up on the territory of the Union.

13. This analysis was general confirmed by the subsequent decision of the Court of Justice in the course of its judgment in Case C-256/11, *Dereci* [2011] E.C.R. I-000. Here the issues which had been referred by the Austrian courts arose from decisions of the Austrian authorities to refuse residence permits to third country nationals who had married Austrian citizens. In some of the cases, the couples had children who were Austrian nationals. On the general *Zambrano* issue the Court of Justice stated:-

> "European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify."

14. It follows, therefore, that the applicant cannot raise a fair question so far as the *Ruiz-Zambrano* arguments are concerned, precisely because there is no real prospect that the deportation of the applicant would bring about a situation where P. would be compelled to leave Ireland or, for that matter, the territory of the Union. In those circumstances, there are no grounds for contending that Mr. A. is entitled to an interlocutory injunction restraining his deportation on *Zambrano* grounds.

The constitutional rights of the child

15. The question of the constitutional right of the child to the care and company of its parents have already been well ventilated by me in my judgments in *AO (No.2)* and *AO (No. 3).* More importantly, the Supreme Court has frequently confirmed that this is a core constitutional value which is inherent in the entire structure of Article 41 and Article 42: see, *e.g., Re JH (an infant)* [1985] I.R. 375, 394-395, per Finlay C.J. As I pointed out in *AO (No.2)*:

> "Article 42.1 of the Constitution envisages that it is the "right and duty" of the parents of a child to provide for its education, welfare and upbringing. Insofar as the Constitution speaks of it being the "duty" of parents, it is because that the child enjoys -presumptively, at least- the right to have both of its parents engaged in that vital and responsible task.

This is because, as O'Donnell J. put it in *Nottinghamshire C. C. v. B.* [2011] IESC 48, [2012] 2 I.L.R.M. 170, 217:

> '...the Articles [41 and 42] at least in general terms, state propositions that are by no means eccentric, uniquely Irish or necessarily outdated: there is a working assumption that a family with married parents is believed to have been shown by experience to be a desirable location for the upbringing of children; that as such the family created by marriage is an essential unit in society; that accordingly, marriage and family based upon it is to be supported by the State. Consequently the State's position is one which does not seek to pre-empt the family, but rather seeks to supplement its position so that the State will only interfere when a family is not functioning and providing the benefits to its members (and thus the benefits to society) which the Constitution contemplates. In that case, the State may be entitled to intervene in discharge of its own duty under the Constitution and to protect the rights of the individuals involved.'

I would merely add that the active involvement of both parents in child-rearing is also inherently desirable from the child's perspective, even if the parents are not married, assuming always that this is feasible and practicable."

16. A practical consideration in the present case is that Mr. A. – whatever about his other failings – has sought to take an active role in the rearing of his son. How, then, would be P. be affected if his father were to be deported? In all likelihood the Ms. O. and P. would remain indefinitely in Ireland and it is not clear to me how father and son could continue to have any meaningful contact if Mr. A. were deported. After all, the very fact that Ms. O. were granted refugee status in itself provides that clearest possible indicator that she could not be expected to travel to Nigeria, even assuming that the family could afford to make such a trip or that Ms. O. would otherwise to do so. In all probability, therefore, if Mr. A. were to be deported, it would mean that P. would never see him again during his minority.

17. In these circumstances, I am therefore coerced to the conclusion that there abundant grounds for suggesting that the substance of P.'s constitutional right to the care and company of his father would be denied were his father to be deported. This would ordinarily be sufficient in itself to justify the grant of an interlocutory injunction restraining the deportation of Mr. A., his disreputable and egregious conduct notwithstanding. It is obvious that damages are not an adequate remedy and the balance of convenience suggests that the child's right to the care and company must be accorded due weight and protection. But before reaching this conclusion, it is necessary to examine the submissions of counsel with regard to the weight of precedent on this issue.

Stare decisis and the rights of the family in deportation cases

18. Counsel for the Minister, Mr. Conlan Smyth, argued that my own decisions in *AO (No.2)* and *AO (No.3)* were wrongly decided, contending specifically that I failed in my own judgment to address the implications of the decision of Clark J. in *Alli v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595, [2010] 4 I.R. 45. For his part, Mr. O'Shea responds by saying that Clark J. herself did not apply the reasoning in *Alli* in her most recent judgment on this topic, *S. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 417. This has brought into sharp focus the question of the consistency of the relevant decisions of this Court on this general topic.

19. In my own case, while I previously deferred to the reasoning in *Alli* (and other similar decisions) in my own judgment *I. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 66, it might be also said that my own subsequent judgments in *XA. v. Minister for Justice* [2011] IEHC 397 and *AO (No.2)* and *AO (No.3)* cannot be readily aligned with the decision in *Alli*. Given these cross-currents of judicial opinion, it seems desirable to consider the matter afresh from first principles.

20. The starting point is, perhaps, the decision of Clarke J. in *Kadri v. Governor of Cloverhill Prison* [2012] IESC 27 where he stated with reference to the precedential status of earlier High Court decisions that a "court should not lightly depart from a previous decision of the same court unless there are strong reasons, in accordance with that jurisprudence, for so doing." Clarke J. thus expressly confirmed a long line of well known authorities, ranging from *Irish Trust Bank Ltd. v. Central Bank of Ireland* [1976-1977] I.L.R.M. 50 to *Re Worldport Ltd.* [2005] IEHC 189.

21. Turning to the substantive issue, it is clear that the constitutional rights of the family are not absolute, for all the reasons set out by the Supreme Court in *AO and DL v. Minister for Justice* [2003] 1 I.R. 1. Yet it is also clear that the result in that case turned on the fact that the parents in that case had indicated that they would take the young dependent children with them in the event that the parents were deported or, at least, that the Minister had assumed that they would do so: see, *e.g.*, the comments of Keane C.J. ([2003] 1 I.R. 1, 13) and those of Murray J. ([2003] 1 I.R. 1, 65).

22. It is true that aspects of the reasoning and conclusion in *AO and DL* may well have to be reconsidered in the light of the reasoning of the Court of Justice in *Ruiz-Zambrano* insofar as any of future case of this kind comes within the scope of EU law. Yet it seems equally plain that *AO and DL* does not directly concern a case of the present kind where, of necessity, the effect of the deportation of his father to Nigeria would be to deprive an Irish citizen child of the opportunity of any real personal contact with his father, not least in circumstances where his mother has been given refugee status in this State, so that it would be unrealistic to expect her to travel to Nigeria.

23. It is true that *Alli* suggests – or, at least, might be thought to suggest – the contrary. After all, the citizen children in that case - two twin girls - were just over five years of age, more or less the same age as P in the present case. The parents were Nigerian nationals. Ms. Alli had been given permission to stay in the State under the IBC 05 Scheme and she stated that she was not prepared to return to Nigeria with her children, even if her husband – who had arrived illegally in the State after IBC05 permission to reside had been give to the wife - were to be deported.

24. In a comprehensive judgment, Clark J. considered that the issue was essentially determined by *AO and DL* ([2010] 4 I.R. 45,73):

> "Such a deportation will be lawful once the Minister has considered all relevant factors and has identified a substantial reason for the deportation. It is not the law that the Minister can only deport the father of a citizen child in exceptional circumstances. The law is that notwithstanding the very important status of citizenship, the Minister can deport such a father in pursuit of an orderly and fair restrictive immigration policy in the common good provided that a full and fair assessment of the particular child and particular family situation has been balanced against the State's interests and the decision is not disproportionate in the circumstances."

25. So far as the proportionality exercise was concerned, the Minister was fully aware of the applicant's representations in relation to Mr. Alli's contributions to family life:

> "If he were to be deported, then the family would be ruptured, the children would have no father to guide them and Mrs Alli would have difficulties with childcare and in bringing up the children as a single parent. As Mrs Alli made it clear that she had considered that her children's best interests lie in their remaining in Ireland, no submissions were made as to the children's life in Nigeria or in the Côte d'Ivoire. It is inconceivable that the Minister was unaware of the consequences of his proposed decision as it was in fact specifically noted that if the mother was to stay in Ireland there would be some disruption to their family life. The Minister also looked at the personal facts pertaining to the citizen children and their family and the consequences of permitting Mr Alli to remain with his family. These consequences were that it Mr Alli was unlikely to obtain employment, the grant of permission for Mr Alli to remain would have an impact on the health and welfare systems of the State and could lead to an expectation of similar decisions in other cases."

26. Clark J. went on to uphold the proportionality of the assessment made by the Minister:

> "In effect, he concluded that the decision to deport Mr Alli would not impact in an excessive way on the personal and family rights of his wife and children as there were no insurmountable obstacles to their going with him to Nigeria and continuing family life there. The Court is satisfied that this was a reasonable conclusion. Quite appropriately, the Minister accorded weight to the relatively short time the family has been in the State; the young age of the twin citizen children; and to Mr Alli's absence from the family for a significant time after his children were born. The Minister had already determined that there is no risk of torture in Nigeria in the event of their return there, and the applicants do not contest that conclusion. The Minister was aware that since his arrival Mr Alli has taken up his parental responsibilities and is loved and needed by his spouse and children, but that on the other hand his wife says that the welfare of their children means she will remain with her children in Ireland even if her husband is deported. He cannot be faulted for assuming that a mother and especially this mother, who had come as a stranger to this country and lived for more than three years without the presence or assistance from her husband during the late stages of her twin pregnancy and their delivery, might be in a good position to consider the best interests of her children and might not be excessively inconvenienced if her husband is returned to Nigeria in accordance with the State's immigration policy."

27. In *KI*, I summarised the effect of *Alli* (and the other similar case-law decided around this time) in the following terms:

> "While the facts of all of these cases differ somewhat, in substance they conform to the same basic fact pattern. Broadly speaking, the mothers are residing in the State pursuant to the permission afforded to them by the Minister pursuant to the IBC 05 Scheme with citizen children who, for the most part, are at an early stage of the Irish education system and which children are typically aged between 4 to 8 years of age. The parents have generally decided that it is in the best interests of the child that the mother should remain in Ireland to look after the child should the father be deported. The consequence of this will lead to the break up of the family, but the case-law to date is clear that the Minister cannot be held responsible for this choice."

28. There is, of course, an immediate difference between *Alli* and the present case in that Ms. O. has no choice worth speaking of. Unlike the mother in *Alli* who availed of a special permission given under the IBC 05 Scheme, Ms. O. has been given asylum here, so that the act of her returning to Nigeria would be inconsistent with the grant of such status. That difference is in itself sufficient to take this case out of the ambit of *Alli*.

29. But over and above those considerations, the subsequent case-law has inched away from the position set out in *Alli*. This is, I think, evident from Clark J.'s own judgment in *S*. In that case the applicants were also Nigerian who had married in the State in early 2003. The wife had received status by virtue of the fact that she had given birth to a Irish citizen child. The husband (who had entered the State illegally and had unsuccessfully applied for asylum) was suddenly deported a few weeks after the marriage, even though the wife was pregnant again.

30. In 2009 the couple applied to have the deportation revoked. By this stage the wife was rearing two young sons on her own, but she (and they) had visited her husband on a number of occasions in Nigeria. The Minister had refused to revoke the deportation order, citing factors such as the adaptability of the children, the fact that they were entitled to Nigerian citizenship and the integrity of the asylum system.

31. Clark J. quashed the Minister's decision saying:

> "The Court is driven to the conclusion that the identification of the constitutional rights involved and the significantly changed circumstances was not followed by a true examination of those circumstances nor did that examination accord with the requirements restated by Denham J. (as she then was) in *Oguekwe v. Minister for Justice* [2006] IESC 25, [2008] 3 I.R. 795,where she outlined the obligation to " weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision." A fair and just consideration would have included an assessment of the length of time the family had spent in the state and whether the children were at school here. While those facts are not determinative of rights of non-national parents, they are facts to be considered when balancing the constitutional rights of a citizen child with those of the state in order to ensure harmonious interpretation of such rights and to arrive at a proportionate decision. In the language of the Strasbourg Court, a fair balance has to be struck between the competing interests of the individual and of the community as a whole."

32. Clark J. went on to say that:

> "The effect of the decision not to revoke the deportation order means that if the family are to live together in a unit, they must abandon their right to live here and uproot and go to Nigeria. In Nigeria they will return to a father who will be unable to depend on his wife's earnings in Ireland and the children will leave their education and their financial security behind them. The alternative is never to have the husband living with them apart from holidays in Nigeria. This cannot be a proportionate decision when measured against the conflicting right of the State to operate a fair immigration system. The balance in this case must fall in favour of the family's strong constitutional rights to live in the country of their citizenship. Their position as settled migrants represents the other side of the coin in the insurmountable obstacles test under Article 8 of the ECHR where it would be unreasonable and therefore disproportionate to expect this family to either live forever without the husband and father or to leave Ireland and return to Nigeria."

33. It is true that Clark J. saw the family in S. as effectively settled migrants. But by the same token in the present case Ms. O. and P. would have to be regarded as settled migrants. P., of course, is not a migrant at all, but rather an Irish citizen and Ms. O. has made her home here, having been given refuge by the Irish state.

34. So far as the children are concerned, both in S. and in this case, however, the effect of the deportation order was (or would be) more or less the same, namely, that they would be effectively deprived of their constitutional right to the care and company of their father. This would be especially true in the present case, as the reality is, as we have already noted, P. is unlikely to see his father again were he to be deported to Nigeria.

35. Similar views were expressed by me in both *XA* and in the decisions in *AO*. In *XA* I found that the probable effect of the deportation of the father to Nigeria was that the Irish citizen mother would be left to rear their Irish citizen child alone. Given, moreover, that she was unemployed and dependent on social security, the prospect that she could even visit Nigeria was in the circumstances an unreal one:

> "All of this is to underscore the reality of what is currently proposed, namely, that the A. family will be forcibly separated, more or less permanently. As this very application exemplifies, it is true, of course, that Mr. A. can apply to have the deportation order revoked under s. 3(11) of the 1999 Act. Nevertheless, as things stand, it is not clear to me how this couple could ever realistically have any real inter-personal contact or how their marriage could actually survive what may amount to a permanent separation. It is sobering to reflect that the couple's daughter - who was admittedly born several months after the Minister's decision – might never actually get to see her father during her childhood…."

36. I went on to say that I could not agree with the views which Clark J. had herself expressed a year previously in *U. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 371, a case with broadly similar facts to the cases under consideration. In *U.* Clark J. had said:

> "The choice the wife now faces is whether to remain in Ireland and raise her son here without her husband, or relocate to Nigeria with him and raise their son together there. This is a choice faced by many couples who come from different countries or even different parts of large countries. Married inter-racial or inter-religious couples often face choices which involve compromise and sacrifices in relation to their choice of residence, standards or beliefs. Adults who marry must make these decisions themselves without seeking the answers in constitutional rights which are neither guarantees nor immunities but must be seen in the context of social order and the common good. The Court is satisfied that the applicants have not established that the Minister had insufficient regard to the wife's constitutional rights when deciding not to revoke the deportation order made against her husband."

37. I then went to say that I found myself coerced not to follow the reasoning in *U.*:

> "But whatever may possibly have been the situation in *U.*, in the present case it is a pure fiction to say that Ms. A. has a choice worth speaking of. This type of case is accordingly very different from the circumstances of cases such as *L. and O. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 where, for example, it was open to the Nigerian parents of an Irish born children to return to the country of origin of both parents where both grown up and had established links. Naturally, in line with the establish practice of this Court since *Irish Trust Bank Ltd. v. Central Bank of Ireland*, I would normally defer as a matter of judicial comity to the prior views of my judicial colleagues (see, *e.g.*, my own judgment in *KI v. Minister for Justice, Equality and Law Reform*). Yet the matter here is so fundamental and goes to the heart of our system of constitutional protection that, absent a binding Supreme Court decision on the point, I deeply regret that I cannot regard myself as bound by the views expressed by Clark J. in *U.*"

38. *AO* I grant a limited interlocutory injunction restraining the deportation of the Nigerian father of an Irish citizen child where the Irish citizen mother had had an acrimonious falling out with the father once his deceptions and criminal conduct had been brought to her attention. Here again I concluded that as the effect of the deportation might well lead to a situation where the father would never even see his child again, if the substance of the child's constitutional right to his care and company was to be preserved, it was necessary to grant some form of interlocutory relief.

39. Given these cross-currents of judicial opinion, it seems to me that the applicant can readily meet the *Campus Oil* standards of arguability. While readily acknowledging the desirability of maintaining judicial consistency, on further reflection I have come to the conclusion that the issue is so fundamental that faced with a choice between decisions such as *Alli* and *U.* on the one hand and *S, XA* and the *AO* decisions on the other, I would respectfully opt for the latter decisions, at least in those cases where the effect of the deportation order would be to split up the family and to deprive the children of the essence of their constitutional rights to the care and company of their parents by condemning them to a childhood without one of their parents. Moreover, it must be recalled that while Article 8 ECHR simply guarantees the right "to respect" for family life, some weight must be given to the even more emphatic description of family rights contained in Article 41 – "inalienable and imprescriptible" – even if those rights are not, of course, to be regarded as absolute. It is for these particular reasons that I consider that in the light of the comments of Clarke J. in *Kadri* I would feel justified in taking this step.

Conclusions

40. In summary, therefore, I would conclude as follows:

i. The applicant has manipulated the asylum system and has engaged in egregiously wrongful conduct. He has no personal merits which would entitle him to administrative or judicial protection.

ii. The applicant is not entitled to rely on the decision of the Court of Justice in *Zambrano*. Given that the mother has refugee status in this State, she cannot realistically be expected to return to or even visit Nigeria and there is almost no prospect that the effect of the deportation order would be to result in the child leaving Ireland or the territory of the Union.

iii. The court must, however, approach this application not from the perspective of the father, but rather from that of the child. It must accordingly seek to ensure, where possible, that the substance of the constitutional right of the child as guaranteed by Article 42.1 to the care and company of his parents is protected.

iv. In the present case, were Mr. A. to be deported, the likelihood is that the child would have no further personal contact with him during his minority, thus depriving the child of the essence of that constitutional right.

v. It is reason that I consider that Mr. A. has satisfied the *Campus Oil* criteria and I will therefore grant an interlocutory injunction restraining his deportation. I will discuss with counsel the form of that order and will give further directions for the early hearing of this application.