Neutral Citation: [2014] IEHC 507

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 405 J.R.]

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

BETWEEN

Q. L.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA AND THE HUMAN RIGHTS COMMISSION

NOTICE PARTIES

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

Background

1. The applicant was born on 20th September, 1981, and is a Chinese citizen. He arrived in Ireland in 2001, and has been living here since. He states that he made his life in Ireland. He and his wife, Ms. A. L., have a daughter, Roisin L., born in Cork on 11th September, 2008. Due to the Irish Citizenship and Nationality Act 2004, Roisin is not an Irish citizen. She does not live in Ireland but is being raised by her grandparents in China, in accordance with family tradition. The applicant and his wife send money to support their daughter's upbringing in China. It would appear that the daughter, Rosin, is entitled to Chinese citizenship.

2. The applicant and his wife own and run a Chinese restaurant in Cork. This business was incorporated as a company on 13th September, 2011, and despite the recession, is performing well. The business employs a number of Irish citizens. The number varied somewhat: according to the applicant's accountant, the restaurant had five Irish citizens employed as of 14th December, 2012; however, as of June 2013, it would appear that the business employed two Irish citizens. The applicant's wife also opened a mobile phone business in 2012. The applicant has never been a burden on the Irish social welfare system, and says that through his business activity he has contributed to the Irish economy. He says that the employees of his restaurant business will lose their jobs if he is removed from the State.

3. In the course of a routine inspection of the shop run by the applicant's wife, Garda Damien Maloney discovered that both the applicant and his wife were living in the jurisdiction without any permission to do so. He recommended that a notice under s. 3(4) of the Immigration Act 1999, be issued against both the applicant and his wife. The applicant was served with a notification of a proposal to deport him under s. 3(3)(a) of the Immigration Act 1999, by letter dated 11th December, 2012. The applicant decided to make representations to the Minister pursuant to s. 3(3)(b); he asserted that he should not be deported because of, *inter alia*, his family rights in the State.

4. In his s. 3 representations, the applicant asserted a right to reside in the State on the grounds that he had developed a private and family life here with his wife. The applicant's permission to be in the State had expired and his only grounds for obtaining permission to reside in the State was on the basis of Article 41 of the Constitution and Article 8 of the European Convention on Human Rights. The applicant submitted that he and his wife had been living in Ireland for over ten years, and that they had social and family ties in the State. The applicant submitted that "it would be devastating to our family unit should a decision be made to deport us". The applicant also lodged the following documentation: a completed s. 3 Form; certified copy Certificate of Registration of Sky Mobile Centre; certified copy Birth Certificate of Roisin L.; certified copy Certificate of Incorporation of Asian Star Oriental Ltd.; certified copy Marriage Certificate of Q. L. and A. L.; certified copy Memorandum and Articles of Association of Asian Star Oriental Ltd.; copy letter from O'Riordan & Associates, certified Public Accountants; and original character reference letters in respect of the applicant and his wife.

5. The Minister's s. 3(6) report dated 5th April, 2013, considers the applicant's case in some detail. At p. 7 of the report, the applicant's rights under Article 8 of the European Convention on Human Rights were considered. The reports notes that:

> *"If the Minister signs a Deportation Order in respect of Q. L., this decision would engage his right to respect for private and family life under Article 8(1) of the ECHR."*

6. The report goes on to state that:

> *"It is accepted that if the Minister decides to deport Q. L., that this has the potential to be an interference with his rights to respect for private life within the meaning of Article 8(1) of the ECHR. This relates to his educational and other social ties that he has formed in the State, as well as matters relating to his personal development since his arrival in the State."*

7. The report continues under the heading of 'Family Life' as follows:

> *"Mr. L. has submitted that as is tradition in his family, his daughter, Roisin, is being raised by her grandparents in China.*

Mr. L. has submitted that himself and his wife have lived in the State for over ten years and that they have social and family ties in the State. He has submitted that 'it would be devastating to our family unit should a decision be made to deport us'.

The applicant's wife, A. L.'s case is currently being considered under s. 3 of the Immigration Act 1999, as amended, and a recommendation is being made to the Minister that he signs a Deportation Order in respect of Ms. L. It is submitted that should the Minister make a Deportation Order in respect of Q. L., both family members will be required to leave the State and return to China where they can be reunited with their daughter, Roisin. Therefore, no break up of the family is envisaged in this instance.

Therefore, it is submitted that a decision by the Minister to deport Q. L. does not constitute an interference in a right to respect for family life under Article 8(1) of the ECHR."

8. The applicant's representations were thus rejected. By letter dated 20th May, 2013, the applicant was informed that on 10th May, 2013, the Minister had made a Deportation Order in respect of the applicant. The applicant instituted these proceedings by notice of motion dated 31st May, 2013, challenging the Minister's right to make the Deportation Order in respect of him.

Relevant Legal Provisions

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

10. Article 41 of the Constitution provides:

1 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –

i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,

ii. there is no reasonable prospect of a reconciliation between the spouses,

iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and

iv. any further conditions prescribed by law are complied with.

3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.

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

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Applicant's Submissions

12. The applicant adopted the legal submissions which had been made in the L.ked case of *Javed v. Minister for Justice and Equality, Ireland and the Attorney General*, which was heard at the same time as the applicant's case herein.

13. The core of the applicant's case was that the absence of a gap between the Minister's rejection of representations made by the applicant pursuant to s. 3 of the Immigration Act 1999 and his making of a Deportation Order constituted an impediment to the applicant's rights to make representations under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights.

14. The applicant submitted that the point raised by him was considered by the Supreme Court in *Haq Nawaz v. Minister for Justice* [2012] IESC 58, which came before the Court on a procedural point as to whether the challenge to s. 3 should have been brought by plenary summons or by judicial review, subject to the requirements of s. 5 of the Illegal Immigrants (Trafficking) Act 2000. The

Supreme Court accepted the Minister's contention that a person challenging the section is, in substance, challenging each of the steps taken under s. 3, and so s. 5 applies. Clarke J. held that any of the steps taken under s. 3 were open to challenge, together with a challenge to the validity of the section. The learned judge stated as follows:

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

15. The applicant submitted that it was not possible to give s. 3 a construction which provided for a gap between the rejection of the submissions and the making of a Deportation Order. To that extent, there was agreement between the parties that the section, properly construed, did not allow for the implementation of a gap between the rejection of the representations and the making of a Deportation Order.

16. The applicant submitted that he was the husband of Ms. A. L., who was in the same position as the applicant and did not have the benefit of current legal permission to remain in the State. The applicant submitted that he was part of the family unit, with rights protected under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights. The applicant relied on the length of time in the State, in this case, thirteen years, in which time he started a family and married.

17. The applicant stated that he wished to make representations to the Minister that he fulfilled the criteria set out in *E.B. (Kosovo) v. Secretary of State for the Home Department* [2009] 1 A.C. 1159, and that his rights can only be vindicated by permitting him to reside in the State.

18. The applicant relied on the following citation from that case:

> *"It does not appear to be disputed that delays in deaL.g with an application may, depending always on the nature of the facts, 'increasing the time that the claimant spends in this country, increase his ability to demonstrate family or private life, bringing him within Article 8(1)': Court of Appeal, para. 24(i). Immigration decisions that cause a rupture in such protected interests are likely to qualify as constituting an 'interference' with them."*

19. In assessing this aspect of the claim, it is necessary to have regard to the timeL.e in this case. According to the Garda National Immigration Bureau, the applicant entered the State on 27th November, 2001. The date of the routine inspection by the gardaí of the shop premises operated by the applicant's wife took place on 3rd November, 2011. By letter dated 11th December, 2012, notification was sent to the applicant that the Minister proposed to make a Deportation Order. The s. 3 form making representations on behalf of the applicant and submitting documentation was submitted on 18th December, 2012. The examination of the file under s. 3 of the 1999 Act took place on 5th April, 2013. The Deportation Order in respect of the applicant was made on 10th May, 2013. The applicant was notified by letter dated 20th May, 2013, that a Deportation Order had been made in his case.

20. In these circumstances, I am not satisfied that there was such delay on the part of the defendants such that the applicant's rights can only be vindicated by permitting him to reside in the State.

21. Counsel for the applicant also submitted that the Minister is not obliged to consider an immigrant's constitutional and Convention rights until representations are made under s. 3. That proposition was set down by the Supreme Court in *Bode v. Minister for Justice* [2008] 3 I.R. 663. The second applicant in *Bode* applied to the Minister for permission to remain in the State as the father of an Irish-born child, the first applicant. The first applicant's mother, the third applicant, had previously been granted such permission. The second named applicant applied under the IBC 05 Scheme. This scheme was a revised set of administrative arrangements for the consideration of applications from parents of Irish-born children who were born in Ireland before 1st January, 2005, for permission to remain in the State.

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

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

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

> *"78 I am satisfied that the scheme was an exercise of executive power by the Minister. It did not purport to address, nor did it address, constitutional or convention rights. It was a scheme with clear criteria. On the face of the documents the criteria were applied to the second applicant, and he failed to meet the criteria.*
>
> *79 As the IBC 05 scheme did not address constitutional or convention rights, applicants who were not successful were left in exactly the same position as they had been prior to their application. There was no interference with any constitutional or Convention rights. Consequently, it was an error on behalf of the High Court to consider the application of the scheme as an arena for decision making on constitutional or Convention rights, whether they be as considered by*

the High Court: (1) the rights of the child under Articles 40.3 and 41 of the Constitution; (2) rights under article 8 of the European Convention on Human Rights; or (3) rights under article 14 of the Convention or other rights. It follows, also, that in establishing the criteria for judicial review, the High Court took too expansive an approach. Neither constitutional nor Convention rights were in issue, at issue was whether or not the Minister acted within the stated parameters of the executive scheme."

Denham J. went on to hold, in respect of s. 3 of the 1999 Act:

"82 The fact that the applicant failed on his IBC 05 scheme application does not mean that constitutional or Convention rights will not be considered. The IBC 05 scheme is entirely separate from the Minister's function under the Immigration Act 1999, as amended, where a decision may be made as to whether or not a deportation order should be made in respect of a foreign national.

83 In making a deportation order the Minister must comply with s. 3 of the Immigration Act 1999, as amended. The Minister is required to have regard to a wide range of matters in s. 3(6) of the Immigration Act 1999 . . . .

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

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

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

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

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

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

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

25. The applicant submitted that where the Minister proposes to make a Deportation Order, he must notify the immigrant of that proposal. Section 3(4) requires the notification to give the immigrant three options: he may make representations in writing to the Minister; he may leave the State before the Minister decides the matter; or he can consent to the making of a Deportation Order. Where the immigrant makes representations, the Minister must consider them in the light of the factors set out in s. 3(6). The Minister will either be persuaded to alter his original proposal to deport, or he will not, and if not, he proceeds to make a Deportation Order.

26. It was submitted that s. 3 does not allow for a gap between the rejection of representations and the making of the Deportation Order. If the Minister is not persuaded by the representations to alter his course, he proceeds to make a Deportation Order. It was submitted, therefore, that the price of making a human rights claim is the risk of a Deportation Order. That risk can only be avoided by electing for the option contained in s. 3(4)(b), i.e. voluntarily leaving the State without having the human rights claim considered.

27. The applicant then turned to a consideration as to whether he had a right to make a human rights-based application to the Minister. That is because the Court is not concerned with whether or not he should succeed in an application to the Minister to remain on human rights grounds: that is a matter for the Minister. The applicant submitted that the infirmity in s. 3 is that it imposes an unnecessary impediment on the right to apply to the Minister: namely the failure to allow a gap between rejection of the representations and the making of a Deportation Order.

28. The applicant submitted that he had a right of access to the Minister as ancillary to the substantive right. He submitted that the existence of a substantive right carries with it a right to apply to the appropriate forum to vindicate that right. In the case of the Convention, the principle of effectiveness is expressly guaranteed by Article 13. The European Court of Human Rights applies the principle of effectiveness in its decisions. In *Airey v. Ireland* [1979] 38 I.L.R. 642, for example, the Court emphasised the principle of effectiveness of the exercise of a right when it held:

"24. The Government contend that the applicant does enjoy access to the High Court since she is free to go before that court without the assistance of a lawyer.

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

29. It was submitted, therefore, that the guarantee of family life in Article 8 implies a right to apply to the appropriate forum to vindicate that right. Turning to the Constitution, it was submitted that it does not contain any express guarantee of effectiveness and the case law on the right at issue in *Airey* - access to the courts - has been determined under the rubric of unenumerated rights guaranteed by Article 40.3.1, rather than on the principle of a right to an effective remedy. However, it was submitted that the case

law whereby the courts will grant an injunction to restrain the breach of constitutional rights, shows that the substantive rights will be rendered effective. In this regard, the applicant cited the decision in *Sullivan v. Boylan* [2012] IEHC 389. The applicant submitted that his rights under Article 41 and Article 8 implied a right to apply to the appropriate forum (the Minister) to consider those rights.

30. The applicant also submitted that there was a right of access under Article 40.3.1. It was submitted that in addition to a right to apply as ancillary to Article 41 and Article 8, the applicant contended that he had a right, under Article 40.3.1, to apply to the appropriate forum in order to vindicate his rights, be they constitutional or Convention rights.

31. The applicant submitted that the cases on rights ancillary to court proceedings are relevant to the applicant's situation because in each type of case, there is a forum for the determination of rights, but an impediment to accessing it. In this regard, the applicant cited the decision in *McCauley v. Minister for Posts and Telegraphs* [1966] I.R. 345. In that case, the *fiat* of the Attorney General was required to commence actions against Ministers of State. This requirement was challenged in that case. Kenny J. held that the requirement for the *fiat* was an unconstitutional fetter on the right of access to the courts. In the course of his judgment, he stated:

> *"If the High Court has this full original jurisdiction to determine all matters and questions (and this includes the validity of any law having regard to the provisions of the Constitution), it must follow that the citizens have a right to have recourse to that Court to question the validity of any law having regard to the provisions of the Constitution or for the purpose of asserting or defending a right given by the Constitution for if it did not exist, the guarantees and rights in the Constitution would be worthless."*

32. It was submitted that the decision in *McCauley* is authority for the proposition that Article 40.3.1 gives a right of access to the appropriate forum. The applicant submitted that in this case, the appropriate forum was the Minister. By analogy, the applicant argued that the situation was similar to that pertaining in criminal cases. In *The State (Healy) v. Donoghue* [1976] I.R. 325, the Supreme Court held that there is a right to legal aid. That was not a case of a right of access to the decision making forum, but one of an impediment to putting the best case forward. The Supreme Court held that a person cannot be "shut out" of the opportunity of putting his best case forward, and declared a right to legal aid as a means of vindicating that right.

33. Finally, on this aspect, the applicant submitted that there was no impediment to a non-citizen relying on rights protected by Article 40.3.1. In *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360, the Supreme Court held:

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

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

35. The applicant submitted that he has a right under the Constitution (as ancillary to Article 41 and/or under Article 40.3.1) and under the Convention (under Article 8 and/or Article 13) to have access to the Minister to make his case for leave to remain based on human rights guaranteed by Article 41 and Article 8. The applicant then submitted that s. 3 of the 1999 Act breaches that right which is inherent in the Constitution by making it disproportionately difficult for the applicant to exercise that right.

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

37. The applicant submitted that the test on proportionality was set out by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593, as follows:

> *"In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (see, for example Times Newspapers Ltd. v. United Kingdom (1979) 2 E.H.R.R. 245) and has recently been formulated by the Supreme Court in Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test.*
>
> *They must:—*
>
> *(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;*
>
> *(b) impair the right as little as possible, and*
>
> *(c) be such that their effects on rights are proportional to the objective."*

38. In support of his argument, the applicant cited the case of *King v. Minister for the Environment (No. 2)* [2007] 1 I.R. 296. The impugned provision in that case contained a requirement that a non-party candidate for election must obtain 30 nominators to sign his nomination papers. While there was no constitutional right to have a particular mode of nomination for election, it was submitted that there was a constitutional right to run for election and the plaintiff contended that the restriction contained in the enactment impeded him from exercising that right. It was not impossible for him to gather the nominators, but it was difficult. The Supreme Court agreed that the impediment was disproportionate.

39. In this case, the impediment that the applicant complains of is the absence of a gap between the rejection of representations and the making of the Deportation Order. The applicant contended that there was no good reason for that absence, and so it was arbitrary and unfair. It was submitted that in the circumstances, it impairs the right significantly by making him decide on whether to make representations and thereby gamble on whether or not a Deportation Order will be made, or electing to leave the State voluntarily so as to avoid the possibility that a Deportation Order may be made against him. It was submitted that it is difficult to

apply the test at (c) in *Heaney* because it is not easy to discern an objective for the absence of the gap.

40. Additionally, the applicant contended that there was an error of fact contained in the examination of the file carried out under s. 3 of the 1999 Act, by Ms. Moira Healy on 5th April, 2013. In his original submissions, the applicant had stated:

> *"I have an excellent track record of employment in the State. I am a business person whose business is providing employers (sic) for others. I have not claimed social welfare in the State. I have never been a burden on the State during my time here. As set out at pt. 8, I am providing employment in the local area as I employ five Irish citizens in my restaurant. Please have regard to the financial information regarding my business, which I attach."*

41. Along with those representations, the applicant submitted a letter dated 14th October, 2012, from Messrs. O'Riordan & Associates, Certified Public Accountants. They stated that, without carrying out an audit, the applicant's business had five Irish employees.

42. In the examination of the file which was carried out pursuant to s. 3 of the 1999 Act, it was stated as follows in relation to the question of the applicant's employment of Irish citizens:

> *"The Department of Social Protection has advised the Minister that there are no employees L.ked to Asian State Oriental Limited and that no returns/contributions are recorded with the Department."*

43. The applicant has stated in his affidavits that he demonstrated that the above information, upon which the first named defendant had based his decision, was, in fact, incorrect. It is contended that the error vitiates the decision of the Minister because it suggests dishonesty on the part of the applicant, in addition to stating that the basis for those aspects of his representations are groundless.

44. The applicant further submitted that while the Minister is not obliged to enter into a dialogue with the applicant, he was obliged to clarify the matter, having regard to the conflict between what the applicant had represented and the response of the Department of Social Protection. It was submitted that the fault for the error did not lie with the applicant; it lay with the Minister in faiL.g to enquire further, having notice of the conflict of fact between what the applicant represented and what was stated by the Department of Social Protection. The Minister was entitled to hold an oral hearing to resolve the issue, or at the very least, to enquire further of the applicant. He failed to do so. It was submitted that in *F.O. (No. 2) v. Minster for Justice* [2013] IEHC 236, Mac Eochaidh J. stated that where relevant facts are not considered in the making of a Deportation Order, the appropriate procedure is a s. 3(11) application to revoke the Deportation Order. However, it was submitted that in the instant case the facts were put before the Minister who made an error of fact in considering them, and that this thereby vitiates the Deportation Order.

45. The respondents submitted that the applicant had not identified precisely which documents he says show that this is wrong. The applicant made submissions to the effect that he had five employees, and there are references from people who say that they are the applicant's employees submitted with the s. 3 representations. There is also a letter from the applicant's accountants confirming, subject to the important qualification that no audit was carried out, that there are five employees.

46. The respondents submit, however, that there was nothing in the representations or documentation submitted by the applicant which states or established that the appropriate returns or contributions had been made. Accordingly, it was submitted that there was no error of fact in the Memorandum.

47. Subsequent to the making of the Deportation Order, the applicant submitted a further letter from his accountants, Messrs. O'Riordan & Associates, dated 11th June, 2013. In that letter, it was stated that there were four employees of the company, being the applicant and his wife and two Irish employees. The PPS Number of each employee was given and a Certificate of Tax Credits and cut-off points was supplied in relation to all four of the employees.

48. While the additional documentation was before the Minister at the time of making his decision, it still does not entirely resolve the matter. There is no documentation showing that any returns or contributions were made to the Department of Social Protection. Even if there is an error in this regard, I am not satisfied that it is sufficiently material or serious to vitiate the Deportation Order.

The Respondent's Submissions

49. The respondents commence their submissions by looking at whether the applicant enjoys an entitlement to reside in the State pursuant to Article 41 of the Constitution and/or Article 8 of the European Convention on Human Rights. The respondents submit that Article 41 of the Constitution incorporates a number of rights enjoyed by members of a "family" for the purposes of that Article. Married couples are entitled to the company in society of each other. Equally, parents are entitled to the care and custody of their children and the children have a concomitant right. However, it was submitted that Article 41 of the Constitution did not confer a right in non-nationals to enter and/or reside in the State. The respondents referred to Article 8 case law (*Abdulaziz v. United Kingdom [*1985] 7 EHRR 471) to the effect that states are not obliged to respect the choice of residence of a married couple.

50. That statement was approved in *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1. The respondents stated that it was notable that in *A.O.* and *D.L.,* the Supreme Court was considering a situation where the parents of Irish citizen infants might be deported and confirmed that, provided a sufficiently serious reason (such as the common good in regulating immigration) was identified, this could be done. A full and detailed analysis of the circumstances of the family, where the effect of a deportation is to separate a family because one of them is an Irish citizen, requires to be undertaken.

51. However, in this case, the defendants submitted that the applicant's "family" appeared to comprise, at the very least, his infant daughter who resided in China with his parents-in-law, and his wife, who was made subject to a Deportation Order on the same date. No separation of the applicant from any of his family members is going to occur as a result of any deportation or, more properly speaking, the making of a Deportation Order and the consequent obligation on the applicant to leave the State. The defendants submitted that if there were a separation, the Supreme Court decision in *T.C. v. Minister for Justice* [2005] 4 I.R. 109, is authority for the view that there is no constitutional right, even for an Irish citizen to have a non-citizen spouse reside with him or her in the State.

52. The defendants further submitted that in the case law under Article 8, where the immigration status of one member of a couple is precarious (a word which refers, not to illegal status, but to short-term permissions to remain, as opposed to settled migrant status), the knowledge on the part of one spouse at the time of entering the relationship that the status of the other was precarious will militate against a finding of a breach of Article 8 rights.

53. It was submitted that in this case, both spouses enjoyed, not a precarious status in the State (this is the type of status which

the applicant's wife enjoyed when she was here on a temporary basis on foot of a student visa), but have been in the State on a completely unlawful basis for many years. In the circumstances, it was submitted that Article 41 and Article 8 were not engaged in the making of the Deportation Order, as the only issue is the right of residence in the State and these Articles do not confer any such right.

54. The applicant submits that he has now been in the State for so long that it would be a breach of his rights to deport him. The respondents in reply noted that all of the applicant's time in the State was unlawful and that at no stage was he "resident". As Feeney J. stated in *Agbonlahor v. Minister for Justice* [2007] 4 I.R. 309:

> *"It is also of significance that in considering the issue of family life that it is appropriate to have regard to the lawfulness and length of stay as being significant factors in seeking to identify the exceptional cases where a state might be prevented from exercising the state's unquestioned entitlement to impose immigration control."*

55. In *BIS v. Minister for Justice* [2007] IEHC 398, Dunne J. approved the statement of Feeney J. in *Agbonlahor* that the applicant was "in truth, asserting a choice of the State in which he would like to reside, as opposed to interference by the State with his rights under Article 8".

56. The respondents submitted that the applicant had no entitlement to choose to move to Ireland, to live here and then to assert a right to remain here. He entered the State unlawfully and has never applied for the permission of the Minister to enter and/or be in the State as required by s. 4 of the Immigration Act 2004. He had an entitlement to apply to the Minister to "enter or be" in the State, and he chose never to exercise it. The availability of that remedy is also material to a consideration of the adequacy of s. 3 in circumstances where constitutional or Convention rights are genuinely affected by the making of a Deportation Order, which is not the case here.

57. The respondents submitted that the mere fact of a lengthy, unlawful presence in the State does not confer rights. The lawfulness of that residence is the key issue. Where a State has conferred a series of permissions on a non-national, allowing them to settle and put down roots, issues may arise. However, that situation has no application on the facts of this case, and the applicant has no *locus standi* to raise this issue.

58. The respondents also contended that the issue of proportionality does not arise, for the reason that there is no "interference" with the applicant's rights pursuant to either Article 41 or Article 8. Proportionality is the applicable test to judge whether the interference with rights can be justified.

59. The respondents stated that without prejudice to the submissions, as stated in *Agbonlahor*, even if proportionality were in issue, legitimate immigration control would, in any event, save in very limited cases, justify the making of a Deportation Order against a non-national who is unlawfully present in the State. The respondents then made submissions in relation to the adequacy of the procedures pursuant to s .3 of the Immigration Act 1999. The Minister submitted that because no constitutional or Convention rights of the applicant were engaged, as their family life and/or family rights would not be affected by the deportation, then the applicant is not able to point to any constitutional right which may be breached by the alleged inadequacies in s. 3 of the Immigration Act 1999, and the applicant, therefore, has no standing to challenge the constitutionality on the basis of such rights.

60. The respondents submitted that it was accepted that s. 3(3) of the Immigration Act 1999, creates the situation where, if representations made pursuant to that section do not persuade the Minister not to make a Deportation Order, he will then immediately proceed to make one. The applicant contends that an additional layer or administrative procedure should be interposed at this point. However, that is not what the section provides.

61. It was submitted that from a reading of sub-section (3) alone, it was relatively clear that the procedure which was in question in these proceedings was a simple proposal to make a Deportation Order, with a consideration of representations. The key decision, and indeed the only decision which was being made, was whether or not to make a Deportation Order pursuant to s. 3 of the Act of 1999. Section 3 is concerned with the making of Deportation Orders. It confers the power to make such orders and identifies the classes of person in respect of whom they can be made. It also identifies the procedures to be employed, and in L.e with the principles identified in *East Donegal Co-Op v. Attorney General*, those provisions are supplemented by such procedures as are required to observe the principles of natural and constitutional justice. Otherwise, the situation is covered by the statute in question.

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

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

63. The net issue, therefore, is whether a person who has remained in the State unlawfully for many years is entitled, in the context of the s. 3 procedure, to a two-stage procedure. It is said that this flows from constitutional and/or Convention rights.

64. As stated by Dunne J. in *BIS v. Minister for Justice* [2007] IEHC 398, Article 8 of the European Convention on Human Rights does not prescribe any particular domestic procedure by reference to which Article 8 may be vindicated. A similar view has been taken of Article 41 rights in *Bode v. Minister for Justice* [2008] 3 I.R. 663. In both cases, the Court was satisfied that the s. 3 procedure was adequate to respect and/or vindicate the rights in question.

65. The respondents submitted that the applicant has misstated the effect of *Bode* in her written submissions: that decision did not state that s. 3 is the only procedure by reference to which Article 41 rights may be considered. However, it does state that the s. 3 procedure is adequate for that purpose. That case concerned an infant Irish citizen and the Supreme Court explicitly rejected the suggestion that the constitutional rights of the child must be considered in a prior application for permission to remain in the State before the deportation process could be engaged in.

66. The respondents submitted that that case is therefore authority for the proposition that in order to vindicate constitutional rights under Article 41 (and these were undoubtedly engaged in that case because the child might have been separated from his parents, who were non-nationals and subject to a Deportation Order), it was perfectly adequate to consider those rights in the context of a s. 3 procedure. The defendants submitted that that authority is binding on this Court, and further submitted that it disposes of the issue raised in the within proceedings.

67. The respondents submitted that the decision in *Haq Nawaz v. Minister for Justice* [2012] IESC 58, was authority for the proposition that the declarations sought by the applicant in that case could only be sought by virtue of judicial review proceedings rather than by plenary summons. It was submitted that the only point decided by the Supreme Court was that this type of declaration must be sought by way of judicial review and in compliance with s. 5 of the Illegal Immigrants (Trafficking) Act 2000, as it was, in reality, an attack on the Deportation Order.

68. The respondents submitted that the applicant had failed to demonstrate that he enjoyed any constitutional or Convention rights which were affected or engaged in the within proceedings. It was submitted that it was well established that where an entire family of illegal non-nationals are proposed to be deported, no issues pursuant to Article 8 arise.

69. It was submitted that in those circumstances, the applicant did not enjoy a constitutional or Convention right which was engaged or interfered with by the s. 3 procedure. It was submitted that if he enjoyed a Convention right, then the State was still bound by the clear words of s. 3 of the Immigration Act 1999, and the applicant would, at best, be entitled to a declaration of incompatibility, but the lawfulness of the Deportation Order would not be affected.

The Supreme Court's decision in Dellway Investments v. The National Asset Management Agency [2011] 4 I.R. 1
70. This case was not opened to the Court by either party to the present proceedings. However, since it is an important Supreme Court authority which is of relevance to the present case, this court should have regard to it.

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

72. Hardiman J. at para. 299 of the judgment, quoted with approval the following passage from De Smith's internationally used work on 'Judicial Review of Administration Action' (6th Ed. 2009 Sweet & Maxwell) by Woolf Jowell & Le Suerur:

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

The learned judge held that this passage represented the law in Ireland. Hardiman J. further held that the trigger for the right to fair procedures is that "the person claiming them is a person 'affected' by the decision" or has "an interest in the outcome". Having reviewed the relevant case law, Hardiman J. held that this has been the trigger for fair procedures in Ireland for at least forty years. The learned judge concluded that "a person 'affected' by the exercise of a discretionary power by a public authority is entitled to be notified and heard before that power is exercised in a manner to which he takes exception". Hardiman J. went on to endorse the judgment of Hamilton C.J. in *Haughey v. Moriarty* [1999] 3 I.R. 1, as follows:

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

70. Fennelly J. held at para. 460 of his judgment:

> *"[460] It does not appear to me that it has been established that the right to be heard before a contemplated decision is made depends on establishing interference with a specific and identifiable legal right. It is difficult to discern a principled basis for restricting the right in that way. The courts have never laid down rigid rules for determining when the need to observe fair procedures applies. Everything depends on the circumstances and the subject matter. The fundamental underlying principle is fairness. If a decision made concerning me or my property is liable to affect my interests in a material way, it is fair and reasonable that I should be allowed to put forward reasons why it should not be made or that it should take a particular form. It would be unjust to exclude me from being heard."*

Dellway Investments is authority for the proposition that there is a constitutional right to fair procedures in the making of a discretionary decision by a public official or officials, based on the status of the person claiming such fair procedures as a person who is or may be 'affected' or 'adversely affected' by such decision, and that that right encompasses the right to be heard. It is not necessary to establish that the decision at issue will affect legal or constitutional rights in order for the right for fair procedures to be triggered. The applicant, consequently, does not have to show that he has family rights; it is sufficient that he is a person who will be affected by the Minister's decision under s. 3 of the 1999 Act. The applicant, clearly, is such a person. Accordingly, he has a constitutional right to fair procedures and that right encompasses the right to make representations.

Conclusions

71. There is a constitutional right to make representations to the Minister in advance of his taking a decision to make a Deportation Order. The applicant had a right, under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights to have his circumstances considered by the Minister prior to making a Deportation Order. This was catered for in s. 3 which provides that the person can make representations within 15 days of receiving notification that the Minister intends to make a Deportation Order.

72. In the *Bode* case, the Supreme Court made it clear that the making of representations pursuant to s. 3 of the 1999 Act, was the appropriate forum to have such representations considered by the Minister. In this case, applicant made written submissions which were considered by the Minister in advance of the making of the Deportation Order.

73. The fact that when the applicant was unsuccessful in his representations, the Minister proceeded to make a Deportation Order without affording the applicant an opportunity to voluntarily leave the State, is not an impediment to the applicant's right to make representations to the Minister. While it was a possible consequence of the making of representations, and while the lack of a gap may operate as a deterrent to some applicants against making representations, it is not an unconstitutional or unlawful interference in the exercise of the applicant's rights to make representations to the Minister as to why a Deportation Order should not be made in his case.

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

75. Accordingly, I am of the view that the scheme provided for in s. 3 of the Immigration Act 1999, safeguards the right for the applicant to make representations to the Minister prior to any Deportation Order being made, is a sufficient protection to the applicant to make representations under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights. The absence of a gap between the consideration of the representations, and, if unsuccessful, the making of the Deportation Order, is not a breach of the applicant's constitutional or Convention rights.

76. I therefore refuse the applicant's application for the reliefs herein.