THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 511
[Record No: 2021/740 JR]

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

BETWEEN:

A.Z.,

AND

M.Z.,

AND

C.Z. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND M.Z.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 27th day of July, 2022

INTRODUCTION

1. In these proceedings, the Applicants seek to challenge the Respondent's decision of the 28th of June, 2021, notified to the First Named Applicant under cover of letter dated the 13th of July, 2021, which refused to revoke the deportation order made in respect of him on the 26th of June, 2019 (hereinafter "the 2019 deportation order") under s. 3 of the Immigration Act 1999, as amended ("the 1999 Act"). Central to the determination of these proceedings is whether there has been a proper consideration of the rights of an Irish citizen child with special needs in making a deportation order in respect of his non-national father.

BACKGROUND

2. The First Named Applicant has a chequered immigration history in the State. He is an Albanian national who entered the State unlawfully, allegedly in March, 1995, and lived under an alias for many years. During that time, he worked in the State without a work permit as a construction worker. It is stated that he formed a relationship with the Second Named Applicant, an Irish citizen, in or about 2005. In 2006, their first son was stillborn. The Third Named Applicant was born in September, 2007.

3. The Third Named Applicant is an Irish Citizen and attends school in the State. Due to a diagnosis of autism and significant hearing loss, he has additional needs and benefits from access to a range of services within the State. He is reported to be progressing well in school where he receives supports.

4. The First Named Applicant is the primary carer for the Third Named Applicant who is now 14 years of age. The Second Named Applicant is married to the First Named Applicant and is the mother of the Third Named Applicant. She is an Irish citizen and is a health care professional. She is the sole bread-winner for the family and works long hours.

5. The Applicants form a family unit. They have lived together continuously since before the birth of the Third Named Applicant with the exception of a three-year period when the First Named Applicant was serving a term of imprisonment.

6. On the 7th of August, 2012, the First Named Applicant was involved in an altercation with a colleague in his workplace where he discharged six bullets from an illegally held firearm striking his colleague. He was subsequently charged with several criminal offences, namely assault contrary to s. 2 of the Criminal Justice (Non-Fatal Offences Against the Person) Act, 1997 (as amended), unlawful possession of a firearm, and possession of a firearm with intent to endanger life or cause serious injury to property.

7. The First and Second Named Applicants married on the 27th of August, 2012, within weeks of the shooting incident. At that stage the Third Named Applicant was almost five years of age.

8. On the 11th of September, 2013, while the above charges were pending against the First Named Applicant, his then solicitors submitted an application on behalf of the First Named

Applicant for a permission to remain in the State on the basis of his parentage of the Third Named Applicant (the "*Zambrano application*").

9. As part of the application, on the 6th of January, 2014, the First Named Applicant's solicitor submitted further documentation including a Criminal Record Declaration Form. The First Named Applicant signed this Declaration Form on the 12th of November, 2013. He declared that he had never been convicted of any offence in the State. This was untrue as he had a previous conviction dating back to the 3rd of November, 2003 when he was fined €200 for intoxication in a public place, contrary to s. 4 of the Criminal Justice (Public Order) Act, 1994 (as amended). The charge of threatening, abusive or insulting behaviour in a public place contrary to s. 6 of the same Act was taken into consideration. In response to the question of whether there were any charges pending against him in the State or abroad, the box was ticked for yes, but no details were given as to the nature of any charges despite this being a question on the form.

10. On the 3rd of March 2014, the First Named Applicant was granted a Stamp 4 permission for three years as the parent of an Irish citizen child (the '*Zambrano*' permission*)*. This was granted on certain conditions, including that the First Named Applicant would obey the laws of the State and would not engage in criminal activity. At the time that the application was approved, it is the Respondent's case (as indeed apparent from the record of the examination of the file under s. 4 of the Immigration Act, 2004 dating to March, 2003) that the Respondent was not aware of the 2003 public order conviction and the serious charges that were pending against him, albeit the First Named Applicant had disclosed that charges were pending without providing details. It appears from the records exhibited that no further enquiry was made by the Respondent notwithstanding the disclosure of pending charges.

11. The First Named Applicant pleaded not guilty to the charges referred to above and following conviction in the Dublin Circuit Criminal Court on the 15th of July, 2014, he was sentenced to five years (with one year suspended) for the unlawful possession of a firearm, and seven years (with three years suspended for four years) for possession of a firearm with intent to endanger life or cause serious damage to property. The presiding judge in the Circuit Criminal Court is reported in the media to have described the First Named Applicant as having *"a very short fuse."* While he was given three concurrent sentences which totalled seven years with the three last years suspended for a period of four years, the First Named Applicant qualified for the remission of his sentence and was released on the 13th of July, 2017. Whilst

in prison, the First Named Applicant had a weekly visit from the Second and Third Named Applicants and daily telephone contact.

12. The Applicant did not renew his permission to be in the State whilst in custody and a deportation order issued for him in October, 2017. On the 19th of April, 2017, a proposal to deport pursuant to s. 3 of the 1999 Act was sent to the First Named Applicant while he was still in custody.

13. On the 12th of May, 2017, his then solicitors submitted representations and supporting documentation on behalf of the First Named Applicant. In the detailed submissions advanced, reliance was placed, *inter alia*, on family rights protected under Article 41 of the Constitution and the decision of the High Court in *Gorry v. Minister for Justice* [2014] IEHC 29 as well as the rights of the family under EU law (with particular reliance on *R v. Bouchereau* [1978] 66 Cr App R 2020) and the nature of the threat to public policy or public security required to justify interference with EU rights, Article 8 of the European Convention on Human Rights (hereinafter "ECHR") which it was contended was not present in this case.

14. It is noteworthy that the submissions also focussed on the requirement to treat the child's best interests as paramount in conducting a proportionality test. It was submitted in reliance on international case-law, specifically *ZH (Tanzania)(FC) v. Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166 and *Wan v. Minister for Immigration and Cultural Affairs* [2001] FCA 568 (para. 32), that the decision maker was required to identify what the best interests of the child required and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the child understood as a primary consideration. Strangely, the Third Named Applicant's special needs did not feature in the submissions made and no reference was made to a diagnosis of autism or other needs.

15. A decision to make a deportation order was made in relation to the First Named Applicant on the 27th of October, 2017 (hereinafter "the 2017 deportation order"). The *Examination of File* which accompanied the 2017 deportation order reflects a consideration of the family and private life rights of the Applicants with reference to Articles 40, 41 and 42 of the Constitution, Articles 7 and 24(2) of the Charter of Fundamental Rights of the European Union [hereinafter "Charter"] and Article 8 of the Convention [hereinafter "the ECHR"]. It is acknowledged in the *Examination of File* that there was an obligation to take into consideration

the child's best interests recognised by Article 24(2) of the Charter (p. 5 of the *Examination of File*), but it is not identified in terms that Article 24(2) identifies the child's best interests as "*a primary consideration*". No reference was made to Article 42A of the Constitution but the *Examination of File* document states:

> *"consideration is given, in the best interest of the child, to all the specific circumstances arising"*.

16. No actual finding as to what the child's best interests were was made but it may be implicit from the statement "*while it is recognised that any further absence of Mr. Z from his son's life will inevitably lead to upheaval for the child, this is a factor which must be considered in the wider context of the threat Mr. Z may pose to society and the consequential right of the State to prevent disorder or crime*" that it was understood that the child's best interests were served by the father remaining in the State. It was expressly noted that "*no further information is provided in respect of the child's education ...it is recognised that he attends primary education and that a consequent level of educational attainment and integration*" (p. 9 of the *Examination of File*) and the *Examination of File* concludes that while relocation of the family would involve an element of upheaval for the family and in particular the Third Named Applicant, no information had been submitted to suggest that there were any insurmountable obstacles to the family relocating (p. 9 of the *Examination of File*). It was observed that any such relocation would be a matter for the family to decide and given the Second Named Applicant's employment, the family would have the means to maintain contact through visits to Albania if they did not relocate as a unit. It was concluded that in all of the circumstances which included the First Named Applicant's immigration history and in particular his "*propensity towards extreme and disproportionately violent outbursts, there exists a genuine, present and sufficiently serious threat affecting a fundamental interest of society, which justified, on the ground of protecting the requirements of public policy, in preventing disorder or crime, deportation of Mr. Z*" (p. 10 of *Examination of File*) the making of a deportation order was justified. It was stated that having weighed the competing interests of family and private rights, the balance lay in favour of the State's interests.

17. To the extent that the State rely on this decision as reflecting a prior consideration of the child's rights both under the Constitution and the ECHR/Charter, it should be noted that Article 42A of the Constitution is not mentioned, there is no separate treatment within the

examination of the child's rights (such as that seen in the most recent decision), there is no express finding as to the child's best interests and no record on the face of the decision that these interests were considered as a paramount or primary consideration. The decision is made in the absence of full information in relation to the child's educational position, as expressly stated in the *Examination of File* and no information had been put before the Respondent with regard to the child's special needs.

18. Judicial review proceedings entitled *A.Z. v. Minister for Justice and Equality* (Record No. 2017/969 JR) issued challenging the 2017 deportation order. On the 13th of November, 2017, while these proceedings were extant, the First Named Applicant sent the first of a series of threatening and abusive emails to the Department.

19. By agreement the 2017 deportation order was revoked on the 26th of January, 2018. following the settlement of judicial review proceedings. It is unclear what the grounds for challenge in these proceedings were or on what basis they were compromised. No material in relation to these earlier proceedings has been placed before the Court.

20. On the 21st of February, 2018, the First Named Applicant was sent a fresh proposal to deport and was invited to submit additional representations.

21. Extensive submissions were submitted by a different solicitors' firm on behalf of the Applicants as to why a deportation order should not be made by letter dated the 10th of April, 2018. In these further submissions, reliance was placed on the intervening decision of the Court of Appeal in *Gorry v. Minister for Justice* (delivered on 27th of October, 2017) where both rights under Article 41 of the Constitution and Article 8 of the ECHR were considered. In addressing the rights of the Irish citizen child, reference was on this occasion made to Article 42A of the Constitution in the submissions delivered on behalf of the Applicants and express reliance was placed on *P.H. v. Child and Family Agency* [2016] IEHC 106, *Jeunesse v. Netherlands* App No 12738/10 (ECtHR, 3 October 2014) and *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795. It was contended that it would be disproportionate to deport the First Named Applicant. Again, in this instance, no reference was made to the Third Named Applicant's diagnosis of autism but in her letter in support of the submission dated the 18th of April, 2018, the Second Named Applicant states:

"He is currently in third class and is very settled there, as they provide all the services that he needs. From the age of four he had been under the HSE's "Early Intervention Team" for speech and language therapy and at present is under their "Speech and Language Therapy Disability Services for children aged 6-18" and their "Occupational Therapy" team. Also he has to date an SNA allocated to him which has had a huge impact on his social and psychological needs. To relocate to Albania would not be feasible as can't guarantee that [name of child] would continue to receive all these services that he so desperately needs as I have never been there and [name of father] has not been there since [name of child] was born….to deport [name of father] now would have a huge effect on [name of child's] relationship with his father and on our whole family. It would mean that he would only have a long distance relationship with him and little or no physical contact as I have full time employment here and [name of child] has services that took a long time to put in place."

22. The First Named Applicant sent a further abusive email on the 23rd of February, 2018 to the Respondent as a way of responding to the proposal to deport letter. Indeed, the deponent on behalf of the Respondent confirms that the First Named Applicant continued to send the same abusive and threatening emails to the Respondent circa 215 times. On the 3rd of October, 2018, the Respondent wrote to the First Named Applicant to request that all correspondence be factual, professional and courteous and the First Named Applicant was requested not to use threatening or inappropriate language in future communication.

23. On the 30th of May, 2019, Mr. Boyle on behalf of the Respondent, wrote again to the First Named Applicant noting that abusive emails were being sent, the most recent being the 28th of March, 2019. The First Named Applicant was advised that the submission of such emails would be factored into the consideration of his case.

24. On the 10th of June, 2019, the First Named Applicant replied stating that he was standing over his previous emails and he continued to use threatening and abusive language in further correspondence to the Respondent.

25. Following a consideration of the First Named Applicant's file, a further deportation order was made in relation to him on the 26th of June, 2019 (the "2019 deportation order"). This deportation order is extant and remains valid. Enclosed with same was a further detailed consideration documentation referred to as an *Examination of File.* It considered, *inter alia*,

the family and private life rights of the Applicants as a family and personally under Articles 40, 41 and 42 of the Irish Constitution and under Article 8 ECHR. It acknowledged that the Third Named Applicant has rights under Article 20 Treaty on the Functioning of the European Union [hereinafter the "TFEU"] and Article 7 and 24(2) of the Charter. Of note, the *Examination of File* document recited that consideration was given "*in the best interests of the child, to all specific circumstances arising*" and the involvement of the First Named Applicant in the Third Named Applicant's life is set out. Although no express finding is made as to what the Third Named Applicant's best interests are in terms of contact with his father, it was recognised in the *Examination of File* that:

> "*any further absence of Mr. Z from his son's life will inevitably lead to upheaval for the child, this is a factor which must be considered in the wider context of the threat Mr. Z may pose to society and the consequent right of the State to prevent disorder or crime*".

26. There is an apparent acknowledgement in the examination document that if the First Named Applicant is deported, it would be extremely difficult for family life to be established outside the State. Despite this extreme difficulty it was concluded that the nature and severity of the conviction and sentence and a propensity on his part towards extremely serious, violent conduct together with more recent inappropriate email communication demonstrated a pattern of behaviour characterised by disproportionate anger and unacceptable aggression coupled with an apparent inability to fully grasp the potentially serious consequences of his actions all supported the conclusion that, when the competing interests were weighed, the State's interests in protecting the public from disorder or crime and to protect the rights and freedoms of others outweighed those of the Applicants.

27. Despite the fact that the decision of the Supreme Court in *Oguekwe v. Minister for Justice* [2008] IESC 25 is cited in the *Examination of File* as establishing that the Minister should deal expressly with the rights of the child in any decision (*Oguekwe* was not cited in the *Examination of File* leading to the making of the 2017 deportation order) and notwithstanding that Article 42A had been relied upon in written submissions, as before, the *Examination of File* document provided in respect of the 2019 deportation order does not record any consideration of Article 42A of the Constitution in recommending a deportation order in respect of the First Named Applicant. The absence of a reference to Article 42A is made starker by the fact that it is identified that the rights of the child arise for consideration under Article 40

of the Constitution and Article 8 of the ECHR and it is also noted that consideration of the best interests of the child arises under Article 24(2) of the Charter.

28. Although the correspondence from the Second Named Applicant setting out the Third Named Applicant has special needs and receives additional services consequent upon those needs is reproduced in the *Examination of File* through the quotation of large extracts from the letter, no further reference is made to the child's special needs and the implications of same for the ability of the family to relocate to avoid the rupture of the family unit and these factors are not reflected in the reasoning in relation to the proportionality of interference with the Applicants which reasoning largely replicates the reasoning relied upon in the *Examination of File* conducted in respect of the 2017 deportation. Similarly, reference is made to the best interests of the child in almost identical terms to that seen in the 2017 *Examination of File* but, as before, no reference is made to the primacy or paramountcy of the child's interests in conducting the proportionality assessment.

29. By letter dated the 26th of July, 2019, the Applicants' current solicitors, MS Solicitors, indicated that they were applying to revoke the 2019 deportation order pursuant to s. 3(11) of the 1999 Act. The Applicants submitted representations in relation to Article 8 ECHR and to Article 41 of the Constitution, and documentation was submitted in support. Again, on this occasion, no reference was made in the submissions advanced on behalf of the Applicants to Article 42A of the Constitution.

30. On the 29th of July, 2019, MS Solicitors were also instructed to apply for a permission to remain on the basis of the parentage of an Irish Citizen Child for a Non-EEA parent (referred to as a *Zambrano* application). There is no evidence in the material before me that any reference was made to the Third Named Applicant's diagnosis of autism or hearing loss in support of this application but the Respondent had already been alerted to the fact that the Third Named Applicant had special needs and was receiving supports from the HSE disability services and had an assigned SNA in school through submissions made to the Respondent in advance of the making of the deportation order.

31. The *Zambrano* application was refused under cover of letter dated the 23rd of September, 2019. The application under s. 3(11) of the Act was refused under cover of letter dated the 2nd of October, 2019 and the validity of the 2019 Deportation Order was affirmed. The cover letter which enclosed the s. 3(11) decision notified the First Named Applicant that

he was to attend at the GNIB offices on the 8th of October, 2019 in order to make arrangements for his removal from the State.

32. On the 28th of November, 2019, the First Named Applicant was arrested and brought to Cloverhill prison for the purpose of his removal from the State. He was detained under s. 5 of the Immigration Act, 1999.

33. On the 29th of November, 2019, the Applicants filed judicial review proceedings. The Applicants sought an extension of time to challenge the validity of the Deportation Order dated the 26th of June, 2019; to challenge the s. 3(11) decision dated the 2nd of October, 2019; to challenge the decision to refuse the Applicant a permission based on the *Zambrano* decision, and an injunction. The leave application and the injunction application were put on notice to the Respondent.

34. Following the *inter partes* hearing on the 3rd of December, 2019, Humphreys J. granted leave to seek the pleaded reliefs, extended the time and also granted a stay on removal of the First Named Applicant from the jurisdiction pending the determination of the proceedings. The matter was transferred into the *Gorry* holding list pending the Supreme Court decision in the appeal in that case. On the 5th of December, 2019, the First Named Applicant was released on bail.

35. In December, 2020, the judicial review proceedings in respect of the 2019 deportation order were compromised and the Respondent agreed to carry out a fresh consideration of the s. 3(11) application. As a term of settlement, it appears that it was agreed that "*a fresh consideration of the First Applicant's case*" would be made within twenty weeks of receipt of any additional representations made by the Applicants.

36. Further and extensive submissions were made by the Applicants under cover of letters dated the 2nd, 24th and 29th of March, 2021. In representations made it was submitted, *inter alia,* that:

> *"It is not submitted that this is an easy case. Mr. Z has committed a serious offence and has made himself an unattractive applicant by subsequent intemperate emails. However, the aforementioned authorities and how they apply to the specific circumstances of Mr. Z's case do not support the legal deportation of Mr. Z. It is*

respectfully submitted that the risk posed by Mr. Z to the public order and the public's right to be protected from crime is not such that would outweigh the Z family's right to unity in Ireland. Failing to revoke the deportation order in this case, would be disproportionate and a breach of legal rights, including the rights under the Constitution and the ECHR, of the Irish Citizens and Mr Z. We ask the Minister to revoke the deportation order."

37. Although reliance was placed on the child's rights in these submissions, Article 42A of the Constitution was again not expressly identified or relied upon. In distinction with earlier applications, however, on this occasion the factual position regarding the Third Named Applicant's diagnosis of autism and new information in relation to hearing loss was more fully set out and supported by documentation from a psychologist, hearing loss specialists and his school. This new supporting material included a HSE report regarding the Third Named Applicant's Language and Social Skills dated the 20th of October, 2020, a letter from his Speech and Language Therapist dated the 11th of April, 2014, a Letter from Dublin Audiology dated the 3rd of March, 2020 confirming his hearing loss including the need to wear hearing aids and a Psychological Assessment/Report dated the 20th of February, 2013 confirming a diagnosis of autism. The Second Named Applicant explained, in a personal submission letter dated the 28th of February, 2021, that she placed an increased reliance on the First Named Applicant as primary care giver to the Third Named Applicant due to injuries she sustained in a car crash and the onset of difficulties with the Third Named Applicant's hearing over the previous twelve months. The Audiology Assessment Report submitted dated to February, 2021.

38. Under cover of letter dated the 13th of July, 2021, the First Named Applicant was issued with the s. 3(11) decision dated the 28th of June, 2021, affirming the 2019 Deportation Order. The *Examination of File* document considered separately the Applicants' rights under Article 41 of the Constitution, the rights of the Irish Citizen Child and the Applicants' rights under Article 8 of the ECHR and under Articles 7 and 24(2) of the Charter but it notably does not refer to Article 42A of the Constitution. Insofar as reference is made to the obligation to take into consideration the child's best interests, no reference is made to this as a "*primary*" or "*paramount*" consideration. The *Examination of File* document, recites under the heading "*Conclusion*":

> ***"****It is submitted that his deportation is not disproportionate as the State has an obligation to protect the public from disorder and crime and protect the rights and freedoms of others. It is therefore submitted that a decision to affirm the Deportation Order in respect of Mr. Z is not in breach of rights under Article 40, 41 and 42 of the Constitution, Article 8 ECHR or Article 7 of the Charter of Fundamental Rights"*

39. This is the decision the First Named Applicant seeks to impugn in this third set of judicial review proceedings. Article 42A of the Constitution is conspicuous by its absence in this decision or any of the earlier decisions and has never been mentioned by the Respondent in any of the several *Examination of File* documents. On this occasion, however, new information had been provided in relation to the Third Named Applicant with regard to a diagnosis of autism, a significant hearing loss issue requiring hearing aids and an increased dependency on his father for care needs because of a road traffic accident involving his mother and her heavy work commitments during the pandemic. The phrase "*best interests of the child*" appears twice in the latest *Examination of File*. Once in a statement referring to Article 24(2) of the Charter (at p. 10 of the *Examination of File*) but without identifying that Article 24(2) requires that the consideration be "*a primary*" one and once further in the actual consideration of the facts and circumstances of the case where it is stated:

> "*It is accepted that it is in the best interests of [name of child] to have the care and company of both of his parents. However, this has to be balanced against the overall public interest and the particular facts of the case*".

40. Again, no reference is made here or elsewhere in the *Examination of File* to the special weight which is required to be attached to a consideration of the best interests of the child. It is further suggested on behalf of the Applicants that there is some inconsistency in the reasoning advanced insofar as, on the one hand, it is accepted that that it would be "*extremely difficult for family life to be established outside the State"* but on the other hand, it is not accepted that there are "*any insurmountable obstacles to the establishment of such family life in Albania should the family choose to relocate there*".

41. A Statement of Grounds was filed on the 23rd of July, 2021 and leave to proceed by way of judicial review was granted (Burns J.) on the 28th of July, 2021. In the Statement of Grounds filed, grounds advanced include, *inter alia*:

"That the Respondent has failed to correctly recognise and/or identify and/or reasonably weigh the primacy of the rights of the Third Named Applicant as a child under national and European law and/or to consider his best interest;

That the deportation of the father would be such as to unlawfully infringe the child's rights to citizenship of the EU as the father is the primary care giver and the child is autistic;

That the Respondent has determined unreasonably that the First Named Applicant presents a genuine and/or present and/or sufficiently serious threat affecting a fundamental interest of society justifying his deportation;"

42. The primary difference between the judicial view proceedings compromised in early 2020 and the within proceedings, at least insofar as apparent from a review of the Statement of Grounds in both cases, is that in the previous proceedings a challenge was brought not only to the s. 3(11) refusal decision but leave was also granted to challenge the 2019 deportation order and the refusal of residency pursuant to the EU law rights of the child which decision had been communicated by way of letter dated the 23rd of September, 2019. Further, while the grounds of challenge advanced in the earlier judicial review were wide ranging it appears that they were directed in the first instance to a failure to consider the ratio in *Gorry v. Minister for Justice* and to have proper regard to the Constitution (non-specific) and Article 8 rights of the Applicants under the ECHR. It was also pleaded, however, that the Respondent had failed to recognise and/or identify the primacy of the rights of the Third Named Applicant as a child and failed to identify and consider his best interests, albeit that these grounds of challenge were directed to the 2019 deportation order rather than the decision to refuse the *Zambrano* application and the refusal to revoke the 2019 deportation order.

43. The primary ground of challenge directed to the s. 3(11) decision on the pleadings was the conclusion that no new issues had been raised, with particular regard to the child, and there had been a failure to correctly address the *Gorry* decision. It is recalled, however, that even at the late stage of the previous judicial review proceedings, no supporting information in relation

to the Third Named Applicant's diagnosis of autism or hearing loss had been submitted. Such additional information as had been provided related to the role of the First Named Applicant in his life as primary carer, bringing him to and from school and appointments and assisting with homework in circumstances where he has been assessed with special needs and was receiving disability and educational services in line with his needs.

ISSUES

44. From the submissions of the parties, the primary issues arising may be summarised as follows:

a) Does the compromise of previous proceedings issued by the Applicants preclude them from challenging the impugned decision?
b) Was the decision of the Respondent to refuse to revoke the deportation order against the First Named Applicant made in contravention of the Applicants' rights under national and/or European law? Specifically, whether the assessment by the Minister of the First Named Applicant's criminal convictions yielded a disproportionate conclusion; and secondly, whether insufficient weight was placed on the position of the First Named Applicant as the father and purported primary carer of the Third Named Applicant, an Irish citizen child; and thirdly, whether proper consideration was given to the First and Second Named Applicants' rights as a married couple and to each of the Applicant's rights as a member of a constitutional family under Article 41 of the Irish Constitution or under EU law.

DISCUSSION AND DECISION

Scope of Challenge and Collateral Attack

45. The Respondent pleads at para. 1 of the *Statement of Opposition* that the current proceedings largely constitute a collateral attack on the 2019 Deportation Order made in respect of the First Named Applicant on the 26th of June, 2019 and on the decision refusing to grant residence to the First Named Applicant based on his parentage of the Third Named Applicant made on the 23rd of September, 2019.

46. It is contended that the Applicants abandoned their challenges to those decisions in compromising their proceedings bearing the record number 2019/863 JR and as a result, those decisions remain extant and valid in law. Accordingly, it is submitted that they are not entitled to pursue grounds relating to the same findings and conclusions reached by the Respondent in the earlier decisions (*Nawaz v. Minister for Justice* [2013] 1 I.R. 142).

47. The Applicants reply that they did not abandon their challenges as they succeeded in having the first s. 3(11) decision quashed and the Respondent agreed to carry out a fresh consideration. The Respondent maintains, however, that in accepting that offer the Applicants abandoned their challenges to the validity of the 2019 Deportation Order and what the Applicants call the "*Zambrano decision*" as all of the claims were compromised on the basis of an agreement that the Minister would quash the first s. 3(11) decision only. The Respondent relies on the decision of Charleton J. held in *XX v Minister for Justice* [2019] IESC 59 at para. 30 where he stated:

> *"As each step was taken, the possibility of invoking judicial intervention presented itself. The availability of an appeal on fact is a different consideration. But where judicial review is declared the sole remedy and is bounded by particular time limits, then as each step is taken and a judicial review point presents, an applicant cannot proceed to any subsequent step, take issue with it and proceed to a collateral attack on an earlier decision. The implications of each step in the procedure are clear. As to the method and manner of seeking the intervention of the High Court, the legislation mandates only that specific decisions should be challenged as and when they arise."*

48. The Respondent relies on a substantial body of caselaw relating to the extent of the Respondent's obligations and the scope of judicial review and the Court's role in an application to revoke a deportation order/challenge to a decision under s. 3(11) of the 1999 Act. The general principles said to be identifiable in this caselaw were summarised by the Respondent as follows:

a) The circumstances in which a person can challenge the making of a deportation are necessarily limited, and the circumstances in which a refusal under s. 3(11) can be challenged is even more limited (*Kouaype v. Minister for Justice* [2005] IEHC 380 and *Cirpaci v. Minister for Justice, Equality and Law Reform* [2005] 4 I.R. 109).

b) The application to revoke must be based upon some new fact or information or some change of circumstance that is truly materially different which has come about since the deportation order was made and which, if established, would render the implementation of the deportation order unlawful. There must be, in the words of Clarke J. (para. 29) in *Kouyape v. Minister for Justice* [2005] IEHC 380 *"unusual, special, or changed circumstances"* (See also: *C.R.A. v. Minister for Justice* [2007] 3 IR 603 at [paras. 78 to 87]; *Irfan v. Minister for Justice* [2010] IEHC 422 (at paras. 7 and 8); *Smith v. Minister for Justice* [2013] IESC 4; *Kouaype*; *I (E A) & I (A A)v. Minister for Justice* [2009] IEHC 334 at para. 7; *P.O. v Minister for Justice and Equality* [2015] 3 I.R. 164; *IRM v Minister for Justice and Equality (No. 2)* [2016] IEHC 478).

c) There is an obligation on the Minister to consider the representations submitted by an applicant: *P.O. v Minister for Justice and Equality* [2015] 3 I.R. 164; *IRM v Minister for Justice and Equality (No. 2)* [2016] IEHC 478, Humphreys J. at para. 50).

d) The Minister is not obliged to embark on any new investigation or to engage in any debate with the applicant or even to provide any extensive statement of reasons for a refusal to revoke. Once it is clear to the Court that the Minister has considered the representations made to him and has otherwise exercised her power to decide under s. 3(11) in accordance with all applicable law, the Minister's decision is not amenable to judicial review by the Court (*I (E A) & I (A A)v. Minister for Justice, Equality and Law Reform* [2009] IEHC 334, Cooke J. at para. 9).

e) If what is asserted to be a significant and a materially new consideration was actually available to the applicant at the time of the previous application, 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 Respondent of the substantive merits of the case. It is also impermissible to drip-feed materials to the Minister that are available at an earlier date – *Smith v. Minister for Justice* [2013] IESC 4 at para. 5.6; *K.R.A. and B.M.A*

(A Minor) v. Minister for Justice and Equality [2016] IEHC 289, at paras. 55 & 58; *K.R.A. and B.M.A (A Minor) v. Minister for Justice and Equality* [2017] IECA 284; *J.A. (Pakistan) v. Minister for Justice* [2018] IEHC 343, Humphreys J. at para. 20; and *K.M. v. Minister for Justice and Equality* [2013] IEHC 566; *Mamyko v. Minister for Justice IM v Minister for Justice* [2003] IEHC 75.

49. The Respondent submits that it is of significance that at the time the deportation order was signed in June 2019, the Respondent carried out a full proportionality assessment and considered the rights of the Applicants for the purpose of the s. 3(6) of the 1999 Act decision. It is argued by the Respondent that the Applicants have not advanced any new facts or special circumstances that are truly materially different from those presented at the time the deportation order was made (*Kouyape v. Minister for Justice* [2005] IEHC 380).

50. The Applicants do not accept that the Respondent has correctly identified the role of the Court in judicial review proceedings concerning the Respondent's decision on a s. 3(11) application and counter the Respondent's submissions by relying on the decision of the Supreme Court in *Sivsivadze v Minister for Justice* [2016] 2 I.R. 403 to the effect that the Respondent must take account of all relevant factors, including any fundamental rights concerning the family and any right to family life of those directly affected by such an order in the consideration of a s. 3(11) application. In *Sivsivadze v. Minister for Justice and Equality* [2016] 2 I.R. 403 the Supreme Court (Murray J.) determined (para. 52):

"*The making of a decision to amend or revoke a deportation order by the Minister invariably arises on the application of the person the subject of the deportation order. In any event, the Minister, when the occasion arises for him to make a decision as to whether to amend or revoke such an order, is again bound to exercise his statutory power in a manner compatible with the Constitution. This means that he must take into account all relevant factors, including any fundamental rights concerning the family and any right to family life, where relevant, of those directly affected by such an order. As the learned President correctly pointed out in his judgment in the High Court in this case, s.3(11) is not to be confined to enabling the Minister to amend or revoke a deportation order only when there has been a change of circumstances arising between the time of 'the making of the deportation and the time of its implementation' (although*

any such change in circumstances would, of course, be relevant factors). Similarly, there is nothing in sub-section 11 of s.3 to suggest that the Minister is confined to making an amendment or revocation of an order under s.3 subsequent to deportation only when there has been a change of circumstances in the situation of the deportee or those affected by the order, such as members of his family. Whenever an application to revoke a deportation order is made the Minister acts having regard to all the pertinent circumstances of the case and, again, a change of circumstances (or the fact of no change of circumstances) may be relevant, but the important point is that the decision is made having regard to all the relevant circumstances as they are at that time. Whether a decision to make a deportation order (or not to revoke one) interferes with a person's fundamental rights depends on the circumstances of the case. More important, whether any such interference is proportionate or disproportionate must depend on the particular circumstances of the case. Thus, in making any such decision, the Minister must take into account such factors as the statute or the Constitution require him to take into account and his decision pursuant to s.3(11) may be the subject of judicial review, brought by those directly and adversely affected."

51. There is not an unbridgeable gap between the principles properly discernible in authorities relied upon by the Respondent and the Applicant's position as to the role of the Court in these judicial review proceedings albeit the position in the authorities is more nuanced in my view than the broad statements of principles urged on behalf of the Respondent in the terms in which they appeared in the Respondent's submissions suggest. It should be recalled that I am not being invited to quash the 2019 deportation order or the decision to refuse permission to reside. The relief sought in these proceedings is directed to the s. 3(11) refusal to revoke the deportation order decision. As Fennelly J. observed in *Cirpaci* (relied upon by the Respondent in their submissions), with regard to s. 3(11) (para. 26):

"On its face, this provision convers a broad discretion, to be exercised in accordance with general principles of law, interpreted in the light of the Constitution and in accordance with fair procedures. Otherwise, the respondent is at large".

52. In *Cirpaci*, the reason for refusing to revoke the deportation order on the s. 3(11) application was that the Irish citizen and her non-national deportee husband had not resided together for an appreciable period since their marriage outside the State. Although further

information was provided to the Respondent (principally in relation to family life in the State prior to the marriage and the non-national's deportation), none of the information showed the couple residing together since the marriage. Accordingly, the new information did not provide a basis for a changed decision still less a challenge to the decision in judicial review proceedings on rationality grounds. *Cirpaci* is therefore not, in my view, authority for the proposition that a s. 3(11) refusal to revoke decision is somehow beyond the scope of challenge by way of judicial review because the underlying deportation order remains extant and valid or is not the subject of challenge in itself.

53. Authorities such as *C.R.A.* and *Kouyape*, however, proceed on the undoubtedly correct basis that a refused asylum seeker in respect of whom a deportation order has been made starts from a fundamentally weaker position than someone bringing a challenge at an earlier stage because they have no right to be in the State such that their position in the State is weaker in law the further along the process towards effecting deportation they move. It might be observed that while this is true when it comes to a consideration of the First Named Applicant's position *vis-a-vis* the revocation application, this is less so with regard to the rights of the Irish citizen applicants whose rights have not been similarly attenuated. However, even in the case of the non-national failed asylum seeker who makes a late application for revocation of a deportation order such as occurred in *C.R.A*., the High Court (McMenamin J.) acknowledged that in considering such representations the Respondent must have regard to the nature of the matters set out at s. 3(a) to (h) which relate particularly as to whether there are personal or other factors, which notwithstanding the earlier refusal or residency or deportation order, might render it unduly harsh or inhuman to proceed with the deportation. A demonstrated failure therefore to consider those factors and to exercise the discretion on the basis of those factors with due regard to rights safeguarded be it under the Constitution, EC law or the ECHR would make the decision amenable to challenge by way of judicial review.

54. From the case-law cited, it is clear that in making a decision under s. 3(11), the Respondent must take into account such factors as the statute prescribes or the Constitution and the ECHR require her to take into account and her decision pursuant to s. 3(11) may be the subject of judicial review brought by those directly and adversely affected. While the s. 3(11) application does not permit of a collateral attack on the preceding deportation order, what is permitted is a review of the consideration given to revoking that order in light of changed circumstances or new information. In considering the position in the light of changed

circumstances or new information, the Respondent must afford due and proper consideration to the constitutional and ECHR rights of the Applicants and to their personal circumstances, insofar as they are known to her in the decision-making process under s. 3(11).

55. Having reviewed the various decisions made by the Respondent, it seems to me that the core complaints in this judicial review relate to the same merits-based arguments as made to and considered by the Respondent in the course of making the deportation order which it is now sought to revoke and with an important exception, the relevant considerations are not significantly changed. Insofar as the same core complaints are reiterated in these proceedings, I am satisfied that there is very little scope for intervention by this Court as they were fully considered at the time the deportation order was made and in refusing the residency application. Inevitably, however, the passage of time and factual developments during that time together with any clarification in the law such as effected by the Supreme Court's judgment in *Gorry*, require to be considered in the context of a fresh s. 3(11) analysis.

56. Further, where the Minister's decision is predicated on a proportionality assessment, as the decision in this case is, it is not possible to ring-fence matters already considered as being precluded from challenge in fresh judicial review proceedings of a further decision pursuant to s. 3(11) of the 2003 Act where the proportionality assessment entails assessing all facts – old and new – to determine whether the balance remains in favour of deporting the First Named Applicant. In other words, while a decision to deport taken in 2019 might have met the requirements of a proportionality assessment, by 2021 changed circumstances added to the existing equation may lead to a different outcome on a fresh proportionality assessment.

57. For these reasons I do not accept the Respondent's contention that a challenge to a fresh s. 3(11) decision constitutes an improper collateral attack on the 2019 deportation order which remains extant and can now be considered immune from challenge by reason of the compromise of earlier proceedings and the passage of time. The Court when considering the fresh decision taken under s. 3(11) can have regard to the matters considered in making a valid deportation order, but must also consider afresh such factors as the statute or the Constitution or the ECHR or EU law require to determine whether any interference with rights is permissible as proportionate having regard to competing interests in refusing to revoke the deportation order made.

58. Perhaps anticipating that this is the approach I would take, the Respondent contends that notwithstanding its' asserted position that these proceedings constitute an impermissible "*collateral attack*" on the deportation order, it is nonetheless apparent from the s. 3(11) decision that the Respondent did take account of all relevant factors and rights arising and weighed them against the relevant factors for the State before refusing the application to revoke.

59. Of particular concern to me in these proceedings is the fact that better information in relation to the position of the child was not advanced earlier. This is not explained. In *C.R.A.,* McMenamin J. emphasized that where different material is relied upon in a revocation application (such as occurred here with regard to the diagnosis and special needs of the child), that the test should include a further inquiry as to whether the material was capable of being presented earlier. While the Third Named Applicant's hearing has deteriorated and information as to the extent of his problems may not have been available at earlier stages in the process, there is no doubt that the First and Second Named Applicants were aware of a diagnosis of autism which according to the psychologist's report exhibited dates to 2013 but despite this, no reference was made to this report until the revocation application which led to the decision under challenge.

60. From the authorities cited by the Respondent, it is clear that the Courts have criticised as undesirable a type of "*drip feed*" of information where information which could have been communicated earlier is advanced late in the face of impending deportation. As stated by Clarke J. in *Smith*, permitting persons to make repeated applications for revocation of deportation orders in the absence of significant new materials or circumstances contributes to delays and has an adverse effect on the orderly implementation of the immigration system. While most of the cases relied upon by the Respondent in this regard related to failed asylum seekers, the public interest in the maintenance of an orderly immigration system remains a weighty consideration in other immigration contexts. In situating where this case lies *vis-a-vis* the authorities relied upon, it is noted that in the *C.R.A*. case the Applicants had in any event debarred themselves from an entitlement to seek leave for judicial review by reason of a want of good faith. In that case the new material relied upon was country of origin information which was not established to be current or material and was not such as to demonstrate that there had been "*unusual, special or changed circumstances relevant to the applicants.*"

61. As noted above, no explanation has been provided for the failure to refer to the Third Named Applicant's special needs at an earlier stage in the process. Reliance on material produced late on a s. 3(11) application which might have been submitted earlier could in itself, in appropriate circumstances, justify a court in refusing relief on discretionary grounds (and it appears to have been at least a contributory factor in the refusal of relief in the *C.R.A* case). Late submission of material can also undermine the credibility of that information or an applicant's position in reliance on it. Each case will turn on an assessment of its own facts and circumstances.

62. Given the nature of the information in this case, which relates to the medical and educational needs of a child and in circumstances where the child is dependent on others to effectively communicate his position and also where the passage of time gives greater clarity as regards the extent of his needs and his diagnosis, it seems to me that there exist factors which mean that it would not be an appropriate exercise of discretion to refuse relief in judicial review proceedings on discretionary grounds because some of the new information submitted could have been provided earlier. It seems to me to be also relevant that in this case the Respondent agreed, in compromise of earlier proceedings, to a fresh consideration of the s. 3(11) application. Accordingly, it would be wrong to see this as a repeat revocation application where the same grounds are advanced again without change. This distinguishes this case from cases such as *Smith* where a new application to revoke followed on from the refusal of a previous one but without challenging the previous one.

Whether the decision of the Minister to refuse to revoke the deportation order against the First Named Applicant was made in contravention of the Applicants' rights under national and/or European law?

63. The thrust of the Applicants' application to the Respondent was that as the rights of the Applicants are so heavily engaged, deportation must be seen as a last resort. They claim that it is both disproportionate and unnecessary to deport the First Named Applicant from the State, and that the Respondent's finding that the First Named Applicant has a propensity for violence is unfounded on the facts.

64. It is noted, as pointed out on behalf of the Respondent, that the claims made on foot of which leave was granted (by Burns J.) related to alleged breaches of constitutional rights and of Article 20 TFEU. While it is pleaded that the Respondent had failed in the application of a proportionality test to recognise, identify or reasonably weigh the primacy of the rights of the Third Named Applicant as a child under national and European law and/or to consider his best interests, no express plea is advanced in reliance on a failure to properly consider his rights under Article 42A of the Constitution and/or the rights of the family under Article 8 of the ECHR.

65. There is no doubt that the consideration exercise is complicated for the Respondent by the fact that the decision on a revocation application is considered through the prism of Irish constitutional law, EC law and law under ECHR, each of which have an evolving and largely converging jurisprudence but with some differences regarding the formulation of the legal tests to be applied. It is apparent from the terms of the impugned decision that the Respondent has grappled with the applicable legal principles in a coherent fashion by approaching the decision under different headings. The Respondent's approach could not properly be faulted in this regard provided the exercise is thorough and considers all relevant legal tests.

The Weight of Criminality as a Factor

66. The Applicants submitted that but for the criminal convictions, it is likely that the Respondent would not have initiated the deportation process against the First Named Applicant given his strong family ties to the State. The Applicants assert that where criminality is a factor in the decision to deport, the Respondent must give *"a careful and discriminating analysis of the factors"* to be considered, including any mitigating factors, the attitude of the offender and the period over which the offences were committed (*K (C)(A Minor) v. Minister for Justice* [2011] IEHC 150).

67. It is apparent to me from the terms of the s. 3(11) decision that the Respondent has considered the nature of the criminal convictions in a careful analysis of all the relevant circumstances. I am satisfied that the Respondent was entitled to regard the 2012 offence as grave and displaying a very serious and disproportionate level of violence and intemperate behaviour on the First Named Applicant's part. While it was asserted that the First Named

Applicant has *"shown himself to be rehabilitated",* the Respondent was nonetheless entitled to state at p. 14 of the impugned decision that:

> *"the Minister is greatly concerned that Mr Z had access to and discharged an illegally held firearm six times as a response to a disagreement he had with a work colleague."*

68. In respect of the barrage of abusive emails sent by the First Named Applicant to the Respondent, MS Solicitors on behalf of the Applicants had submitted that:

> *"at their height, they are determinative of Mr Z's feeling of frustration at his situation and an unacceptable response. However, they do not show criminality or present as an actual danger to the safety of anyone else. They could not justify life-long deportation and the destruction of the family unit."*

69. While it is accepted that they do not show criminality as contended on behalf of the Applicant, I am quite satisfied that the Respondent was entitled to take the view that they were relevant in a consideration of a propensity to violence and a consideration of questions of risk. The kind of language expressed by the First Named Applicant in his emails was noted in the decision as follows:

> *"…on 13th November 2017, statements such as, "…put it this way ye dirty finian famine c……s, if ye think that you are going to win with me think again I am ready to give ye leprechaun scumbags a run to the European court of justice and I am going to make ye the laughing stock that ye are. Now you can take and read this email tell the minister and commissioner that I don't give a f..k, and more importantly print out the email and if you want I send you this rubbish that you sent here back to you and shove it up your wide a…s."* (redacted)

70. The First Named Applicant sent a similarly toned email on the 23rd of February, 2018 and on the 10th of June, 2019, all three of which were sent repeatedly in or around 215 times. Hardly surprisingly, the language and persistence of the emails only served to reinforce the view of the Respondent that the First Named Applicant has a propensity to violence. As the Respondent observed:

> *"They appear to reflect a pattern of behaviour characterised by disproportionate anger*

and, in certain circumstances, entirely unacceptable aggression, coupled with an apparent inability to fully grasp the potentially serious consequences of his actions. The email addressed to the female civil servant, in particular, contains comments which go beyond inappropriate and contain sexually aggressive commentary, even if they do not amount to a threat as such." (p.15)

71. This seems to me to be a valid and lawful conclusion for the Respondent to draw.

72. In arriving at her decision, the Respondent had regard to the principles set down by the ECtHR in *Uner v. Netherlands* (2007) 45 EHRR 14, which the Applicants also rely upon in their legal submissions. There, the Court held that a State is entitled to consider, *inter alia*, the conduct of an individual since the commission of an offence. The Respondent's decision lists all the factors referred to in *Uner*, and the Respondent acknowledged that those factors must be weighed in a fair and just manner.

73. I reject the Applicant's submission that the email correspondence, while inappropriate, is not criminal and therefore not evidence of a propensity to violence. Further, contrary to what was submitted on behalf of the Applicants, I am satisfied that the Respondent was entitled to have regard to the 2003 offence together with the offending and very serious behaviour involving a firearm in 2012 which resulted in the imposition of a significant term of imprisonment and the aggressive and inappropriate email correspondence addressed to the Respondent's office. In my view, the Respondent was fully entitled to consider that these cumulative features evidence a serious propensity to violence. This view as to the existence of a propensity to violence could in turn be relied upon by the Respondent in deciding whether it was a proportionate exercise of discretion to deport the First Named Applicant. In light of the fact that the First Named Applicant was only released from prison just over four years ago (with the suspended years running up until July, 2021) and the pattern of highly aggressive, vulgar and vitriolic email correspondence in November, 2017 and February, 2018 as stood over by the First Named Applicant in his letter in June, 2019 when invited to reconsider his approach, I am satisfied that the Respondent was entitled to adopt the position that the First Named Applicant has demonstrated a lack of remorse and disregard for the laws of the State.

74. It is not necessary for the First Named Applicant to have been convicted of an offence for this behaviour to be relied upon as part of a pattern of violent and sometimes criminal

behaviour which could justify the making of a deportation order notwithstanding very significant interference with rights thereby effected. In reaching this conclusion, I am guided by the Supreme Court decision in *Sivsivadze* which is authority for the proposition that it is a matter for the Respondent to decide whether a consideration of those rights mean that a deportation order ought to be made or ought to be revoked. While any such decision adverse to the deportee or his or her family is subject to scrutiny as to its proportionality under the Constitution and ECHR having regard to the circumstances of any individual case, the Respondent is entitled to deport a person from the State as a consequence of having committed serious criminal offences. At para. 42, Murray J. held in *Sivsivadze* that:

> *"In any event, it has to be said that there is no prohibition, as such, in law or the Constitution which prevents the deportation of an alien as a consequence of having committed a serious criminal offence. It is a common practice among states and as regards the third relief sought by the appellants concerning compatibility with the European Convention on Human Rights, it is also evident from the European Court of Human Rights' case law that deportation as a sanction in such circumstances does not, as such, contravene the Convention."*

75. Reading the impugned decision in the round, I am satisfied that it would be wrong in law and on the basis of the Respondent's detailed reasoning for me to conclude that there had been a failure to properly assess the First and Second Named Applicant's rights. I am satisfied that the Respondent took due cognisance of the fact that the making of a deportation order would most likely result in the separation of the family unit as it is acknowledged in the Decision that the Second and Third Named Applicant would likely not move to Albania with the First Named Applicant or would encounter very significant difficulties in doing so. It seems to me that the Respondent clearly considered it likely that the family would be separated but concluded that this was not a disproportionate outcome having regard to the serious nature of the common good concerns presented by the First Named Applicant's behaviour. In this regard, it is relevant that there was little in terms of new information submitted in support of the application to revoke which might cause the Respondent to reconsider the decision to deport having regard to the respective positions of the First and Second Named Applicants. To the extent that the *Gorry* decision had not been finally determined when earlier decisions were made, this is addressed by a full and proper consideration of the protection of the family rights

under the Constitution and the ECHR in the light of Supreme Court decision in that case in arriving at the impugned decision.

76. Accordingly, as regards the First and Second Named Applicant's position, it is my view that the Applicants have not established a failure on the part of the Respondent to reconsider relevant factors in accordance with law or any disproportionality in the decision to refuse to revoke notwithstanding the consequences for their personal and family rights. To my mind, however, a different position prevails when it comes to the rights of the Irish citizen child, the Third Named Applicant and it is to this issue which I now turn.

Consideration of the Rights of the Child

77. Considerable new information was provided to the Minister with regard to the position of the Third Named Applicant in the remitted s. 3(11) application. To that extent the remitted application is not a mere reiteration of a case previously made and while no explanation has been given as to why this information was not provided before, the new information is clearly material to a consideration of the Third Named Applicant's rights as a child and his best interests and the weight to be attached to them in balancing competing interests. As summarised above, this new information included a HSE report regarding the Third Named Applicant's Language and Social Skills, a letter from his Speech and Language Therapist, a letter from Dublin Audiology confirming his hearing loss and a Psychological Assessment/Report confirming a diagnosis of autism. While it is of course entirely unsatisfactory that a diagnosis of autism dating to 2013 and other difficulties were not fully referred to at any time before the most recent s. 3(11) revocation application, this new information requires to be considered and weighed by the Respondent insofar as the child's individual rights (including constitutional rights) are concerned, particularly where this has not occurred before.

78. The rights of the child are protected under a number of different provisions of the Constitution. It is clear from the *Examination of File* document that the Respondent considered the rights of the child and a separate heading is provided in the *Examination of File* under which the rights of the child are addressed. As noted above, however, while it is expressly stated in the *Examination of File* that Articles 40, 41 and 42 of the Constitution were considered in arriving at this conclusion, there is no reference to Article 42A of the Constitution. In the

balancing exercise conducted the Respondent concluded that the interests of the State were weightier than the Applicants' rights (including the Third Named Applicant's) and went on to uphold the validity of the 2019 deportation order concluding that it was not disproportionate.

79. A question which must now arise however, is whether this exercise was conducted by the Respondent having properly identified the nature of the protection for the child's rights under the Constitution in view of the absence of any reference to Article 42A of the Constitution. A further issue arises as to whether there has been proper application of the best interests' principle in the weighing of the child's rights, be that under the Constitution or under EU law by reason of the failure to reflect an appreciation that these interests are according a special weight described variously as "*paramount*" (under the Constitution) and "*primary*" (in international instruments and jurisprudence of the ECHR). It bears some emphasis, I think, that in each of the three earlier *Examination of File* documents in evidence before the Court a similar approach was taken with no reference in any of the four documents (one in respect of the 2017 deportation order, one in respect of the 2019 deportation order and two in respect of two successive revocation applications) to Article 42A of the Constitution or to the paramountcy or primary weight to be accorded to the child's best interests in the conduct of a proportionality assessment.

80. As these proceedings are brought on the basis that there has been a failure to properly weigh the rights of the child and to have regard to and apply the best interests' principle in the decision to refuse to revoke the deportation order, albeit without express reliance on Article 42A, 42A1 or 42A4 in either the pleadings or the written submissions, it is necessary for me to consider whether the approach taken in the decision under review to the weighing of the rights and interests of the child reflects a proper application of Article 42A1 and/or 42A4.

Article 42A of the Constitution

81. Article 42A1 affirms children's natural and imprescriptible rights and the State's duty to uphold these rights. Article 42A4 further provides that in the resolution of all proceedings concerning access to any child, the best interests of the child shall be the "*paramoun*t"

consideration in respect of matters captured by that provision.

82. As Article 42A is the provision of the Constitution which was adopted to provide in clear terms for the individual rights of the child, one would expect to see reference made to it where a decision which will impact on a child's rights is under consideration, particularly where trouble has been taken, as in this case, to identify the constitutional provisions under consideration. It is frankly difficult to comprehend a decision which considers the constitutional rights of a child being taken with express reference to Articles 40, 41 and 42 and without reference to Article 42A of the Constitution.

83. That said, I accept that it may be possible to read the *Examination of File* as including a consideration of the child's rights under Article 42A without express reference being made to that provision where it is clear that the values enshrined in Article 42A are reflected in the Respondent's considerations. This is particularly so where it remains unclear to what extent Article 42A extends the protection for the child's rights beyond what was already provided for under Articles 40, 41 and 42.

Does Article 42A Enhance the Protection of the Rights of the Child in an Immigration Context?

84. In *In Re JB v. KB* [2019] 1 I.R. 270, O'Donnell J. set out his understanding of the background to the newly introduced Article 42A provision as follows (p. 278):

> *"Article 42A was introduced to the Constitution by the 31st Amendment… Article 42A.4.1° does not stand alone. It was introduced as part of an amendment designed to ensure that the Constitution was more clearly child centred. For that reason, for example, a new Article 42A.1 states explicitly that the State recognises and affirms the "natural and imprescriptible rights of all children and shall, as far as practicable, by its law protect and vindicate those rights". As we understand it, the amendment as a whole was directed towards a perceived approach of statutory and constitutional interpretation as a matter of history, which was considered to be*

unsatisfactory in principle, and to give rise to potentially unsatisfactory results. That is because it was considered that issues in relation to children could be skewed by the emphasis placed by the Constitution as originally enacted on the family as the natural and primary educator of children, and as a moral institution possessing rights anterior and superior to positive law, which might lead to cases being resolved in a way which subordinated the interests of the child to that of a family, and in effect, therefore, of parents… Article 42A can therefore be seen as a restating of the balance, acknowledging in explicit terms the individual rights of children… It is unnecessary at this stage to consider whether concerns as to the interpretation of the Constitution were justified, or to what extent any unhappy outcomes were the consequence of the text of the Constitution or the interpretation applied to it."

85. As O'Donnell J. further noted in *JB:*

"*The Constitution has, since 1937, affirmed the central importance of the Family. The Family is, however, a collective body made up of individuals who themselves have rights. One aspect of the Constitution position of the Family is the right of a family collectively to make decisions, for example, in relation to lifestyle or life choices, sometimes as a result of religious or ethical beliefs, and the State must respect those choices within certain constitutional limits. However, some decisions made within the Family are decisions by parents in relation to their children, and where it is possible that the parental decision, or the absence of a parental decision can be said to be damaging to the interests of the child. Article 42A.1 is an emphatic statement of the rights of the child, and that there is, therefore, a corresponding duty on parents to uphold and vindicate those rights."*

86. While O'Donnell J. refers to Article 42A as an "*emphatic*" statement of the rights of the child and the corresponding duty on parents to uphold and vindicate those rights, it is also clear that it places a corresponding duty on the State to uphold and vindicate those rights. The

Supreme Court had further opportunity to consider Article 42A in the matter of *In Re JJ* [2021] IESC 1. That case concerned an application to admit to wardship and substitute parental consent in respect of treatment orders sought by a hospital on the basis of alleged parental failing. O'Donnell J. on behalf of the Court stated (para. 126):

> *"It is necessary to place Article 42A.2.1° in the context of Article 42A generally. In particular, it is of some significance that Article 42A.1 provides explicitly that "the State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights". While, as already observed, the recognition that children had natural and imprescriptible rights was implicit in the provisions of the terms of Article 42.5, this is now made explicit. In doing so, the text crystallises and endorses a developing trend in the case law."*

87. He continued (at para. 131) as follows:

> *"In some aspects, most notably in the recognition of the rights of children contained in Article 42A.1, it can be said that the change was one of emphasis rather than substance, or making explicit what was implicit, but that does not mean that the change was without significance or importance for constitutional interpretation."*

88. On the basis of the foregoing, and while the changes with regard to the protection of the child's rights by reason of the constitutional amendment may be subtle nonetheless it appears that effective State protection for the rights of the child now requires a greater focus on the child as an individual, separate from the family unit as a whole and not subordinate as part of the family unit. The Supreme Court has found that Article 42A results in some recalibration of the protections which had already been available to children under the other provisions of the Constitution, not least Articles 40, 41 and 42 as referred to in the *Examination of File*.

89. It is incontrovertible that Article 42A4 gives an express constitutional status to the "*best interests of the child*" principle and the paramountcy of the child's rights in certain proceedings. What is less clear is whether the same best interests' principle is a constitutional imperative in proceedings leading to and arising from a refusal to revoke a deportation order which will have the likely effect of separating an Irish citizen child from his non-national father.

90. Article 42A has been considered in other decisions involving the deportation of a parent to which I was referred during the hearing. None of the cases identified concerned a citizen child remaining in the State where a custodial parent was being deported as appears likely (and is accepted by the Respondent as such) in this case, however, it is noted that the decision of Humphreys J. in *OOA v. Minister for Justice* [2016] is such a case.

91. The first immigration case to refer to Article 42A was *Dos Santos v. Minister for Justice* [2015] 2 I.L.R.M. 483; [2015] 3 I.R. 411. This was a case in which the decision under challenge concerned a deportation order made in respect of non-citizen children before the adoption of the Article 42A amendment. This notwithstanding the Court of Appeal considered whether the amendment would introduce a requirement to have regard to the best interests of the child as a paramount consideration. The Court of Appeal found that constitutional rights deriving from citizenship under Article 40.3 did not avail the children because they were not Irish citizens. In response to the argument that s. 3(6) of the Immigration Act, 1999 required a consideration of the best interests of the child as a paramount consideration having regard to the requirements of Convention on the Rights of the Child, the Court found that s. 3(6), when read in the context of the full section and scheme of the 1999 Act, could not be interpreted as requiring the Minister to consider a child's best interests as a "*primary consideration*" when determining whether or not to make a deportation order in respect of a child given that the Oireachtas had not enacted into domestic law the United Nations Convention on the Rights of the Child.

92. In her judgment on behalf of the Court in *Dos Santos* Finlay-Geoghegan J. addressed the proper interpretation of s. 3(6) and also the newly enacted Article 42A of the Constitution as follows (p. 418):

"The Oireachtas, in requiring in s.3(6) of the 1999 Act that the Minister have regard to the age of a person, intends inter alia that he identify whether the person is or is not a child, and if so of what age, and then consider the remaining relevant matters set out in s.3(6) to a child of that age. Amongst the other matters are: (b) duration in the State; (c) family circumstances; (d) connection with the State and (h) humanitarian considerations. Certain of these relate to the welfare or best interests of the child. However it is not permissible to interpret the words used in s.3(6) in the context of the full section and scheme of the 1999 Act as requiring the Minister, to consider the child's best interests as "a primary consideration" when determining whether or not to make a deportation order in respect of a child. There is nothing in the Act which warrants such an interpretation. To so interpret s.3(6) of the 1999 Act would be in breach of Art.29.6 and the power of the Oireachtas to determine the implementation in domestic law of the Convention on the Rights of the Child.

This interpretation is also reinforced by Art.42A of the Constitution which came into force only after the judgment of the trial judge. The type of decisions in respect of which laws must be enacted to provide that the best interests of the child shall be "the paramount consideration" pursuant to Art.42A.4.1° does not include a decision such as that to be taken by the Minister in relation to the deportation of a child."

93. In this passage the Court of Appeal is, of course, considering the best interest principle in Article 42A41 rather than the recalibrated rights of the child as a separate individual within a family unit asserted in Article 42A. On one reading, the decision in *Dos Santos* suggests that Article 42A41 (the best interests of the child as paramount consideration principle) simply has no application to decisions under s. 3 of the Immigration Act, 1999 in the immigration context seemingly because these are no proceedings concerning either the care and safety of a child or rights of adoption, guardianship, custody or access being the types of proceedings contemplated within the terms of Article 42A4. However, it seems to me that this would be to extend the ratio in that case beyond what the Court intended having regard to the issues under consideration in that case.

94. Unlike the position in *Dos Santos,* I am not required to consider a deportation order made in respect of a non-citizen child. In this case I am considering the lawfulness of an order

which it is accepted will interfere with a citizen child's rights of access and custody with his father where his non-national father is deported and the child remains. When viewed in that way, these proceedings concern rights of access and custody even though they are not child care proceedings. Of course, at the stage of the Respondent's considerations, an issue further arises as to whether the process may properly be considered to constitute "*proceedings*" within the meaning of Article 42A4.

95. The next case in which Article 42A was considered in an immigration context was *K.R.A v. Minister for Justice and Equality* [2019] 1 I.R. 567. In that case the Court of Appeal considered whether Article 42A required the Minister to consider the educational rights of a non-citizen child when deporting that child together with her parent. The Court of Appeal stated (Ryan P.) at para. 29:

> *"[29] Article 42.4 of the Constitution expresses the obligation of the State to provide for free primary education. The trial judge held that the right of a child to such education is one of the natural and imprescriptible rights to be enjoyed under Articles 40.3, 41, 42 and 42A. The last-mentioned provision is not specific to education or to immigration but applies generally in respect of rights and children. It is not that it does not apply to those areas but rather that it is not particular to them. It is also clear that the new Article is not restricted to citizen children.*
>
> *[30] The trial judge was firm in his view that children residing in the State are entitled to avail themselves of the right to education specified in Article 42.4. He found it difficult to see how Article 42A made any material difference to that express provision. However, accepting that, the second applicant had a constitutional right to primary education that was not and could not be absolute. Humphreys J. cited Saunders v. Mid-Western Health Board [1989] I.L.R.M. 229, Sinnott v. Minister for Education [2001] 2 I.R. 545 and Oguekwe v. Minister for Justice [2008] IESC 25, [2008] 3 I.R. 795.*
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> *[31] The judge dissented from the prediction made obiter in C.O.O. v. Minister for Justice and Equality [2015] IEHC 139, (Unreported, High Court, Eagar J., 4 March 2015) by Eagar J. that the situation of immigrant children claimants would change remarkably for the better if Article 42A became law. It seems that the judge in that case was referring to the best interests of the child test that is specified in the new Article*

for certain decisions which do not include immigration, a point that is emphasised by this court in Dos Santos v. Minister for Justice [2015] IECA 210, [2015] 3 I.R. 411. These sympathetic observations in anticipation of the enactment of a measure that had no relevance to the case under discussion do not amount to, nor I think were they ever intended to be, a legal interpretation of the impact of Article 42A in a particular future case. It is understandable of course why the applicants should use them to support their contentions. I would respectfully adopt the views of Humphreys J. on this question.

[32] In circumstances where there is a specific constitutional right dealing with the child's entitlement or the entitlement of children generally, it is not a reasonable inference that this general provision of protection of rights should be considered to have altered the existing obligations of the State. But let us assume that Article 42A did impose some extra obligation. The question arises as to what is the nature of the obligation. It might be argued that Article 42.4 is limited to citizen children or to children lawfully present in the State. If that were the case, an argument could be made under the new provision that it would be unlawful to continue the exclusion of children not lawfully present. But how can the new provision be construed as giving entitlement to a child to live in the State simply for the purpose of education when he or she is not otherwise permitted to be here? There is not a freestanding right provided by the Constitution to all children wherever located to be educated in Ireland if they can once come to reside here.

[33] The real question is not whether the second applicant is entitled to free primary education in the State while she is living here, but whether she is entitled to live here in order to avail herself of free primary education. The answer is that she is not.

[34] In my view, the situation is clear. The trial judge was correct to hold that Article 42A does not amount to a bar to the deportation of a child who is undergoing primary education in the State. The new article does not give support to the claim made by the second applicant and it does not actually make any material difference to her education rights. While she is undoubtedly entitled to avail herself of the right to education while she is living here, that does not mean that she has a right to live here in order to avail herself of education.

[35] Ultimately, the question is whether the educational rights that the second applicant is entitled to enjoy in the State represent a barrier to deportation. I agree

with the trial judge that they cannot do so. A contrary view would make the State's immigration policy impossible to implement. Any child who happened to be in the State whether legally or illegally would have the entitlement to have individual evaluation of his or her claim to remain here. Secondly, the respondent would have to measure the educational opportunities in the destination country against Irish provision. This would be irrespective of how the child came to be in Ireland. In the instant case, it would also mean that the unlawful course adopted by the first applicant redounded not only to the very great advantage of the second applicant but also by extension to the first applicant."

96. While clearly an authority to the effect that Article 42A does not impede the deportation of a non-citizen child who has a right to education in the State when resident in the State (already protected by express constitutional provision), the *KRA* decision appears to have limited application to the facts of this case. In this case there is no proposal to deport a child in a manner which may interfere with rights the child enjoys in the State. It is the deportation of the child's father while the child remains in the State which gives rise to the need for a consideration of the child's rights and best interests with regard to custody and access to his father. That said, the decision in *KRA* illustrates the question as to what difference the Article 42A amendment made to the substance of the child's rights as already protected under the Constitution and reflects that in the education context, where a specific right already existed, there is no real difference. This differs from the situation, however, where the child's rights are not already expressly protected. Accordingly, while the child's personal rights were already protected under Articles 40.3, 41 and 42 of the Constitution, the Supreme Court has ruled in *JB* and again in *In Re JJ*, both referred to above, that there is a difference in terms of the recalibration of the child's rights as an individual, separate from the family unit.

97. In the *OOA v. Minister for Justice and Equality* [2016] IEHC 468 Humphreys J. was required to consider the position of an Irish citizen child whose non-national father enjoyed limited access rights on foot of a District Court order. The non-national father was the subject of a deportation order which the Minister had refused to revoke. Under the heading "*Did the Minister fail to treat the best interests of the child as a primary consideration?",* Humphreys J. referred to the submission on behalf of the applicants in that case in reliance on Article 8 of the ECHR that the Minister is required to treat the best interests of a child as a primary consideration and commented that as is usual in cases of this kind, it was emphasised

in the case made that the child was ' *innocent of the transgressions of the father*' before adding (para. 30):

> *"this boilerplate truism is simply not relevant. Indeed at best it is a piece of rhetoric rather than a legal test. To contend that a child must continue to enjoy the society of a father (even on such a limited basis as ordered by the District Court here) irrespective of the father's legal status is logically equivalent to conferring an immunity from deportation on a person who manages to produce a child who is entitled to reside in the State. No rational immigration system could survive a rule with such perverse incentives or such a gaping hole at its core. It is one thing to say that the deportation of the first named applicant will be unfortunate for his child. It is quite another to say that it is unlawful. To make the latter finding simply substitutes the court's view of the appropriate balancing exercise for that of the Minister. I go back to the question: who is running the immigration system, the Minister or the courts?*
>
> *..... The best interests of a child are presumptively to be found in facilitating him or her in enjoying the society of both parents. Indeed, in the absence of factors to the contrary, best interests would also presumptively militate in favour of normal and reasonable access to grandparents, relatives, and persons, particularly those in loco parentis, with whom the child has developed a positive relationship.*
>
> *However, the essence of the Minister's decision in the present case was not that, all other things being equal, it was better for the child to have his father deported. Such a finding would not be compatible with the fact that there is in existence an order for access from the District Court (see A.O. (No. 3)).*
>
> *The essence of the decision was that such family rights as the applicants enjoyed were outweighed by the importance of giving effect to the immigration control system in this case (see Oguekwe v. Minister for Justice, Equality and Law Reform [2008] 3 I.R. 795 per Denham J. at 817 (para. 65); B.S. v. Minister for Justice, Equality and Law Reform [2011] IEHC 417 (Unreported, High Court, Clark J., 13th October, 2011) at paras. 25 to 28; and E.A. v. Minister for Justice and Equality [2012] IEHC 371 (Unreported, High Court, Hogan J., 7th September, 2012)).*
>
> *That is a matter for the judgment of the Minister. The court can only intervene if the Minister's decision is clearly unlawful. In this case it is not."*

98. These cases in the immigration context now need to be read in the light of the more recent Supreme Court decisions in *JB* and *In Re JJ* referred to above. I agree with Humphreys J. that neither the child's rights nor a finding as to the child's best interests can trump all else. I further agree that the balancing of interests is a matter for the judgment of the Respondent and that the court can only intervene if the decision is unlawful. However, the case made here is not that a child must continue to enjoy the society of a father irrespective of the father's legal status. Nor is it in this case contended that there is an immunity from deportation of a person who "*manages to produce a child who is entitled to reside in the State*" in the terms described by Humphreys J in *OOA*. Rather, what is contended is that the child's individual rights require to be identified and weighed, separate from the rights of the family as a whole. I consider that this flows as a necessary consequence of the recalibration effected by Article 42A as recognised in the more recent Supreme Court decisions in *JB* and *In Re JJ* which I understand to require a consideration of the child's rights from the separate, distinct and individual perspective of the child rather than the child as a member of the family. In turn, those rights, as properly identified, require to be given a particular weight on a proper application of the best interest principle (a question I return to below). However, in this context, I suggest that a reference to the child being innocent of the transgressions of the father is not "*mere rhetoric*" if what is understood by it is that the force or weight of the child's individual rights are not diluted by the transgressions of the father under Article 42A, in the same way as the rights of the child as a member of the family as a whole and otherwise protected under the Constitution arguably are.

99. I further agree with Humphreys J. in *OOA* that it is no part of my function to substitute my views relating to the requirement to protect the child's best interests. However, on the basis of the authorities cited above, I am satisfied that a recalibration of the rights of the child resulted from the Article 42A amendment to the Constitution and accordingly, the case-law on the rights of the child in the immigration context needs to be viewed in this light. I am charged with ensuring that rights, including constitutional rights, are respected in the Respondent's decision-making process through the identification and application of the appropriate legal test. The issue which I am concerned with here is not whether I consider it disproportionate to deport the First Named Applicant having regard to the impact on the rights and interests of his son which would likely result but rather whether the correct test was identified and applied by the Respondent when embarking upon an exercise in balancing competing interests having regard to the particular protection of the child's rights and interests in Irish law which includes under Article 42A.

100. I am satisfied that the rights of an Irish citizen child under Article 42A1 require to be considered when deciding whether to deport his non-national father with the likely effect that the child will be separated from the father. I have considered whether, I even though the Third Named Applicant's rights under Article 42A1 were not mentioned, I can nonetheless be satisfied that the Respondent has properly considered the child's interests in the decision to refuse to revoke noting what was said by O'Donnell J. in *In Re JJ* to the effect that the changes may be more of emphasis than of substance. Here, I again rely on Humphreys J. in *OOA* where he continued at para. 38 of his judgment:

> *"One could legitimately quibble with the wording of the decision insofar as some of the foregoing is not made clear. But the Minister's analysis is not to be reduced to a box-ticking exercise whereby a particular formula must be used. Reading the decision in the round, it is clear that the child's interests were considered, and held to be outweighed by the requirements of the immigration system. That approach was reasonably open to the Minister. A finding that best interests can be outweighed is compatible with a finding that they are a primary consideration, because the latter does not preclude the former."*

101. Turning then to what was said in the s. 3(11) *Examination of File* to assess whether the rights of the child were properly considered, it is immediately clear that the *Examination of File* acknowledged that the then thirteen-year-old Third Named Applicant had social and educational needs due to a diagnosis of autism. It is acknowledged that by reason of this diagnosis he receives supports by way of resource teaching hours and further assessment and occupational therapy. It is further acknowledged that he requires a hearing aid. It is acknowledged that the First Named Applicant is his primary carer as the Second Named Applicant works full-time outside the home and it is normally the First Named Applicant who brings and collects the Third Named Applicant from school. It is claimed on behalf of the Respondent that at the time the deportation order was signed in June, 2019, the Respondent carried out a full proportionality assessment and considered the rights and best interests of the Third Named Applicant for the purpose of the s. 3(6) of the 1999 Act consideration. I observe in this regard that at that time the Respondent did not have material information concerning the Third Named Applicant's particular needs. From pages 9 to 12 of the impugned decision, the position of the Irish citizen child possessing rights under the Constitution is identified and

considered however, as noted above, only Articles 40, 41 and 42 are referred to. It is also acknowledged that the Third Named Applicant enjoys rights under Article 20 TFEU and Article 7 of the Charter of Fundamental Rights ["Charter"] in conjunction with a consideration of the child's best interests under Article 24(2) of the Charter. The decision then goes on to note that these rights are not absolute and must be considered in the context of the factual matrix of the case, alongside a consideration of the State's right to control the entry, presence and exit of foreign nationals etc. It is then acknowledged that *"[t]he Minister must weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision."*

102. Further, the Respondent referred in the *Examination of File* to *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795. In that case the Supreme Court affirmed the personal rights of an Irish citizen child, within Article 40.3.1 of the Constitution, which the Minister was obliged to have regard to identified by the learned High Court judge as follows (p. 810):

> *"1. The right to live in the State. 2. The right to be reared and educated with due regard to his/her welfare including a right 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 parents are married to each other the rights which as an individual, the child derives from being a member of a family within the meaning of Article 41."*

103. Denham J. stated (p. 815):

> *"I would affirm this non-exhaustive list of rights. However, the rights are not absolute, they have to be weighed and balanced in all the circumstances of the case."*

104. In *Oguekwe,* Denham J. set out the factors which required to be considered when deciding whether to deport a parent of a minor Irish child, which include the requirement to identify a substantial reason that requires the deportation of a foreign national parent of an Irish born child. However, the decision in *Oguekwe* pre-dated the 2015 constitutional amendment which added Article 42A to the Constitution so that a reference to that decision without also acknowledging the particular protection provided under Article 42A Constitution and considering the said special or particular protection is not in itself, in my view, sufficient to

demonstrate a proper consideration of the rights of the child.

105. I consider that by reason of the recalibration effected by Article 42A1 the Respondent should approach the question of the proportionality of interference with the child's rights on the basis that the child bears no responsibility for the father's wrongs and the proportionality of the decision must therefore be assessed by weighing the individual child's rights against the identified interests of the State without in anyway attenuating the child's rights because of the culpability of his father. I stress that this does not mean that the child's rights will trump the interests of the State. This will be a matter for the Respondent to weigh. However, a lawful balancing exercise can only occur through a proper identification of the child's rights in the first instance. From my reading of the decision, I am not satisfied the child's rights in this case were considered under Article 42A1 the Constitution. Indeed, there is nothing to suggest that the Respondent was aware that Article 42A had any relevance to the decision on the revocation application at all. On the facts and circumstances of this case and in view of the terms in which the *Examination of File* are recorded, I am not satisfied that the Respondent had due regard to the individual rights of the child protected under Article 42A1.

Child's Interests a Paramount or Primary Consideration

106. In the *OOA* case, the learned trial Judge, found that the best interests of the child required to be considered as a paramount consideration under Article 8 jurisprudence rather than under the Constitution. Thus, Humphreys J. stated (at para. 37):

> *"The situation seems to me to be that the best interests of the child are a primary consideration, although not necessarily decisive, not by virtue of Art. 42A.4 of the Constitution (which does not apply) but by reason of the Strasbourg jurisprudence on art. 8. Those best interests clearly militate in favour of the father's continued presence in the State. However the Minister has in substance decided that those interests are outweighed by the importance of the integrity and consistency of the asylum and immigration system. That balancing exercise has not been shown to be unlawful."*

107. Similarly, in *C.M. v. Minister for Justice* [2018] IEHC 217, Humphreys J. concluded that Article 42A4 did not apply in a case concerning the deportation of unsettled migrants in the following terms (para. 14):

"Best interests pursuant to Article 42A.4 of the Constitution do not apply (see per Ryan P. in K.R.A. and B.M.A. v. Minister for Justice and Equality [2017] IECA 284 (Unreported, Court of Appeal, 27th October, 2017)). Best interests can however be imported via art. 8 of the ECHR as applied by the European Convention on Human Rights Act 2003; but as already indicated deportation of unsettled migrants only breaches art. 8 in exceptional circumstances: see P.O., per MacMenamin J. at para. 26, per Charleton J. at para. 35, P.S.M. v. Minister for Justice and Equality [2016] IEHC 474 (Unreported, High Court, 29th July, 2016), C.I. v. Minister for Justice and Equality [2015] IECA 192 [2015] 3 I.R. 385. As I said in O.O.A. v. *Minister for Justice and Equality [2016] IEHC 468 (Unreported, High Court, 29th July, 2016) para. 37 and Wang v. Minister for Justice and Equality [2017] IEHC 652 [2017] 10 JIC 0608 (Unreported, High Court, 6th October, 2017) para. 22 such best interests can be outweighed by other factors*

108. It is noted, however, that in *K.R.A*., Ryan P. was not considering the best interest principle at all and Article 42A4 was not mentioned in the decision. The decision in that case was addressed to the extent to which the right to remain in the State to receive education when otherwise unlawfully in the State. Accordingly, *K.R.A*. is not authority for the proposition that the best interest principle in Article 42A4 has no application, as the Court of Appeal did not consider that question and its ratio is confined to a consideration of the educational rights of the child (in that case a non-citizen child).

109. I am not sure how these decisions fall to be reconciled with the earlier decision of Denham C.J. on behalf of the Supreme Court in *Ogueke* or the later decision of O'Donnell J. on behalf of the Supreme Court in *In Re JJ* [2021] IESC 1. Afterall, in *Ogueke,* Denham C.J. affirmed the analysis of the High Court in that case that the protection of the constitutional rights of the child under Article 40.3 of the Constitution encompassed a best interest test ever before the enactment of Article 42A4 stating (at para. 25):

"It is difficult to state in the abstract in clear terms the nature of the consideration which must be given by [the Minister], to the facts relevant to the rights of the citizen child to live in the state and to be educated and reared with due regard for its welfare and have its welfare, including what is in its best interest, taken into account in the decision

making. It will always depend to some extent upon the factual circumstances of the citizen child and his parent or parents in the State."

110. Similarly, more recently in *In Re JJ*, the Supreme Court observed (para. 142):

"It was also argued that the provisions of Article 42A.4.1° had not been brought into effect, at least insofar as the type of decision in issue in this case was concerned; that is, where it is said that a decision in relation to medical treatment prejudicially affects the welfare of a child. That appears to be correct. However, it is not clear what follows from this. If the court has a jurisdiction to supply the place of parents when the requirements of Article 42A.2.1° are present and the decision of the parents is found to prejudicially affect safety or welfare, then the court must make the decision in place of the parents. That decision must be compatible with the Constitution and the values it espouses, and Article 42A.4.1° is a part of that constitutional value structure. In any event, it is difficult to see how the court could reach its decision other than in the best interests of the child. Accordingly, we consider that the objections in relation to procedure, or the absence of legislation, are either ill-founded or do not give rise to a fundamental objection, and the court must accordingly address the central issue here in this case."

111. In identifying a best interest test in *Ogueke*, the Supreme Court does not refer to it as weighing as a primary or paramount consideration. It is clear from the decision in *In Re JJ*, however, that the paramountcy or primacy of the best interests of the child enshrined in Article 42A.4.1° is now a part of "*the constitutional value structure*".

112. It is not clear from the judgment in the *OOA* case why it was concluded that Article 42A4 did not apply to require consideration of the child's rights as a primary or paramount consideration. It may be because at first reading a view might be taken that Article 42A4 only applies to child-care, adoption, guardianship or to custody and access proceedings which clearly immigration proceedings are not or it may be because there is no statutory requirement introduced to give effect to a requirement to weigh the best interests of the child as a primary consideration specifically in the immigration context. For whatever reason, the case appears to have been argued on the basis of Article 8 considerations alone. It seems to me, however, that there is certainly a strong case to be made that the primacy of the best interest consideration

is constitutionally rooted, separate and distinct from the requirements of the ECHR and requires to be considered as such in the decision-making process, albeit in circumstances where Article 42A4 does not have strict application. This seems to follow from the decision of the Supreme Court in *In Re JJ*.

113. Where immigration proceedings concern an order which impacts on custody and access, such as in this case, then as a matter of Irish constitutional law the best interest of the child require to be weighed as a paramount or primary concern. The is particularly so where the likely effect of a deportation order is the separation of the family unit and considerations are different where children are being deported together with their parents as proposed in the *K.R.A* case because the order does not then impact on custody and access.

114. A separate issue arises in relation to what constitutes "proceedings" for the purpose of Article 42A4 and this may also lie at the heart of the position taken in *OOA* to the effect that Article 42A4 did not apply to immigration proceedings. It might potentially be contended that the paramountcy of the best interest principle is one which the Court must apply but not the Respondent if "*proceedings*" is limited to legal proceedings before a court. If *Oguekwe* and *In Re JJ* are authorities for the proposition that the paramountcy of the child's best interest test is already encompassed within the constitutional protection of the rights of the child, as it seems to me that they are, then it seems to me that this is a distinction without a difference. If that is the case, then it would seem to follow that insofar as the constitutional rights of the child are concerned, there is an onus on every decision maker to afford primary weight to the best interests of the child when conducting a proportionality assessment in connection with an interference with that child's rights. To hold otherwise would be to find that there are two separate constitutionally rooted best interest tests, which seems to me to be simply wrong.

115. It is not necessary, however, to decide the question of whether the best interests test applies as a constitutional imperative under Article 42A4 or derives under Article 40.3 for the purpose of this application because, as acknowledged in *OOA v. Minister for Justice and Equality* [2016] IEHC 468, the paramountcy of the best interests of the child which is reflected in express terms in Article 42A4 is not unique to Irish constitutional law and applies in any event. Accordingly, whether under Articles 40.3 and/or 42A4 of the Constitution and/or Article 8 of the ECHR (and given effect to by s. 3 of the European Convention on Human Rights Act, 2003) or otherwise, the Respondent was bound by the best interests' principle and the heavier

weight to be attached to a child's rights in her approach to the proportionality assessment conducted when considering whether to revoke the 2019 deportation order. Indeed, in submissions made on behalf of the Applicants by a previous solicitor in May, 2017, particular reliance was placed on the decision of Lady Hale in the UK case of *ZH (Tanzania) (FC) v. Secretary of State for the Home Department* [2011] 2 AC 166 where she said (at para. 26):

> *"Nevertheless, even in those decisions, the best interests of the child must be a primary consideration. As Mason CJ and Deane J put it in the case of Minister for Immigration and Ethnic Affairs v. Teoh [1995] HCA 20, (1995) 183 CLR 273, 292 in the High Court of Australia:*
>
> *"A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it."*
>
> *As the Federal Court of Australia further explained in Wan v. Minister for Immigration and Multi-cultural Affairs* [2001] *FCA 568, para 32,*
>
> *"[The Tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration."*
>
> *This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia."*

116. In the same case, Lord Kerr stated (para. 46):

"It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."

117. It is recalled that in *Jeunesse v. Netherlands* (Application no. 12738/10, European Court of Human Rights, 3rd October, 2014) at para 109, a case referred to in the Respondent's Decision, it was said that the best interests of the child were ' *of paramount importance*'. As Humphreys J. observes in *OOA* (para. 40):

"this phrase cannot be taken in isolation because it is immediately qualified by the court to the extent that ' alone, they cannot be decisive' but must be attended by ' significant weight'. This necessarily implies that they can be outweighed, as the Minister lawfully found in this case. It has not been demonstrated that she failed to afford due and significant weight to those rights."

118. Turning then to the consideration of the best interests of the child in this case. In similar fashion to the earlier *Examination of File* documents, the "*best interests of the child*" are mentioned only once in the *Examination of File* on the application to revoke the subject of these proceedings. This mention appears at the bottom of p. 11 of the impugned decision where the best interests of the Third Named Applicant are mentioned once as follows:

"It is accepted that it is in the best interests of [name of child] to have the care and company of both of his parents. However, this has to be balanced against the overall public interest and the particular facts of the case. ….it is the case that the family have been separated during Mr. Z's imprisonment and he has already missed out on important occasions in his son's life. Again this is a direct result of the actions of Mr. Z alone".

119. It is clear from the foregoing that it is acknowledged by the Respondent that it is in the Third Named Applicant's best interests that he is not separated from his father. This aspect of the decision concludes that while there would be '*potential hardship'* for the Second and Third Named Applicants to relocate to Albania if the First Named Applicant is deported, this *"is outweighed by the public interest in preventing disorder or crime and protecting the rights and freedoms of others in the particular facts of this case"* even though elsewhere in the decision it appears to be accepted that the First and Second Named Applicant will not re-locate.

120. While the best interest principle is mentioned only once, it is more troubling that there is no recognition anywhere in the *Examination of File* that this consideration requires to be accorded a particular weight as compared with other considerations because it is required under the Constitution and/or the ECHR to be treated as "*paramoun*t" or "*primary*" consideration. Accepting that a finding that a child's rights can be outweighed may also compatible with a finding that they are a primary consideration, nonetheless it seems to me to be established by the terms of the *Examination of File* in this case that the Respondent did not approach the decision on the basis that the child's best interests are considered to have a particular weight which flows from the fact the child's interests are a primary or paramount concern. While the child's interests are certainly considered in the case, there is nothing in the *Examination of File* or the terms of the subsequent decision that suggests that the Respondent appreciated that they should be accorded particular or more significant weight *vis-a-vis* other considerations.

121. Given that it is established that the interest of the child must rank higher than any other and it is not merely one consideration that weighs in the balance alongside other competing factors, it seems to me that the absence of any acknowledgement of the greater weight to be

attached to the child's interests anywhere in the record of decision challenged in these proceedings is evidence of a failure on the part of the Respondent to properly consider the bests interests of the Third Named Applicant in the revocation decision. Therefore, while it is clear that the Respondent concluded that the requirements of the common good prevailed in this case, it does not appear from the record of the decision that the best interests of the child were identified as a paramount concern in the balancing exercise. Where I have separately concluded that there has been a failure to properly consider the child's rights under Article 42A1, it must also follow that these non-identified rights have not been afforded due primacy in the balancing exercise which it falls to the Respondent to carry out. The Respondent has not demonstrated and it is not otherwise discernible from the record of the decision that she has attached a particular weight or primacy to the child's interests as required by law in conducting the proportionality assessment.

EU Law

122. For completeness, although not pressed during the hearing, I have considered whether in her decision to refuse to revoke the deportation order in this case the Respondent erred in law in failing to properly consider the Third Named Applicant's rights as an EU citizen. In this regard the Applicants relied on the decision of the CJEU in Case C-304/14 (*Secretary of State v. CS*, Decision of the Grand Chamber, 13th of September, 2016). It seems to me that it was open to the Respondent to conclude that it has not established on the facts in this case that the deportation of the First Named Applicant would have the effect of impairing the EU law rights of the Second or Third Named Applicants. Those rights are not threatened because the Third Named Applicant remains in the custody of his mother and both obviously have an entitlement to remain in the State. There is nothing to suggest that any rights of the Second or Third Named Applicants under the EU treaties will in fact be jeopardized by the deportation of the First Named Applicant as it has not been demonstrated how a refusal of the application will prevent the exercise of a Treaty right by a Union citizen or will interfere with the exercise of that right.

123. Even accepting, for the sake of argument, that the Third Named Applicant would be obliged to move to Albania, the Respondent was entitled to conclude on the evidence that there

was a genuine, present and sufficiently serious threat affecting public order and safety to justify deporting the First Named Applicant in this case provided that in arriving at this decision the Respondent properly weighed and considered the best interests of the child as a primary consideration in accordance with Article 24(2) of the Charter. This brings us back, however, to what I consider to be the failure on the part of the Respondent to properly weigh and consider the child's interests in the decision-making process.

CONCLUSION

124. The Respondent has failed to consider the Third Named Applicant's rights under Article 42A1 of the Constitution and has not accorded a paramount or primary weight to the child's best interest in arriving at that decision to refuse to revoke the deportation order under challenge in these proceedings. Accordingly, I propose to make an order of *certiorari* quashing the decision to refuse to revoke and to remit the s. 3(11) application for further consideration in the light of the terms of this judgment.

125. This does not mean that affording primacy to the Third Named Applicant's best interests will necessarily lead to a decision in conformity with those interests but in failing to reflect the proper consideration due to the child's rights, the Respondent has erred in law with the result that in conducting a proportionality assessment, the competing factors have not been properly weighed. Whether the competing concerns are sufficiently substantial and significant to outweigh the Third Named Applicant's best interests' right to the company and care of his father is a matter for the Respondent. That said, the decision on an application to revoke the deportation order is one which must be taken having due regard to the special weight afforded the child's rights properly identified.

126. This matter will be listed at the beginning of next term for submissions in respect of the form of the order or any further consequential matters.