

**THE HIGH COURT
JUDICIAL REVIEW**

[2019 No. 267 JR]

BETWEEN

B.S. (INDIA), A.A.D.

AND

Z.S.S. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND A.A.D.)

APPLICANTS

AND

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL
RESPONDENT**

(NO. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 17th day of August, 2020

1. In *B.S. (India) v. Minister for Justice and Equality (No. 1)* [2019] IEHC 367, [2019] 5 JIC 1011 (Unreported, High Court, 10th May, 2019), I granted an interlocutory injunction against deportation pending the determination of the proceedings. I also partly dismissed and partly adjourned the proceedings as they then stood. I am now dealing with the balance of the claim for substantive relief.
2. The principal facts are set out in the (*No. 1*) judgment, but are worth recapitulating for clarity of understanding of the present stage of the proceedings. The first-named applicant was born in India in 1981. The second applicant was born in Romania in 1987. The first-named applicant resided unlawfully in the UK from 2004 to 2014 and was eventually arrested. When released on his own bond he absconded and came to the State, he claims on 2nd January, 2015. He resided in the State illegally thereafter.
3. The second-named applicant says she arrived in the State in June 2015 although she doesn't appear to have left any kind of paper trail for the early years of her alleged presence here.
4. When eventually arrested, the first-named applicant applied for asylum on 22nd July, 2015 but did not pursue that application, which was deemed withdrawn on 29th April, 2016. A deportation order was then made on 30th September, 2016. However, he evaded that order until April 2019 when he was arrested again.
5. The applicants claim to have met on 1st April, 2017 and to have been in a relationship since 15th April, 2017.
6. The second-named applicant only obtained a PPS number on 5th December, 2018 and the third-named applicant, who is said to be their child, was born on 18th January, 2019. The first-named applicant was named as the father on the birth certificate.
7. The first-named applicant's arrest in April 2019 triggered a rash of applications on his behalf, beginning with an application to revoke the deportation order submitted on 3rd May, 2019.

The first statement of grounds

8. The procedural history in this case is more complex than the norm. The first of six statements of grounds was filed on 7th May, 2019 the primary relief being an injunction restraining deportation until a decision was made on "*an application currently pending*" before the Minister. I granted an interim injunction on the same date and adjourned the leave application to 10th May, 2019.

The second statement of grounds

9. An affidavit of 9th May, 2019 exhibits a second statement in the form of a draft amended statement of grounds setting out a fairly minor amendment. A copy was then delivered purportedly allowed pursuant to an order of 10th May, 2019. However, the order of that date didn't allow the amendment. Rather, I granted leave in the 11 a.m. list and then on foot of strenuous submissions from the respondent on the basis that to apply the normal timescale to the proceedings would determine the effect in favour of the applicant, listed the matter by consent for substantive hearing at 2 p.m. on the same day.
10. I then gave the (*No. 1*) judgment dismissing certain grounds and adjourning other matters to the 20th May, 2019 and granting an interlocutory injunction. I gave liberty to the applicants to amend the proceedings and indicated that a s. 3(11) application under the Immigration Act 1999, if it was going to be made, should be made by 13th May, 2019.
11. Following the judgment, the first-named applicant made a s. 3(11) application on 13th May, 2019, notable because there is no reference in that application to any specific legal provisions and only general reference to EU Treaty rights and to the judgment of the CJEU in *Gerardo Ruiz Zambrano v. Office national de l'emploi*, Case C-34/09 (Court of Justice of the European Union, 8th March, 2011).
12. A further letter was sent regarding revocation which referred to arts. 8 and 13 of the ECHR, Article 40.1 of the Constitution (a point that was never subsequently pursued), art. 24 of the EU charter and art. 20 of the TFEU. No details were set out as to why deportation of the first-named applicant would breach any of those provisions.
13. On 15th May, 2019, an EU treaty rights application was made on behalf of the first-named applicant as a permitted family member. Large parts of the application were left blank including the immigration history, criminal record, and an account of the second-named applicant's movements and economic activity. On the same date, an application was made pursuant to the CJEU decision in *Chen v. Secretary of State for the Home Department*, Case C-200/02 (Court of Justice of the European Union, 19th October, 2004). The s. 3(11) application was refused on 16th May, 2019. The refusal notes at p. 2 state that "*in the normal circumstances Mr. [S]'s outstanding immigration applications would be determined before dealing with his request to have the deportation order revoked . . . however, the Department is complying with the court's direction*".
14. On 17th May, 2019 the Department wrote referring to the *Chen* application and asking for DNA evidence. The letter set out a particular procedure and referred to a particular company as an example of the companies that apply the necessary standards, stating

that "*it is necessary that you use a court approved DNA service*". The applicants' evidence is that they were not able to avail of that procedure until passports for all concerned were available. On 20th May, 2019 further documents were sent in by the applicants' solicitors in support of the Chen and EU treaty rights applications.

The third statement of grounds

15. While I had in the (*No. 1*) judgment envisaged that the applicants could apply for an amendment of the statement of grounds, and while the applicants did deliver a draft (third) amended statement of grounds to the respondents, they overlooked the need to actually apply for the amendment until a later stage. The respondents filed an amended statement of opposition in response to that third version of the statement of grounds, albeit that the latter had not actually been allowed, still less filed.
16. On 21st May, 2019 the hearing resumed, and bail was applied for and granted subject to certain conditions. The matter was then adjourned to 29th July, 2019 with the injunction continuing.
17. In June 2019 (according to subsequent correspondence from the Romanian Embassy), the second-named applicant applied for a Romanian passport for the child.
18. On 21st August, 2019 a letter was received by the Department confirming the applicants' change of residence to an address in Roscommon.
19. On 7th October, 2019 the EU treaty rights application was refused at first instance and on 8th October, 2019 the *Chen* application was also refused at first instance. On 14th October, 2019 review applications in both matters were submitted. The proceedings came back before the court and were adjourned further to the 4th November, 2019 pending determination of the reviews. On the latter date the matter was adjourned again to 16th December, 2019 but in the meantime on 13th November, 2019 the review decisions issued, upholding the original decision in both cases.
20. The EU treaty rights review decision contrasted the second-named applicant's claim to have arrived in the State in 2015 with the absence of any documentary evidence to suggest that she was actually here between 2015 and 2018 and noting that the PPSN was only assigned in December 2018. It also noted that her Romanian identity card was issued on 1st August, 2018 listing her address in Romania. The Minister then informed the first-named applicant that therefore "*your paternity of this child must be considered to be in some doubt*". The letter also noted the lack of DNA evidence as well as an alleged limited evidence of cohabitation and shared financial arrangements. The *Chen* application was refused *inter alia* on the basis of a lack of demonstration that the first-named applicant could live independently of recourse to public funds.
21. On 26th November, 2019 the District Court made an order appointing the first-named applicant as a guardian of the child. The first and second-named applicants say that they intend to marry, but haven't been able to progress that. On 11th December, 2019 the applicants' solicitor sought withdrawal of the review decisions. On 16th December, 2019

the matter was back before the court and was adjourned to 13th January, 2020 pending a response to that request.

22. On 17th December, 2019 (according to a subsequent letter from the Romanian Embassy), the child's Romanian birth certificate was issued. According to the embassy this was a precondition for the grant of a passport to the child.
23. On 8th December, 2020 the applicants' request for withdrawal of the review decisions was refused. On 13th January, 2020 the matter was adjourned to 20th January, 2020.

The fourth statement of grounds

24. On the latter date the applicants indicated an intention to challenge the s. 3(11) decision and requested permission to deliver a further amended statement of grounds. On 27th January, 2020 I granted liberty to deliver a (fourth) amended statement of grounds (which in effect was equivalent to the third statement of grounds that the applicants didn't actually seek leave to deliver) without prejudice to the respondents' objection as to time. That incorporated the points made in the draft of 9th May, 2019 so the issue in relation to the failure to actually have that amendment granted is in effect superseded.
25. On 18th June, 2020 the Romanian Embassy wrote indicating that the mother could collect the passport on 19th June, 2020. I am informed that the mother missed her transport to go to the embassy, so the appointment was rescheduled and that it was actually collected on 23rd June, 2020. That was an important development because only at that point could the DNA procedure required by the Department be activated.

The fifth statement of grounds

26. On 24th June, 2020 the applicants were permitted to apply for yet a further amendment of the statement of grounds in the sense that the version of the statement of grounds at that point didn't seek a substantive injunction even though that was what was actually the main relief that was intended by the applicants. I also held at that stage that relief 1 was defunct and struck it out, and that relief 8 was repetitive and also struck that out. Counsel for the applicants didn't oppose that.
27. On 27th June, 2020 some four days after getting the child's passport, the second and third-named applicants left for Romania. Evidence on their behalf is that the original intention was to go for one week, although they are still there about a month later, but have indicated an intention to come back within two to three weeks from 21st July, 2020. The second-named applicant's position according to the affidavit of the first-named applicant of 1st July, 2020 was that her "*mother's health was poorly*".
28. I adjourned the matter for a draft amended statement of grounds which would allow a claim for a substantive injunction which was the proper relief that the applicants in fact wanted, as well as other amendments and further affidavit evidence, with liberty to the respondent to reply, and I continued bail and the injunction for the time being.
29. On 15th July, 2020 a fifth draft amended statement of grounds was then delivered. Generally, a statement of grounds should be structured in accordance with the formula

envisaged by Appendix T, Form 13 of the Rules of the Superior Courts, namely under headings numbered (a) to (g), with the reliefs at (d) and the grounds at (e) (use of this format also facilitates the Central Office in preparation of the order granting leave, as the template order is predicated upon the headings and numbering used in the rules being followed). Under the grounds at heading (e), the grounds should be divided into sections in numbered integers commencing with legal grounds followed by factual grounds (preferably re-starting at 1 under a separate heading). I indicated to counsel for the applicants that the numbering sequence in the original statement of grounds should be preserved to avoid confusion, apart from changing the numbering from Roman numerals to Arabic numerals which are preferable as the first-order numbering (as opposed to subparagraphs).

30. Under the heading of reliefs, I directed that the reliefs already struck out should remain in their original numbering, but struck through. The applicants had confusingly renumbered some of the grounds and dropped the original ground 2 altogether instead of striking it through, and I directed that those matters be rectified to ensure continuity and clarity. Simply omitting struck out grounds would not be the correct procedure. Another problem was that in the amended statement of grounds there were two ground 7s, so I directed that the second one be renumbered 8 and so on. I also directed that any new relief should be added after the existing relief 8 as a relief 9, any new grounds should be added after the existing ground 13 as a ground 14 and so on. Also problematically, the applicants had sought to re-word ground 1 which was not appropriate because that ground had been struck out altogether in May 2019, and a final problem was that the facts section of the statement of grounds omitted all developments since the statement of grounds was first filed. Maybe these problems give some glimpse into the vortex of procedural confusion that has surrounded this case since its inception.

The sixth statement of grounds

31. As of 15th July, 2020, the applicants had rectified all of these problems, but one issue remained, which was that the substantive injunction eventually sought was entirely open-ended. Counsel for the applicants accepted that he was not entitled to such an open-ended order so the logical consequence was that he needed to come back with a further amended version of the statement of grounds narrowing the reliefs sought. Therefore, I adjourned the proceedings until 22nd July, 2020 to allow a revised version of the statement of grounds. I allowed the State's application for costs of the hearing of 15th July, 2020 because the adjournment was caused by deficits on the applicants side. That was not strenuously opposed.
32. On 22nd July, 2020 a further version of the statement of grounds was presented. The applicants sought liberty to deliver it and the respondents opposed that and sought to set aside the injunction. The applicants suggested leaving that point to the final hearing. I allowed the applicants to file the amended statement of grounds without prejudice, directed that the statement of opposition would be taken as covering the amended statement of grounds, and fixed 27th July, 2020 as a resumed hearing date, adjourning the application to set aside the injunction to that date. Any further affidavits or

submissions were to be lodged by 11 a.m. on 24th July, 2020. An amended statement of opposition was nonetheless filed on 23rd July, 2020. The applicants' solicitor filed an affidavit setting out instructions which indicated some information about the grandmother's historical medical condition.

33. Matters resumed on 27th July, 2020 but were adjourned further to 30th July, 2020 at which stage the applicants sought permission to introduce further correspondence on an undertaking to put that correspondence on affidavit. The respondents objected to the correspondence on the grounds that it was too late and not relevant, but I allowed it on the basis that it was *inter partes* correspondence so I should be seeing it anyway and that the applicants were to put it on affidavit for the record. At the close of the applicants' oral submissions I dismissed the proceedings as far as they concerned one aspect (the claim for an order pending an opportunity to seek the DNA test) and heard from the respondents on that aspect which will be outlined further below.
34. Having heard full submissions on that issue, I informed the parties of the order and indicated that reasons would be provided later; and I am now taking the opportunity to set out those reasons. In relation to this matter I have received helpful submissions from Mr. Paul O'Shea B.L. for the applicants and from Ms. Siobhán Stack S.C. (with Mr. John P. Gallagher B.L.) for the respondents.

Reliefs sought

35. The latest amended statement of ground seeks as substantive reliefs the following:

- (i). an interlocutory injunction in particular terms - that has already been struck out;
- (ii). declaratory relief - that is unnecessary;
- (iii). an injunction pending determination of the proceedings - that has already been granted;
- (iv). further or other relief;
- (v). costs;
- (vi). *certiorari* of the s. 3(11) refusal of 16th May, 2019 - unfortunately, the applicants haven't demonstrated grounds to render the refusal unlawful in the light of the information available to the Minister at that date. The applicants are faced with a great deal of pre-existing contrary law: see *e.g. O.O.A. v. Minister for Justice and Equality* [2016] IEHC 468, [2016] 7 JIC 2924 (Unreported, High Court, 29th July, 2016), and it wouldn't add anything to the jurisprudence to spell out in any more granular detail why this aspect of the challenge fails. All sorts of exotic points were made regarding EU law including the hardy annual of an effective remedy, but nothing of substance has been made out. The EU treaty rights points (which loomed large at the interlocutory stage, but have been superseded by the actual ministerial decision) don't arise because EU treaty rights were refused for quite separate reasons, essentially failure to establish that the second-named applicant

was actually exercising treaty rights. Thus, there is in reality no issue of EU law in the case. So no CJEU reference is necessary, and even if it had been, the applicants' proposed question as set out in submissions is academic and implausible as a possible subject of a reference, and not a serious encapsulation of any point on which the case could possibly turn. A submission that the Illegal Immigrants (Trafficking) Act 2000 and common law rules are unconstitutional if the court can't grant an injunction is totally misconceived because the court *can* grant an injunction - and actually did so in the present case. Insofar as the claim is made that the Minister didn't deal with the issue of the constitutional rights of the child to the society of both parents under Article 42A.1 in the context of the s. 3(11) decision, that might have had substance had that point actually been made to the Minister, but since it wasn't, the Minister was not obliged to deal with it: see *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] IESC 25, [2008] 3 I.R. 795. Thus, I uphold the objection in the statement of opposition to that effect;

- (vii). an order that the application to revoke the deportation order be determined in accordance with law - that does not arise having regard to the fact that the s. 3(11) challenge fails;
- (viii). an injunction pending the determination of the challenge to the s. 3(11) decision - that has already been struck out;
- (ix). a substantive injunction which in effect restrains deportation until the applicants have had the opportunity to pursue the DNA test or alternatively to become married. As far as marriage is concerned, there is nothing to this point. A person who doesn't have a right to be in the State doesn't have the right to remain here merely because he or she intends to marry; and deporting that person doesn't breach their right to marry: see *Akhtar v. Minister for Justice and Equality* [2018] IEHC 781, [2018] 12 JIC 1814 (Unreported, High Court, 18th December, 2018). The only part of the substantive injunction that is potentially going anywhere is the claim that the applicants should be entitled to a reasonable opportunity to get a DNA test and apply on foot of the result of that, and I deal with that separately below.

36. Accordingly, at the close of the applicants' case I dismissed the proceedings except insofar as concerns the part of relief 9 that relates to the DNA issue and the grounds associated with that.

Respondents' complaint regarding extension of time

37. The respondents complained that time should not be extended. That in substance does not arise having regard to the dismissal of the s. 3(11) challenge on the merits. Insofar as the relief regarding the DNA testing requires an extension of time, I would view there to be good and sufficient reason for the *de minimis* extension in the interests of justice in all the circumstances, insofar as it's necessary.

Respondents' objection that amendments should be disallowed

38. The only relevant amendment at this point is the one adding relief 9 and the associated grounds. It is not necessary to decide whether the other amendments should have been allowed because they fail on their merits anyway. Ms. Stack suggested the amendments should be disallowed, and in fairness they are late in the day and also come on the heels of a lot of procedural complexity instigated by the applicants, but on balance I think the applicants should be allowed to at least seek to make their best case. The criteria for amendment are arguability, explanation (in this case mistake by counsel) and lack of irremediable prejudice. Those criteria are satisfied here. The State have already been compensated with an order for costs of one of the resumed dates. See generally, *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296, [2018] 2 I.L.R.M. 56, *Habte v. The Minister for Justice and Equality* [2019] IEHC 47, [2019] 2 JIC 0405 (Unreported, High Court, 4th February, 2019) (the comments on amendments were undisturbed on appeal, *Habte v. Minister for Justice and Equality* [2020] IECA 22 (Unreported, Court of Appeal, 5th February, 2020)).

Respondents' objection that the proceedings should be dismissed on a discretionary basis on grounds of lack of candour or delay

39. Ms. Stack argues that the proceedings should be dismissed in the discretion of the court on grounds of candour, referring in particular to:

- (i). an alleged failure to disclose evidence regarding why the DNA test was not obtained earlier;
- (ii). concerns regarding the second-named applicant's assertion of EU treaty rights when it has been found that she wasn't exercising EU treaty rights;
- (iii). the court only being told of the second and third-named applicants' plans to leave the State after the event; and
- (iv). the lack of evidence as to when the flights to Romania were booked.

40. Relatedly, she complained of the proceedings not having been progressed with adequate expedition and what she called a series of "*rolling amendments*" and "*rolling hearing dates*". There may well be something to these complaints, but the objective interests of the child have to be a significant factor, and in that light, on these facts, I don't think it would be just to dismiss the proceedings on a discretionary basis, having particular regard to the approach of the Supreme Court in *Sivsiivadze v. Minister for Justice* [2015] IESC 53, [2016] 2 I.R. 403.

Jurisdiction to grant injunction

41. Turning then to the question of the claim for a substantive injunction for the purposes of preventing deportation of the first-named applicant pending a reasonable opportunity to obtain DNA test results, the first issue was whether the court has jurisdiction to grant such an injunction. A preliminary point, emphasised in the (*No. 1*) judgment, is that the balance of convenience does not suffice for a substantive injunction. Balance of convenience or justice is part of the test for an interim or interlocutory injunction. To get

a substantive injunction as part of the ultimate relief in the case a party must demonstrate an entitlement to it. In the (*No. 1*) judgment I said that it could be disproportionate to deport somebody where they were highly likely to succeed in an application to be brought back very shortly thereafter, referring to *Chikwamba v. Secretary of State for the Home Department* [2008] UKHL 40, [2008] 1 WLR 1420. I thus rejected submissions from the respondents that there was no "free-roaming jurisdiction to correct disproportionality" (para. 12). I don't think, however, that at this particular point in time, on the evidence we now have, it could be said that the applicants are highly likely to succeed in the application; but high likelihood is not the only possible test for determining disproportionality, and nor is jurisdiction to grant an injunction limited to correcting disproportionality.

42. Much emphasis was laid by the respondents on the legal right of the Minister to enforce a deportation order, but that is what an injunction (and indeed what equity generally) is for: to mitigate law where justice so requires. The statutory jurisdiction to grant an injunction derives from the Supreme Court of Judicature Act (Ireland) 1877, s. 28(8), which allows the court to grant injunctive relief whenever it is "*just or convenient*" to do so. Ms. Stack complained that the applicants hadn't referred to the 1877 Act and characterised that as "*an issue introduced by the court*", but that isn't correct. In an adversarial system, the issues are normally defined by the parties. Here the issue which has been in the case since the beginning is whether there is a jurisdiction to grant an injunction as sought by the applicants, either interlocutory or as it became ultimately, substantive. Having introduced such an issue, the parties can't complain if the court tests that issue against a range of legal, including statutory, materials. The fact that a party did not refer to something in submissions is not a justification for the court ignoring it; doubly so if that would be ignoring statute law (indeed if counsel want to be legalistic about it, both sides are *obliged* to draw the court's attention to all relevant statutory materials - and the 1877 Act certainly falls into that category). Likewise for other pertinent legal material. Certainly the fact that counsel doesn't refer to such material doesn't preclude the court from considering it. Normally, if recourse to such material would be crucial to the result and would materially change the outcome from what it otherwise would have been, the court will refer to it during the hearing to give the parties a chance to comment; and, whether necessary or not, that happened here. Anyway, Ms. Stack ultimately did accept that she wasn't making a fair procedures point and did not want more time to consider any such material and said she was happy for the court to give a decision. If it's any consolation to her, my mentioning the 1877 Act at the hearing is small potatoes compared to *T.D. v. Minister for Justice Equality and Law Reform* [2014] IESC 29, [2014] 4 I.R. 277, where the Supreme Court noted without apparent disapproval (see judgment of Fennelly J. at para. 2) that Hogan J. (the trial judge in the High Court) had, of his own motion, taken a point, not as to statutory interpretation, but as to the *validity* of s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 in terms of EU law, or to *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473 (Unreported, High Court, 13th December, 2011), where Hogan J. also took a very significant point of his own motion after having reserved judgment, and reconvened the hearing to invite further submissions on it.

43. In *Mercedes-Benz AG v Leiduck* [1996] AC 284, Lord Nicholls (dissenting, although not apparently on this issue), referred approvingly to the view that ". . . *the jurisdiction to grant an injunction, unfettered by statute, should not be rigidly confined to exclusive categories by judicial decision. The court may grant an injunction against a party properly before it where this is required to avoid injustice, just as the statute provides and just as the Court of Chancery did before 1875. The court habitually grants injunctions in respect of certain types of conduct. But that does not mean that the situations in which injunctions may be granted are now set in stone for all time. The grant of Mareva injunctions itself gives the lie to this. As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year.*" I would very respectfully entirely endorse this analysis as representing the preferable approach in this jurisdiction also.
44. That case related to an interlocutory injunction, but that dimension doesn't seem to be crucial. Alastair Hudson, *Equity and Trusts*, 9th ed. (London, Routledge, 2017) at p. 1032 says "*the courts have a very broad inherent power to grant injunctions in any sort of case in the interests of avoiding injustice.*" He also refers to Spry, *The principles of equitable remedies: specific performance, injunctions, rectification and equitable damages*, 8th ed., (Pyrmont, NSW, Lawbook Co., 2010) at p. 331, that the jurisdiction operates "*without limits and can be exercised either in support of any legal right, or in the creation of a new equitable right as the court thinks fit in the application of equitable principles*".
45. Bearing in mind the possibility of granting an injunction to prevent injustice, to recognise new equitable rights, or in the application of equitable principles, Hilary Biehler phrases the matter a little too narrowly at p. 564 of *Equity and the Law of Trusts in Ireland*, 6th ed. (Dublin, Round Hall, 2016) by saying "*An injunction will only be granted to protect a right of the plaintiff whether a legal right deriving from the common law, an equitable right ... a constitutional right, or a right deriving from a specific statutory power.*" I prefer the formulation of Lord Nicholls that an injunction is available in any case where this is appropriate to prevent injustice.
46. The fact that the injunction is sought in judicial review proceedings under O. 84 of the Rules of the Superior Courts doesn't change the scope of that jurisdiction; and indeed judicial review properly speaking as discretionary remedy is a branch of the equitable jurisdiction. In any event viewing the matter in terms of the extent to which the injunction is appropriate to protect rights, there *is* a right of the child at issue here, namely the right to the society of his father implicit in Article 42A.1, assuming that the first-named applicant is actually the father. Thus, perhaps to be technically precise, what's really at issue here is a derivative right, namely the right to a reasonable opportunity to assert the right of society with a putative father. Whether that is viewed as implied in Article 42A.1, as part of the right of access to the court under Article 40.3, or as part of the right to an effective remedy under art. 13 of the ECHR (in conjunction with art. 8) as applied by the European Convention on Human Rights Act 2003, or some

or all of these, is not crucial to the conclusion. One can also look at it through the lens of art. 8 of the ECHR as applied by the European Convention on Human Rights Act 2003 by saying that the right to private and family life implies a reasonable opportunity to prove family relationships.

Whether the jurisdiction to grant an injunction should be exercised here

47. In *P.N.S. (Cameroon) v. Minister for Justice and Equality* [2018] IEHC 504, [2018] 7 JIC 1607 (Unreported, High Court, 16th July, 2018), I made the point (at para. 42) that it is well established, in an abundance of caselaw from the Supreme Court down, that an attempt to enjoin the enforcement of a deportation order is a collateral attack on that order and accordingly s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies. Such a collateral attack could not be launched in a way that would circumvent applicable time-limits. I did, however, note that, in the case of an enforceability-related issue that arose after the date of the decision, the time-limit runs from when the grounds of unenforceability arise. The Supreme Court decision in that case, *P.N.S. (Cameroon) v. Minister for Justice and Equality* [2020] IESC 11 (Unreported, Supreme Court, McKechnie J. (O'Donnell, MacMenamin, Dunne and Charleton JJ. concurring), 31st March, 2020), referred to some specific examples, but doesn't overturn the general principle, and indeed McKechnie J. specifically said at para. 66 that "[t]here may well be other like examples of supervening events which fall into this category". Ms. Stack's reading of the judgment that the court only recognised naturalisation and EU free movement rights as relevant to re-starting the clock for review, with some narrow and perhaps entirely theoretical third category in the background, is just not plausible. Nor is it logical; and still less would it be just. The legal and constitutional landscape is just too complex and ever-changing for the court to pretend to be able close the categories of rights, any more than it would be meaningful to close the categories of negligence.
48. More generally, what's true of deportation orders is true of any public law measure subject to a time-limit for challenge, whether that be 3 months under O. 84 or 28 days under s. 5 of the 2000 Act. An injunction to restrain enforcement of a public law decision is a collateral challenge to its validity. No public law decision that is subject to a time-limit for challenge (that is, measures in the nature of particular decisions, addressed to individual natural or legal persons, as opposed to general or regulatory measures like statutes, rules or policies, addressed to persons generally or categories of persons, on an ongoing basis, to which the time limits don't apply) can be collaterally challenged out of time (without good and sufficient reason for an extension) on grounds that existed when the decision was adopted. However, if the grounds of alleged unenforceability come into being subsequent to the decision being challenged, time runs from the date those grounds arise. The categories of situations where such subsequent unenforceability can arise are not closed and nor can they be arbitrarily limited.
49. In the present case, the claim is that the deportation order should not be enforced at this particular point in time because the applicants haven't had a reasonable opportunity to do a formal paternity test as demanded for the first time by the Department after the initiation of the proceedings. Ms. Stack argues that the applicants could have got the

child's passport earlier in the sense that the evidence is that an appointment with the Romanian Embassy was originally arranged for 12th March, 2020 with the passport to be expected to be available two weeks after that. She complains that the delay hasn't been explained on affidavit. It could in fairness be said that the applicants could have been more explicit with further details, but given the COVID emergency it is hardly surprising that there were some delays in the passport being available. The DNA test only became feasible on 23rd June, 2020 when the child's passport became available, and 28 days from then is 20th July, 2020. The applicants sought to raise the entitlement to a substantive injunction in the draft statement of grounds delivered on 15th July, 2020 where the intention to get a DNA test is referred to in the factual issues, albeit not in the grounds or reliefs. The reworded statement of 22nd July, 2020 does frame the issues properly. Strictly speaking that's two days after the expiry of the 28 days, but in the context where the applicants had already claimed a substantive injunction and indicated an intention to reformulate the grounds on 15th July, 2020, I wouldn't hold the delay against the applicants herein and would extend time for good and sufficient reason if and insofar as that *de minimis* extension is necessary.

50. In *L.C. v. Minister for Justice, Equality and Law Reform* [2006] IESC 44, [2007] 2 I.R. 133, McCracken J. said that only in circumstances that are hard to envisage, such as newly discovered evidence, could the court grant injunction to restrain the enforcement of a valid deportation order. However, there is no great analogy with the present case. That decision was dealing with the all-too-common situation where an applicant doesn't challenge a deportation order, or does so unsuccessfully, and then at some later point in the process (often when arrested) seeks revocation of the order and an injunction on grounds that in fact existed all along. The key point being made in *L.C.* is that grounds that existed originally are not a basis for an injunction to restrain an unchallenged or unsuccessfully challenged deportation order. One cannot restart the limitation period by re-agitating an issue that existed originally.
51. The present case is different because the grounds *didn't* exist originally - indeed the Minister only questioned the first-named applicant's paternity quite some way into the process. The central concern here is that if (still a significant if) the first-named applicant is indeed the father of the third-named applicant, then his deportation will have a significant impact on this nuclear family and the child in particular. That in itself is not an absolute bar to deportation because the rights of a child can be outweighed by public interest considerations, for example where an offence has been committed: see *e.g. Seredych v. Minister for Justice & Equality (No. 1)* [2018] IEHC 187, [2018] 3 JIC 2206 (Unreported, High Court, 22nd March, 2018). It is worth mentioning in passing that there are no unusual public interest considerations here beyond the first-named applicant's loose record of compliance with immigration law in the UK and Ireland.
52. Where we are then in the present case is at quite a stark crossroads. The Minister doesn't accept the first-named applicant's paternity, implying that the whole thing is a scam. So it may turn out to be; one can't say at this stage. On the other hand it might not, and the Minister is breaking up this little nuclear family on inadequate evidence. In

circumstances where the Department hasn't accepted the paternity of the first-named applicant, and where there is a reasonable prospect of proof one way or another within a reasonable time, and where, if paternity is proved, such a finding would significantly impact on the Minister's analysis of the private and family life rights at issue, it seems to me that the first-named applicant's deportation without affording a reasonable opportunity to prove such paternity would on these peculiar facts be an unnecessary, disproportionate or unjust interference with the right of the child to assert an entitlement to society with his putative father, and with the family life rights of the applicants under art. 8 of the ECHR as applied by the European Convention on Human Rights Act 2003. If the DNA test is negative, the Minister will of course be free to deport the first-named applicant, whereas if it is positive, surely the Minister would want to know that before finalising the first-named applicant's immigration status.

53. Ms. Stack finally says that the injunction should be refused because the second and third-named applicants are currently outside the State, but that is averred to be a temporary situation. If that turns out not to be the case, the matter will resolve itself fairly rapidly, having regard to the terms of the order I am proposing to make. If it's any further consolation to the respondents, if the applicants' claim regarding parentage turns out to be unfounded, my taking considerable effort to finalise the matter before the end of Trinity Term, 2020 and making the order set out below won't disadvantage the State in any way that wouldn't have happened had I not made such special efforts and simply adjourned the matter to October, 2020. Indeed, the very limited injunction probably makes no difference in practice anyway given the current restrictions on deportations due to the COVID emergency.

Summary

54. The principal legal conclusions therefore are as follows:

- (i). While the balance of convenience is part of the test for an interim or interlocutory injunction, that in itself is insufficient to obtain an injunction as a substantive remedy. An applicant must demonstrate an entitlement to such an order.
- (ii). The Supreme Court of Judicature Act (Ireland) 1877, s. 28(8), which allows the court to grant injunctive relief whenever it is "*just or convenient*" to do so, allows the court to grant an injunction as a substantive relief in support of an existing right, in the course of recognising a new equitable right, in the application of equitable principles, or more broadly where would prevent injustice to do so.
- (iii). The situations in which injunctions may be granted are not set in stone. As circumstances change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is whatever is appropriate to prevent injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yesteryear.

- (iv). An injunction to restrain enforcement of a public law decision is a collateral challenge to its validity. No public law decision that is subject to a time-limit for challenge (that is, measures in the nature of particular decisions, addressed to individual natural or legal persons, as opposed to general or regulatory measures like statutes, rules or policies, addressed to persons generally or categories of persons, on an ongoing basis, to which the time limits don't apply) can be collaterally challenged out of time (without good and sufficient reason for an extension) on grounds that existed when the decision was adopted. However, if the grounds of alleged unenforceability come into being subsequent to the decision being challenged, time runs from the date those grounds arise. The categories of situations where such subsequent unenforceability can arise are not closed, and nor are they to be arbitrarily limited. Nor, in the case of a deportation order, are they limited to acquisition of citizenship or EU treaty rights, which are only illustrative rather than definitional examples.
- (v). A child has a right to the society of his or her parents and each of them as an aspect of the rights of the child under Article 42A.1 of the Constitution (subject to possible qualifications in particular circumstances) and under art. 8 of the ECHR as applied by the 2003 Act (again with possible qualifications). That right implies a derivative right to a reasonable opportunity to assert the right of society with a putative parent. Whether that is viewed as implied in Article 42A.1, as part of the right of access to the court under Article 40.3, or as part of the right to an effective remedy under art. 13 of the ECHR in conjunction with art. 8 as applied by the European Convention on Human Rights Act 2003, or some or all of these, is not crucial to the conclusion. The putative father and the mother also have art. 8 rights as applied by the European Convention on Human Rights Act 2003 which include a right to a reasonable opportunity to assert their relationship with the child.

55. The principal fact-specific conclusions are as follows:

- (i). The claim for an injunction here should be categorised as a collateral challenge to the deportation order, but one that is not out of time because the grounds of challenge arose subsequently to the order, and the challenge is raised within time (or at least within time as extended) of the grounds arising in the sense of the applicants being in a position to assert a right based on an ability to pursue a DNA test.
- (ii). On these facts, it is just and convenient to grant a time-limited injunction in order to give effect to the right of the child to assert an entitlement to the society of the putative father and the corresponding rights of the putative father and the mother to an opportunity to establish the putative father's alleged genetic relationship with the child.

Order

56. Accordingly, the order I made on 30th July 2020 was as follows:

- (i). I refused the application to set aside the amendments to the statement of grounds;
- (ii). I extended time insofar as that was necessary regarding relief 9 of the final amended statement of grounds to the extent that it related to the issue of an opportunity to conduct a DNA test;
- (iii). I refused the applicants' application to refer a question to the CJEU because the case doesn't come down to any necessary question of EU law, and because anyway the question suggested by the applicants was implausible;
- (iv). I dismissed the proceedings except in relation to relief 9, insofar as that concerned the DNA test issue;
- (v). in relation to that issue alone I granted a substantive injunction restraining the deportation of the first-named applicant as follows:
 - (a). the injunction will last until 5th October, 2020 unless a negative DNA test result is received before then;
 - (b). if a DNA test is completed and submitted for analysis before 5th October, 2020, the injunction will continue until either there is a negative result or until 28 days following a positive result showing the first-named applicant to be the father of the third-named applicant; and
 - (c). if the first-named applicant applies for permission to remain in the State within a period of 28 days following such a positive result the injunction would continue until 28 days following the determination by the Minister of that application;
- (vi). conditions of the injunction will be:
 - (a). continued presentation by the first-named applicant;
 - (b). the applicants are to provide full information to the respondents as to the progress of the DNA testing; and
 - (c). the applicants are to furnish written consent to the respondents to the effect that all information and results are to be furnished directly to the respondents at the same time as they are furnished to the applicants;
- (vii). I continued the first-named applicant's bail for the duration of the injunction.
- (viii). The matter was adjourned to 17th August, 2020 for possible submissions on leave to appeal.