Neutral Citation: [2014] IEHC 83

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 459 J.R.]

IN THE MATTER OF THE IMMIGRATION ACT 1999, AND IN THE MATTER OF THE CONSTITUTION, AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3(1)

BETWEEN
K.I. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND M. I.) A.A.O. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND M.I.) A.O. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND M.I.), M.I. AND R.O.

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice McDermott delivered on the 21st day of February, 2014

1. The fifth named applicant (R.O.) is a Nigerian national and a failed asylum seeker. The fourth named applicant (M.I.) is R.O.'s partner. She is the mother of the first named applicant (K.I.), a minor, who is an Irish citizen born on 1st October, 2002. R.O. is not the natural father of K.I., but R.O. and M.I. are the parents of the second named applicant (A.A.O.) and the third named applicant (A.O.), who are not Irish citizens but were born in Ireland on 2nd April, 2009 and 16th April, 2011, respectively.

2. R.O., according to his initial claim for asylum, arrived in the state on 15th April, 2009, having departed Nigeria on 13th April. He claimed to have worked as a cameraman in Nigeria between October, 2006 and September, 2008 and to have fled Nigeria following the making of a documentary which implicated a number of senior politicians in corruption as a result of which the producer of the programme was murdered and he was wounded. He was subsequently beaten. He feared for his life because of his involvement in the making of the documentary and the resulting prosecution of a number of politicians. Following a series of threats the applicant claimed that he moved to the city of Ibadan in Oyo State, but returned to Lagos on 14th February, 2009, believing it was safe to do so. He claimed that on 2nd April armed men called to his house and threatened to kill him. He was spared but his house and car were burnt. He was then advised by another politician to leave the country, which he did. His application for asylum was rejected on credibility grounds in June, 2009 and the recommendation of the Refugee Applications Commissioner was affirmed by the Refugee Appeals Tribunal in a decision made on 29th August, 2009, following an oral hearing on 4th August. A deportation order was made in respect of R.O. on 27th July, 2010.

3. In grounding affidavits to these proceedings R.O. claimed that he left Nigeria in February, 2008 and he and M.I. deposed that they formed a relationship at that time shortly after R.O. arrived in Ireland. R.O. complained that he never received notification of the decision of the Refugee Appeals Tribunal and the Minister concerning the refusal of asylum, or notification of the deportation order.

4. By letter dated 20th May, 2011, R.O.'s solicitors wrote to the INIS (Irish Naturalisation and Immigration Service) claiming that he was the father of three Irish citizen children, namely, K.I., A.A.O. and A.O.. This was incorrect. Original birth certificates were furnished in respect of A.A.O. and A.O. and an Irish passport in respect of K.I.. A letter from a national school confirmed K.I. was enrolled and attending the school since March, 2008 and that R.O. delivered and collected him every day. A claim was made that as a result of the decision by the European Court of Justice in Case C-34/09 *Ruiz Zambrano v. Office National de l'Emploi* [2011] ECR 1-1449, delivered after the making of the deportation order, Ireland was precluded from refusing R.O., a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in Ireland which was also their place of residence and nationality, and from refusing to grant him a work permit, insofar as that decision deprives the children of the genuine enjoyment of the substance of their rights as European Union citizens. Further documentation was supplied over the subsequent months in support of this claim.

5. The first named respondent considered these representations under s. 3(11) of the Immigration Act 1999, as amended. Amongst the documents furnished was a letter from M.I. in which she stated that R.O. was a caring and loving partner whom she had known for years, and was a caring father. In addition, a letter from Our Lady's Hospital for Sick Children, Crumlin of 7th February, 2012, stated that K.I. had been diagnosed with severe eczema and would, for the foreseeable future, require regular follow up and blood tests to monitor and treat his condition.

6. The first information received by the first named respondent concerning R.O.'s claim to be the parent of an Irish citizen child was contained in the letter of 20th May. In his asylum application he claimed only to be the father of two children living in Nigeria, born in 1998 and 2000 respectively. The Irish birth certificate submitted in respect of K.I. clearly indicated that R.O. was not his natural father. His father was A.I. to whom M.I. was married on 26th January, 2001. The other two children, A.A.O. and A.O. are not Irish citizens, though born in Ireland.

The Decision

7. By letter dated 9th May, 2012, R.O. was informed that the Minister had affirmed the earlier deportation order and a copy of the latest consideration was enclosed. The examination of file dated 3rd May, 2012, referred to the submissions made on behalf of the applicant arising out of the *Zambrano* judgment and other documents submitted. The first named respondent was left to configure the exact relationship of R.O. to the three children from these documents. The examination of file correctly concluded that the *Zambrano* judgment had no application in respect of the relationship between K.I. and R.O. Having done so, the first respondent treated the correspondence as an application under s. 3(11) for revocation of the deportation order, though no formal application was made: the alternative was simply to reject the submissions based on *Zambrano*.

8. The examination of file contained an extensive consideration of the applicants' right to respect for family life under Article 8 of the European Convention on Human Rights. It was accepted that R.O. had established family life in the state with M.I. and that a decision to affirm the deportation order would constitute an interference with R.O.'s right to respect for that right. It was noted that in the case of *Abdulaziz & Ors v. United Kingdom* [1985] 7 EHRR 471, the European Court of Human Rights acknowledged that the state enjoys a wide margin of appreciation in determining steps to be taken to ensure compliance with the Convention and that the extent of its obligations to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the case. It was emphasised that the state has a right to control entry of non-nationals onto its territory. The court held that the applicants had not shown that there were obstacles to establishing family life in their own or their husband's home countries or that there were special reasons why that could not be expected of them. In addition, the court laid particular emphasis on the fact that their husbands had been admitted for limited periods and that they were obliged to leave after the expiration of those periods. The court found that there was no lack of respect for family life and, therefore, no breach of Article 8 when considered on its own.

9. The conclusion was reached in the examination of file that where a person establishes family ties in the state while fully aware that he has no lawful residency or entitlement to a right to reside in the state, it will only be in exceptional circumstances or for compelling reasons that the enforcement of a deportation order will be contrary to or in breach of Article 8. There were no such exceptional circumstances demonstrated in the s. 3(11) application. In addition, the unemployment rate in the economy and the relatively poor chances of R.O. obtaining employment in the state, the potential impact on the health and welfare systems of the state of granting him permission to remain and the state's interest in maintaining control of its borders had to be balanced against other aspects of the claim.

10. It was also considered that there was nothing to suggest "that there are any insurmountable obstacles for the family being able to establish family life in Nigeria".

11. It should be noted that in the affidavit of M.I. it is accepted that R.O. is not the biological father of K.I. and that neither A.A.O. or A.O. are Irish citizens. She states that:-

> "The basis of the application seeking the revocation of the deportation order was our family circumstances and this basis was not materially changed or disturbed by such errors."

12. It is clear that the substantive new information relied upon in the s. 3(11) application was the *Zambrano* decision which, if applicable, offered a basis upon which to have the order revoked because of a new legal development which could not have been addressed or foreseen by the parties. This was accepted by the Supreme Court in *Smith v. Minister for Justice and Equality* [2013] IESC 4 and *Okunade v. Minister for Justice and Equality* [2012] IESC 49. However, that submission was made on a totally incorrect basis. R.O., since he is not K.I.'s natural father, is not the father of an Irish citizen child (though, the couple were expecting a further child in March, 2013). It is clear that the Minister was initially misinformed by R.O.'s solicitors as to the status of the child applicants. K.I. was an Irish and European Union citizen. He was not biologically related to him. The second and third child applicants were not European Union citizens: though born in Ireland they were entitled to apply for Nigerian citizenship. There was no mention of the relationship between R.O. and M.I. in the application for refugee status or prior to the making of the deportation order. R.O. only claimed paternity of two children who remained in Nigeria, but did not inform the Minister of the true circumstances of how he came to be in the state or when he arrived. He then submitted a completely unstateable claim for the revocation of the deportation order on the basis of his paternity of three European Union child citizens. M.I. accepts in her affidavit that this application was made on information and instructions given by R.O.. R.O. in his affidavit states that his solicitors advised him that he should apply for permission on foot of the *Zambrano* judgment because he explained to them that he had three children, one of whom was an Irish citizen, in respect of whom he was the "*de facto*" father. The remaining error in the submissions concerning the alleged Irish citizenship of the two other children was said to be one made by the solicitors. The unfounded nature of this claim was identified in the consideration and the application was determined in accordance with their actual status.

The Challenge
13. The applicants claim declarations that ss. 3(1) and/or (11) of the Immigration Act 1999, as amended, are invalid having regard to the provisions of the Constitution and incompatible with the state's obligations under the provisions of the European Convention on Human Rights. An order of *certiorari* is sought quashing the decision of the first named respondent to affirm the deportation order against R.O.. Injunctive relief is also sought preventing his removal from the state. An application for an injunction was sought and granted on 8th November, 2012, and an amendment of the grounds was sought and granted on 20th November.

Grounds 1 to 8
14. Grounds 1 to 8 of the amended grounds relate to the challenge to the constitutionality of ss. 3(1) and (11) of the Immigration Act 1999, and the declarations sought that the same provisions were incompatible with the European Convention on Human Rights. I am satisfied that all of these grounds were considered in the case of *Sivsivadze & Ors v. the Minister for Justice and Equality, Attorney General and Ireland* by Kearns P. (Unreported, High Court, 21st June, 2012). Accordingly, since the learned President found that the said provisions were not repugnant to the provisions of the Constitution or incompatible with the provisions of European Convention on Human Rights, I am as a matter of judicial comity obliged to follow that decision unless it is appropriate to come to a different view where, for example, the initial decision was not based upon a review of a significant relevant authority or there is a clear error in the judgment (*Re World Port Ltd* [2005] IEHC 189). Such considerations do not apply in this case and I am, therefore, satisfied that Grounds 1 to 8 must fail.

Ground 9
15. This concerns a criticism that the first named respondent failed in affirming the deportation order "to express in clear and unambiguous language that it had given sufficient consideration of the relevant criteria in respect of the constitutional and Article 8 rights 'of the whole of the family' in this jurisdiction". I am satisfied that the examination of file contains clear and unambiguous findings. It is clear that the respective interests of the applicants were considered as were the interests of the family as a "whole". It is not specified in what particular way insufficient consideration was given to relevant criteria, or what criteria were not considered. It is clear that every aspect of the information supplied was considered, notwithstanding the incorrect basis upon which it was submitted. I have no doubt that the Convention and constitutional rights of the children and their parents, and their family rights under Article 8 of the Convention were at the heart of the first named respondent's considerations. The court notes that no complaint or challenge was made to the deportation order in this case nor could it have been having regard to the continued misinformation concerning the nature and extent of the family relationships.

16. It is necessary in an application under s. 3(11) to advance specific matters additional to those considered in the deportation order and more particularly, if not advanced at the time it was made, some compelling reason as to why not. It is clear that both R.O. and M.I. were fully aware of his precarious status in the state at the time they formed their relationship. The evidence offered that he was unaware of the making of the deportation order is, in the circumstances, a feeble excuse and not accepted by the court. The

history of this case is one of drip feeding of information by R.O. when it suits him as is now clear from the untrue history furnished in the course of the asylum application, and his decision to reveal to the Minister the existence of an entirely new family formed within the state during the period which he claimed in the asylum process, not to have been here. I am not satisfied that Ground 9 affords the applicants any basis upon which to seek leave. Furthermore, I consider the ground to be so unclear and imprecise in its focus and lacking in particulars that it would be inappropriate to grant leave on such terms.

Ground 10
17. The error referred to in Ground 10 is one which does not detract from the overall understanding, reasonableness or lawfulness of the decision. It is clearly an error and has been explained on affidavit, and I am not satisfied to grant leave on that basis.

Ground 11
18. It is submitted that the first named respondent failed to consider that K.I.'s medical condition was such that it was unreasonable to expect him or the other applicants to return to Nigeria. The child suffers from eczema which will require continuing treatment. The condition was referred to in a number of short medical reports submitted in the course of the s. 3(11) application. There is nothing to suggest that this condition was not known to the applicants at the deportation stage, and could not have been made the subject of a submission at that time had R.O. chosen to engage in the process. Nevertheless, the matter was fully considered and is referred to in the body of the consideration. There is no suggestion that it is in any way a life threatening condition or that treatment would not be available in Nigeria. I am satisfied that his condition was appropriately considered in the examination of file. In any event, his mother has no intention of returning to Nigeria with him or the other children.

Grounds 12 and 13
19. These grounds refer to child related issues. They are:-

> "12. The respondent failed to have regard to the fundamental principle that the minor applicants' best interests be a primary concern, in accordance with the European Convention on Human Rights, the Charter of Fundamental Rights and Freedoms, and UN Convention on the Rights of the Child and the Constitution.
>
> 13. In concluding that the deportation of the fifth named applicant was proportionate on the grounds that the family unit could relocate to Nigeria, the first named respondent acted in breach of Article 8 of the European Convention on Human Rights and/or Article 7 of the Charter of Fundamental Rights and Freedoms, in conjunction with Article 20 of TFEU. In this regard, having regard to the fact that the first named applicant is an Irish national, the interference with the family rights of the applicants can only be justified on the basis that the conduct of the fifth named applicant gives rise to considerations of such weight as to justify his separation and not on the basis that the family can relocate to Nigeria."

European Union Law
20. The claim made in this respect concerns the European Union rights of K.I. as a European Union citizen. Article 20 of the TFEU provides that every person holding the nationality of a member state shall be a citizen of the European Union and Article 20(2) provides that:-

> "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:-
>
> (a) The right to move and reside freely within the territory of the member states.
>
> These and other rights under Article 20 must be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

Article 21(1) provides that:-

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

21. Article 7 of the Charter of Fundamental Rights of the European Union states:-

> "Everyone has the right to respect for his or her private and family life, home and communications."

Article 24 of the Charter provides in respect of the rights of the child that:-

> "(2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interest must be a primary consideration.
>
> (3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with his or her parents, unless that is contrary to his or her interests.

Article 51 of the Charter importantly provides that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and "to the member states only when they are implementing Union law". Article 52(3) provides that:-

> "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

22. It was correctly concluded in the examination of file that the children were not Irish citizens. Since R.O. was not recorded on the birth certificate as the father of K.I., and was not his natural father, and since the other two children were not, in fact, Irish citizens, R.O. could not claim to be entitled to the benefit of Article 20 of the TFEU or the *Zambrano* and related judgments, and the Minister was not precluded from refusing him a right of residence and work permit. As already noted it was also accepted that the first applicant. would not, in fact, be required to leave the territory of the European Union if R.O. were to be deported. Therefore, R.O.'s deportation was not precluded on that basis.

23. It was claimed, however, that the Minister was required to examine whether R.O.'s deportation violated K.I.'s right to family life under Article 7 of the Charter of Fundamental Rights. I am not satisfied that the provisions of Article 7 apply to this case. Article 51 provides that the provisions of the Charter are addressed to the institutions of the European Union and to member states "when they are implementing Union law". The deportation of R.O. is pursuant to domestic legislation and is not in the course of the implementation of European Union law. The exercise of K.I.'s rights as a European Union citizen are not affected by R.O.'s deportation in any respect.

New Facts

24. The applicants initially sought a revocation of the deportation order on the incorrect basis that the *Zambrano* principles applied to their client but were obliged to shift the focus of challenge away from the central basis of their application when the basis for that claim evaporated. It is important, therefore, to recall the nature and scope of a s. 3(11) application. In *M.A. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 17th December, 2009) Cooke J. stated:-

> "When an application to revoke is made to the Minister under s. 3(11) of the Act, the Minister has, in effect, two duties. He is required to consider carefully and fairly the reasons that are put forward for revocation; and he must also verify that since the deportation order was made, no change of circumstance has occurred either so far as concerns the applicant or the situation in the country of origin, which would bring into play any of the statutory prohibitions on the return of a failed asylum seeker to the country of origin…Otherwise…in dealing with an application to revoke, the Minister is not obliged to embark on any new investigation or inquiry; nor is he obliged to enter into any exchanges of observations and replies or into any debate with the applicant or the applicant's legal representatives or even perhaps to supply any extensive narrative statement of his reasons for refusal. Once it is clear to the court that the Minister has properly discharged these two functions, a decision to refuse to revoke a valid order of deportation will not be interfered with."

This approach was followed in *Irfan v. the Minister for Justice, Equality and Law Reform* [2010] IEHC 422. This is part of the effective remedy available to applicants in circumstances where new post decision facts become available (see: *Efe v. the Minister for Justice, Equality and Law Reform & Ors (No.2)* [2011] IEHC 214.

25. It is important to identify what relevant new fact, apart from the *Zambrano* decision, was being relied upon in the s. 3(11) application. The Minister is only obliged to consider genuinely new facts or facts, which for some special and compelling reason, could not have been advanced at the deportation stage. The focus of any judicial review in respect of a s. 3(11) determination must focus on how that new material was considered. In *Smith & Smith v. Minister for Justice and Equality and Ors*, Clarke J. in delivering the judgment of the court stated:-

> "5.4 …It seems to me… that it is only where a relevant applicant can point to some significant feature, not present, when the original deportation order was made, that there can be any obligation on the Minister to give detailed reconsideration to the question of deportation. It likewise follows that a similar situation arises where, as here, there is a second or subsequent application for revocation of a deportation order. Where, as here, neither the original deportation order nor the first or earlier application for revocation was challenged in the courts by judicial review (or where any such challenge failed), it must be assumed that the analysis of the Minister, on the basis of the facts, materials and considerations then before the Minister, was correct. It follows that the only basis on which a challenge to a second or subsequent refusal on the part of the Minister to revoke a deportation order can be brought is where reliance is placed on a suggestion that there were new circumstances not before the Minister when the deportation order or any previous decision not to revoke same was determined and where the challenge is directed to the consideration by the Minister of the application in the light of such new circumstances…
>
> 5.6 … there is an obligation on persons seeking to invoke their right to invite the Minister to revoke a deportation order to put before the Minister all relevant materials and circumstances on which reliance is sought to be placed. The question of the presence of new and significantly material considerations such as might justify a reconsideration of a previous deportation decision (including a previous refusal to revoke) must be judged against that obligation. The mere fact that what is said to be a new consideration was not before the Minister when an earlier decision was made does not of itself render it the sort of consideration which requires the Minister to actively reconsider. If what is asserted to be a significant and material new consideration was actually available to the applicant at the time of the previous application, but was not advanced or brought to the Minister's attention, then, in the absence of special circumstances, it is difficult to see how the existence of such a consideration can properly be advanced as a new consideration requiring an active reassessment by the Minister of the substantive merits of the case. For a new circumstance to require such a reassessment it must either have arisen after the earlier decision of the Minister or there must be compelling explanation as to why, notwithstanding the existence at the relevant time, it was not then advanced.
>
> 5.7 There does not seem to me to be any basis, on the facts of this case for suggesting that Mr. Smith had any difficulty in asserting any family rights which he wished in the course of his various applications to the Minister. It follows that, on the facts of this case, an assessment of the Minister's second decision not to revoke necessarily involves only a consideration of any new circumstances which arose subsequent to the previous, and unchallenged, decisions of the Minister to deport and declined to revoke the deportation order. Against that background, it is necessary to asses the arguability of the grounds asserted on behalf of the Smiths which are said to constitute such new and changed circumstances."

26. Apart from the new circumstances asserted by the applicants based on the *Zambrano* case which, the court is satisfied, did not apply, it is important to isolate any other new circumstances which might offer the basis for a reconsideration of the deportation order as set out in the applicants submissions to the Minister. The correspondence clearly indicates the position maintained by the solicitors that they were not aware of the deportation order until 9th August, 2011. The response of the Minister was to consider the representations as an application under s. 3(11) of the Act. However, no formal application was made under s. 3(11), notwithstanding that the solicitors understood that the deportation order had been made. Furthermore, the solicitors did not identify to the Minister any error in the previous submission under *Zambrano*.

27. The officials recognised that they were now dealing with a claimed new relationship between the applicants. Having read the documents submitted in support of the hopeless *Zambrano* application, they proceeded in fairness to the applicant to consider the application as one under s. 3(11) rather than simply dismiss it out of hand. With minimal help from the applicants they deduced the correct relationship between the parties and considered all of the documents submitted on behalf of R.O. Notwithstanding the difficulties created for the officials, a consideration of the applicants' rights under Article 8 of the Convention was carried out. Based on the correct relationship between the applicants, it was accepted that R.O. had established family life in the state with M.I. and that the affirmation of the deportation order would constitute an interference with the right to respect for family life. It was determined that the proposed deportation was in accordance with Irish law, pursued a legitimate aim of maintaining control of state

borders and operating a regulated system for processing and monitoring non-nationals within the state, and ensuring the economic wellbeing of the state. It was also considered that there was no less restrictive process available which would achieve those aims. The proportionality of that decision was considered in detail.

28. The status of K.I. as a European Union citizen was considered and that he would not be deprived of his genuine enjoyment of the substance of the rights attaching to his citizenship in that he could continue to live with his mother and siblings who enjoyed a right of residency in the state. It was noted that it was open to M.I., a Nigerian national, to follow R.O. to Nigeria if she chose to do so. In addition, it would be open to K.I.'s mother under Nigerian law to apply for Nigerian citizenship on his behalf if she chose to do so. It is stated in the consideration:-

> "It is clear that where a person establishes family ties in a state while fully aware that he/she has no lawful residency, or entitlement to such in the state, it will only be in exceptional circumstances, or for compelling reasons, that the enforcement of an existing deportation order will be contrary to or in breach of Article 8. In (R.O.'s) case there are no exceptional circumstances of such gravity which would lead to a breach of Article 8."

29. It was noted that the two other children were also eligible for Nigerian citizenship and, therefore, would have the right to live in Nigeria with R.O. if their mother chose to do so. In addition, it was stated that having considered all the information on file and "all new information submitted":-

> "There is nothing to suggest that there are any insurmountable obstacles to the family being able to establish family life in Nigeria. In weighing the right of the applicant against these rights of the state, it is submitted that the affirmation of the deportation order made in respect of the applicant is not disproportionate as the state has the right to uphold the integrity of the state and to control the entry, presence and exit of foreign nationals, subject to international agreements, (and) to ensure the economic wellbeing of the country."

30. It is clear that had R.O. engaged truthfully and fully with the authorities, all of the correct basic facts of the family's relationship and life in the state would properly have been made known during the course of the asylum application and in a subsequent application under s. 3 for leave to remain. The reference to "drip feeding" contained in the consideration is appropriate having regard to the history of this case, but it is equally clear that the applicants did not suffer prejudice as a result. On the contrary, every effort was made to accommodate and consider all of the material submitted under the rubric of a s. 3(11) application, notwithstanding the fact that on the evidence available the respondent could legitimately have determined that this material should have been submitted under a s. 3 application when that opportunity was available. A very fair decision appears to have been made not to simply reject the submission in relation to *Zambrano* as clearly incorrect, but to consider as fresh material, the submissions and documentation furnished by the applicants. In summary, this material was:-

> (i) The actual relationships between the children, M.I. and R.O.;
>
> (ii) The fact that K.I. is now attending school;
>
> (iii) The fact that K.I. suffered from eczema; and
>
> (iv) The correct legal status of each of the applicants in the state.

31. The reality is that R.O. persisted in the deception that he had arrived in the state in 2009 until the rather opportunistic application following the decision in *Zambrano*.

32. Having considered the balance of the application made on behalf of the applicants under s. 3(11), I am not satisfied that any of the factors advanced could not have been advanced at an earlier stage of the process. I am also satisfied that the reason they were not advanced prior to the making of the deportation order was the continued intention of R.O. to persist in the deception that he had arrived in the state in 2009. It has not been adequately explained to the court why or how R.O. was inspired to tell his solicitors the truth following the delivery of the *Zambrano* decision. In any event, the application was then made but, as already noted, on an entirely incorrect basis. It is clear, therefore, that the above factors were nonetheless treated as "new" for the purpose of the s. 3(11) application by the first named respondent. The remaining elements of the challenge concern the treatment of these factors having regard to the respective rights of the applicants under the Constitution and Article 8 of the European Convention on Human Rights.

The Constitution

33. R.O. is not married to M.I. but she was married to K.I.'s father. Since they are not lawfully married, Article 41 of the Constitution does not avail R.O.. R.O. is the natural father of A.A.O., and A.O. who are not Irish citizens. He has not been appointed as lawful guardian to the children in accordance with s. 6(A) of the Guardianship of Infants Act 1964, as inserted by s. 12 of the Status of Children Act 1987.

34. The natural mother, though not having rights under Articles 41 and 42 of the Constitution, has rights arising under Article 40.3 which a natural father does not share (see *Nicolaou v. An Bord Uchtala* [1966] I.R. 567, *G. v. An Bord Uchtala* [1980] I.R. 32). Thus, a natural father does not have a constitutional right to the custody of his non-marital child. M.I. is the primary carer of K.I. who remains in her custody in accordance with her constitutional rights as the natural mother. Furthermore, though a natural father has a statutory right to apply to be appointed as a guardian of his child under s. 6(A), he does not have a constitutional right to guardianship (see *J.K. v. V.W.* [1990] 2 I.R. 437, *W.O'R. v. E.H. (Guardianship)* [1996] 2 I.R. 248 and *W.S. v. An Bord Uchtala* [2010] 2 I.R. 530 (per O'Neill J.)). Therefore, R.O., as the natural father of A.A.O. and A.O. is not vested with the same constitutional rights or status as if the children had been born within a lawful marriage and a legal connection between him and his two natural children has not been established pursuant to section 6(A). As Finlay C.J. stated in *J.K. v. V.W.*:-

> "I am satisfied that…although there may be rights of interest or concern arising from the blood link between the father and the child, no constitutional right to guardianship in the father of the child exists. This conclusion does not, of course, in any way infringe on such considerations appropriate to the welfare of the child in different circumstances as may make it desirable for the child to enjoy the society, protection and guardianship of his father, even though its father and mother are not married.
>
> The extent and character of the rights which accrue arising from the relationship of a father to a child or to his mother who is not married must vary very greatly indeed, depending on the circumstances of each individual case.

> The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as a result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurturing to the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed."

35. In an application under s. 6(A) of the Guardianship of Infants Act 1964, as amended, the Supreme Court in *W.O'R.* considered the character and extent of the rights of interest or concern to a natural father. Hamilton C.J. stated (at p. 269):-

> "The rights of interest or concern in the context of the guardianship application arise on the making of the application. However, the basic issue for the trial judge is the welfare of the children. In so determining, consideration must be given to all relevant factors. The blood link between the natural father and the children will be one of the many factors for the judge to consider and the weight it will be given will depend on the circumstances as a whole. Thus, the link, if it is only a blood link in the absence of other factors beneficial to the children, and in the presence of factors negative to the children's welfare, is of small weight and will not be a determining factor. But where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a *de facto* family as opposed to a constitutional family, then the natural father on application to the court under s. 6(A)…has extensive rights of interest and concern. However, they are subordinate to the paramount concern of the court which is the welfare of the children (under the statute)."

He added that the Supreme Court had in the J.K. case recognised the existence of "*de facto* families" and also the fact that a natural father who lived in such a family might have extensive rights of interest and concern to him which must be taken into account on any application under s. 6(A).

36. The facts relevant to a consideration of the constitutional and legal rights of the natural father and the rights of his children in guardianship proceedings fall to be considered in entirely different circumstances, and are of a different order to the issues and circumstances in a deportation case. However, I am satisfied that the factors outlined by Hamilton C.J. are also relevant to a consideration of the welfare or best interests of R.O.'s children in this "*de facto*" family arising out of the proposed deportation. This does not arise from any constitutional right vested in R.O. or any legal right arising under an order made pursuant to s. 6(A).

37. The Supreme Court has recognised on numerous occasions that a child born outside marriage has the fundamental rights of every human being and the fundamental rights which spring from the child's relationship to its natural mother. In the *Nicolaou* case it was determined that the mother's natural rights include the right to the custody and care of her child. In *G. v. An Bord Uchtala*, Walsh J. noted at p. 67 that:-

> "Rights also have their corresponding obligations or duties. The fact that a child is born out of lawful wedlock is a natural fact. Such a child is just as entitled to be supported and reared by its parent or parents, who are the ones responsible for its birth, as a child born in lawful wedlock. One of the duties of a parent or parents, be they married or not, is to provide as best the parent or parents can for the welfare of the child and to ward off dangers to the health of the child…in my view in this respect there is no difference between the obligations of the unmarried parent to the child than those of the married parent. These obligations on the parent or parents amount to natural rights of the child and they exist for the benefit of the child. The child's natural rights in these matters are primarily to be satisfied by the parent or parents."

Henchy J., noted that:-

> "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."

While the rights of children born inside or outside marriage to the care and support of loving parents in a long term relationship arise under different Articles of the Constitution, they are of equal importance to the nurture, health, educational care, welfare and dignity of all children.

38. It follows that when considering whether to deport a non-national parent of a family based on marriage under Article 41 or a "*de facto*" family in which the parents are not married but demonstrates all the other attributes of family relationships and life, similar consideration should be given when assessing the affect of the deportation on children whether their rights arise under Article 41 or Article 40.3.. The core element of any such consideration is the affect of the disruption of family life and its consequences for R.O.'s children, when they or their other parent are otherwise entitled to lawful residence in the state. Their constitutional rights to the care, support and society of their parent must be assessed against the reality that the applicants constitute a "de facto" family and that there are, on the evidence, strong bonds between R.O. and the children formed during the course of his relationship with M.I. following their births. It is incumbent upon a decision maker to take into account the extent and character of the relationships in a family which may differ from case to case. A natural father may have little or no relationship with his children or, as in this case, have developed and sustained a close relationship with his partner and children bearing nearly all of the characteristics of a constitutionally protected family. A consideration of the children's best interests and welfare based on those established circumstances was an essential part of the balancing of rights required in making the s. 3(11) decision. It is clear, therefore, that "*de facto*" family life was established and, as recognised by the decision maker, a deportation would disrupt that family life.

Article 8

39. The family afforded protection under Article 8 of the European Convention on Human Rights has a broader definition than the family based on marriage under the Irish Constitution (*Keegan v. Ireland* [1994] 18 EHRR 342). In cases involving the deportation of a parent, married or unmarried couples do not have a right to choose their country of residence. Even if a close degree of legal relationship is demonstrated between family members, it does not follow that a deportation will necessarily amount to an interference with the right to family life. The decision maker must consider a number of factors.

40. The objective is to ensure that effective family life is respected, not to guarantee the right to family life in a particular country. The nature and extent of the children's relationship with and dependence upon the parent are important.

41. When assessing the proportionality of the decision which is otherwise in accordance with law and deemed to be necessary in the interest of public safety, the economic wellbeing of the country or the prevention of disorder or crime, the decision maker must approach the matter in the terms set out by the European Court of Human Rights in *Boultif v. Switzerland* [2001] 33 EHRR 1179. Though that case concerned a proposed deportee who had been convicted of a criminal offence, the principles outlined in the

decision are of a wider application:-

> "48. …in assessing the relevant criteria in such a case, the court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during the period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion."

In *Uner v. The Netherlands* [2007] 45 EHRR, the European Court added two further criteria which were held to be implicit in those quoted above, namely:-

> "(i) The best interests and wellbeing of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
>
> (ii) The solidity of social, cultural and family ties of the host country and with the country of destination."

It is well settled that the couples knowledge of the precarious legal status of one or both of them in the State at the time of entering into the relationship or in the course of the relationship is an important consideration which may weigh heavily against an applicant in considering Article 8 rights. It is clear that there is a considerable overlap between the rights of the children under the Constitution and Article 8. The European Court of Human Rights has also accepted that "the mutual enjoyment by parents and children of each other's company constitutes a fundamental element of family life" (*B. v. United Kingdom* [1998] 10 EHRR 87). While a more remote relationship may not be considered to constitute family life, it may on occasion give rise to family life rights even though there is not a direct legal relationship between the individuals concerned. In this case K.I. is part of the extended family unit and was clearly considered as a child who would be affected by the deportation.

Adapting the Oguekwe Guidelines

42. In *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795 the non-national father of an Irish born citizen child was refused permission to remain in the state under the IBC05 Scheme. The Supreme Court considered the extent to which the Minister was obliged to have regard to the personal rights of an Irish citizen child under Article 40.3.1 of the Constitution when considering the deportation order against the non-national parent. These rights included:-

> "1. The right to live in the state.
>
> 2. The right to be reared and educated with due regard to his welfare including to have his/her welfare considered in the sense of what is in his/her best interests in decisions affecting him/her.
>
> 3. Where, as in the case of the applicants herein, the applicants are married to each other, the rights to which as an individual the child derives from being a member of the family within the meaning of Article 41."

43. K.I. has a constitutional right to live in the state. The two other children have a legal right of residence. A.A.O. and A.O. are children of an unmarried couple but have rights, already set out by the court, deriving from their relationship with their natural father under Article 40.3 of the Constitution. I am satisfied that there is an obligation on a decision maker to determine the facts relevant to the personal rights of the children in this case under Article 40.3 of the Constitution in a fair and proper manner, to identify a substantial reason which requires the deportation of the non-national parent of the children who are all legally resident in the state, thereby disrupting their parental relationship and to demonstrate that the deportation was a reasonable and proportionate decision in the circumstances. It is axiomatic that each case must be determined on its own circumstances and in accordance with law.

44. I am also satisfied that "matters relevant for consideration" by the Minister in making a decision to deport as outlined by Denham J. (as she then was) in *Oguekwe* can be usefully adapted to the circumstances of a "*de facto*" family. In particular, the court is satisfied that the personal rights of the children of the non-marital relationship under Article 40.3 can only be given due weight by a consideration of the relationships between the children and the proposed deportee. The nature and history of the family unit and the potential interference with the children's rights must be considered. The legal rights of A.A.O. and A.O. to reside in the state and their constitutional rights to the society, care and company of their parents are important aspects of the factual and legal matrix. The Convention rights of the applicants should also be considered and overlap to some extent with the constitutional rights referred to above. The constitutional and Convention rights of the applicants in this regard are not absolute and the Minister is not obliged to respect the choice of residence of a non-married couple.

45. The Minister is also entitled to take account of the state's rights to control the entry, presence and exit of foreign nationals subject to the Constitution and international agreements. The state may consider issues of national security and public policy, and the integrity of the immigration system. There may be a substantial reason associated with the common good for the Minister to make an order to deport a foreign national who is the parent of a child having constitutional rights under Article 40.3, vis-à-vis, his natural father. The decision should not be disproportionate to the end sought to be achieved. In that regard as in *Oguekwe*, the Minister is entitled to take into account whether it would be reasonable to expect family members to follow the deported parent to the country of origin.

46. It is clear that the extent of the constitutional rights enjoyed by R.O.'s natural children are not the same as those of K.I., an Irish born citizen child. However, in terms of the relationships formed within a family unit and the factors relevant to those relationships as previously outlined in this judgment, a decision maker is obliged to consider the affect of separation of the natural father from his children on their rights under Article 40.3 of the Constitution and Article 8 of the Convention. Of course, by its very nature, the deportation order has the potential to cause family separation.

Balancing the Rights and Proportionality

47. It is not accepted that the reason for an interference with these constitutional or Convention rights must be compelling or can only be justified on the basis that the conduct of the proposed deportee gives rise to considerations of such weight as to justify the separation of the family. As already noted, a much wider range of factors must be considered by the decision maker in balancing the rights of the parties and determining the proportionality of a decision to deport.

48. The Minister should consider the circumstances of each case by due inquiry in a fair and proper manner as to the relevant factors affecting the family. The respondent is not required to inquire into matters other than those that have been submitted to him by or on behalf of the applicants. The paucity of information furnished by R.O. in respect of the children and the suggested effect upon them and M.I. of disruption of family life is a feature of this case. However, it is clear that the decision maker considered the circumstances of the family insofar as they were known which included a mother who had been given residency in the state and whose eldest child, K.I., is an Irish citizen child but not related by blood link or otherwise to R.O., two other children, A.A.O. and A.O, who are the natural children of R.O. and who have personal rights under Article 40.3 of the Constitution to the care, support and society of their father. Regard was also had to the relationship between M.I. and R.O. and that K.I. was part of the extended family. The first named respondent considered the ages of the applicants, the duration of their residence in the state, the family and domestic circumstances of the applicants, R.O.'s employment prospects, K.I.'s health, and any relevant submissions made.

49. It is accepted that there is no express reference in the examination of file to the constitutional rights of A.A.O. and A.O. under Article 40.3, but it is clear that the status and rights of the applicants as a family unit and the welfare of the children insofar as they might be affected by the deportation were identified and considered. It is unrealistic to conclude that because Article 40.3 was not specifically referenced, the core substance of these rights was not considered. It is not necessary to recite or invoke the relevant provision in every case (see *Pok Sun Shum v. Minister for Justice, Equality and Law Reform* [1986] ILRM 593: *P.F. v. Minister for Justice* (Unreported, High Court, Ryan J., 26th January, 2005: *B.I.S. & Anor v. Minister for Justice, Equality and Law Reform* [2007] IEHC 398) though it might be prudent and appropriate to do so, especially where more extensive submissions or evidence is furnished concerning the likely affect of a father's deportation on a member or members of a family, than was available in this case. Therefore, the court is satisfied that in this case the first respondent gave fair and proper consideration to the respective constitutional and Convention rights of the applicants. The reality that deportation necessitated a separation of the children from their father, R.O., and the consequences of that disruption were clearly a necessary and primary feature of the assessment made in this case.

50. The court is satisfied that the objection taken to the conclusion that the family could relocate to Nigeria is unsustainable. The test applied in this case was that which was also applied in *Alli and Others v. Minister for Justice, Equality and Law Reform* [2010] 4 I.R. 45, to the deportation of a citizen child's non-national father (prior to *Zambrano*). Clark J. held that the Minister could deport a father notwithstanding the child's citizenship in pursuance of an orderly and fair restrictive immigration policy provided a full and fair assessment of the particular child and family situation was balanced against the state's interest and that the decision was proportionate to those interests. The court found that the Minister had not erred in law in applying the test as to whether there were "insurmountable obstacles" to the family moving with the father to Nigeria and continuing family life there. It was held that the evaluation of whether there were such "insurmountable obstacles" incorporated an assessment of the reasonableness of expecting the family to move.

51. In that case it was also submitted that before the father could be deported the Minister would have to demonstrate "a very compelling reason" which would justify the rupture of a family (in that case the family based on marriage). Clark J. was not satisfied that the Minister could only deport the father of a citizen child in exceptional circumstances. The *Zambrano* case has considerably altered the position in respect of an Irish citizen child as a European Union citizen, but for the purposes of the present case in which no legal relationship exists between K.I. and R.O., M.I. and R.O. are not a married a couple, and A.A.O. and A.O. are not Irish citizen children (though legally entitled at present to remain in the state), the principles in *Alli* provide assistance in dealing with the complicated "*de facto*" family circumstances.

52. It is clear that the question of whether it is reasonable for the family to relocate to Nigeria is accepted by the European Court of Human Rights as one of the numerous aspects of the case that should be considered in an inquiry as to whether a deportation order was reasonable or proportionate. Clark J. noted that:-

> "Minor or significant inconvenience is not seen as an obstacle that would render deportation permissible under Article 8… the European Court of Human Rights Jurisprudence shows that it would normally be considered unreasonable for a family to go to great lengths to be able to continue family life together. In determining which side of the coin applies necessitates an examination of the facts of that particular case and a realistic and reasonable assessment of why they cannot live together in their country of origin. This can only be done on a case by case basis." (para. 48)

53. However, it was also noted (para. 50) that the European Court commences its assessment from the perspective that contracting states are not obliged to respect the choice of residence of a family and that knowledge on the part of one spouse at the time of marriage that the right of residence of the other spouse was precarious is a consideration. Clark J. noted that in *Narenji Haghighi v. The Netherlands* (app. No. 38165/07) (2009) 49 EHRR 8, the European Court of Human Rights stated that in cases involving persons whose presence in a host state related solely to their asylum and immigration applications (as opposed to settled migrants who are legitimately residing in the host State), the following matters require consideration:-

> "Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see *da Silva and v. the Netherlands*, (app. No. 50435/99, (2007) 44 EHRR 34 at para. 39)."

54. The learned judge concluded that the degree of anticipated difficulties or obstacles in establishing family life elsewhere was a relevant factor in the assessment of the proportionality of removing a third country national from a contracting state within the meaning of Article 8, whether that deportation is for the purposes of immigration control or for the maintenance of public order. This matter was specifically addressed in the examination of file. It was concluded that there was no insurmountable obstacle to the family moving to Nigeria. K.I. was in the custody of M.I., his natural mother, who had the parental authority to designate where the child should reside. Of course, it has been decided by the parents in this case that the children will continue to reside in Ireland, notwithstanding the determination reached in the examination of file.

55. The first respondent was obliged to weigh each of the foregoing matters when considering R.O.'s deportation. As Denham J. said in *Oguekwe* concerning the deportation of a non-national parent of a Irish born citizen child (pre *Zambrano*):-

> "11. The Minister should weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision. While the Irish born child has the right to reside in the State, there may be a substantial reason,

associated with the common good, for the Minister to make an order to deport a foreign national who is the parent of an Irish born child, even though the necessary consequence is that in order to remain a family unit, the Irish born child must leave the State. However, the decision should not be disproportionate to the end sought to be achieved.

12. The Minister should consider whether in all the circumstances in the case there is a substantial reason associated with the common good which requires the deportation of the foreign national parent. In such circumstances the Minister should take into consideration the personal circumstances of the Irish born child and the foreign national parents, including in this case whether it would be reasonable to expect family members to follow the first applicant to Nigeria.

13. The Minister should be satisfied that there is a substantial reason for deporting a foreign national parent, where the deportation is not disproportionate to the ends sought to be achieved, and that the order of deportation is a necessary measure for the purpose of achieving the common good. . . .

15. There should be a substantial reason given for making an order of deportation of a parent of an Irish born child."

56. In this case the applicants, though legally represented, did not advance much more than basic information giving the ages of the children and, to some degree, the medical and educational progress of K.I. The additional factors that emerged from the materials submitted are set out in para. 30 of this judgment and were assessed in the examination of file. Though it is now contended that the best interests and welfare of the children were not adequately considered having regard to their rights under Article 40.3 or Article 8, nothing was advanced in respect of A.A.O. and A.O., or indeed K.I., other than the fact that R.O. was a caring and supportive father or father figure. It is also clear that the best interests of the children, though clearly regarded as an important consideration in the examination of file, is one of a number of factors to be considered under the Constitution and Article 8. I do not accept that there was a failure to regard the children's best interests as a primary consideration in this decision which was focused on the status of each of the applicants and the affect of deportation on the family based on the limited material supplied.

57. The respondent was entitled to consider the other aspects of the case. R.O. had entered the state and made a false application for asylum. During the course of that application and for up to a year prior to that, he was involved in a relationship with M.I. His first child was born when he was illegally within the state and thirteen days before he applied for asylum. The couple's second child was born approximately nine months after the making of the deportation order. Throughout, he acted in complete disregard of the immigration and asylum laws and established and maintained a family life in the knowledge of his very precarious status. The first respondent was entitled to take this conduct into account in relation to maintaining the integrity of the state's immigration and asylum laws. The respondent also considered that R.O. was not permitted to work in the state and the fact that he would be dependent on the state's health and welfare systems. He was entitled to do so and to conclude that it was proportionate to deport R.O.. It was concluded that these factors constituted "a substantial reason" associated with the common good which required the affirmation of the deportation order – an order that was never challenged. The court is not satisfied that this decision can be regarded as disproportionate or unreasonable. I am satisfied that the applicants have failed to establish that the respondent's decision is fundamentally flawed on grounds 12 and 13. I am also satisfied that the applicants' rights under Article 40.3 of the Constitution and Article 8 of the Convention were appropriately considered and that the welfare and best interests of the children insofar as they could be assessed having regard to the minimal information supplied by M.I. and R.O. were fairly and properly assessed.

Conclusion

58. For all of the foregoing reasons, the court is not satisfied that the applicants have established that the first named respondent's decision in refusing to revoke the deportation order pursuant to s. 3(11) was vitiated on any of the grounds advanced, and I refuse the application.