**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2014 No. 601 J.R.]**

**BETWEEN**

**YUXIN LIN (A MINOR SUING BY HER FATHER AND NEXT FRIEND MINGHONG LIN), MINGHONG LIN AND HAI HONG WANG**
**APPLICANTS**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENT**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 18th day of December, 2018**

1. The applicants are a Chinese family. The father has been in Ireland since 2009 and has never had permission to be here. The mother came to Ireland in April, 2012 and has also never had such permission. The parents applied in September, 2012 for ministerial permission, which was refused. A proposal to deport was made in February, 2013. The first-named applicant was born in the State on 15th August, 2013. On 19th September, 2014 the child applied for permission to be in the State under s. 4 of the Immigration Act 2004. The department wrote a letter dated 24th September, 2014, acknowledging that correspondence. That stated that *"given that this child has no valid basis to remain in the State both her parents being the subject of a deportation order, arrangements are being made to have a notification pursuant to the provisions of section 3 of the Immigration Act, 1999 as amended issued to her"*. The letter went on to say *"it will be open to her or those who represent her interests to submit written representations setting out reasons why she should not have a deportation order made in respect of her"*. Deportation orders were made on 26th August, 2014 in respect of the husband and on 27th August, 2014 in respect of the wife. The parents have since applied to revoke those orders. On 26th September, 2014 a proposal under s. 3 of the 1999 Act was made in respect of the child.

**Procedural history**
2. Proceedings were issued on 14th October, 2014, the primary relief sought being:

> (i) *certiorari* of what was described as a "*decision*" of 24th September, 2014 to refuse to consider the application for permission under s. 4 of the Immigration Act 2004, and
>
> (ii) *certiorari* of the proposal to deport the first-named applicant.

3. Section 5 of the Illegal Immigrants (Trafficking) Act 2000 applies to relief 2 and possibly to relief 1 as well, seeing as it is so intimately bound up with the proposal the subject of relief 2. Originally the application was by way of leave on notice. There was to have been a telescoped hearing, which was listed twice, and adjourned on both occasions because of issues concerning the *Luximon v. Minister for Justice and Equality* [2016] IECA 382 [2016] 2 I.R. 725 [2017] 2 I.L.R.M. 35 litigation. On 3rd October, 2017, I made an order un-telescoping the proceedings and granting leave to the applicants. The case was then sent to the *Luximon* holding list. Following the Supreme Court's decision in *Luximon v. Minister for Justice and Equality* [2018] IESC 24, a statement of opposition (undated) was delivered and the matter was listed for hearing. The respondents have given an undertaking in the present proceedings not to process the s. 3 proposal and not to deport the parents pending determination of the proceedings. I have received submissions from Mr. Colm O'Dwyer S.C. (with Mr. James Buckley B.L.) for the applicants and Mr. Rory Mulcahy S.C. (with Mr. Anthony Moore B.L.) for the respondent.

**Was the purported application by the child under s. 4 of the Immigration Act 2004 valid?**
4. The child's s. 4 application was clearly misconceived. The Supreme Court has already held that "*the obvious focus of s.4 is not to set some general template for all permissions granted, but rather to make provision for the decision of immigration officers at point of entry to the State*" *per* O'Donnell J. in *Sulaimon v. Minister for Justice and Equality* [2012] IESC 63 (Unreported, Supreme Court, 21st December, 2012) at para. 19; see also *Hussein v. Minister for Justice and Equality* [2015] 3 I.R. 423, *Dike v. Minister for Justice and Equality* (Unreported, Faherty J., 23rd February, 2016) and R.*G. v. Minister for Justice and Equality* [2016] IEHC 733 (Unreported, O'Regan J., 24th November, 2016).

5. The s. 4 procedure does not apply to a child born in the State without a legal entitlement to remain. Even if hypothetically the Minister exercised the power under s. 4 directly, as opposed to through an immigration officer, that remains in the context of a control of entry procedure (leave to land, as it is put in the marginal note) and does not convert s. 4 into a free-roving procedure to grant permissions to anyone who happens to be present in the State.

6. If and insofar as the judgments in *Jamali v. Minister for Justice and Equality* [2013] IEHC 27 [2013] 1 I.R. 609 *per* Clark J., or *Saleem v. Minister for Justice and Equality* [2011] IEHC 223 [2011] 2 I.R. 386 *per* Cooke J. suggest to the contrary, such interpretations should not be followed because the position as laid down by the Supreme Court is clear to the effect that the executive power to grant a permission to a non-Irish national is separate to the provisions of s. 4, and the latter provisions relate to the point of entry. It is true the decision in the present case does not actually expressly say that s. 4 is inapplicable, but that omission does not render an otherwise inapplicable section applicable.

**An applicant does not have an entitlement to make a free-standing application to remain**
7. As stated by Denham J. in *Bode v. Minister for Justice and Equality* [2007] IESC 62 [2008] 3 I.R. 663 at 695: *"The appropriate process within which to consider constitutional or convention rights of applicants is the process under s. 3 of the Act of 1999. This is the relevant statutory scheme … Consequently, it is my view that there is no free standing right of the second applicant to apply to the Minister. The appropriate procedure is under s. 3 of the Act of 1999, as amended, with the potential right to apply under s. 3(11) in the future if the need to make such an application should arise."* Such a point was also rejected in *A.B. v. Minister for Justice and Equality* [2016] IECA 48 (Unreported, Court of Appeal, 26th February, 2016) per Ryan P. at para. 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."* Even assuming that the applicant's application for permission is valid, which it was not, it was not one that the Minister was obliged to consider outside the s. 3 process.

**An applicant cannot dictate how and when a permission application is to be dealt with**

8. The impugned letter says that because the child has no legal basis to be in the State, the parents being the subject of deportation orders, it was proposed to issue a proposal under s. 3 of the 1999 Act. That is a lawful decision. The Minister can, if he wants, grant a permission to the child to remain in the State even if the parents are subject to a deportation order. All the letter is saying is that any such consideration will take place in the context of the child's responses to a s. 3 proposal. If, after that process, the Minister decides to give the child permission, that can be done. From the child's point of view, it is immaterial whether it is done under the 2004 Act, which does not apply, or the executive power of the Minister, which does apply. As averred to by Karen Tighe at para. 14 of her affidavit, "*the s. 3 procedure thereby affords the first named Applicant a comprehensive process capable of determining the entitlement of the first named applicant to remain in the State, as part of which all representations made on her behalf … will be considered, along with any constitutional or cognate rights under the European Convention of Human Rights relied upon by her".*

9. The Minister is not obliged to dance to an applicant's tune and to consider granting permissions at the demand of an applicant rather than in the context of a process laid down by the Minister having regard to the statutory scheme. This is fundamentally different from *Luximon*, which was a case where a person who already had permission under s. 4 and was entitled to have their ECHR rights considered in the context of renewal of such permission under s. 4(7).

**Claim that the child has to gamble with her rights by engaging in the s. 3 process.**

10. The statement of grounds argues that the respondent's interpretation of the 2004 Act is unconstitutional, although it does not contend that the Act itself is invalid. As Mr. Mulcahy points out in written submissions at para. 79, simply because the 2004 Act does not cater for the making of an application for permission by persons like the first-named applicant does not make it unconstitutional. There are other procedures in which the interests and, if relevant, rights of the first-named applicant can be weighed. Complaint is made that the family do not have the opportunity to leave prior to deportation if the permission is refused in the s. 3 context, but that is not so. They can leave at any time and make the application for permission from outside the State. If a person, including a child, contrary to Irish law, insists on remaining in the State rather than applying for permission outside of it, then liability to having a deportation order made in such a situation is not an injustice. These applicants are fundamentally different from the applicants in *Luximon* who *did* have permissions to be in the State for an appreciable period of time.

11. The risk of life-long exclusion is relied on, although that has been regarded as a valid feature of the deportation procedure by the Supreme Court in *Sivsivadze v. Minister for Justice and Equality* [2016] 2 I.R. 403. The point at issue under this heading was also rejected by Ryan P. in A.B. at para. 48 "*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 … 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."*

**It is inappropriate to challenge a mere proposal**

12. The gist of the impugned letter is that the first-named applicant should engage with the s. 3 process and make any and all points in that context. As averred to by Ms. Tighe, that will provide a comprehensive mechanism to protect her rights. All that is in existence under that heading at present is a proposal. Only in exceptional circumstances could a court quash a mere proposal. Apart from any other reason, the applicant has an alternative remedy, namely to respond to the proposal and to challenge the ultimate decision if unfavourable. The principle of refusal of relief by judicial review on the basis of alternative remedies is too well-established to require citation of authority. It would have been inappropriate to quash the proposal even if there was an infirmity with the Minister's reluctance to consider the s. 4 application independently, which there was not.

**Order**

13. For those who optimistically believe that authoritative legal decisions create clarity going forward, the present case can be offered as a bracingly realistic counter-example. A mountain of appellate authority against them on virtually every point argued has not taken a feather out of the applicants. This perhaps illustrates the truly Sisyphean nature of the judicial role, particularly in areas where the dominant business model is the attempted creation of systemic gridlock. As put by O'Donnell J. in *I.G. v. Minister for Justice and Equality* [2019] IESC 25, at para. 6, "*there are areas of law where generic points are taken which apply if correct to all applications or decisions made in that area".* The courts can perhaps be part of the problem, by applying the same latitude to such litigation as applies to cases that concern the parties alone, or alternatively can be part of the solution, by considering using the approaches legitimately available to them in a more brisk and demanding manner that where possible minimises or avoids situations where the whole system grinds to a juddering halt simply because a new point is dreamed up or an old and stale one revived. The application is dismissed and the respondents are released from their undertakings in the proceedings.