THE COURT OF APPEAL

[2014 No. 1440]
[2014 No. 1441]
[2014 No. 1442]

Ryan P.
Peart J.
Hogan J.

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

BETWEEN

A.B., C.D. AND E.F.

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND

THE ATTORNEY GENERAL

RESPONDENTS

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTIES

JUDGMENT of the Court delivered by the President on 26th February 2016

A.B.'s Case

1. The applicant was born in February 1960 and is a Pakistani national. Her daughter and son-in-law live lawfully in Cork with their two Irish citizen daughters who were born, respectively, in 2010 and 2011. She came to Ireland on a visitor visa lasting for 90 days from the date of issue in April 2011 and was here for the birth of her daughter's second child. Further permissions were granted enabling her to remain lawfully in the State for longer time covering a period up to 31st October 2012. During the currency of the first visa period, A.B. went back to Pakistan from where she returned to the State on 17th November 2011. She has remained here since.

2. Shortly after A.B.'s arrival in November 2011, she applied for an extension of the permission which was granted on 16th January 2012 for a further period of three months. The Minister's letter said that this was an exceptional measure. By letter of 23rd March 2012 from her solicitor, A.B. indicated that she wanted to live in the State and applied for Stamp 4 permission which would entitle her to live in the State and to work and access public services. In a letter of 25th April 2012, the Minister refused that application for a change of status, but granted a further three months permission to remain on the same conditions as before, stating that it was an exceptional measure. That permission extended until 25th July 2012.

3. By letter of 25th May 2012, A.B.'s solicitor returned to the question, saying that his client "would like to travel to and from Pakistan and be with her family here as the need arises". The Minister in response granted another three months extension until 31st October 2012.

4. Following another application by A.B.'s solicitors in a letter of 20th February 2013, the Minister responded in a formal memorandum dated 20th March 2013. In this memorandum, the Minister set out the history of A.B.'s immigration status in the State and the submissions that were made on her behalf. The solicitors had relied on High Court authorities suggesting that grandparents could have rights recognised under the Constitution and that A.B. was entitled to avail herself of such entitlements. The case was also made that she was needed because of her daughter's state of health. The Minister addressed the issue of rights under the Constitution or of Article 8 of the European Convention on Human Rights. The memorandum concluded that a refusal did not interfere with any rights that A.B. might have under these provisions. The Minister refused the application on A.B.'s behalf to renew the previous permissions.

5. In the Minister's letter of 22nd March 2013, A.B. was instructed to make arrangements to leave the State since her visitor's permissions had expired on 31st October 2012 and the letter required that she should provide the Minister with evidence of her departure which should be done by 15th April 2013. If that was not done, it was the intention of the Minister to issue notification under s. 3(4) of the Immigration Act 1999, that is, a proposal to deport in respect of A.B..

6. A.B. did not leave the State. The Minister wrote by letter of 17th April 2013, stating that she proposed to make a deportation order against A.B. under s. 3 of the 1999 Act. The reasons given were that her permission had expired on 31st October 2012; that she had remained in the State since that date without permission and that she was consequently unlawfully present in the State. The letter outlined the three options open to A.B. under s. 3(4), namely, that she could make representations in writing to the Minister within 15 days; that she could leave the State before the Minister decided the matter or that she could consent to the making of the deportation order. The letter said that she could submit written representations against the making of the deportation order and she could attach any additional documents in support of her case. If she decided to avail herself of the facility of making representations as to why the order should not be made, the Minister provided the following caution and information:

"If you choose this option, it is very important that you understand the following:

The Minister will proceed to decide on your case in accordance with the provisions of s. 3 of the Immigration Act 1999 (as amended). If the Minister decides to make a Deportation Order in respect of you, you will no longer have the option of leaving the State voluntarily i.e. without a Deportation Order."

The letter said that a deportation order would place a legal obligation on A.B. to leave the State and remain outside it. If A.B. did not make representations, the Minister would proceed to consider the case on the basis of the information already on the file.

7. A.B. did not opt for any of the choices offered to her, but instead instituted the present proceedings by notice of motion of 1st May 2013, seeking reliefs including an order of certiorari quashing the Minister's proposal to make a deportation order; a declaration that the Minister is obliged to put in place a procedure whereby A.B. may make representations that she is entitled to reside in the State on the basis of her rights under the Constitution and the European Convention on Human Rights without risking being permanently excluded from the State should those representations be unsuccessful; if necessary, a declaration that s. 3 of the Immigration Act is invalid, having regard to the provisions of the Constitution and a declaration that the section is incompatible with the Convention.

8. The High Court (Barr J.) rejected A.B.'s claims in a judgment delivered on 1st October 2014. The court accepted that A.B.'s had a constitutional right to make representations to the Minister against the proposed deportation and to have her circumstances considered against the background of Article 41 of the Constitution and Article 8 of the Convention. Such rights were provided by s. 3 of the 1999 Act. The fact that the Minister would proceed in the case of rejection to make a deportation order was not an impediment to A.B.'s right to make representations, notwithstanding that it might operate as a deterrent to her or two other potential applicants. The provision was not accordingly unconstitutional or unlawful.

9. A.B. appeals to this Court. She claims, first, that Barr J. was in error in making a distinction between an impermissible impediment and a permissible deterrent; second, the judge failed to apply the principle of proportionality where the Minister had not adduced evidence to justify interference with A.B.'s rights; third, the judge was in error in citing an analogy with an order for costs in civil proceedings; fourth, the judge was wrong in rejecting the argument that the procedure represented an impediment on her right to make representations; finally, she appeals against the judge's finding that s. 3 of the Immigration Act 1999 was not invalid having regard to the provisions of the Constitution or inconsistent with the European Convention on Human Rights.

10. In the appeal to this Court, the parties produced an issue paper listing a series of issues which they agreed arose for consideration, in addition to a further four issues that the Minister considers also arise for decision. The questions reflect the grounds of appeal and matters that arise implicitly or consequentially from the legal and factual context. The central issue that arises on the questions agreed between the parties is whether a person who is served with a notice under s. 3 has a right under the Constitution or the Convention to have the representations considered and a decision made either to accept them or to reject them before the Minister proceeds to make a deportation order. The Minister seeks to have other questions decided, two of which raise preliminary matters: (a) are the procedures premature and potentially unnecessary because the Minister has not decided on any representations that may be made by A.B.? (b) it has not been ascertained whether A.B. is claiming a substantive right to remain in the State under Article 41 of the Constitution or Article 8 of the Convention. Obviously, if she makes such a case and is successful, the issue of deportation evaporates. (c) Does A.B. actually have a right to remain in the State by reason of those provisions? (d) Does she possess any rights or other than to make representations prior to the Minister's decision whether to make a deportation order?

11. It is helpful, before proceeding further, to set out some relevant statutory provisions, namely, parts of s. 3 of the Immigration Act 1999 and s. 5 of the Immigration Act 2004:

Immigration Act 1999:

"3.—(1) Subject to the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996, and the subsequent provisions of this section, the Minister may by order (in this Act referred to as "a deportation order") require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State.

(3) (a) Subject to subsection (5), where the Minister proposes to make a deportation order, he or she shall notify the person concerned in writing of his or her proposal and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that he or she understands.

(b) A person who has been notified of a proposal under paragraph (a) may, within 15 working days of the sending of the notification, make representations in writing to the Minister and the Minister shall—

(i) before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and

(ii) notify the person in writing of his or her decision and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that the person understands.

(6) 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 by or 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.

(9) (a) Subject to paragraph (b), where the Minister decides to make a deportation order under this section, the notice under subsection (3)(b)(ii) shall require the person concerned to present himself or herself to such person and at such date, time and place as may be specified in the notice for the purpose of his or her deportation from the State.

(b) A person who is ordinarily resident in the State and has been so resident for a period (whether partly before and partly after the passing of this Act or wholly after such passing) of not less than 5 years and is for the time being employed in the State or engaged in business or the practice of a profession in the State other than—

(i) a person who has served or is serving a term of imprisonment imposed on him or her by a court in the State, or

(ii) a person whose deportation has been recommended by a court in the State before which such person was indicted for or charged with any crime or offence, shall not be deported from the State under this section unless 3 months' notice in writing of such deportation has been given by the Minister to such person.

(10) A person who contravenes a provision of a deportation order or a requirement in a notice under subsection (3)(b)(ii) shall be guilty of an offence.

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

Immigration Act 2004:

"5.—(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister.

(2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State.

(3) This section does not apply to—

(a) a person whose application for asylum under the Act of 1996 is under consideration by the Minister,

(b) a refugee who is the holder of a declaration (within the S.5 meaning of that Act) which is in force,

(c) a member of the family of a refugee to whom section 18(3)(a) of that Act applies, or

(d) a programme refugee within the meaning of section 24 of that Act.

Submissions of the Appellants

(i) There is no good reason for not providing for a gap between the decision of the Minister in regard to deportation and the making of the deportation order.

(ii) The absence of a gap impairs the right to make representations because the applicant has to decide whether to gamble on the result of the Minister's consideration of her representations to remain with that proposition.

(iii) The absence of a gap is also invalid because it impairs the applicant's right, as alleged, more than is minimally necessary.

(iv) Upholding the integrity of the immigration system is not damaged by giving an applicant a few weeks to leave the State.

(v) The High Court was in error in drawing a distinction between an impediment to a constitutional right and a permissible deterrent in relation to proportionality.

(vi) The judge failed to engage in a balancing exercise required by proportionality in light of the point about the deterrent.

(vii) The judge was wrong to draw an analogy between the possibility of a deportation order and an order for costs in a civil action.

(viii) The High Court erred in holding that making a deportation order without giving the applicant an opportunity to leave the State voluntarily was not an impediment to the applicant's right to make representations.

(ix) The judge was wrong in holding that s. 3 was not in breach of the Constitution or of the Convention.

12. A.B. claims an entitlement to reside in the State in vindication of her family rights under Article 41 of the Constitution and Article 8 of the Convention. The Minister will only consider such rights as part of the deportation order process. The Minister has written to

A.B. giving her the options in subsections (3) and (4) of the 1999 Act. The written submissions set out the essence of the cases:

> "In order to advance her human rights claim, the applicant is thereby obliged to risk the making of a Deportation Order. The applicant can avoid the risk of a Deportation Order only by abandoning her human rights claim and leaving the State pursuant to section 3(4)(b). There is no good reason why the applicant should not be allowed to make her human rights representations without risking an automatic deportation order, so that requirement is disproportionate. There does not appear to be a means of giving section 3 an interpretation that allows for a gap between the rejection of representations and the making of a Deportation Order, and so the section is repugnant to the Constitution and incompatible with the Convention."

13. The applicant has a right under the Constitution to have access to the Minister to make his or her case for leave to remain based on his or her human rights under Article 41 of the Constitution and Article 8 of the Convention. That is so, irrespective of their status as persons without legal status or entitlement to be in the State. It is said that this part of the High Court judgment has not been appealed and therefore it is clear that this constitutional and Convention right is accepted and acknowledged.

14. The Constitution permits interference with constitutional rights, but only in pursuit of a legitimate State interest and with the minimum interference with the rights of the person. Section 3 is a disproportionate interference and they cite the comments of Judge Barak on proportionality. A provision can interfere with human rights provided it represents minimal restraint on the exercise of protected rights and is in the interest of the common good in a democratic society. The tests are that (a) the restrictions must be rationally connected to the objective and not the arbitrary, unfair or based on irrational considerations; (b) they must impair the right as little as possible and (c) they must be such that their effects on rights are proportional to the objective. Judge Barak, in his book 'Proportionality: Constitutional Rights and their Limitation' 2012, proposes that a provision which purports to change the nature of a constitutional right is invalid regardless of its proportionality whereas a statutory provision that limits the exercise of a constitutional right is subject to a test of proportionality. In this case, the applicants submit that the right to make representations is abrogated by the provisions of s. 3, or alternatively, that it is disproportionately interfered with.

Submissions of the State Respondents

15. Fair procedures apply to the s. 3 process – see *Dellway v. NAMA* [2011] 4 I.R. 1. The applicants are not able to point to any substantive right that would be infringed by the making of a deportation order, but they are nevertheless entitled to fair procedures. It may well be thought that that is the very thing that s. 3 provides for and is what the High Court found in this case. The test is not proportionality, but simply fairness.

16. The s. 3 procedure is fair because it begins with a proposal to deport and an invitation to make representations and an obligation on the Minister to provide reasons for the deportation order. See the judgment of Hardiman J. in *F.P. v. Minister for Justice* [2002] 1 I.R. 164 at 173-174, quoted below.

17. Article 8 ECHR does not prescribe any particular domestic procedure by reference to which it must be vindicated, *Esme v. Minister for Justice* [2015] IESC 26 per Charleton J. (Laffoy J. concurring). This was a case similar to the A.B.'s case because it concerned a grandmother who arrived in Ireland, not as a refugee, but who wished to stay in Ireland to look after her daughter, a single mother, and her grandchildren. The court noted that the grandmother's "position as a visitor lacked any long term viability" and concluded that the grandmother's "entitlement to urge humanitarian considerations under s. 3(6) of the Immigration Act 1999 was used to the full. It was only used, however, after a legal challenge ended in settlement. In terms of what it was, it was only that – a humanitarian representation. It is now untenably argued that this set of circumstances has morphed into a constitutional right".

18. In the C.D. case, the applicant came in by permission as a student under the Student Visa Programme. She had no right to remain in the State, merely a limited permission to come here for a specific purpose. This applicant does not have any constitutional or Convention rights. Charleton J. cited the Grand Chamber judgment in *Nunez v. Norway*, a judgment of the European Court of Human Rights, 28th September 2011, Application No. 55597/09. Again, this passage is important because it also refers to the other well-known case of *Nnyanzi v. United Kingdom*.

19. The sole entitlement of a person who is otherwise not entitled e.g. as a refugee or as an asylum claimant who is entitled to be here pending the determination of the claim, a person in a different situation, such as we have here, is confined to the sole right to make humanitarian representations. It may be that A.B. has humanitarian grounds to be given some facility by way of visa acceptance and the same may apply in the cases of C.D. and E.F.

20. Whatever assertion of right is made on behalf of C.D., it cannot derive from Article 41 of the Constitution or Article 8 of the Convention in circumstances where the appellant's 9-year old daughter is living in China. However, that is very much a particular point and the basic submission is that the applicant has a right to make representations but they are humanitarian in nature rather than rights based.

21. The arrangements in place under s. 3 constitute fair procedures and the right to be heard in Article 41 of the Charter of Fundamental Rights does not oblige a State to interpose an additional layer of decision making.

22. The proposal to deport is directed to those unlawfully in the State. The unlawful status comes first before the Minister considers deporting the applicant. The Minister submits that it is not open to the applicant to demand the creation of a new free-standing right to apply for permission to remain in the State.

23. Proportionality does not arise because there is no question of any substantive rights.

Having said that, the operation of s. 3 is proportionate to its purposes and is subject to any claims or rights or entitlements that they may assert or humanitarian matters that they may wish to bring to the attention of the Minister.

24. In *Bode v. Minister for Justice* [2008] 3 I.R. 663, the Supreme Court was satisfied that the s. 3 procedure was adequate to respect and vindicate the rights in question. The Minister does not take the position that s. 3 is the only procedure whereby Article 41/Article 8 rights may be vindicated if they happen to be engaged, but it does say that the case is authority that s. 3 is adequate. It seems to me that Bode is also a significant authority in this area and I will have to make reference to it and cite relevant authority.

Relevant Case Law

25. *Haq Nawaz v. Minister for Justice* [2012] IESC 58 involved a procedural point as to whether the challenge to s. 3 should have been brought by Plenary Summons or judicial review subject to s. 5 of the Illegal Immigrants (Trafficking) Act 2000. The Supreme Court accepted the Minister's contention that a person challenging the section is in substance challenging each of the steps taken

under s. 3 and so s. 5 applies. Clarke J. held that any of the steps taken under s. 3 is open to challenge together with a challenge to the validity of the section:-

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

26. The applicant submitted that the absence of a gap is a disproportionate interference with her right to make representations. The proportionality test was set out in *Heaney v. Ireland* [1994] 3 I.R. 593:-

> "In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (see, for example Times Newspapers Ltd. v. United Kingdom (1979) 2 E.H.R.R. 245) and has recently been formulated by the Supreme Court in Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:—
>
> 1. (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> 2. (b) impair the right as little as possible, and
>
> 3. (c) be such that their effects on rights are proportional to the objective."

27. In *Fleming v. Ireland* [2013] IESC 19, 2 I.R. 417, the Supreme Court commented on the suggestion that the burden of proving constitutionality shifted to the State and the approach to be taken:-

> "It should be observed that there is no support in the jurisprudence of this court for such an approach. Accordingly, this court expressly reserves for a case in which the issue properly and necessarily arises, and is the subject of focussed argument and express decision in the High Court, whether the approach to proportionality urged by the appellant, whether cumulatively, or any component part thereof, is required by, or compatible with, the Constitution."

28. In *Bode v Minister for Justice* [2008] 3 I.R. 663, the issue arose as to the decisions of the respondent Minister made pursuant to the Irish Born Child Administrative Scheme as to residency, and whether the Minister had considered the constitutional and ECHR rights of the applicants in respect of their efforts to prove continuous residence in Ireland since the birth of their children. Denham J. stated:-

> "The Oireachtas has established a statutory scheme providing that the Minister, in considering the situation of foreign nationals, shall have regard to a wide range of issues when making a decision under s. 3 of the Immigration Act 1999, as amended. Constitutional and convention rights are appropriately considered at that stage. If there is a change of circumstances then an application may be made to the Minister to consider further matters under s. 3(11) of the Immigration Act 1999, as amended."

29. An applicant is entitled to fair proceedings in the context of the s. 3 procedure which applies to her. As Fennelly J. stated in *Dellway v. NAMA* [2011] 4 I.R. 1:-

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

30. In *F.P. v. Minister for Justice* [2002] 1 I.R. 164, Hardiman J. stated:-

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

31. In *Esme v. Minister for Justice* [2007] IEHC 398, Charleton J., in considering whether a grandmother of Irish citizen children who resided lawfully with their mother in the State actually enjoyed constitutional rights, as opposed to a right to make representations, stated that the legal and factual setting in which the representations were made was critical to the analysis of whether a substantive

right was enjoyed. The court noted that, while a grandmother clearly was important to her daughter and to her family, nevertheless, as a foreign national she had entered Ireland on an untenable basis, without seeking a visa and the her "position as a visitor lacked any long term viability", he concluded:-

> "[The grandmother's] entitlement to urge humanitarian considerations under section 3(6) of the Immigration Act 1999 was used to the full. It was only used, however, after a legal challenge ended in settlement. In terms of what it was, it was only that – a humanitarian representation. It is now untenably argued that this set of circumstances has morphed into a constitutional right."

32. There is no entitlement for non-nationals to establish a domicile absent appropriate national permission. For this proposition, Charleton J. cited the Grand Chamber judgment in *Nunez v. Norway* (Application No. 55597/09) 28th September 2011 and stated as follows:-

> "The argued-for right to remain in Ireland does not have the status of any entitlement recognised under the Convention or otherwise established by law. Instead, absent a failure by the State to have an immigration policy, which amounts to a legal contradiction of the nature of nation states, legal, and not convention, rights supplant the absence of any entitlement of non-nationals to enter or remain within a country that is not their own. Here, there are no rights identified on behalf of Esmé of asylum, rights against refoulement or rights to be protected against a state of general chaos that threatens life and health in the country of origin. If any right was sought in this application under section 3(11) of the Act of 1999, it was what is commonly referred to as humanitarian leave to remain within the State, as provided for in section 3 of the Act of 1999. That discretion is based on the legal criteria therein set out and gives the respondent Minister appropriate discretion. There is no convention right to enter in and to reside in another country; Nnyanzi v United Kingdom (No. 21878/06) (judgment of April 8th, 2008). The approach of the officials of the respondent Minister does not depart from the analysis in that case.
>
> Further, as a matter of an appropriate application of convention rights, the precarious status, known to all of the appellants in this case, of Esmé, emerges as the central factor; since it was during the existence of the rejection of an application for asylum, and the existence of a valid deportation order that had never been overturned, that the integration of Esmé as grandmother from abroad took place into this family; see Butt v Norway (No. 47017/09) (judgment of March 4th, 2013)."

Discussion

A.B.'s Case

33. There is a single issue in these cases. It appears to have its origin in the argument in *Nawaz v. Minister* and in a comment by Clarke J. in his judgment in that case. The issue is not concerned with substantive rights or humanitarian considerations that might avert a deportation order. The applicants may, to varying degrees, be able to invoke countervailing interests to weigh against exclusion from the State, but they do not fall to be assessed at this time, even at the level of the manner of their evaluation in judicial review proceedings. The matter for debate here and now is the process of presentation and receipt of the points that the applicants wish to advance in support of their applications to remain in the State.

34. Insofar as these applicants have cases to make, they will be able to do so. That is not in question. A.B. can make her representations under s. 3(6). C.D. and E.F. can apply for revocation of the deportation order under s. 3(11) in addition to any new and separate applications as mentioned above.

35. It is convenient to take A.B.'s case first. The co-applicants' cases are similar on this question. We have above set out the relevant statutory provisions and the case law. The parties' arguments are briefly recorded.

36. There is no decisive authority on the point in dispute so the question must be answered by analysing the position of the applicants against the background of statute and case law.

37. A.B. wants to make a free-standing application to the Minister that does not have associated with it the fear that in case of rejection there will be an immediate deportation order. The starting point is that a person who outstays her visa permission is unlawfully in the State. A.B.' accordingly did not have any right to be in the State.

38. A.B. wants to be able to come and go to Pakistan as she chooses and to bring one or other of her grandchildren back to Pakistan for visits and then to return to Ireland. She is close to her daughter and her grandchildren so there is a humanitarian connection between A.B. and her daughter's family. It is contended that it is her family and that she has family rights under the Constitution to be found in Article 41 but that is not what this case is about. The question for this court concerns the machinery by which that claim may be put forward and considered by the Minister.

39. The Minister's statutory function exists in relation to visas and permissions and there is presumptively an inherent function in the State to make those decisions independent of specific statutory provision. The State, like any other State, is entitled to decide who among nationals of other States comes in and who goes out. That is a function of statehood and sovereignty, subject of course to EU law, but that does not apply in the case of somebody from Pakistan.

40. The Minister has a specific function under the 1999 Act. She also has power and functions to be found elsewhere in regard to visas and she has exercised that power and discretion by saying that she will not extend A.B.'s permission any further. So, then the question arises as to what happens next. If A.B. is correct and the Minister is obliged to consider in the abstract what rights A.B. has under Article 41 of the Constitution or under Article 8 of the Convention or otherwise and/or to take into account humanitarian considerations, it is difficult to see where that jurisdiction is to be found.

41. A decision of the kind envisaged would be open to judicial review because it would seriously affect the rights and interests of the applicant. If that procedure were available, the Minister's determination would happen independently of and in advance of a proposal by the Minister to make a deportation order. The Minister might refuse to accede to the application for a number of reasons including for example that the applicant:

> (a) did not have constitutional rights under Article 41 or did not have them in a manner that was sufficiently powerful or influential to override the State's immigration interest and/or

(b) that the Article 8 rights under the Convention were not engaged or not sufficiently powerful to outweigh the State's interest and/or

(c) that the humanitarian considerations put forward were not persuasive enough to justify giving long-term permission or freedom to come and go or whatever the particular request was.

What would then be the situation when the Minister subsequently came to consider making a deportation order? It seems to me that A.B. is asking the Minister to decide in advance the very things that the Minister will indeed have to decide in the context of deportation proceedings that have arisen.

42. This application seems to me to be misconceived. It misunderstands the function of the Minister in regard to immigration and deportation. It seeks to confer on the Minister a power and to impose on the Minister an obligation to decide on something in advance of the statutory function that the Minister must perform i.e. deportation. It suffers from the weakness that the person applying does not have any right, while the application is being considered, to remain in the State, and the only way that the right is going to be considered or can be considered is in the context of a deportation order which is the very thing that A.B. wants to avoid being considered.

43. The point is not whether A.B. does or does not have constitutional or Convention rights or entitlement to put forward a humanitarian case against deportation. The only question is one about procedure. I do not think that A.B. possesses a right to insist on a particular procedure or to impose on the Minister an obligation to consider her application and circumstances in advance of the same considerations being brought into play when the Minister has to address them in the context of deportation consideration.

44. The essential point is that there is not a halfway house status. There is no limbo position between being here by way of permission, and when that status ends, having a right to remain in suspended permission while a free-standing claim can be made. If a person is not here by permission or as of right such as an asylum seeker, they are prima facie unlawfully here and are subject to being expelled.

45. This case is not about whether A.B. has rights, but rather whether she has a right to having a particular procedure prescribed by her in order to determine her rights and to insist on that procedure operating at a time when she has prima facie no right whatsoever to be here. This case falls to be decided by reference to A.B.'s entitlement, if any, to specify and insist upon the procedure of a discrete and advance consideration of her claim to be entitled to remain in the State. Apart from anything else in that regard, there is a serious problem because it would involve the Minister deciding on a separate and advance basis the very case that the Minister would have to address in performing the Minister's own statutory functions under s. 3 of the 1999 Act.

46. A.B.'s advisers are seeking to exercise control over the process of decision making involving A.B., whereas the reality is that the consideration of A.B.'s situation and whether she should be permitted to be in the State is part of the Executive function, properly exercisable by the Minister in accordance with law. In this case, the Minister is exercising the executive power of the State under Article 28.2 of the Constitution in accordance with law enacted by the Oireachtas.

47. A foreign national who is given permission to come into the State by a visa issued by the Minister does not have the right to demand the following: "My permitted residence has come to an end. I now want the Minister to confirm my entitlement to be in the State while I continue to reside here and I want the Minister to engage in that consideration outside of and independently and in advance of any question of deportation". That is inconsistent with the Minister's function as part of the Executive. When a person is in the State unlawfully, the Minister is arguably obliged to consider making a deportation order, but that does not have to be decided in this case.

48. A person is in the State either with permission or without permission. A person claiming asylum is in a special category that is protected by law in order to safeguard the person's position while the application is being considered. A non-refugee who comes to the State on a visa or a person who claims a right that arises otherwise or that comes into being by reason of the relationships that are developed during the time the person is in the State in accordance with a permission – any such person may ask for further permission and it is the Minister's function to decide whether or not to grant the permission. If the Minister decides not to, and gives reasonable notice to the entrant/applicant, then the person is, after the expiration of the notice period, not lawfully in the State, and under s. 5 of the 2004 Act the person is unlawfully present in the State. In those circumstances, it is incumbent on the Minister to consider deportation. The person does not have a right to be here thereafter, but they may be able to resist a deportation order on legal, Constitutional, Convention or humanitarian grounds. Such consideration, however, takes place in the context of a proposed deportation order and not otherwise. That happens because the Minister is operating the Executive function of the State in accordance with law enacted by the Oireachtas.

49. If the Minister did have such capacity, that would give rise to precedential rulings that could be invoked in subsequent applications. This thought demonstrates the fallacy of the proposition that the Minister is obliged or can be required to give such a ruling. In fact, the Minister does not have to specify on what basis she is permitting a person to remain in the State. It may be that the Minister makes a decision based on a consideration of all the issues, including the humanitarian ones, and may or may not specify which ones have ultimately tipped the balance or whether it is the combined impact of all the considerations.

50. Such proposed rulings in advance of any deportation consideration would create another layer of administration, not only for the Minister in preparing a mode of dealing with these claims and with all the necessary additional resources that would be deployed in dealing with those applications, but also for the courts which would have to cope with an influx of claims that arose upstream from the deportation order. In my judgment, that is contrary to the scheme of the legislative apparatus to deal with immigration and asylum claims. This consists now of a body of legislation and there is also a large number of cases decided by the Supreme Court and the High Court dealing with various aspects of the administration of this system. There is no justification for adding a new stage in the process.

51. The presumption of constitutionality applies to s. 3 of the 1999 Act so the onus of proof is on the applicant to establish disproportion and not on the State to establish that its regime is reasonable. The applicants have not done so. It is not tenable to propose that there is an inhibition on making a case because of the consequence of a deportation order in the event of refusal. It is not that the person is inhibited from putting forward a case. If the person has rights, the Minister is obliged to respect them. If the applicant is disappointed, he or she can seek judicial review of the Minister's decision. There is nothing in the scheme of deportation under s. 3 of the 1999 Act to inhibit any claim being put forward by A.B. or any other applicant. The objection is that there is a sanction that, in the event that the application fails, the Minister will proceed to make a deportation order. But the flaw in this argument is that the nature of the consideration is in the context of deportation. The applicant is prima facie not entitled to be in the State at all, but that will be trumped and deportation averted if the applicant can put forward a case on one or other basis to

warrant being permitted to be here or being accepted as being entitled to be here as of right.

52. There is no inhibition on the right of the applicant to make any submissions that he or she wants to make to the Minister in the context of a deportation proposal under s. 3. I agree it would be more comfortable for a person to think that he or she could make representations and then have the Minister decide whether to accept them or not before any question of a deportation order arose. That, however, has the difficulty of envisaging a state of limbo in which the person unlawfully in the State is nevertheless protected while making and maintaining the application and any further procedures that arise out of it so that the Minister is then not in a position to enforce the immigration laws of the State.

Conclusions
53. My conclusion, accordingly, is that the High Court was correct in rejecting the application and this appeal should be dismissed.

The Cases of C.D. and E.F.
54. C.D. and E.F. married in 2012 and have a daughter, born in the State on 11th September, 2008. Due to the Irish Citizenship and Nationality Act 2004, their daughter is not an Irish citizen. She does not live in Ireland, but is being raised by her grandparents in China, in accordance with family tradition. The applicant and his wife send money to support their daughter's upbringing in China. She is entitled to Chinese citizenship.

55. C.D. was born on 3rd November, 1984 and is a Chinese citizen. She entered Ireland on the basis of a student visa on 20thJanuary 2004 which permitted her to remain in the State on condition that she was pursuing a fulltime course of study and did not work more than 20 hours per week. Her permission expired on 28th February 2005. He has remained in the State since then. She came to the attention of the Gardaí in 2008 and a proposal to deport her was issued on 29th September 2008. By letter of 17th October 2008, she made submissions through her solicitors why a deportation order should not be made. No decision was made until 2013. On 3rd November 2011, during a routine inspection of a shop run by this applicant, she came to the attention of the authorities. The Minister then proceeded to consider the making of a deportation order, which was signed on 10th May 2013.

56. E.F. was born on 20th September 1981 and is a Chinese citizen. He arrived in Ireland in 2001 and has been living here since. He and his wife own and run a Chinese restaurant in the State. C.D. also opened a mobile phone business in 2012, and in the course of a routine inspection of the shop run by her, it was discovered that both appellants were living in the jurisdiction without any permission to do so. A notice under s. 3(4) of the Immigration Act 1999 issued against both husband and wife. They were served with a notice of a proposal to deport him under s. 3 of the Immigration Act 1999. They made representations to the Minister pursuant the section and asserted that they should not be deported because of, inter alia, their family rights in the State. Those representations were unsuccessful and deportation orders were made in respect of both C.D. and E.F..

57. The High Court (Barr J) gave separate judgments in the cases of C.D. and E.F. on 1st October 2014. The court noted that the applicants had adopted the submissions made in the linked case of A.B. which was heard at the same time. The core of the cases was that the absence of a gap between the Minister's rejection of representations pursuant to s. 3 of the 1999 Immigration Act and the making of a deportation order constituted an impediment to an applicant's right to make representations under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights.

58. The court's conclusions in the three cases, A.B., C.D. and E.F. were similar. Barr J. held that there was a constitutional right to make representations to the Minister before the making of a decision on a deportation order. Such a right arose under Article 41 of the Constitution and Article 8 of the Convention to have her circumstances considered. These rights were catered for in s. 3 of the 1999 Act. The Supreme Court had held that the s. 3 procedure was the appropriate forum for representations and that had happened in the instant case. The fact that the Minister will proceed to make a deportation order without further option to leave the State in the event of rejection of the submissions was not an impediment to the right to make representations. Although that might operate as a deterrent to some applicants, it was not an unconstitutional or unlawful interference with the right to make representations. This feature might be compared with the risk of an award of costs against a party in civil litigation; that may be a deterrent to some people but it is not, in principle, an interference in the right of access to the courts. The scheme provided in s. 3 of the 1999 Act safeguarded the right to make representations in accordance with the Constitution and the Convention. The absence of a gap was accordingly not a breach of the applicant's rights.

Difference in Facts
59. The applicants, C.D. and E.F., have made another application – for some reason through different solicitors – to have their daughter given permission to remain in the State. If that is successful, the parents will have a quite separate claim to be in the State and that will in due course arise for consideration. Counsel for the State parties submitted that the application in this court was accordingly moot.

60. Yet another issue which may give rise to discrete consideration of the couple's situation by the Minister is notified in an affidavit of 16th January 2015 from the appellants' solicitor in which he deposes to the fact that the couple now have a second child, born in February 2015, and they may in the future seek to make a second application to revoke the deportation order on the basis of changed circumstances, and specifically, that they would now be regarded as being in breach of China's one child policy. It will be of interest to these applicants that the court has been formally notified by the Chief State Solicitor's Office in respect of a different case in which the one child policy is expressly raised, that there has been a change in official policy in China. Obviously, nothing turns on that question in these cases before the court.

Conclusions
61. The core issue that the High Court decided in these cases is the same as in A.B.'s appeal and the result must also be the same. There is much in the Minister's argument in these cases that the issue is moot. The husband and wife have each gone through the deportation order process laid down in s. 3 of the Immigration Act, 1999. They made their representations which were duly considered by the Minister. Of course, the question may nevertheless arise in respect of further applications concerning their children who were born in Ireland. Moreover, a decision on mootness in their cases would have no impact on the case of their co-applicant A.B.. In the circumstances, I would prefer to make no decision on mootness.

62. For the reasons explained above, I would dismiss these appeals also.