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THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 371 J.R.]

BETWEEN

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

APPLICANT

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment delivered by Ms. Justice Irvine on the 4th day of March, 2008

1. The applicant in these proceedings was born in Ireland on the 24th March, 2006. The applicant's father, O. E., is a Nigerian national, who was born on the 10th January, 1985. The applicant's mother ("AH") is an Irish citizen, who was born on the 4th June, 1986 and who at all times has resided in Ireland.

2. The within proceedings arise as a result of a refusal by the respondent on the 15th March 2006 to revoke a deportation Order which he had earlier made in respect of the applicants father on the 14th March 2006. In making his said decision the respondent was exercising the Statutory powers afforded to him under s. 3 of the Immigration Act 1999 ("the Act"). The applicant was granted leave by the High Court to apply for judicial review in respect of that decision on the 7th July 2007.

Historical Background

3. O. E. came to Ireland as an unaccompanied minor of 17 years of age on 26th February, 2002. O.E. thereafter applied for refugee status on 14th March, 2002 but was not granted asylum notwithstanding an appeal to the Refugee Commissioners.

4. On 21st January, 2005 a deportation order was signed by the respondent and O.E. was deported back to Nigeria on the 14th March 2005. O.E. has maintained that following his deportation, he was detained and imprisoned in Lagos where he alleges he was alone and without support. At all times O.E. has contended that his father was shot on religious ground in Nigeria and that thereafter he became dislocated from his mother and extended family.

5. As a result of significant media controversy and in particular petitions by his schoolmates from Palmerstown Secondary School, the respondent on 24th March, 2005 revoked the deportation order and permitted O.E. to return to Ireland on a study visa with permission to remain until 30th September, 2005 so as to complete his Leaving certificate. Accordingly, O.E. arrived back in Ireland on the 1st April, 2005.

6. The affidavits in this application suggest that the applicant's father started dating AH in early April 2005 and that following four months of that relationship AH became pregnant with an unplanned pregnancy. On the 1st September, 2005 O.E. was notified that his permission to remain in Ireland was due to expire on the 30th September, 2005 and he was invited to make representations regarding his status. On the 15th September, 2005 O.E.'s solicitors sought an extension of time to deliver submissions on his behalf and by letter dated the 23rd September, 2005 O.E. was granted until the 14th October, 2005 to make representations. Further O.E.'s visa was extended for an additional period of twenty eight days.

7. On the 28th October, 2005 O.E.'s solicitors made representations to the respondent. Included within that submission was an assertion that O.E. would not be safe if repatriated to Nigeria and that he would be persecuted. Humanitarian reasons were also advanced on behalf of O.E. and significant emphasis was placed upon the extent of his connections with Ireland at that time.

8. By letter dated the 3rd November, 2005 the respondent sought confirmation that the submissions made on behalf of O.E. were complete and a letter on the 4th November, 2005 from O.E. solicitors confirmed that this was so. It is common case that O.E.'s solicitors made no mention of AH or her pregnancy. At that time AH, it is asserted, had not advised her parents of the pregnancy and consequently O.E.'s solicitor made no disclosure of these facts in the representations made on his behalf. Included with the submissions was O.E.'s own life story written by him setting out details of his life in Nigeria prior to arriving in Ireland as an unaccompanied minor, his account of what occurred following his deportation to Nigeria in March 2005, and details of his plans to study and support himself through further education in Ireland. No mention was made of any relationship with AH.

9. A chronology of the events leading up to the decision the subject matter of these judicial review proceedings is set out in the memorandum of Amanda Carolyn, Clerical Officer to the Repatriation Unit of the department dated the 8th March 2006 and which memorandum is exhibited at "EO 2" in O.E.'s Affidavit. This exhibit reveals that on the 20th January, 2006 the respondent decided to reject the submissions made on behalf of O.E. and he was immediately by letter of the 24th Jan 2006 notified of this fact. He was also advised of the Minister's reasons for his proposed deportation. The reasons given were:-

> 1. The original permission to remain in the State was for the purpose of having an asylum application processed and that this was unsuccessful.
>
> 2. That following initial deportation O.E. was re-admitted to the State to complete his Leaving Certificate and that this had been achieved.
>
> 3. That he had not been in compliance with the laws of the State that he had not been in compliance with the laws of the State in that he had been convicted of a number of minor road traffic offences.
>
> 4. That to grant O.E. permission to remain would be contrary to the common good in that it would have implications for the integrity of a coherent and efficient immigration and asylum system.

10. In the same letter O.E. was invited to make further submissions within fifteen days.

11. On the 10th February, 2006 O.E.'s solicitors, Colgan and Company, made further representations pursuant to s. 3 of the Act. The form furnished by the Department of Justice, Equality and Law Reform, referred to as the Section 3 Form 1, is pre-printed and sets out each of the factors to which the respondent must have regard in reaching a decision under s. 3(6). The Form provides space for

inclusion by the applicant of information relevant to each of the considerations referred to in the Section includes the applicant's "family and domestic circumstances". In dealing with the detail of his "family and domestic circumstances" it was stated on behalf of O.E. that he was in a relationship with an Irish citizen and that his deportation would have adverse consequences for both of them. AH's name was not mentioned nor was any further detail given regarding her pregnancy or the consequences which were likely to ensue should deportation be pursued by the respondent. The Affidavits assert that a deliberate decision had been made by O.E. and AH not to disclose the pregnancy as her parents at that time were only just coming to terms with knowledge of same. It is further alleged that AH feared that such information might, if disclosed, find its way into the media.

12. The exhibits to the respondent's affidavit show that Amanda Carolan, first supervisor and clerical officer to the Repatriation Unit, considered O.E.'s file under s.3 of the Act and prepared a report dated the 8th March, 2006. In her report dealing with O.E.'s family circumstances under s. 3(6) she stated that O.E.'s solicitors had advised that he was in a relationship with an Irish citizen but had given no further information regarding that relationship other than that his deportation would have adverse consequences for both of them. Ms. Carolan in her report went on to refer to the voluminous representations received from members of the Oireachtas and the public both for and against O.E.'s application for leave to remain in the State, many of which attested to his good character. Notwithstanding the aforegoing, she advised that the integrity of the asylum and immigration process would favour deportation.

13. On the 9th March, 2006 Audrey Walsh, Executive Officer in the Repatriation Unit, prepared a further report on the application of O.E.. In her report Ms Walsh referred to the fact that the Minister was obliged to have regard to the eleven factors set out in s. 3(6) of the Act. Having referred to these matters herself she concluded from all of the information she had seen that O.E. should be repatriated.

14. From the documentation exhibited at "EO 2" to O.E.'s affidavit it is clear that the report of Audrey Walsh was brought to the attention of Dermot Cassidy, Assistant Principal of the Repatriation Unit. He has made a note on Audrey Walsh's report to the following effect:-

> "I have read and considered the papers in this case. I agree with the recommendation below that the Minister should sign the deportation order in respect of O. E. in the file pocket opposite."

15. It appears to be the case that the report of Audrey Walsh dated the 9th March, 2006 as endorsed by Dermot Cassidy was thereafter forwarded to Noel Dowling Principal Officer. In turn by his own report dated the 10th March, 2006 Mr. Dowling advised the Minister in favour of O.E.'s deportation. Mr. Dowling's report to the Minister set out a number of matters in favour of permitting O.E. to stay in Ireland. These included the fact that O.E. had arrived in Ireland as an unaccompanied minor, that he was a good student, that he had integrated well and that he had been in the country for four years. On the other hand Mr. Dowling drew attention to the fact that the objective of re-admitting O.E. to Ireland had been to permit him to complete his Leaving Certificate and that this had been achieved. He also referred to the fact O.E. had committed a number of minor road traffic offences whilst in Ireland and that these were factors which might favour his deportation.

16. There is one matter which is somewhat surprising in relation to Mr. Dowling's report. Mr. Dowling's report makes no mention whatsoever of O.E.'s relationship with AH or any Irish citizen notwithstanding the fact that the submissions made on his behalf had included reference to the existence of such a relationship and also having regard to the Minister's obligation under s. 3(6)(c) of the Act to consider the family circumstances of an individual whom he was considering for deportation. Clearly, given that O.E. had not disclosed the existence of a pregnancy this factor was not weighted either in favour or against his deportation in Mr. Dowling's report.

17. Mr. Dowling's recommendation to the Minister was in favour of his signing the deportation order on the four grounds upon which the initial order had been made and which grounds are referred to earlier in this judgment.

18. On the 14th March, 2006 O.E. was advised that his submissions had been rejected and the deportation order was served personally on him. He was served with copies of the memorandum prepared by the relevant departmental officials and was also furnished with the Minister's handwritten decision dated the 14th March, 2006. The Minister's decision reads as follows:-

> "1. I have carefully considered the papers submitted in this and the accompanying file. I have also had regard to various other statements and messages in support of granting O.E. humanitarian leave to remain.
>
> 2. I decided to re-admit O.E. to Ireland to complete his leaving certificate because I was of the view that it would have been unfair not to do so having regard to the intention prior to his deportation order that the order would not be enforced before his Leaving Certificate Examination.
>
> 3. Having regard to all the circumstances and submissions and having regard to all of the matters to which I am by law required to take into consideration, I am of the clear opinion that the reason stated in Mr. Dowling's memo of the 10th March, 2006 at para. 4(iv) is correct and that I should make an order.
>
> 4. I would hold that I would have been of the same clear opinion even if O.E. had had no problems with the criminal law."

19. There was no mention made of O.E.'s relationship with AH.

20. On the 15th March, 2006 O.E. instructed his solicitors to write to the respondent to disclose the impending birth of his child. In their letter of the 15th March 2006 O.E.'s solicitors advised the respondent that AH was due to have the birth of their child induced on the 20th March, 2006 and that if the birth was not induced on that date that the infant had an expected delivery date of the 4th April, 2006. The letter from Colgan and Company advised the respondent of the name of the applicant's mother namely AH. However, no further detail was given regarding AH's age, family or financial circumstances, employment details, address or telephone number. The Minister was asked as follows:-

> "In the circumstances we would be obliged if you would confirm that you will reconsider the position in relation to O.E.'s status in the State and would confirm that you will refrain from executing the deportation order signed by you on the 14th March, 2006 until the matter has been reconsidered by you.
>
> In the circumstances our client is most anxious to avoid the necessity of issuing any proceedings in this matter but to protect his interests we have advised him this may become necessary should we not hear from you by 1.00pm next Monday the 20th inst."

21. The Minister in his decision incorrectly refers to the date of the letter received from Colgan and Company as being a letter dated

the 14th March, 2006. It is agreed by all parties that the respondent's subsequent decision was in response to the letter of the 15th March from Colgan and Company to which I have just referred. The decision of the Minister reads as follows: -

> 1. I have received a letter from Colgan & Co. addressed to Lorraine O'Brien of the repatriation section and a copy of the letter dated the 14th March 2006 from the same solicitors firm addressed to me.
>
> 2. Both letters were composed and sent after the indication of my decision to make a deportation order.
>
> 3. The letters indicated that O.E. is the natural father of an unborn baby which is expected to be born in or about the 4th April.
>
> 4. The letter to me indicates that the mother to be and O.E. are in a loving relationship, a matter that was briefly referred to in the representations.
>
> 5. I am of the opinion that the fact that O.E. entered into a relationship and has fathered an unborn child is not sufficient to cause me to rescind my decision or to vary it.
>
> 6. I would have made the decision already made even if I had been aware that the relationship had led to a pregnancy at the time I made it.
>
> 7. I am affirming the decision made by me.
>
> 8. I wish, in the context of this indication of possible Court proceedings being instituted, to reiterate that I have given this case every possible care and sympathetic consideration and I am of the clear view that the common good requires that I should not vary the order that I have made. To vary it or rescind it would, in my opinion, be gravely injurious to the common good.
>
> Signed: Michael McDowell, 15th March, 2006."

22. In the aftermath of the aforementioned decision, O.E., on the 24th March, 2006, being the date of the applicant's birth, applied to the High Court on his own behalf and on behalf of the applicant for an interim injunction restraining his deportation. O.E. also sought leave to apply for judicial review. Accordingly, on the 7th July, 2007 Dunne J., made an order restraining O.E.'s deportation pending the outcome of these proceedings and by the same order the Court also granted leave to apply for judicial review but strictly confined such leave to the relief sought at para. D6, 8, 9 and 10 of the Statement of Grounds dated 24th March, 2006. Those reliefs reflect the fact that at that time the first named applicant was O.E. the second named applicant his son, (AHE). The leave granted was limited to the right to claim:-

> "6. A declaration that the respondent in refusing on or about the 15th March, 2006 to vary and/or amend the deportation order as provided for by s. 3(11) of the Immigration Act, 1999 as amended did fail to have due regard to the first and second named applicant's rights under the European Convention on Human Rights and the second named applicant's constitutional rights and failed to have regard to the matters set at s. 3(6) of the Immigration Act, 1999.
>
> 8. An order setting aside the Minister's decision of 15th March, 2006 not to revoke or amend the deportation order dated the 14th March, 2006.
>
> 9. Further and other reliefs.
>
> 10. Costs."

23. The order granting leave to apply for judicial review was confined to the grounds set out above insofar as they related to the rights of the then second named applicant, who is the sole applicant in this application.

24. By further order dated the 22nd November, 2006 the order dated the 7th July, 2006 was amended to include a right on the part of the applicant to seek an order directing the respondent to reconsider O.E.'s application to revoke and/or amend the deportation order pursuant to s. 3(11) of the Immigration Act, 1999.

25. The amended Statement Required to Ground the Application for Judicial Review was delivered on the applicant's behalf on the 29th November 2006 and the Statement of Grounds of Opposition delivered on the 20th July 2007.

26. The formal pleadings in this judicial review application concluded with the service by the applicant's solicitors of a notice on the Attorney General pursuant to O. 60, r. 2 of the Rules of the Superior Courts.

27. On the 29th November, 2006 a further affidavit was filed on behalf of the applicant. On that date, Gerard Byrne, Consultant Psychiatrist swore an affidavit referring to an interview which he had with O.E., his partner AH and their son and wherein he exhibited a report containing his opinion that the separation of the applicant from his father would have deleterious consequences upon him psychologically in future years. I do not believe it would be appropriate for me to take into account the contents of this affidavit when reaching my decision. Insofar as the Court must look at the inquiry that the respondent was obliged to carry out at the time he exercised his power under s. 3(11) I believe that this Court should confine itself to the facts known or ascertainable at the time when the respondent made the decision which it is now sought to impugn.

28. The application for judicial review was heard by this Court on the 13th and 14th November, 2007. Written submissions were filed by both parties and these have been a helpful guide to the areas of law relevant to the issues to be determined. However, the written submissions do not entirely reflect the argument made in the course of the hearing and hence may appear to be somewhat at variance to certain matters referred to in this judgment.

The Law

29. There is an elaborate statutory framework in this jurisdiction under which non nationals such as the applicant's father are entitled to have their claims for asylum status given fair consideration. This framework embodies an appeals procedure to an independent tribunal. Further, in respect of each determination the applicant can have recourse to the High Court and can seek, subject to leave being granted, to have any such decision judicially reviewed. In this case the applicant availed of the totality of his statutory entitlements but has been unsuccessful in gaining asylum status. The applicant now invokes the judicial review process in respect of

the decision of the Minister under s. 3(11) of the Act whereby he decided not to revoke or amend the deportation Order of the 14th March, 2006.

30. What is not an issue in this case are the respondent's very wide-ranging powers, in the interest of the common good, to control aliens and their movements. Neither is there any doubt that the Court has no power or right to substitute its own views for those of the respondent in making any decision under s. 3(11) of the Act. As Costello J. in *Pok Sun Shum & Others v. Ireland, The Attorney General and The Minister for Justice* [1986] ILRM 593 said at p. 599: -

> "The State through its Ministry for Justice must have very wide powers in the interest of the common good to control aliens, their entry into the state, their departure and their activities within the state. There must be given to the Minister wide discretion in this area."

31. For these reasons the Court can only examine how and in what circumstances the respondent exercised his powers so as to ensure that he complied with his statutory and constitutional obligations and that he did so whilst according to those concerned natural justice and fair procedures.

The Immigration Act 1999
32. The Minister, prior to making a deportation order under the Immigration Act, 1999, as amended, must have regard to those factors set out at s. 3(6) thereof. Section 3(6) provides as follows:-

> "In determining whether to make a deportation order in relation to a person, the Minister shall have regard to –
>
> (a) the age of the person;
>
> (b) the duration of residence in the State of the person;
>
> (c) the family and domestic circumstances of the person;
>
> (d) the nature of the person's connection with the State, if any;
>
> (e) the employment (including self-employment) record of the person;
>
> (f) the employment (including self-employment) prospects of the person;
>
> (g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
>
> (h) humanitarian considerations;
>
> (i) any representations duly made on behalf of the person;
>
> (j) the common good; and
>
> (k) considerations of national security and public policy, so far as they appear or are known to the Minister."

33. Section 3(11) of the Act, 1999 provides that the Minister shall also have the power to alter a decision made by him under s. 3(6). Section 3(11) of the Act provides as follows:-

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

34. This latter provision may be utilised to notify the Minister of any new or changed circumstances which may occur after the making of a deportation order but prior to its execution.

The Pleadings
35. Simply put the applicant asserts that the respondent in making his decision on the 15th March 2006:-

> (i) failed to have regard to the applicant's rights under Articles 40.1, 40.3.1, 41 and 41.2.2 of the Constitution.
>
> (ii) failed to have regard to the rights of the applicant under the European Convention on Human Rights and in particular Article 8 thereof.
>
> (iii) did so at a speed which evidences pre-judgement on his part not to revoke the deportation order. Alternatively, it is asserted that the speed at which the respondent made his decision made it impossible for him to conduct a proper investigation into the applicant's constitutional and/or human rights.

36. In terms of Domestic Law, leaving aside any inferences the Court is asked to draw from the speed of the respondent's determination, the kernel of the applicant's case is that the respondent simply failed to assess the extent to which his decision not to revoke the deportation order would effect the constitutional rights of the applicant. The applicant contends that the decision of the respondent was wanting in natural and constitutional justice, was disproportionate and made on foot of a procedure that was unfair.

37. The respondent's statement of grounds of opposition can be summarised as follows:-

> (i) that the applicant on the date of his decision enjoyed no constitutional rights save those derived from Art 40.3.3.
>
> (ii) that if the applicant had rights beyond those conferred upon him by Article 40.3.3 that the proposed deportation of O.E. did not breach such rights.
>
> (iii) that the respondent had full regard for the rights of the applicant from the facts made known to him at the time he made his decision.
>
> (iv) that the applicant's constitutional rights could be satisfied by the potential ability of O.E. to travel to Ireland to visit

the applicant.

(v) that the applicant enjoyed no rights under Article 8 of the European Convention on Human Rights and that in any event the applicant's deportation would be lawful having regard to Article 8(2) of the said Convention.

(vi) that the respondent did not pre-judge the application under s. 3(11) and the speed of his decision did not deprive the applicant of the opportunity to make effective representations in relation to the application under s. 3(11) of the Act.

(vii) in alternative, that the applicant's next friend withheld relevant information from the respondent both prior to the making of the deportation order of the 14th March, 2006 and also prior to the decision of the respondent of the 15th March, 2006.

38. Section 3(6) of the Act, sets out eleven matters to which the Minister must have regard prior to making a deportation order. The Court must decide whether these are matters which must again be considered by the Minister if he is asked to vary or revoke the deportation order under s. 3(11). Further, the Court must consider whether the Minister, when making a decision under s. 3(6) or s. 3(11), must have regard to matters which are not specifically provided for in s. 3 such as the constitutional rights which may be enjoyed by an infant whose birth is imminent at the time of such decision.

39. Most recently in *Bode (a minor) v. the Minister for Justice, Equality and Law Reform and Others* (20th December, 2007 the Supreme Court), whilst principally engaged in considering the obligations of the Minister when dealing with applications for residency under what is described as the IBC/05 scheme, considered the role of the Minister when exercising his statutory remit under s. 3 of the Act.

40. The IBC/05 scheme had been introduced by the Minister against the backdrop of the 27th amendment to the Constitution in 2004. That amendment had the effect of excluding from automatic Irish nationality and citizenship a child born in Ireland to parents neither of whom was entitled to be an Irish citizen at the time of the child's birth. The said scheme was designed to facilitate applications by foreign national parents of Irish born children who wished to remain in the State. The decision of the learned trial judge, which was the subject matter of the Supreme Court's deliberations, had concerned itself, amongst other matters, with the obligations of the Minister when dealing with such applications.

41. In concluding that the learned High Court judge had erred in deciding that the Minister was obliged under the IBC/05 scheme to consider the constitutional and conventional rights of the applicants, who were the Nigerian parents of an Irish born child, Denham J. had cause to consider precisely when and in the course of what process such rights fell to be considered by the Minister. In concluding that the Minister was not obliged to conduct any inquiry into the constitutional rights of the applicants at the time of considering applications under the IBC/05 scheme, the Court advised that these were matters to be dealt with by the Minister at the time he would be asked to consider making a deportation order in any particular case.

42. Denham J. outlined the extent of the Minister's role when exercising his statutory powers under s. 3 of the Act, in the following manner at para. 25 of her judgment:-

> "Thus, bearing in mind the case law of this Court, the Minister is required to consider in this context the 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."

43. In *Bode* the learned Supreme Court judge at para. 27 of her judgment advised:-

> "The appropriate process within which to consider constitutional or convention rights of applicants is on the process under s. 3 of the Act of 1999. This is the relevant statutory Scheme."

44. The validity of the decision of the respondent in the present case on 14th March 2006 under s. 3(6) to proceed with the deportation order is not in dispute. At the core of the present proceedings is the decision made by the Minister under s. 3(11) following the receipt of the letter sent by Colgan and Company on the 15th March 2006 advising him of the impending birth of the applicant. In relation to the circumstances in which the Minister might have to consider the constitutional rights of an Irish citizen child at the time of an application under s. 3(11), Denham J., in the course of her judgment at para. 27 stated as follows:-

> "Thus, a person such as the second named 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 reply. The integrity of the system should be maintained, as long as it protects the rights of the applicants, which it does in this case.
>
> Consequently, it is my view that there is no free standing right of the second named 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."

45. It seems to be implicit from the said judgment that the Minister was obliged to consider the constitutional rights of those affected by proposed deportation orders both at the time of the making of a deportation order under s. 3(6) or if the information regarding those rights only emerged subsequent to the making of the deportation order, at the time of being asked to amend or revoke an earlier decision under s. 3(11) of the Act.

46. In this particular case the respondent made his decision on the 14th March 2006 to deport O.E. and in doing so sought to balance the rights of O.E. against the implications of allowing him to stay for the integrity of the immigration and asylum system. Having regard to the Court's decision in Bode I conclude that the respondent was obliged to carry out the same balancing exercise including the new information furnished to him by letter of the 15th March 2006 when exercising his power under s. 3(11) and then come to a decision which was proportionate in all of the circumstances. In reaching his decision the respondent was obliged to take into account the factors set out in s. 3(6), the rights of O.E. against whom the deportation order had been made and also the constitutional rights, if any, of the infant whose impending birth was the very reason for the Minister being asked to invoke his powers under s. 3(11). It goes without saying that for the decision to be proportionate the respondent was obliged to take into account all of the relevant circumstances pertaining to the decision which in this case included all the facts and information relevant to any constitutional rights

enjoyed by the infant whose birth was then imminent.

Issues for the Court
47. Assuming that I am correct in concluding that the respondent was obliged, at the time of entertaining O.E.'s application to revoke the deportation order under s. 3(11), to consider the constitutional rights of an infant likely to be affected by the deportation order, it appears to me that the Court should consider the following issues namely:-

> 1. Did the unborn applicant at the time of the respondent's decision on the 15th March 2006 have constitutional rights which the respondent was obliged to consider?
>
> 2. If the unborn child had constitutional rights which had to be considered by the respondent, what were those rights having regard to the fact that the parents of that child were unmarried?
>
> 3. In the light of the existence of any such rights what was the nature and extent of the inquiry that the respondent was obliged to carry out when exercising his statutory powers under s. 3(11)?
>
> 4. Was the Inquiry carried out in this case by the respondent one which complied with his statutory and constitutional obligations?
>
> 5. Did the unborn applicant, at the time of the respondent's decision, enjoy rights by reasons of Article 8 of the European Convention on Human Rights and if so whether the same were adequately considered by the respondent at the time?

1. Constitutional rights: Did the applicant enjoy any constitutional rights as of the 15th March, 2006?
48. Article 40.1 provides as follows:-

> "All citizens shall, as human persons, be held equal before the law.
>
> This shall not be held to mean that the State shall not in its enactments have due regards to differences of capacity, physical and moral, and of social function."

49. Article 40.3.1:-

> "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

50. Article 40.3.2:-

> "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of very citizen."

51. Article 40.3.3:-

> "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.
>
> This subsection shall not limit freedom to travel between the State and another state.
>
> This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as made be laid down by law, information relating to services lawfully available in another state."

52. The respondent in his amended Statement of Grounds of Opposition at para. 2 pleaded as follows:-

> "The applicant was unborn on the date of the decision impugned in the within proceedings. By reason of that fact, the applicant did not, as of the date of the said decision enjoy any constitutional rights other than those specified in Article 40.3.3 of the Constitution, nor does the applicant have any rights pursuant to Article 8 of the European Convention on Human Rights and or the European Convention on Human Rights Act, 2003."

53. Whilst this formal plea was delivered on behalf of the respondent this argument was not purposefully pursued in the course of the hearing. The respondent did not ask the Court to consider the constitutional rights of the unborn child in this case, having regard to its impending birth, as being any different from the rights which he would have enjoyed had he been born at the time the respondent was asked to exercise his power under s. 3(11).

54. Notwithstanding this apparent concession it is worthwhile noting that Article 40.3.3 arises by virtue of the 8th Amendment of the Constitution Act, 1983 which significantly post dated the decision of the Court in *G. v. An Bord Uchtála* [1980] I.R. wherein Walsh J. at page 69, stated as follows:-

> "Not only has a child born out of wedlock the natural right to have its welfare and health guarded no less well than that of a child born in lawful wedlock, but a fortiori it has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth. The child's natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practise of religion and to follow his or her conscience. The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life and the right to maintain that life at a proper human standard in matters of food, clothing and habitation."

55. I cannot accept that the only constitutional rights enjoyed by the applicant at the time the respondent was making his decision under s. 3(11) was the right to be born by virtue of Article 40.3.3 which right the Courts had already concluded existed prior to this amendment to the Constitution in October 1983 and which rights are described by Walsh J. in *G. v. An Bord Uchtála* and also by Barrington J in *Finn v. Attorney General* [1983] I.R. 154.

56. In the aforementioned circumstances it seems only appropriate that Counsel for the respondent, as she did, dealt with the present proceedings on the basis that the constitutional rights enjoyed by the applicant at the time of the respondent's decision, particularly having regard to his impending birth, were the same as those he would have enjoyed had he been born at that time. To have argued successfully otherwise would have placed the applicant in a position where the happenchance of a premature delivery would have afforded him rights which the respondent would have had to consider at the time he made his decision but in the event of his having been born on his expected delivery date, he would have enjoyed no rights which required the respondent's consideration. It seems to me that little would be achieved by enshrining the right of the unborn to be born if such a right did not ensure that when ultimately born that infant would enjoy the constitutional rights and protections so carefully enshrined in the Constitution for the benefit of Irish citizen children.

57. The plea at para. 2 of the Statement of Grounds of Opposition is also one which, if correct, would place the rights of the unborn child from a constitutional perspective at a much lower level than the rights afforded to the unborn child at common law. At common law, an unborn child has very significant rights. As was stated by Dillon L.J. *in B. v. Islington Health Authority, DeMartell and Merton and Sutton Health Authority, The Times Law Reports*, 25th March, 1992 there is a maxim of civil law that an unborn child should be deemed to be born whenever its interests require it. By way of example, the common law recognises the duty of care which is owed to the unborn child and its consequential right to sue should it sustain injury or disability by reason of any negligence perpetrated against it prior to its birth.

58. In these circumstances I find no difficulty in concluding that the applicant, although not born at the time of the respondent's decision under s. 3(11) should have been treated by him as enjoying precisely the same rights as he would have enjoyed had he been born prior to the making of the decision.

2. What constitutional rights were enjoyed by the applicant at the time of the Minister's decision under s. 3(11)?
59. Assuming that the unborn child in this case was possessed of the same constitutional rights as he would have enjoyed had he been born at the time of the respondent's decision, the question then arises as to the nature of such constitutional rights.

60. The parents of the applicant are not married to each other and this is a factor which affects the constitutional rights of the applicant in this case. The non marital family is not recognised as a legal unit in Irish law and does not possess the same rights and obligations as the family based on marriage. In a series of cases the Supreme Court has determined that the mother and father of a child born outside of marriage and their children are not a family for the purposes of Article 41 or Article 42. In the *State (Nicolaou) v. An Bord Uchtála and the Attorney General* [1966] I.R. 567, the Supreme Court rejected the contention that Articles 41 and 42 applied to the family outside of marriage. This fact has the effect of denying to the child born outside marriage the specific rights and protections provided for by Articles 41 and 42. In this respect it seems to me that any arguments put forward which directly rely upon rights deriving from the provisions of Articles 41 or 42 must be rejected. However, that is not to deny the child of parents who are not married very considerable constitutional rights by virtue of the provisions of Article 40.1 and 40.3 of the Constitution.

61. There are a number of decisions of the Supreme Court which support the view that the personal rights of a child born outside marriage are the same as those of a child whose parents are married. Henchy J., in *G. v. An Bord Uchtála* [1980] I.R. 32 stated at p. 86:-

> "While the moral capacity and social function of parents are, in constitutional terms, not alone distinguishable but necessarily distinguishable, depending upon whether the children are legitimate or illegitimate, all children, whether legitimate or illegitimate, share the common characteristic that they enter life without any responsibility for their status and with an equal claim to what the Constitution expressly or impliedly postulates as the fundamental rights of children. Since Article 42 recognises the children of a marriage as having a natural and imprescriptible right (as the correlative of their parents' duty) to the provision for them of moral, intellectual, physical and social education, a like personal right should be held to be impliedly accorded to illegitimate children by s. 3 of Article 40."

62. Walsh J., in addition to outlining the rights of children born outside marriage in the course of his judgment stated as follows:-

> "There is no difference between the obligations of the unmarried parent to the child and those of the married parent. These obligations of the parent or parents amount to natural rights of the child and they exist for the benefit of the child."

63. The decision of the Court in *G. v. An Bord Uchtála* is authority for the proposition that all children, irrespective of the marital relationship existing between the parents, enjoy a constitutional right to bodily integrity, the right to be reared with due regard to religious, moral, intellectual, physical and social welfare, to be fed, to be educated, to work and to enjoy personal dignity. In addition, these children also enjoy the constitutional right to the society and support of their parents.

64. It is undoubtedly the case that Murphy J. in *T.D. v. Minister for Education* [2001] 4 I.R. 259 queried the existence of such rights or the precedent supporting the conclusions of the majority of the Court in *G. v. An Bord Uchtála*. Murphy J. suggested that whilst such rights could be described as "natural" in nature that this did not necessarily mean that they had their origins in the Constitution.

65. Notwithstanding the decision of Murphy J. in *T.D.* and the two dissenting opinions of the Court in *G. v. An Bord Uchtála* I believe I must accept that the aforementioned rights of the child born outside marriage have their origins in Article 40.3 of the Constitution. I believe that this Court is bound by the majority view of the Supreme Court in *G. v. An Bord Uchtála* in which judgment of Henchy J. at p. 86 stated as follows:-

> "While the moral capacity and social function of parents are in constitutional terms, not alone distinguishable but necessarily distinguishable, depending on whether the children are legitimate or illegitimate, all children, whether legitimate or illegitimate, share the common characteristic that they enter life without any responsibility for their status and with an equal to what the Constitution expressly or impliedly postulates as the fundamental rights of children. Since Article 42 recognises the children of a marriage as having a natural and imprescriptible right (as the co-relative of their parents duty) to the provision for them of religious and moral, intellectual, physical and social education, a like personal right should be held to be impliedly accorded to illegitimate children by s. 3 of the Article 40."

66. The Court in advising on the constitutional obligations of unmarried parents to their children makes it clear that these obligations confer on their children reciprocal constitutional rights to the security and other benefits that should arise from such constitutional obligations.

67. At the present time, the applicant cannot be considered as enjoying rights under Articles 41 or 42 of the Constitution. However,

the position of children born outside of marriage and their rights under Articles 41 and 42 of the Constitution may well be augmented and/or clarified in the event of the proposed 28th Amendment of the Constitution being passed later this year. In the event of the constitutional amendment being passed the rights of those children which Murphy J. stated to be "natural" but without any constitutional origin will be given constitutional support in the proposed Article 42(a) which will read as follows:-

> "Article 42(a)
>
> 1. The State acknowledges and affirms the natural and imprescriptible rights of all children."

68. Of significant importance in the present case is the right of the child to the society and support of its parents albeit that such a right is clearly not absolute. In this respect the Court has considered the decision in *Osheku v. Ireland* [1986] I.R. 733. In that case proceedings were instituted by the Nigerian husband of an Irish wife and child. The husband sought an Order prohibiting the Minister from deporting him. He contended unsuccessfully that the constitutional guarantees pertaining to marriage and the family afforded him immunity from the legal sanction of deportation in respect of his unlawful presence as an alien within the State. The learned trial judge held that the Minister could, notwithstanding the constitutional protection afforded to marriage and the family, in appropriate circumstances deport the husband and that the Constitution did not impose any such restriction on him. Hence this Court is not concerned with the undoubted right of the Minister in the present case to deport O.E. and must confine itself to an assessment of the validity of the process engaged upon by the respondent prior to the making of his decision on the 15th March 2006.

69. For the reasons set out above I conclude that the applicant in this case enjoyed personal rights under Article 40.3 of the Constitution at the time the Minister made his decision under s. 3(11). These rights, as already advised earlier in this judgment, include the infant's right to expect that once born he would enjoy the care, society and support of his parents.

3. What was the Extent of the Minister's Obligation to Consider the Constitutional Rights of the applicant?

70. Having regard to the decision of the Supreme Court in Bode I believe that the respondent, when exercising his statutory power under s. 3(11) was mandated to consider the constitutional rights of the applicant. The respondent was obliged to investigate how the deportation order would affect those rights which included, but were not by any means limited to, the applicant's right to the potential society and support of his parents. However, as was advised by Denham J. in Bode such rights are not absolute and the weight to be attached to them is a matter for the respondent. It was clearly open to the respondent in the present case to balance the applicant's constitutional rights against matters such as the integrity of the asylum process and the common good so that he could reach a decision which was proportionate and fair.

71. As Denham J. stated in *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. at p. 58:-

> "Personal rights guaranteed under the Constitution are not absolute; social order and the common good may require restriction of such rights."

72. In a number of relatively recent decisions the Supreme Court has expressed its considered opinion on the type and the extent of the inquiry that must be conducted by the Minister where a decision is to be made which will impact upon the constitutional rights of Irish citizens, who will be affected by the making of a deportation order.

73. In *Fajujoni v. Minister for Justice* [1990] 2 I.R. 151 the Supreme Court upheld the finding of the High Court that the provisions of the Aliens Act of 1935 was not unconstitutional because it permitted the Minister to deport three Irish Citizen children of a couple who were both non nationals. In that case, the father of the children was Nigerian and the mother Moroccan. The couple had arrived in Ireland eight years prior to the Minister making his deportation order. Finlay C.J. at p. 3 of his judgment concluded:-

> " … parents who are not citizens and who are aliens cannot, by reason of their having as members of their family children born in Ireland who are citizens, claim any constitutional right of a particular kind to remain in Ireland."

74. In holding that the Minister had a discretion to consider whether to permit or prevent the entire family continuing to reside in the State he went on to state at p. 4 of his judgment that such discretion: -

> "… is a discretion that can only be carried out after and in the light of a full recognition of the fundamental nature of the constitutional rights of the family."

75. In the High Court the case had been confined to a net issue which was the assertion that the third named plaintiff, the Irish born child of the first and second named plaintiffs, was entitled to certain rights by reason of Articles 40, 41 and 42 of the Constitution, and in particular that she had a right to remain resident within the State with the family of which she was a member as a unit of society and to be parented there, by her parents. Barrington J. determined that the constitutional rights provided to the family and those rights of the third named infant plaintiff were not absolute and could be restricted by the proper exercise by the Minister for Justice of the powers conferred upon him in the Act of 1935.

76. In the Supreme Court the plaintiff was permitted to advance a different case to that made in the High Court. On appeal the plaintiffs contended that the constitutional rights of the third named plaintiff could only be restricted or infringed for very compelling reasons.

77. Whilst Finlay C.J. in *Fajujoni* advised that the Minister required "grave and substantial reasons associated with the common good" to make a deportation order it is clear from his judgment that those words "grave and substantial reasons" were specific to the circumstances of that particular case in which the couple concerned had been resident in Ireland for eight years and had three Irish citizen children at the time of the Court's decision.

78. The challenge in *Fajujoni* clearly relied heavily upon the rights of the constitutional family which rights are not available to support the applicant's claim in these proceedings. Nonetheless, the decision in *Fajujoni* is good authority for the proposition that the Minister must, prior to the making of a deportation order, consider the effect that such an order is likely to have on all of the constitutional rights of those who will be affected by the order and in particular in the present case the applicant's right to enjoy the care, company and support of his father.

79. Once again the type of Inquiry to be carried out prior to the making of a deportation order where a child's constitutional rights were likely to be affected was considered in *A.O. and D. L. v. Minister for Justice* [2003] 1 I.R. 1. In those proceedings the Court was asked to decide whether two non national married couples who had children born to them whilst in Ireland had an entitlement to remain in Ireland by reason of the citizenship of their Irish born children and their rights to the care and company of their parents.

80. In *A.O. and D.L.* the first named applicant in the first case was a Nigerian national who arrived with his pregnant non national wife in Ireland in May 2001 having been refused refugee status in the United Kingdom. The second named applicant in the first case was the Irish citizen child of the first named applicant. The first and second applicants in the second set of proceedings were Czech nationals and the parents of two children when they arrived in Ireland in 2001. At the time of such arrival the mother was pregnant with her third child. The parents in both cases applied for refugee status and their applications were rejected by the commissioner and also by the refugee appeals tribunal subsequent to which the respondent signed a deportation order in each case. The mother in each case gave birth to a child after the making of the deportation order and thereafter the applicants sought judicial review of the decisions of the respondent.

81. One of the major issues in the case was the weight to be attached to the rights of the Irish citizen children who would be affected by the deportation orders. It was likely that unless the order was revoked that the Irish Citizen children would have to leave the State albeit with their parents and siblings. This led Denham J. to consider the extent of the Minister's obligations in terms of an inquiry prior to making such an order. Denham J. concluded that the rights of children to the care and company of their parents could be protected by residence elsewhere and at p. 54 of her judgment she stated:-

> "There must be an appropriate inquiry as to the facts and factors affecting the family in a fair and proper manner. To deport the applicants, the respondent should be satisfied that, for good and sufficient reason, the common good requires that the residence of the parents within the State should be terminated, even though it has the necessary consequence that in order to remain a family unit the children must also leave the State."

82. This decision is good authority for the proposition that the Minister must, at the time of making a deportation order or considering an application to revoke the same, seek out all of the facts relevant to establishing what constitutional rights exist for the benefit of any child likely to affected by his decision. The Minister must then weigh up the effect of making or confirming a deportation order on that child's right to be supported emotionally, physically and financially whilst enjoying the care of its parent who is the subject matter of the deportation order.

83. Having considered all of the learned judgments in *A.O. and D.L.* it appears to me that one of the matters that the Minister must have regard to when he is considering the constitutional rights of a child only one of whose parents is to be deported is whether that child can exercise its constitutional rights to the society of that parent by travelling with both of its parents back to the country to which that parent is to be repatriated. This of necessity must involve a consideration of whether it would be possible for the Irish citizen mother and the Irish citizen child to reside in such country should that be the decision of the parents in the face of a deportation order affecting only one of them. I believe the Minister must also give consideration to the type of society, care and support that the child can ever hope to enjoy from his father should it be the decision of its parents that the mother and infant should continue to reside in this jurisdiction. Indeed, one might expect the Minister, in certain circumstances, to consider how the constitutional rights of an infant child might be met, if it seemed likely that the child might travel with its parents back to reside in the country to which one of its parents had been deported. Matters such as these were given consideration by the Court, albeit in respect of the adopted child, by MacMenamin J. in *The Attorney General v. Dowse* (Unreported, 31st January, 2006).

84. There is much discussion in the learned judgments of the Supreme Court in *A.O. and D.L.* emphasising the fact that constitutional rights are not absolute and that the State may make appropriate laws which may infringe those rights.

85. In relation to the unenviable task faced by the Minister in seeking to balance the rights of the child or the family against the overall interests of the State and the common good I believe it is relevant to refer to a number of extracts from the decisions of the court in *A.O. and D.L.* Denham J. at p. 60 stated as follows:-

> "In these cases the two minor children are citizens of Ireland. I am satisfied that as a consequence they are entitled to reside in Ireland. They also have the right to the society, the care and the company of their parents. However, the rights of the children are not absolute. They are protected in a proportionate fashion. It does not follow from the rights of citizenship and residency of a minor child that he has a right to the society, the care and the company of his parents in Ireland. Neither does it follow that the family of such a child as a unit has, or the parents or siblings have, a right to reside in Ireland."

86. In relation to competing rights Murray J., at p. 71 of his judgment stated as follows:-

> "It seems to me that the facts and circumstances in which the balance could be struck between these competing considerations or rights may vary greatly. In principle, the constitutional rights of citizens must be taken into account in every case but the degree to which a deportation order may constitute an injury to those rights may, in a qualitative sense, vary according to the circumstances of the case."

87. The role of the Minister was further clarified by Murray J. at p. 91 of his judgment where he stated as follows:-

> "A child or infant of non-national parents has, *prima facie*, a right to remain in the State. While in the State such a child has the right to the company and parentage of its parents, these rights are not absolute but are qualified. The rights do not confer on the non-national parents any constitutional or other right to remain in the State. The rights referred to are qualified in the sense that the respondent, having had due regard to those rights and taking account of all relevant factual circumstances, may decide for good and sufficient reason, associated with the common good, that the non-national parents be deported, even if this necessarily has the effect that the child who is a citizen leaves the State with its parents. In deciding whether there is such good and sufficient reason in the interests of the common good for deporting the non-national parents, the respondent should ensure that his decision to deport, in the circumstances of the case, is not disproportionate to the end sought to be achieved."

88. I refer to the aforementioned judgments in *A.O. and D.L.* for the purposes of reflecting upon the graveness of the decision made by any Minister which may result in what are *prima facie* constitutional rights being rejected in favour of the common good. The importance to be attached to such a decision resonates strongly from the decision of Finlay C.J. in *Fajujoni* and leads me to conclude that in order for the decision to favour the common good over the constitutional rights of a child that the inquiry to be conducted by the Minister in advance of such decision must be both real and weighty.

89. The importance of the child's constitutional rights are perhaps most starkly apparent in a case such as the present one where one parent is an Irish national and the other a non national who is the subject matter of a deportation order. In these circumstances there must be a real risk that the Irish citizen child will, following deportation, become permanently separated from his non-national parent. In such circumstances the Inquiry mandated must be at least as fulsome as that which the respondent is required to carry

out where both parents are aliens of the same nationality who have an Irish citizen child. In such circumstances the likelihood of the parental unit being spilt as a result of the deportation order is probably significantly less likely. It is only by conducting such an inquiry that the Minister, can, as advised by Murray J., strike a balance between the respective competing rights of the child and the common good.

90. What procedure or steps the Minister might have to employ to vindicate the constitutional rights of a child to be affected by a deportation order or an application to revoke a deportation order is likely to vary from case to case depending upon the information known or made known to the Minister. He might in a case where he is asked to exercise his power under s. 3(11) advise an applicant that he required additional information and set out what information is required. Alternatively, an applicant such as O.E. might be asked to attend for interview with or without his partner. In either case the Minister might consider it proper to briefly suspend the execution of the deportation order pending the outcome of those inquiries. But in every case where a child's constitutional rights are likely to be adversely affected by a deportation order the Minister is mandated to conduct an inquiry so that all of the relevant facts can be ascertained. It is only against such a backdrop that a decision which is both fair and proportionate can take place.

4. Was the inquiry carried out by the respondent one which complied with his statutory and constitutional obligations?
91. Counsel on behalf of the respondent submitted that the Minister in the present case complied with his statutory and constitutional obligations, when reaching his decision on O.E.'s application under s. 3(11) on the 15th March, 2006. It was submitted on his behalf that the decision, on its face, makes it clear that the respondent considered the rights of the unborn child when deciding not to revoke the deportation order.

92. Regrettably, I must conclude that I am not satisfied that the respondent gave any real consideration to the constitutional rights of the then unborn child at the time of making his decision.

93. In considering the respondent's argument that he did consider the applicant's potential constitutional rights at the time of making his decision I think it is important to note that this is a case where the Court appears to be privy to all of the information which was available to the respondent at the time he made his decision not to revoke the deportation order. The Court is of the opinion that whilst the respondent, on the face of his decision dated 15th March, 2006 refers to the existence of a relationship between O.E. and A.H. and the fact that O.E. had fathered an unborn child, there is nothing in his report or in the underlying documentation from which this Court could conclude that the Minister had sufficient facts to allow him conduct a considered inquiry into the rights of the child. Even if the Minister had scrutinised every line of all of the reports and memorandum making up O.E.'s file his attention would never have been drawn to the issue of the constitutional rights of the applicant who is simply not mentioned anywhere in such documentation albeit because the information was withheld by O.E.. Further, insofar as the Minister was required to make a decision which was proportionate in all of the circumstances taking into account the child's rights, I believe the Minister simply did not have adequate information to make a decision which was fair in the circumstances. All the Minister knew was the name of AH and the potential delivery date of the applicant as per the letter from Colgan and Company on the day he made his decision. Nothing more was known about the applicant or his mother. In this respect it is worth contrasting the circumstances of the present case with what was known to the Minister at the time he made the deportation orders in the case of *A.O. and D.L.*

The Lohan Memorandum
94. In *A.O. and D.L.* the Court had access to what is described as the Lohan Memorandum in each case. Mr. John Lohan was the Principal Officer in the Immigration Division of the respondent's Department and it was on foot of his report in each case that the Minister confirmed the original deportation orders notwithstanding the births of the Irish citizen children thereafter.

95. Details regarding the content of the Lohan Memorandum are set out in the judgment of Murray J., commencing at p. 65. From the synopsis of the report referred to in the course of his judgment it is clear that Mr. Lohan in each case specifically had regard to the constitutional rights of the Irish citizen child and the countervailing case in favour of deportation to preserve the integrity of and the respect for the State's asylum and immigration laws. Consideration was given, for example, in the second case, to the fact that the deportation of the parents would result in the removal of K., their son, an Irish citizen, from the State. Mr. Lohan advised that "the respondent should weigh up the rights of that Irish citizen against the needs of the common good". At para. 9 of his report he stated:-

> "It is accepted that KL is an Irish citizen and may have rights to reside in the State. It would also appear that he has the protection of the Constitution in terms of guaranteeing him the right to the company, care and parentage of his family/parents. However, against those factors is the need for the respondent to preserve the integrity of and the respect for the State's asylum and immigration laws."

96. In a further paragraph Mr. Lohan advised as follows:-

> "On the basis of the family protection claimed by the applicants, it should be presumed that the applicants would preserve the family unit on enforcement of the orders by taking K. with them, thereby preserving his right to the care and protection of his family as per Article 41 of the Constitution."

97. Unlike in *A.O. and D.L.*, the memorandum prepared by Mr. Dowling in the present case makes no mention of the constitutional rights of the applicant because he was not appraised of his impending birth at the time he prepared his memorandum on 14th March, 2006. The same point applies to all of the previous reports made by various officials in the Repatriation Unit.

98. The Court simply cannot assume that the Minister's mind was directed to the constitutional rights of the child whose birth was imminent and it seems that the impending birth of the infant was considered by the respondent solely as a factor which might have enhanced O.E.'s rights to stay in Ireland. A separate and distinct inquiry by the respondent was mandated to consider how his failure to revoke the deportation order would affect the child's personal constitutional rights including his right to the potential support and care of his father. Neither are there any facts within the documents exhibited which demonstrate that even had the respondent turned his mind to the constitutional rights of the said child that he had the information necessary to weigh those rights against the benefit to the integrity of the asylum process or the common good of deporting the infant's father.

99. Having reviewed the documents exhibited in the affidavit delivered on behalf of the respondent, I am not surprised that there is no specific averment in Mr. Kelleher's affidavit to the effect that the Minister did consider the constitutional rights of the child whose birth was imminent, at the time he made his decision under s. 3(11). If the respondent had done so, one would have expected a memorandum somewhat like the one that was prepared by Mr. Lohan in the case of *A.O. and D.L.* to have been on O.E.'s file as to the 15th March, 2006 and wherein reference might have been made to the possibility of the child's constitutional rights being affected by the Minister's decision. There is nothing in the decision of the Minister or any of the supporting documentation to show that the Minister weighed the loss to the infant of any of his constitutional rights, including his potential loss to the care and support of his

father, against the State's need to deport him.

100. Whilst Mr. Kelleher in his replying affidavit on behalf of the Minister contends that the applicant will not be precluded from a meaningful relationship with his father should the respondent be regularly granted permission to visit the country there is no averment that such matters were considered at the time when the respondent made his decision.

101. It is to be inferred from the documentation and the affidavits delivered in these judicial review proceedings that the Minister made his decision confined to the information which is in the file. This is particularly so in circumstances where no replying affidavit had been delivered to contend that the Minister took account of any other matters beyond what was in the file.

102. Whilst the onus is on the applicant to prove that there was a departure by the respondent from his obligations in his failure to conduct a proper inquiry I believe that the applicant has discharged this burden of proof.

103. As Finlay C.J. stated in *Fajujoni*, the Minister is entitled to interfere with constitutional rights but can only do so after he has conducted a due and proper inquiry into of all of the facts relevant to those rights and is thereafter satisfied that the interests of the common good and the protection of the State justify an interference with those rights. Further, like Finlay C.J. in *Fajujoni*, I can find no evidence to support a careful consideration of the applicant's rights by the Minister or any evidence to suggest that he attached any importance to those rights by reason of their constitutional origin.

104. Finally, the respondent has contended that the applicant was not entitled to be given reasons by the Minister for his decision under s. 3(11) and has also contended that the Court should assume as per the decision in *Pok Sun Shun v. Ireland* [1986] I.L.R.M. 593 and *P.F. v. Minister for Justice* (Unreported, High Court, Ryan J., January 26th 2005) that the Minister acted in accordance with natural justice and fair procedures.

105. In *Pok Sun Shun* the first named plaintiff was a native of China. After he came to live in Ireland in 1978, he married the second named plaintiff in this country and went on to have three children whilst residing in Ireland. In 1981 the first named plaintiff made a formal application for a certificate of naturalisation and the right to carry on business as a self employed person. To this end he had meetings with the Department of Justice and also engaged in correspondence with that Department. His application was refused and he was given three months to leave the country.

106. One of the grounds upon which the plaintiff sought to impugn the decision of the Minister was that his decision was in breach of natural justice and fair procedures. The plaintiff contended that he was not given a formal hearing, and that the Minister failed to state the reasons for his ultimate decision. The plaintiff further alleged that there was no evidence that the Minister took into account the particular needs of the family which are protected by the Constitution. Costello J. determined that there was no particular rule of law requiring the Minister to give reasons for decisions of an administrative nature and in the course of his judgment he stated as follows:-

> "It is true, as has been submitted by counsel for the plaintiffs, that no official of the Department, and perhaps I can properly assume the Minister himself, did not take down the Constitution and considered the constitutional provisions relating to the family before reaching a decision or making a recommendation, but I do not think that that vitiates the decision that was reached. The Minister was well aware of the marital status of the applicant. As I pointed out, in the course of discussion with counsel, it would seem to me to be unnecessary to send out an officer to inquire as to the effect of (a) the refusal of a certificate of naturalisation and (b) a refusal to permit residence in the country because it seems to me that the Minister was entitled to assume that these would be very serious indeed. Notwithstanding this, he took the decision. I am not a Court of appeal and I am not to be asked whether or not he was correct in taking these decisions. All I am required to do is say whether it was carried out in accordance with law and in accordance with the provisions of natural justice. The evidence clearly suggests that the Minister was aware of the applicant's marital status, and that is sufficient, to my mind that there was no failure to carry out fair procedures in the plaintiff's case."

107. I believe that facts of the present case are entirely distinguishable from those in *Pok Sun Shun* as there is evidence from which I can infer the basis for the Minister's decision. The fact that a Minister may not be obliged to give reasons does not mean that an applicant may not seek to establish, from the available evidence, the basis upon which the Minister made his decision. In this case the Court has all of the memorandum and information that was available to the Minister from which it is clear that the only thing he knew about the applicant, at the time of his decision under s. 3(11) was that he was about to be born and the name of his mother. He knew nothing regarding the age of AH, her financial or employment position, whether the child would be supported financially if the father was deported, whether AH had any personal or family support, whether the couple could, if they wished, maintain their family unit by moving to Nigeria together or whether the applicant's father would ever be in a position because of his financial means to visit his son in the event of his deportation being affirmed. Further, this is a case where the Minister did given his reasons and nowhere in his decision does he mention the fact that he considered the applicant's constitutional rights. Most importantly, in his replying affidavit, Mr. Kelleher, on behalf of the Minister makes no averment that the Minister considered the constitutional rights of the applicant and neither does he state that the Minister knew of other matters which he considered other than those contained in the reports which were placed before him at the time he made his decision.

108. The decision in *P.F. v. Minister for Justice* does nothing to convince me that I should assume that the Minister considered the applicant's constitutional rights at the time he made his decision under s. 3(11). In that case the first named applicant was an Irish citizen and the second named applicant a Romanian citizen. The couple lived together from March 2002 and a deportation order was made in respect of the second named applicant in April 2002. The couple married on the 11th November, 2002 and thereafter the second named applicant applied for residency in November 2002 on the basis of her marriage to the first named applicant. The second named applicant was subsequently deported on the 14th March, 2003 and thereafter the first named applicant made an application in April 2003 pursuant to s. 3(11) to have the Minister revoke the deportation order based upon the second named applicant's marriage to him. The full text of the letter is set out in that judgment. The letter specifically sets out the applicant's contention that the deportation order violated his rights under Article 41 of the Constitution. The letter requesting the Minister to invoke his powers under s. 3(11) contained no other material other than reference to the marriage and the applicant's constitutional rights.

109. The decision made by the Minister made no specific mention of the constitutional rights of the first named applicant and the decision was challenged on this basis. Ryan J. concluded that the absence of any reference in the decision to the Minister's consideration of marriage could not be taken to suggest that the issue was not in the Minister's mind at the time he considered the revocation of the order as it was the only matter referred to by the applicant in his letter. Accordingly, the facts of that case are entirely distinguishable from the facts in the present case where not only was there no mention of the applicant's constitutional rights but there was no mention of any of the facts which would have been relevant to the Minister's consideration of those rights.

110. Finally, prior to setting out my conclusions in this case, I note the role of the Court in a dispute such as the present one is as per the decision of Keane C.J. in *A.O. and D.L. v. The Minister for Justice* where at p. 26 he stated as follows:-

> "The resolution of these complex political, social and economic issues which, it need hardly be said, are not in any sense unique to Ireland, is entirely a matter for the Oireachtas and the executive. The function of the Courts is to ensure that the constitutional and legal rights of all the persons affected by the legislation in question are protected and vindicated."

111. Having regard to the obligation on the Court to ensure that the constitutional and legal rights of the applicant are protected and vindicated I have come to the conclusions set out hereunder.

Evidential Conclusions and Legal Summary

112. For the reasons stated above I am driven to the conclusion from the evidence that the respondent failed to conduct a proper inquiry into the applicant's personal constitutional rights at the time he refused to revoke or vary the deportation order referable to O.E. when requested to do so under s. 3(11) of the Act, on the 15th March, 2006. It is regrettable that the Minister must be criticised in respect of his decision dated the 15th March, 2006 as it is apparent from the documentation exhibited in this case that the respondent and the Repatriation Unit under his charge afforded extraordinary latitude to O.E. to make a case on his own behalf to remain in this country. Further, O.E. on any one of a number of occasions could well have brought to the respondent's attention all of the matters relevant to seeking to engage the Minister in a meaningful and deep consideration of the applicant's constitutional rights and the likely effects of deportation on those rights.

113. It is undoubtedly the case that the Minister gave of a significant amount to his time to consider all of the material placed before him. Ultimately, after the aforementioned protracted process, the Minister was faced with an ultimatum attached to which there was a wholly unreasonable deadline in the light of the prior withholding by O.E. of critical information, to make a decision under s. 3(11). Regrettably, the respondent did not have available to him sufficient facts which would have allowed him to consider in a meaningful way the effect of the deportation order on the applicant's constitutional rights, so as to be in a position to balance those rights and their potential loss against the need to maintain the integrity of the asylum process or the common good. I conclude that the Minister was driven into error in the aforementioned circumstances. Accordingly, the decision made by the respondent on the 15th March, 2006 did not afford to the applicant natural justice or fair procedures. Further, the decision cannot be deemed to be proportionate insofar as all of the relevant facts were not known to the Minister at the time he made his decision.

114. In the aforementioned circumstances the Minister should now conduct an inquiry and reconsider O.E.'s application pursuant to s. 3(11) having due regard to all of the facts relevant to the applicant's constitutional rights.

115. In reaching the aforementioned conclusion I would summarise the legal rights of the applicant as follows:-

> 1. The applicant in this case, whilst unborn and at the time of the respondent's decision enjoyed constitutional rights which required protection and vindication by reason of Articles 40.1 and 40.3 of the Constitution.
>
> 2. The personal rights enjoyed by the applicant at the time of the respondent's decision included, amongst many others, a constitutional right to the support, company and care of both of his parents following upon his birth.
>
> 3. The fact that the parents of the applicant were not married at the time of the respondent's decision is only relevant to the origin of the infant's constitutional rights which do not derive from Articles 41 and 42 of the Constitution but rather from the unspecified rights which originate in Article 40.
>
> 4. The respondent was obliged not only to consider what the applicant's constitutional rights were but how those rights would be affected in the event of O.E., the infant's father being deported at the time he made his decision under s. 3(11) of the Act.
>
> 5. The respondent was obliged, in order to reach a proportionate and fair decision under s. 3(11) of the Act, to weigh all of the factors in favour of deportation as specified in s. 3(6), including the infant's constitutional rights and then consider, having attached the appropriate weight to such rights, whether the common good and the integrity of the asylum process still required the deportation of O.E..
>
> 6. The applicant has discharged the onus of proof upon him to establish that the respondent did not conduct the type of inquiry that was mandated of him having regard to the impending birth of the applicant at the time he exercised his statutory powers under s. 3(11) of the Act. The Court further concludes that the respondent did not have the factual information which would have been necessary for him to reach a decision which was proportionate and fair in all of the circumstances. Further, the Court concludes that there is no evidence of the respondent having had regard to the applicant's personal constitutional rights as opposed to any rights which may have been enjoyed by O.E. himself.

116. The Court will accordingly direct the respondent to reconsider the deportation order made on the 14th March, 2006 pursuant to s. 3(11) of the Act. It is clearly a matter for the respondent to decide the nature of the inquiry which he should conduct in the circumstances of the case and the weight to be attached to all of the relevant evidence.

117. Having regard to the Court's findings above, the Court does not feel it necessary to determine whether or not the applicant enjoyed any rights pursuant to Article 8 of the European Convention on Human Rights and whether or not the Minister, in affirming the deportation order, contravened any such rights.

118. I will also consider making an order, should I be asked to so, restraining the respondent from deporting O.E. pending the reconsideration by him of his application under s. 3(11) of the Act.

119. In this respect I have considered the decision of McCracken J. in *Cosma v. The Minister for Justice* (Unreported, Supreme Court, 10th July, 2006). In that case the applicant appealed to the Supreme Court against the decision of the High Court in respect of the refusal of the Minister under s. 3(11) of the Act to revoke a deportation order. The Court also was engaged in deciding whether it was appropriate to grant an injunction to restrain the execution of the deportation order pending the appeal.

120. McCracken J. concluded that the Court clearly had an inherent power to grant an injunction. However, given that there was in being a valid deportation order and that what was under appeal was the Minister's refusal to revoke the same, it had to be accepted that the injunction would have the effect of thwarting a valid deportation order in that case. McCracken J. went on to advise that in some circumstances such an injunction might be appropriate, although it was difficult to envisage the circumstances that might

demand the making of such an order. McCracken J. stated:-

> "It might conceivably be exercised when a previously unknown fact comes to light, being a fact which was unknown at the time of making of the deportation order."

121. I am satisfied that this is precisely the type of case that merits the granting of an injunction given that the purpose of the within proceedings is to seek to vindicate and protect the applicant's constitutional rights to the care and support of his natural father. In these special circumstances I believe the Court should, if so asked, seek to maintain the status quo in the light of the applicant's constitutional rights to the care and support of his natural father until the respondent has revisited the application of O.E. under s. 3(11) of the Act.