Neutral Citation: [2013] IEHC 480

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2012/869 J.R.

Between:

A.N., M.C. AND C.C. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND M.C.)

APPLICANTS

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 31st day of July 2013

1. The applicants seek an order quashing the decision of the respondent Minister dated the 9th August, 2012, to affirm a deportation order made against the first applicant A.N. on the 21st December, 2011. A.N., who is a national of Albania, has been in Ireland since 2008. He married the second applicant M.C. on the 29th February, 2012. The third applicant C.C., who was born on the 17th December, 2011, is M.C.'s son from a previous relationship. M.C. and her son are Irish citizens. Their challenge to the Minister's refusal to revoke is based on Article 8 of the European Convention on Human Rights (ECHR). Leave to apply for judicial review was granted on an *ex parte* basis on the 23rd October, 2012 and the substantive hearing took place on the 3rd July, 2013. Ms Rosario Boyle S.C. with Mr Anthony Lowry B.L. appeared for the applicants and Mr Robert Barron S.C. with Ms Kilda Mooney B.L. appeared for the respondent.

Background

2. A.N. who states that he was born in 1985 is a failed asylum seeker from Albania who came to Ireland in 2008 leaving his parents, sister and three brothers in Albania. His claim that he was the victim of a blood feud was found not credible. For reasons which are not clear he did not apply for subsidiary protection. In his affidavit grounding these proceedings A.N. says he had instructed his then Solicitors to make representations on his behalf to remain in the State but they failed to make such an application. He has not exhibited any documentation in support of this averment. Moreover, despite making this very serious allegation against his former legal representatives, they have not been made a notice party to these proceedings. A second firm of solicitors informed the Minister that they were now acting for him in July 2011 and then informed the Minister of his change of address in October 2011 without making any application for subsidiary protection or leave to remain on his behalf.

3. On the 21st November, 2011, A.N. and M.C. gave notice of their intention to marry to their local Civil Registration Office. This fact was not notified to the Minister. Similarly, he was not informed when on the 17th December, 2011, M.C. gave birth to her son C.C. Thus when he made the deportation order four days later, the Minister was totally unaware that A.N. intended to marry an Irish citizen.

4. By letter dated the 11th January, 2012, the Minister informed A.N. that he had made a deportation order in respect of him on the 21st December, 2011, and informed him that he was required to leave the State by the 28th January, 2012, and to remain outside the State thereafter. It is no surprise that the examination of file appended to that letter (dated the 24th November, 2011,) treats A.N. as a single man with no family connections in the State.

5. On the 18th January, 2012, Kelleher O'Doherty Solicitors wrote to the Minister on behalf of A.N. seeking revocation of the deportation order as they were awaiting a decision in respect of "*his outstanding application*" by which it can be inferred that they believed that a subsidiary protection decision was awaited. They were informed that there was no such outstanding application. They made no further representations to the Minister at that time.

6. On the 6th March, 2012, the Minister wrote to A.N. noting that he had not complied with the requirements of the deportation order. The Minister offered to pay for his return flight on an agreed date, as a commercial passenger, without a GNIB escort. The offer was not accepted.

Revocation Application

7. The Minister first became aware of the existence of M.C. and a marriage when he received a personal letter dated the 8th March, 2012, from M.C. informing him that she had married A.N. and did not want the Minister to send her husband back to Albania. The applicants were not legally represented at that time but it is apparent (and her counsel accepted at the hearing) that M.C. may have had some assistance in drafting her letter and knowing where to address her letter. M.C. who was almost twenty years of age informed the Minister that she did not speak Albanian and did not think she could live there because she would be unable to socialise and communicate with Albanian people and would find it difficult to gain employment or to go to college for further study. She said she could not face life without her husband and she recounted the history of their meeting on the 14th April, 2011, when she split up from her former partner by whom she was pregnant. She recounted A.N.'s support throughout her difficult pregnancy, how he held her son after he was born and helped out when she left hospital and that they had obtained a date at the registry office and then got married. The Minister was asked to consider her feelings and those of A.N. as well as her son in deporting her husband. It was claimed that A.N. and the baby shared a bond that she felt would never be broken if he was permitted to remain with them. She furnished a copy of their marriage certificate dated the 29th February, 2012.

8. On the 28th May, 2012, the Minister received further documents; a copy of M.C.'s Irish passport, a document from Albania dated the 11th November, 2011, certifying A.N.'s identity, a letter from the Civil Registration Office acknowledging the couple's notification of intention to marry, and some photographs of the couple's wedding. A.N. was then informed that his file had been transferred by the *Spouse of Irish National Unit* of the INIS to the *Repatriation Division* of the Department of Justice.

9. On the 4th July, 2012, a third firm of Solicitors, Murchan & Co. Solicitors, formally applied to the *Repatriation Unit* on behalf of A.N.

seeking revocation of the deportation order under s. 3(11) of the Immigration Act 1999. It was submitted that the couple had been in a stable relationship for some time and that it would be disproportionate to deport A.N. and contrary to Article 8 ECHR. There was no reference to M.C.'s son C.C.

10. On the 14th July, 2012, M.C. emailed the *Spouse of Irish National Unit* of the INIS, begging them in a *cri de coeur* not to deport her husband. Her email was forwarded to the *Repatriation Unit*. M.C. explained that if her husband were deported their lives including that of her baby son would be put on hold. She was suffering from depression as they were walking on egg shells since "*we honestly don't know when a knock will come to our door and for (A) a husband and a father to be taken away from his loving family*". She said she cries every time he signs on with GNIB "*in case thats the day he has to turn his back on me and our son [sic]".*

The Impugned Decision
11. A.N.'s file was re-examined on the basis of this new information but the Minister's earlier decision to make a deportation order in respect of him remained unchanged. He was required to present himself to the GNIB on the 16th August, 2012, to make arrangements for his removal from the State. The lengthy recommendation concentrates on the couple's rights under Article 8 of the ECHR. It was accepted that the deportation would interfere with A.N.'s rights under Article 8(1) but it was found that the interference would be proportionate to the legitimate public interest ends to be achieved. It was noted that no further information was provided in relation to M.C.'s child; that A.N. and M.C. were aware that there was a valid deportation order against A.N. when they married; that they did not inform the Minister of their intention to marry even when their then solicitors were corresponding with the Minister in January 2012 about the subsidiary protection application; that their relationship commenced when they were fully aware of the precarious nature of A.N.'s immigration status; and that it was only on the 26th March, 2012, when M.C.'s letter was received, that the Minister became aware that he was involved in a relationship.

12. The key part of the refusal to revoke is found in that part of the recommendation which finds that "*It is considered that it would be open to (M.C.) to apply to reside with (A.N.) in Albania as husband and wife. (M.C.) states (A.N.) acts as a step father to her child (C.C.). However, no further information in relation to the child was submitted*". The recommendation consults passages from a UNHCR document on Albanian *Law for Foreigners* dated 1999 and concludes that "*(M.C.) if she chooses, would be entitled to apply for a stay permission in order to reside in Albania with her husband*." It also relies on the judgment of this Court in H.U. & Others v. The Minister [2010] IEHC 371 and concludes:

> *"(M.C.) now has the option to go to Albania with (A.N.) in order to preserve family life, or to remain in the State and this is a choice for her to make. This is a choice faced by many couples who come from different countries. It is considered that couples from different countries often face choices which involve compromise and sacrifices in relation to their choice of residence. The Minister is not obliged to respect the choice of residence of this couple. Therefore, it is clear that (M.C.), as an adult, must make the choice herself as to whether to travel with her husband to Albania or remain here without him […]".*

13. The recommendation has regard to the rights and interests of the State in maintaining control of its borders and operating a regulated immigration system. Under the heading "Balancing Rights" the recommendation states:

> *"All factors relating to the position and rights of (M.C.), who is an Irish citizen, has been considered against the rights of the State. (M.C.) states (A.N.) is stepfather to her Irish Citizen son, (C.C.), who was from her previous relationship. No further information was provided in relation to (M.C.'s) child.*
>
> *I have also considered that (M.C.) is an Irish citizen and that she and (A.N.) were marred in the State on 29/02/2012. I have also considered the fact that the applicant did not inform the Minister of his relationship with (M.C.) prior to their marriage."*

14. The applicants challenge the validity of reasons for the refusal to revoke.

Grounds
15. The grounds on which leave was granted may be paraphrased as follows:

> a. The Minister failed to have adequate regard to the fact that the probable effect of the deportation of A.N. is that M.C. will be left to raise her son C.C. on her own and as a result she will potentially become (or remain) a burden on the State;
>
> b. The Minister failed to adequately consider the obstacles that the applicants face in relocating to Albania, including the matters raised by M.C. in her letter dated the 8th March, 2012 (summarised above);
>
> c. The Minister failed to adequately consider the effect of the deportation of A.N. on the family as a whole and, in particular, that as a result, M.C. will have to decide whether to stay in Ireland without her husband or to relocate to Albania and raise her son there; and
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> d. Further or in the alternative the Minister failed to have adequate regard to the fact that relocation to Albania would deprive M.C. and C.C. of their right to reside in the territory of the EU and of the rights attaching to Irish citizenship.

16. Leave was also granted to apply for judicial review on the ground that the Minister failed to have adequate regard to the proportionality of imposing a deportation order of potentially indefinite duration. Since leave was granted in this case, that argument has been decisively rejected by Kearns P. in *Sivsivadze v. The Minister* [2012] IEHC 244 (21st June 2012). As in *M.A.U-H. v. The Minister [Pakistan]* [2012] IEHC 572 and in *J.C.M. and M.L. v. The Minister* [2012] IEHC 485, the Court is satisfied that the applicants are not entitled to relief on the basis of this argument which may in any event have minimal significance in view of Albania's application for membership of the EU.

The Applicants' Submissions
17. The applicants' arguments as to the adequacy of the Minister's Article 8 assessment are, for the most part, well-rehearsed. Their oral arguments therefore focused on the submission that the Minister failed to adequately consider the effect of the deportation on the infant C.C. who is an Irish citizen and an EU citizen. In the applicants' submission, the best interests of the child are paramount when decisions are being made by State authorities that potentially affect them (*A.O. and D.L. v. The Minister* [2003] 1 I.R. 1; *Beoku-Betts v. The Minister* [2009] 1 A.C. 115; *H.U. & Others v. The Minister* [2010] IEHC 371; *ZH (Tanzania)* [2011] 2 A.C. 166). They accept that no specific representations were made with respect to the step-child in this case but they argued that as his citizenship must have been apparent, very little more needed to be said.

18. The applicants nailed their colours, so to speak, on C.C.'s EU citizenship and on a proposition advanced in paragraphs 93-95 of the decision of the UK Upper Tribunal (Immigration and Asylum Chamber) in *Sanade (British Children – Zambrano – Dereci)* [2012] UKUT 00048 (IAC). They argue that even though A,N, does not qualify for a right of residence under the principles established in *Zambrano v. ONEm* (Case C-34/09, judgment of 8th March 2011), E.C.R. [2011] Page I-01177, M.C. and C.C.'s EU citizenship mean that it will never be reasonable to expect them to relocate outside the EU and the Minister was therefore precluded from considering whether it would be reasonable for them to join A.N. in Albania. Instead he was confined to considering whether the inevitable rupture of the family would be proportionate to the aims to be achieved. In other words, the traditional approach to Article 8 proportionality assessments has been overtaken.

The Respondents' Submissions

19. The respondent notes that no submissions were made to the Minister at any stage in relation to the best interests of the step-child or the impact of the deportation upon him. The facts in relation to the step-child were set out in the decision so far as they were known to the Minister and he cannot be faulted for not going further. The respondent relies on the judgment of Clarke J. in *Smith v. The Minister* [2013] IESC 4 at paragraphs 5.5 and 5.6.

20. Mr Barron SC, for the respondent was invited by the Court to confine his oral submissions to the *Sanade* point. In that respect he argued that the only occasions when the Minister is obliged to consider family rights guaranteed by Article 7 of the Charter of *Fundamental Rights of the EU* and the right to reside in the territory of the EU under Article 20 TFEU is when the Minister is implementing EU law, and that this point was not argued in *Sanade*. *Zambrano* and subsequent decisions give rights to certain non-EEA family members of dependent EU citizen children to reside in the territory of the EU. An applicant therefore comes under *Zambrano* or does not and if not, that is the end of the matter. In this case, A.N. did not qualify for *Zambrano* rights so his case falls to be considered under Article 8 ECHR, not with EU law. This view is supported by Cooke J. in *Smith v. The Minister* [2012] IEHC 113 at paragraph 24 and by O'Keeffe J. in *Troci & Healy v. The Minister* [2012] IEHC 542 at paragraph 48. The proposition was not argued in *Sanade*, which the Respondent firmly argues is wrongly decided and where the Secretary of State for Home Affairs accepted the proposition . The imposition of a deportation order is a purely internal matter and, unless *Zambrano* applies, EU law has no bearing upon the assessment of whether it is proportionate to impose a deportation order.

THE COURT'S ANALYSIS

21. It is by now very well established that foreign nationals who seek leave to remain in Ireland on the basis of their family circumstances must put all relevant information and supporting documentation before the Minister at the first available opportunity and in a coherent fashion. In *Smith & Others v. The Minister* [2013] IESC 4, delivering the judgment of the Supreme Court, Clarke J. held at paragraph 5.6 that "*there is an obligation on persons seeking to invoke their right to invite the Minister to revoke a deportation order to put before the Minister all relevant materials and circumstances on which reliance is sought to be placed*." At paragraph 5.14, he reiterated that "*It is incumbent on any party seeking revocation of a deportation order to put forward the entire argument which they wish to advance (subject … to any undiscovered points which could not, with reasonable diligence, have been discovered), so as to enable the Minister to consider all such points*."

22. The Minister's corresponding obligation is to consider all relevant information which is put before him in a full and fair manner. He must, under s. 3(6) of the Immigration Act 1999, consider the family and domestic circumstances of the applicant "*so far as they appear or are known to the Minister*". This applies equally when new or changed facts, materials or circumstances are put before him in a revocation application under s. 3(11) as occurred in this case. The Minister is not in the normal course required to himself seek out additional information from such applicants as such a requirement could render the revocation system unworkable. In *Oguekwe v. The Minister* [2008] 3 I.R. 795, where family rights under the Constitution and under the Convention were engaged, Denham J. (as she then was) discussed the correct approach to the Minister's discretion under s. 3 of the Immigration Act 1999 thus:

> "*1. The Minister should consider the circumstances of each case by due inquiry in a fair and proper manner as to the facts and factors affecting the family.*
>
> *2. Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the department. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances."*

23. It follows that the Minister cannot be criticised for failing to consider the effect of the deportation order on M.C.'s baby when no information was put before him beyond the fact that he existed and that A.N. played a kindly step father role in his life. The first representations made to the Minister by A.N.'s then legal representatives in January 2012 when seeking to revoke the deportation order were confined to asserting that there was an outstanding subsidiary protection application. No mention was made that he was acting as step-father to his fiancée's new-born baby. The formal s. 3(11) application made by his new legal representatives on the 4th July, 2012, informs the Minister of the marriage to an Irish citizen but made no reference at all to her baby. Were it not for M.C.'s personal letter to the Minister on the 8th March, 2012, and her emotional email dated the 14th July, 2012, the Minister would have been unaware of the existence of the baby and the circumstances of the A.N. – M.C. family. The information which was furnished in those two communications was that M.C. was pregnant by her former partner when she began a relationship with A.N. in April 2011. He supported her through a difficult pregnancy and some seven months into their relationship they formally notified the local Registrar of their intention to marry. Three weeks later the infant was born and A.N. took an active part in caring for the baby from the outset – collecting them from the hospital, buying him gifts, taking him for walks, feeding him and changing his nappies. The couple married when the baby was two months old and she now felt A.N. had an unbreakable bond with the baby which would not be broken if he was permitted to remain.

24. No information was furnished on the child's religion or about any particular developmental, medical or educational requirements he may have. There was no information on M.C.'s current and prospective domestic arrangements and her intentions for the baby's future care and education. It was not specified whether she and the baby and A.N. were living together as a family unit, if she was working and contributing financially to the baby's upbringing or whether A.N. was contributing. Nothing was said about A.N.'s family in Albania or what their attitude was to the marriage with an Irish woman considering their Muslim background. It was not said whether if they relocated to Albania they would be living with the in-laws or whether they would set up a home of their own or whether A.N. would have employment. The Minister was unaware whether C.C. has a relationship (legal, financial or emotional) with his biological father, about whom there is a startling absence of information. It was not known if the father has sought custody or access rights to the child. No information about that former partner's nationality, means or whereabouts was furnished. There was quite simply a total information vacuum in relation to C.C.'s father which is clearly unsatisfactory.

25. No information was provided about M.C. herself. While she made it clear that she did not think she could live in Albania because she did not speak Albanian and would be unable to socialise and communicate with Albanian people and would find it difficult to gain employment or to go to college for further study, she furnished no information about her education or employment background. She

was silent as to what language she speaks with A.N., the extent of his English, and how he or indeed they support themselves financially. There is nothing beyond assertion that it would it be difficult for her to get a job or to study in Albania. It is not even known if it would even be possible for her to bring her baby with her, given that the lack of formal legal relationship with A.N.. No information was provided as to the relative merits or deficits in the Albanian and Irish health and schooling systems for C.C.

26. The facts are that A.N. has manifestly neglected to engage with the Minister's office since the summer of 2009 when he was made aware that his asylum application was refused. He now seeks at the eleventh hour to mend his hand at a very late stage without a sound legal basis. The Court simply cannot grant the reliefs sought as it is apparent that the Minister engaged in a fair analysis of the limited information presented to him. He relied on the unequivocal jurisprudence of the European Court of Human Rights which state that it is open to domestic authorities to have regard to the circumstances in which family life is created and in particular, whether family life was developed in the knowledge of an applicant's precarious immigration status. The jurisprudence also firmly establishes that Contracting States are not obliged to respect the choice of residence of a married couple. It must be assumed that A.N. was fully aware that he had been refused a declaration of refugee status and that deportation was a logical next step. While M.S. is eight years younger and from her personally drafted email may possibly not be educated to any high level and was only 19 when they married, she had enough initiative to sit down and write to the Minister not once but twice to provide him with information which should have come through A.N. and his solicitor. It must be assumed that she was also aware that he faced the prospect of deportation at the time they married.

27. It cannot be said that the Minister failed to have regard to M.S.'s Irish citizenship or the consequences for her of the choice she faces as to whether she should relocate to Albania and raise her son there with her husband within the family unit, or whether to remain in Ireland with her son but without her husband. These are undoubtedly difficult decisions but as this Court has held on previous occasions, such decisions are not uncommon for married couples comprising different ethnicities, religions, races and nationalities. Couples from different parts of Ireland have to forego their places of origin in pursuit of jobs. As this Court held in *H.U. & Others v. The Minister* [2010] IEHC 371, at paragraph 54:

> *"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."*

28. Albania is not as far from Ireland as Sicily or many of the Greek islands where many Irish citizens spend their summer holidays. Albania is a European democracy, a member of the Council of Europe since 1995, a party to the ECHR since 1996, and a formal candidate for EU membership since April 2009. While a predominantly Muslim country, it also has a sizeable Christian population including a large Catholic community. The Court notes that in October 2012 the European Commission recommended that Albania should be granted membership of the EU subject to completion of key measures in the areas of judicial and public administration reform and revision of the parliamentary rules of procedures. While Albania may not be the most modern of the post-communist states nor is its democracy deeply rooted, the EU Commission notes progress on these fronts. This progress informs the assessment of whether it would be reasonable to expect an Irish citizen to relocate there in order to maintain family life with her Albanian husband.

29. No information was put before the Minister which would warrant the conclusion that it would be unreasonable to expect M.C. and her child to relocate to Albania. That is not to say that no such information exists, but the Minister cannot be criticised for failing to engage in speculation given the deficit of information which he faced.

THE SANADE PROPOSITION

30. The applicants' argument based on the judgment of the Upper Tribunal in Sanade has not previously been raised before this Court and therefore merits a number of observations. The applicants very correctly have not claimed that their situation falls to be considered under Article 20 TFEU in accordance with the *Zambrano* judgment. They accept that A.N. is not C.C.'s primary carer and that C.C. would not necessarily be required to leave the EU if A.N. is deported. They admit that neither he nor his mother is dependent on A.N. for their subsistence. Both are Irish citizens and can remain in Ireland if A.N. is deported although clearly their newly established family life will be ruptured. There is no question of a constructive expulsion of the child C.C. in contravention of Article 20 TFEU.

31. The applicants contend however that *Sanade* imports a new limitation on the Minister's assessment of Article 8 ECHR and now represents Irish law. The proposed limitation is summarised in the headnote to the *Sanade* decision as follows:

> *"Case C-34/09 Ruiz Zambrano now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so."*

An examination of the decision reinforces the commonly held view that it can sometimes be dangerous to rely on the headnote to a judgment. *Sanade* was in fact a determination to consider the impact of the decision of the Supreme Court in *ZH (Tanzania) v. Secretary of State for the Home Department [*2011] AC 166 and the decision of the Court of Justice in *Zambrano*. Generally the case concerned the joint appeals of three foreign national men (one Indian and two Jamaican) who were the subject of automatic deportation orders pursuant to s. 32 of the UK Borders Act 2007 as they had each been convicted of criminal offences that carried sentences in excess of 12 months. They argued that their deportation would breach Article 8 ECHR as it would be disproportionate in light of their family circumstances where each applicant had a wife and children who had British nationality. For reasons which are not clear from the judgment, the Upper Tribunal asked the Secretary of State for assistance on the following question:

> *"Does the respondent agree that in a case where a non-national parent is being removed and claims it is a violation of that person's human rights to be separated from a child with whom he presently enjoys family life as an engaged parent, that a consequence of the CJEU's judgment is that it is not open to the respondent to submit that an interference can be avoided because it is reasonable to expect the child (and presumably any other parent/carer who is not facing deportation/removal) to join the appellant in the country of origin? If not why not?"*

32. The following submission was made on behalf of the Secretary of State:

> *"We do accept … that in a case where a third country national is unable to claim a right to reside on the basis set out above it will not logically be possible, when assessing the compatibility of their removal or deportation with the ECHR to argue that any interference with Article 8 rights could be avoided by the family unit moving to a country which is outside of the EU".*

33. The Upper Tribunal accepted this proposition, as follows:

> *"95. We shall take this helpful submission into account when we consider the application of Article 8 to each appellant's case. We agree with it. This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so. The case serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in ZH (Tanzania). If interference with the family life is to be justified, it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation." (Emphasis added)*

34. The Tribunal went on to engage in a balancing exercise with respect to Article 8 rights. Only in the first case did the Tribunal allow the appeal. In each of the other cases, the Tribunal found that it was proportionate to deport the father.

35. The applicants argue that the approach taken by the Upper Tribunal at paragraph 95 of *Sanade* represents the law in Ireland. This means that when the Minister was assessing the proportionality of the proposed deportation of A.N. under Article 8 ECHR, it was not open to him to consider whether it would be reasonable to expect M.C. and her son to relocate; the Minister should instead have focused his assessment on the proportionality of the rupture of the family. In the applicants' submission, this follows from the concluding paragraphs of the CJEU judgment in *Dereci & Others v. Bundesministerium für Inneres* (Case C-256/11, judgment of 15th November 2011). Even if *Zambrano* rights do not arise, the fact that there is an EU citizen child involved means that this is not purely a matter of domestic law and the implications of EU citizenship must therefore be considered when assessing the proportionality of the proposed deportation under Article 8 ECHR.

36. As noted above, the respondent argues that paragraph 95 of *Sanade* is wrongly decided and that either one falls to be protected by EU law under Article 20 TFEU or one does not and if not, the implications of EU citizenship have no role to play in an assessment conducted under Article 8 ECHR.

The Court's Observations

37. The applicants' submission is effectively that paragraph 95 of *Sanade* introduces an irrebuttable presumption that where a deportation has the potential to impact on an EU citizen child, even where it is not an inevitable consequence of the deportation that child will be required to leave the EU, it will nonetheless never be reasonable to expect that child to relocate outside of the EU. The Minister is therefore precluded from considering whether it is reasonable to expect the family to relocate and is essentially confined to looking at whether the conduct of the proposed deportee and the interests of the State are such as to justify the rupture of a family including Irish citizens.

38. There are a number of reasons why the validity of this proposition is doubtful. It may have represented the view and policy of the UK Border Agency that the concession was made but cannot be accepted as representing the law as it currently applies in Ireland. First and foremost, it seems to this Court that the Upper Tribunal may in error have conflated Britain's obligations under EU law with its obligations under the ECHR. The applicants accept that the rights of M.C. and C.C. under Article 20 TFEU are not engaged in this case. Non-EEA nationals acquire rights under Article 20 TFEU only if their expulsion from the territory of the EU would have the necessary consequence that a dependent EU citizen child would be required to leave the territory – effectively, the constructive expulsion of an EU citizen child. It is clear from *McCarthy v. Secretary of State for the Home Department* (Case C-434/09, judgment of 5th May 2011) and *Dereci* (cited above) that nothing short of the constructive expulsion of the EU citizen will suffice and the rupture of family life will not engage Article 20 TFEU. By the applicants' own admission, A.N.'s deportation would raise no entitlements under Article 20 TFEU[1] as they are not dependent on A.N. and he is not C.C.'s primary carer. They have not argued that the Minister was obliged to consider their rights under Article 7[2] of the *Charter of Fundamental Rights of the EU*, presumably because the Charter is of no application since the Minister, in affirming the deportation order was applying domestic law and was not implementing EU law. The position with regard to purely internal situations such as the present was clearly set out by Cooke J. in *Smith v. The Minister* [2012] IEHC 113, at paragraph 24:

> *"[…] as Article 51 of the Charter makes clear, its provisions are addressed to the institutions of the European Union and its agencies; and to the Member States "only when they are implementing Union law". The revocation of a deportation order made under s. 3 of the Immigration Act 1999, does not involve, as such, any implementation of Union law. It is the exercise by the State of its sovereign entitlement to decide who shall remain within the territory of the State. The removal of a third country national from the State does, of course, also remove the individual from the territory of the European Union. In circumstances such as those in the present case, however, it is only where the principle of the Zambrano judgment is applicable that the Member State comes under any obligation derived from Union law not to effect the removal. As the Minister has, correctly and lawfully in the judgment of the Court, decided in the first refusal that this was not a case in which the Zambrano principle was applicable because the deportation of Mr. Smith would clearly not result in any other member of the family leaving the European Union, that consideration cannot be said to arise in this case."*

39. Cooke J. held similarly in *Lofinmakin v. The Minister* [2011] IEHC 38 at para. 48 and his approach was followed by O'Keeffe J. in *Troci* (cited above) at para. 38. It seems to this Court to follow that where EU rights are not engaged, the *Zambrano* judgment has no bearing on the Minister's Article 8 ECHR assessment. For this reason, the Court must disagree with the UK Upper Tribunal's finding in *Sanade* insofar as the point was determined at all. The Upper Tribunal's approach does not sit easily with the approach taken by the Court of Appeal of England and Wales at para. 63 of its judgment in respect of an appeal brought by one of the *Sanade* appellants (*DH (Jamaica) v. Secretary of State for the Home Department* [2012] EWCA Civ 1736):

> *"[…] there is really no basis for asserting that it is arguable in the light of the authorities that the Zambrano principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU. If the EU citizen, be it child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 Convention rights may then come into the picture to protect family life as the Court recognised in Dereci, but that is an entirely distinct area of protection."*

40. These observations were not made in relation to the *Sanade* paragraph 95 proposition on which the applicants rely as it was not raised before the Court of Appeal. The observations were made in relation to the appellants' attempt to bring themselves within the strict parameters of *Zambrano* even though the immigration decisions under appeal would not result in the constructive expulsion of an EU citizen. Nonetheless it is relevant that the Court of Appeal resisted the conflation of the Secretary of State's obligations under EU law on the one hand and Article 8 ECHR on the other.

41. The Court agrees with the submission made by the respondent that there is no analysis in the *Sanade* judgment of the premises on which the paragraph 95 proposition is based or on the consequences of its acceptance. The Upper Tribunal simply put the proposition to the Secretary of State for her comment and she accepted its applicability by way of a written submission drafted on her behalf by the UK Border Agency. It appears from the *Sanade* judgment that no oral submissions were received with regard to the proposition and the applicants were not consulted. The Upper Tribunal did not hear any arguments on the qualifying decision of *Dereci* and it did not consider the import of McCarthy on the Zambrano decision. This Court is unaware of any decision in which the paragraph 95 proposition has been tested with any rigour, although the same concession has been made by the Secretary of State and accepted by the Upper Tribunal in a number of subsequent decisions (see e.g. *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393 (IAC), *Izuazu (Article 8 – new rules)* [2013] UKUT 45 (IAC) and *Ogundimu (Article 8 – new rules) Nigeria* [2013] UKUT 60 (IAC)). However, in *Izuazu*, the Secretary of State's concession (annexed in full to the Upper Tribunal's judgment) was tempered by the following proviso:

> *"The Secretary of State continues to accept that where the primary carer of a British citizen is denied a Zambrano right of residence on the basis that his or her removal or deportation would not force the British citizen to leave the EU, it will not logically be possible when considering any Article 8 claim made by such a person to determine their claim on the basis that the family (including the British citizen) can relocate together to a place outside the EU. However, the Secretary of State does not accept that it follows that there will be no circumstances in which a decision taken in respect of the primary carer of a British citizen can require that British citizen to leave the UK. The Secretary of State does not consider that the UK Border Agency letter sent to the Tribunal in Sanade suggested that she did accept that it is never reasonable to expect a British citizen party to genuine family life in the UK to relocate permanently abroad but apologises for any lack of clarity in the correspondence which may have caused the Tribunal to reach this conclusion." (Emphasis added)*

42. The Court is unaware of any decision which tested the paragraph 95 proposition. In the circumstances it may be that paragraph 95 of *Sanade* is little more than an expression of a policy advocated by the UK Upper Tribunal and adopted by the Secretary of State in the context of frequently changing and complex UK Immigration Rules which can have no applicability in this jurisdiction. In contrast, the Minister has in these proceedings clarified that the proposition is not representative of Irish immigration policy.

43. This Court is hesitant to accept that *Sanade* represents the law for further reasons. First, despite the fact that the point was not fully argued before this Court or indeed before the *Sanade* Tribunal, it seems that if the proposition advanced by the applicants is accepted, then the jurisprudence of the European Court of Human Rights has been swept away when addressing the right of Contracting States to deport the foreign national parent or parents of children who are citizens of a Contracting State. The foundation of human rights law does not rely on preferences for nationality or citizenship but applies because people enjoy rights as human drawn from their common humanity and from citizenship rights. The application of the rights guaranteed by the ECHR are not confined to citizens of the Contracting States; they extend to all persons residing in the territory of the Council of Europe.

44. The domestic courts of this State have also tackled situations of that nature, for example in *A.O.* and *D.L.* and *Oguekwe* (cited above) by requiring a substantial reason for the deportation of the parent of an Irish citizen and a decision which is proportionate to the effect on the family. The Court is unaware of any such case where the Strasbourg Court or the domestic courts have found that it would be ***illogical*** to expect the family to relocate because the child would lose the benefits of his or her citizenship, or that the loss of the benefits of citizenship creates an irrebuttable presumption that it would be unreasonable to expect the person to relocate. The consistent approach has been that the reasonableness of relocation is to be assessed in each case according to the particular family's circumstances. The citizenship or nationality of the family members is a factor to be weighed in the balance but it is not determinative. As Lady Hale noted in *ZH (Tanzania)* (cited above), nationality is not a "*trump card*". If this is the case for national citizenship, there is no reason to treat EU citizenship any differently and *Zambrano* does not import any such requirement. Certainly, it seems to this Court that Irish citizenship embodies rights which are more extensive and more numerous than those envisaged in the TFEU.

45. Finally, it is relevant to note that the context in which *Sanade* was decided is fundamentally different to the situation which pertains in the present case. As previously noted, in *Sanade* the Upper Tribunal was considering the obligation of the Secretary of State, pursuant to s. 32 of the UK Borders Act 2007, to impose an automatic deportation order in respect of a person convicted of a criminal offence and sentenced to more than twelve months' imprisonment. There is no equivalent provision in Irish law and there is no known element of criminality in this case.

46. The position therefore remains unchanged. Where it is accepted that an expulsion measure will interfere with family life, Contracting States are obliged to assess whether the expulsion is in accordance with law and is necessary in a democratic society. A measure will be necessary in a democratic society if it corresponds to a pressing social need and is proportionate to the legitimate aims of the State which are being pursued. The proportionality assessment consists of two steps. First, the Contracting State must consider whether it is reasonable to expect the family members to relocate with the proposed deportee so as to maintain family life with him or her. Where the expulsion has the potential to affect a child, the best interests of that child must be weighed in the balance irrespective of the nationality of the child (see e.g. *Üner v The Netherlands* (2006) 45 EHRR 421). The decision-maker must consider the seriousness of any difficulties the child might encounter in the country to which it is proposed that the family could relocate and balance the solidity of social, cultural and family ties with the host state with the country to which relocation is proposed. As noted above it is the obligation of the person seeking to rely on the child's rights to put pertinent information in this regard before the Minister and the Minister cannot be faulted for failing to speculate where little or no relevant information is furnished to him about the child. Where the child to be affected by the expulsion measure is a national of the host state, the State must also consider the rights enjoyed by the child by reason of that citizenship and the impact on that child of being deprived of the enjoyment of those rights – but again, only so far as the circumstances of the child are known to the Minister. As Denham J. held in *Oguekwe* (cited above), addressing the Minister's obligation where a proposed deportation will interfere with the family life of an Irish citizen child:

> *"6. The Minister should consider expressly the constitutional rights, including the personal rights, of the Irish born child. These rights include the right of the Irish born child to:-*
>
> *(a) reside in the State,*
>
> *(b) be reared and educated with due regard to his welfare,*
>
> *(c) the society, care and company of his parents, and*
>
> *(d) protection of the family, pursuant to Article 41.*

The Minister should deal expressly with the rights of the child in any decision. reference to the position of an Irish born child of a foreign national parent is required in decisions and documents relating to any decision to deport such foreign national parent.

7. The Minister should also consider the Convention rights of the applicants, including those of the Irish born child. These rights overlap to some extent and may be considered together with the constitutional rights."

47. The obligation to consider the citizenship of the child as part of the Article 8 assessment was further underscored by Lady Hale in *Z.H. (Tanzania)* (cited above). At paragraph 30 of her judgment, she held that nationality, while not a "*trump card*", is of particular importance in assessing the best interests of any child. She pointed out that if a citizen child's parent is deported and the child is forced to move with that parent, the child is deprived of the protection and support (socially, culturally and medically) of his home country. His childhood is socially and linguistically disrupted. He loses the opportunity to be educated in his country of citizenship and he is isolated from normal contact with his family in his home country. She continued:

"32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. As Jacqueline Bhaba (in "The 'Mere Fortuity of Birth'? Children, Mothers, Borders and the Meaning of Citizenship", in Migrations and Mobilities: Citizenship, Borders and Gender (2009), edited by Seyla Benhabib and Judith Resnik), has put it, at p 193:

> *"In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children."*

33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. […]"

48. The weight to be given to the citizenship rights of the child will depend, for example, on the child's age, the solidity of his social, cultural and familial links with his country of citizenship and the stage of his social and educational development. This is clear from the jurisprudence of the Strasbourg Court. If, as in *ZH (Tanzania),* having weighed these competing interests in the balance it is concluded that it would not be reasonable to expect the family members to relocate with the proposed deportee, then the Contracting State proceeds to the second of the two steps and is required to assess whether the interests of the State and the circumstances of the case would justify the rupture of the family.

49. In sum, in the view of this Court, the judgment of the CJEU in *Zambrano* and the rights which flow from Article 20 TFEU do not preclude the Minister from considering whether it would be reasonable to expect an EU citizen to relocate outside of the EU to maintain family life with a non-EEA national in the event of his / her deportation. It remains a matter for the Minister to weigh all relevant facts and circumstances in the balance so far as they are known to him and to reach a reasonable and proportionate decision on a case-by-case basis.

Conclusion

50. The applicants have not established an entitlement to the reliefs sought. The application fails.

51. The Court is concerned that information relevant to C.C. was simply not presented to the Minister when the applicants sought revocation of the deportation order. There is nothing to prevent the applicants from making a further and more informed s. 3(11) application, putting matters relevant to C.C.'s best interests before the Minister. In this regard, the applicants must consider whether C.C.'s best interests lie with knowing his biological father and family in Ireland and remaining with his mother and grandmother, or with his mother and step-father in Albania. As C.C. is an innocent child with no choice in his mother's decisions, his best interests require that full information on the effect of a deportation order in respect of his step-father on his long term well being must be put before the Minister. In light of the information which was put before the Court by way of affidavits from the first and second applicants in relation to the infant, which was not before the Minister at the relevant time, and taking account also of the fact that the applicants do not appear to have had consistent legal assistance at the material times, the Court will grant a temporary injunction prohibiting the deportation of A.N. for a period of eight weeks from today's date to enable the making of a focused, relevant and expanded Section 3(11) application which specifically addresses how C.C. will be affected if the benefits of Irish and EU citizenship now enjoyed by C,C, are suspended or replaced if he travels with the family unit to Albania. If the relevant application is made, the Court may continue the injunction pending the Minister's decision.

1. Article 20 TFEU

2. Article 7 is in effect a reiteration of Article 8 of the ECHR