THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 737

[Record No. 2023/940JR]

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

BETWEEN

[EA] AND [LM]

APPLICANTS

-AND-

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr. Justice Mark Heslin delivered on the 20th day of December 2024

Introduction

1. In these proceedings the applicants challenge the decision made by the respondent on 17 July, 2023 to refuse to revoke deportation orders made on 27 October, 2017 in respect of each of them.

2. In essence, the legal grounds relied upon by the applicants are, first, to assert that the decision was irrational and, second, to contend that the impugned decision constituted an interference with the applicants' rights to respect for their private lives under Article 8(1) of the European Convention on Human Rights. Whilst no concessions were made, Counsel for the applicants made clear that "*the major point is one of irrationality".*

3. Before proceeding further, I wish to acknowledge the great assistance given by Mr. Rogers SC for the applicants and by Mr. Leonard BL for the respondent. Both Counsel furnished detailed written submissions in advance. These were supplemented by oral submissions of great clarity during the hearing. During this judgment I will refer to the principal submissions made by both parties.

Chronology

4. Having carefully considered the pleadings, affidavits and exhibits, a chronology of facts emerges, which I propose to set out in conjunction with certain legal provisions and principles which seem to me to be of most relevance.

5. The applicants are a married couple and are Nigerian nationals.

6. Their claim that they arrived in Ireland on 28 May, 2022 is not disputed.

7. The applicants' son was born in this State on 11 November, 2002. He is an Irish citizen and his birth pre-dated the 27th amendment to the Constitution which was passed by referendum on 11 June, 2004.

8. The applicants obtained an Irish passport for their son on 3 December, 2002 and it is not disputed that they returned to Nigeria shortly thereafter.

9. The second named applicant claims to have returned to Ireland on 17 June, 2004 and left again for Nigeria on 8 July, 2004. The foregoing is not disputed.

March 2005 - IBC scheme application

10. No issue is taken with the applicants' claim that they travelled again to Ireland together on 15 March, 2005.

11. On 21 March, 2005, the applicants applied for permission to remain in Ireland under the 'IBC/05 Scheme' ('IBC' being a reference to "Irish born child"). The foregoing scheme enabled non EEA national parents of children born in this State prior to 1 January, 2005 to apply for permission to remain, based on parentage of Irish citizen child.

The applicants' address in the State

12. The IBC/05 Scheme application requested (at para. c) the applicants' *"current address"* and (at para. h) asked *"what other addresses in the State have you been resident at?".* The applicants supplied a single address in response to both questions. It is a matter of fact that this was the one and only address the applicants ever furnished to the respondent.

July 2005 – the applicants leave Ireland

13. Before their IBC/05 Scheme applications had been determined, the applicants left Ireland, on 6 July, 2005 and returned to Nigeria.

Failure to notify the Minister

14. The applicants acknowledge that they did not notify the respondent Minister of their departure from Ireland, in 2005.

1946 Order

15. Article 11 (1) (a) to (d) of the Aliens Order 1946 [S.I. No. 395 of 1946] (the "1946 order") provides:

> *"11.—(1) An alien shall comply with the following requirements as to registration :—*
>
> *(a) he shall, as soon as may be, furnish to the registration officer of the registration district in which he is resident, particulars as to the matters set out in the Second Schedule to this Order, and, unless he gives a satisfactory explanation of the circumstances which prevent his doing so, produce to the registration officer, either a valid passport, or some other document satisfactorily establishing his nationality and identity;*
>
> *(b) he shall furnish to the registration officer of the registration district in which he is resident particulars of any circumstances affecting in any manner the accuracy of the particulars previously furnished by him for the purpose of registration, within seven days after the circumstance has occurred, and generally shall supply to the registration officer all information (including where required by the registration officer a recent photograph) that may be necessary for maintaining the accuracy of the register kept under this Order;*
>
> *(c) he shall, if he is about to change his residence, furnish to the registration officer of the registration district in which he is then resident, particulars as to the date on which his residence is to be changed, and as to his intended place of residence, and on affecting any change of residence from one registration district*

to another, within forty-eight hours of his arrival in the registration district into which he moves, report his arrival to the registration officer of that district;

(d) if at any time he is absent from his residence for a continuous period exceeding one month, he shall report to the registration officer of the district of his residence, his current address and every subsequent change of address, including his return to his residence…" (emphasis added).

Registration officer

16. Reference to the "*registration officer"* is a reference to the relevant member of An Garda Siochana. The applicants failed to furnish to the registration officer of the relevant district particulars of the matters set out in the second schedule to the 1946 order.

Requirement to provide address

17. The second schedule of the 1946 order concerns *"Particulars to be furnished on registration"* and includes *"6. Address of residence in the State".*

18. The applicants *inter alia* (i) failed to provide to the registration officer the address of their residence in the State; and (ii) failed to give notice that they were leaving the State and would no longer be resident at any address in Ireland.

Breach of 1946 Order

19. Having regard to the facts, I accept the respondent's submission that the applicants breached Article 11 (1) (a) to (d) of the 1946 order.

22 November 2005 – refusal of IBC/05 application

20. By letters dated 22 November, 2005, the respondent Minister notified the applicants of the decision to refuse their IBC/05 Scheme applications. These letters were sent to the applicants at the one and only address supplied by them.

21. The applicants acknowledge that they had *not* been continuously resident in the State following the birth of their son (a requirement for the IBC/05 scheme) and, hence, did not qualify for inclusion in the relevant scheme.

7 September 2006 – notice of proposal to deport

22. By letters dated 7 September, 2006, the Minister gave notice of the proposal to make a deportation order against each of the applicants. These letters were sent to the address which the applicants supplied when making their IBC/05 scheme application.

Validly served

23. I am satisfied that, as a matter of law, the 7 September 2006 letters were validly *served* on the applicants who had not complied with the notification obligations imposed by Article 11 of the 1946 order.

Not received

24. However, as a matter of fact, these letters were not *received* by the applicants who left the State 14 months before the letters were sent. In other words, it is a matter of fact that they left the State over a year before the proposal to deport them was served. Thus, they were unaware of the proposal to deport them.

left / leave

25. Given (i) the refusal of the IBC/05 application and (ii) the applicants' failure to given notice of their departure, the respondent had no reason to believe that the applicants had *already left* the State, and remained outside the State, when the Minister served notice of the proposal to make deportation orders which would require the applicants *to leave* the State.

26. The foregoing is reflected in the respondent's letter 7 September, 2006 letter to each applicant, which began:

> *"I refer to the decision to refuse your application for leave to remain in the State under the revised arrangements for parents of Irish children born before 1 January, 2005, commonly referred to as the IBC05 Scheme.*
>
> *As a result of the above decision, I am directed by the Minister for Justice, Equality and Law Reform to notify you that the Minister now proposes to make a Deportation Order in respect of you under the power given to him by s.3, Immigration Act, 1999 as you have no current permission to remain in the State. (For information I am attaching s.3 of the Immigration Act, 1999, as amended).*
>
> *The three options now open to you are set out in detail below. It is important that you note that some of these options may involve the making of a deportation order and that you know what this entails. A deportation order will require you to leave this State and to remain outside the State thereafter. Moreover, you should be aware that regulations will be make* (sic) *under the European Communities Act, 1972, as amended, to give statutory effect to the European Union (EU) Directive 2001/40/EC which obliges each EU member state to mutually recognise and give effect to deportation orders issued in respect of their country nationals i.e. anyone who is not a national of any EU state. This means that a deportation order may also prevent you from entering another EU State in the future.*
>
> *Options now open to you*
> *Under section 3(4) of the Immigration Act, 1999, as amended, you must now choose one of three options explained below…"* (emphasis added).

Reason for

27. In circumstances where the respondent was not aware that the applicants had left the State, each of the 6 September 2006 letters set out explicitly and succinctly the *reason* for the proposal to make a deportation order i.e. "*…as you have no current permission to remain in the State"* (emphasis added).

Purpose of

28. Not being aware that the applicants were no longer in Ireland to be deported, and consistent with the reason why it was proposed to make the deportation orders, the letters sent on behalf of the respondent also made clear the nature and *purpose* of same: "*A deportation order will require you to leave this State and to remain outside the State thereafter*" (emphasis added).

Effect

29. The Minister was also aware of, and specifically referred to, a possible *effect* of the making of a deportation order, in that each letter stated: "*…a deportation order may also prevent you from entering another EU State in the future"* (emphasis added).

3 Options

30. The fact that, insofar as the respondent was aware, the applicants continued to reside in Ireland is also clear from the statement in the said letters, under the heading "*Options now open to you*". This began "*Under section 3(4) of the Immigration Act, 1999, as amended, you must now choose one of three options explained below…"* (emphasis added). These were, in summary, to:

> *"(1) leave the State before the Minister decides that matter…"* [under s.3(4)(b)];
> *(2) consent to the making of a Deportation Order …"* [under s.3(4)(c)]; or
> *(3) make representations to remain temporarily in the State…"* (emphasis added).

31. It seems fair to say that the foregoing options pre-suppose that the recipient of the letter remained in the State or wished to remain. In the manner presently examined, the applicants were not in the State; did not wish to remain; and do not now seek to enter or remain in the State.

Circumstances as then understood by the respondent

32. The aforesaid letters were not received by the applicants. Furthermore, it is clear that the then prevailing circumstances were *not* as the respondent understood them. Looking at the 3 options set out in the 7 September 2006 letters from the perspective of facts then *unknown* to the respondent:

> Regarding Option 1 - the applicants had already left the State, on 6 July 2005, i.e. well before the Minister decided the matter;
> Regarding Option 2 - the applicants did not consent to, or oppose, the making of a deportation order, in circumstances where they had left the State and were unaware of any proposal that the Minister would make orders requiring them to leave;

Regarding Option 3 – having previously departed, the applicants made no representations to remain temporarily in the State.

Invitation to make representations

33. Both of the 7 September, 2006 letters made clear that it was open to the applicants to make representations to remain, which the respondent Minister would consider before making a deportation order, in that each letter stated *inter alia*:

> "*In determining whether to make a deportation order against you, the Minister will be obliged to consider a number of factors including, the rights of the child/children and the common good. Your parentage of an Irish born child/children and any correspondence received subsequent to the decision letter to refuse your application under the IBC/05 scheme will be considered in that context.*
>
> ***If no response is received to this letter withing 15 working days of the date of this letter, the Minister will proceed to consider the making of a deportation order…"*** (emphasis in original).

Address notification form

34. The said letters also enclosed an "Address Notification Form", dated 7 September, 2006. In this manner, the Minister invoked Article 18 of the 1946 order, which states:

> *"18. The Minister may, by notice served on an alien, require such alien to comply with particular provisions (either in addition to or in substitution for any provision of this Order) as to registration, change of abode, travelling, employment, occupation and other like matters, and such alien shall comply with such provisions.".*

35. The address notification form gave notice to each applicant that the following requirements were now placed on them, in addition to Article 11 of the 1946 order, namely:

> "1. *to confirm your current address in the State by completing the address notification form at Part 2 below and return it to the Repatriation Unit, Irish Naturalisation & Immigration Service, Department of Justice, Equality and Law Reform, within fifteen working days of the date of this notification, and*
>
> *2. at any stage in the future, until such time as your case has been finally determined pursuant to section 3(6) of the Immigration Act, 1999, you must notify the Irish Naturalisation & Immigration Service at the address stated above if you change address…"* (emphasis added).

36. As noted earlier, the applicants did not, in fact, receive the 7 September 2006 letters. Despite this, it seems to me that the applicants can fairly be said to have breached the aforesaid Article 18 requirements. I take this view in circumstances where each Address Notification Form (enclosed with each letter dated 7 September 2006) was validly served in the present case i.e. both were sent to the one and only address in the State which the applicants provided.

25 October 2017 – Examination of file

37. Moving forward in time over 11 years, on 25 October 2017, an executive officer within the respondent's "Repatriation Division" conducted an "Examination of file" under s. 3 of the Immigration Act 1999, as amended, for the purpose of making a recommendation as to whether or not deportation orders should be made by the respondent Minister. The examination of file with respect to the first named applicant dealt with "*Duration of Residence in the State…*", as follows:-

> "[EA] *states that he arrived in the State on 28/05/2002.*
>
> *In March 2005,* EA *applied for permission to remain in the State under the IBC05 scheme.*
>
> *By letter dated 22/11/2005, he was notified by the Minister that his application for permission to remain in the State under the IBC05 scheme was refused. This refusal was on the basis that* EA *did not meet the necessary criteria insofar as residency was concerned. He did not provide acceptable evidence of continuous residence in the State since the birth of his son on 11/11/2002.*
>
> *By letter dated 07/09/2006, he was notified that the Minister was proposing to make a Deportation Order in respect of him and was giving consideration to this case under s. 3 of the Immigration Act 1999, as amended. In addition, he was informed that he had 15 working days from the date of the letter to make written representations setting out the reasons as to why he should not have a Deportation Order made in respect of him.*
>
> *By letter dated 08/04/2008,* EA *was invited by the Minister to update or make any further representations regarding the proposal to make a Deportation Order in respect of him.*
>
> *No representations and/or correspondence has been received from* EA *since March 2005.*
>
> *Based on the foregoing, it cannot be stated with any degree of certainty exactly how long he has been in the State."* (emphasis added).

38. I pause to say that, having left the State two years earlier, the aforementioned correspondence dated 08/04/2008 was not received by the applicants. That said, the foregoing was an accurate summary of the chronology of events and information as *then* known by the respondent.

Notified / invited

39. In other words, it was entirely correct to say that "*By letter dated 22/11/2005, he was notified…"; "By letter dated 07/09/2006, he was notified…"; "In addition, he was informed that he had 15 working days…";* and "*By letter dated 08/04/2008,* EA *was invited…"* in that the said

correspondence was validly served (on both applicants, at the sole address they provided). It was not, however, received by them.

"in the State"

40. The fact that, as of October 2017, the relevant Department could not state *"with any degree of certainty exactly how long he has been in the State"* (emphasis added) discloses an understanding of circumstances which were very different to the facts (i.e. neither applicants were "*in the State"*, nor had they been for over 12 years).

True circumstances

41. In other words, it is very clear that, as of October 2017, the respondent did not know the true circumstances. The fact that the respondent was not then aware that neither applicant had been in the State for more than a dozen years flowed, of course, from the applicants' failure to comply with notification requirements. However, the reason *why* the respondent did not know the correct position very obviously does not change the fact *that* the respondent did not know the true circumstances. In the manner presently examined, the respondent came to know the correct position several years later, in 2021. For now, it is appropriate to continue looking at the examination of file, which went on to address a range of considerations and stated, *inter alia*: "

> *Section 3(6)(k) – Considerations of national security and public policy.*
> *Considerations of national security and public policy do not have a bearing on this case."*

42. Later, under the heading *"Consideration under Article 8 of the European Convention on Human Rights (ECHR)"*, the examination of file stated:-

> *"Private life*
> *The House of Lords decision in R (Razgar) v. Home Secretary [2004] A.C. 368 sets out five questions which are likely to have to be addressed when considering Article 8 rights in the context of a proposal to remove an individual. Those questions are as follows:-*
> *(1) will the proposed removal be of an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?*
> *(2) if so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?*
> *(3) if so, is such interference in accordance with the law?*
> *(4) if so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
> *(5) if so, is such interference proportionate to the legitimate public ends sought to be achieved?*
> *In considering the first question, it is accepted that if the Minister decides to deport* EA*, this has the potential to be an interference with his right to respect for private life within the meaning of Article 8(1) of the ECHR. This relates to his educational and other social*

ties that he has formed in the State as well as matters relating to his personal development since his arrival in the State.

EA *has submitted no information regarding this private life in the State.*

In addressing the second question, and having weighed and considered the facts of this case as set out above, it is not however accepted that any such potential interference will have consequences of such gravity as potentially to engage the operation of Article 8.

Therefore, I submit that a decision to deport EA *does not constitute an interference with his right to respect for his private life, under Article 8 of the ECHR.*

Family Life

EA *presented as a married man. Information on file states that he is married to a Nigerian native* [LM]. *They have one child who was born in Ireland on 11/11/02. His name is* [AN]. [LM]*'s case is being dealt with in tandem with this case so no separation of the family is envisaged.*

No further representations have been submitted in relation to the family life he enjoys in the State.

Therefore, I submit that a decision to deport [EA] *does not constitute an interference with his right to respect for his family life, under Article 8 of the ECHR.*

Recommendation

[EA]*'s case was considered under s. 3(6) of the Immigration Act 1999, as amended. Refoulement was not found to be an issue in this case. In addition, no issues arise under s. 4 of the Criminal Justice (UN Convention against Torture) Act, 2000. Consideration was also given to private and family rights under Article 8 of the European Convention on Human Rights (ECHR).*

Therefore on the basis of the foregone, I recommend that the Minister make a Deportation Order in respect of [EA]*."* (emphasis added).

43. A similar recommendation was made in respect of the second named applicant. The executive officer's recommendation was accepted and approved.

9 November 2017 – decision to make a deportation order

44. On 9 November 2017, the Repatriation Division of the respondent's Department wrote to each of the applicants (again, to the sole address provided by them in the context of the IBC/05 application). These letters, similar in terms, notified the applicants of the following:-

> *"The Minister has decided to make a Deportation Order in respect of you under s. 3 of the Immigration Act, 1999 (as amended). A copy of the order and a copy of the Minister's considerations pursuant to s. 3 of the Immigration Act, 1999 (as amended) and s. 5 of the Refugee Act, 1996 (as amended) are enclosed with this letter…"* (emphasis added).

Reasons

45. Each letter went on to state, *inter alia*: *"The reasons for the Minister's decision are that you have remained in the State without the permission of the Minister for Justice and Equality."* (emphasis added).

Remained in the State without permission

46. In light of the foregoing, it is clear that the reasons for the Minister's decision to deport the applicants were 'squarely' based on the fact (as then understood by the respondent) that each of the applicants *"…remained in the State without the permission of the Minister"*. Given that the applicants had failed to tell Minister otherwise, the foregoing *was* the position insofar as the Minister was aware, in October 2017. However, the true circumstances were different. Unknown to the respondent at the time, the applicants had in fact left Ireland over 12 years earlier (having returned to Nigeria on 6 July 2005). For the purposes of the present application, it is not disputed that, since returning to Nigeria in July 2005, the applicants have not re-entered this State, nor sought to.

47. The respondent submits, and I entirely accept, that the Minister was unaware of the foregoing because of the applicants' failure to comply with notification obligations. However, that does not take away from the fact that, when the deportation orders were made, the circumstances were not as the respondent understood them to be.

48. Contrary to the very "*reasons*" relied on by the Minister, the applicants (i) were not in the State, having left in July 2005; and (ii) had remained outside the State since their departure over 12 years earlier.

Deportation order

49. The reasons relied upon by the respondent would appear to reflect, precisely, the nature and purpose of a deportation order, as explained in *D.P. v. The Governor of the Training Unit, Minister for Justice, Equality and Law Reform & Ors* [2001] IESC 113, wherein Keane J. (as he then was) stated that:-

> *"The deportation order was an order which meant that the applicant was no longer entitled as a matter of law to remain in this country and was further an order which entitled the State to take any necessary steps to ensure that he did not remain in this country. Those are the twin effects of a deportation order…"* (emphasis added).

50. More recently, in *Sivsivadze v. Minister for Justice* [2016] 2 IR 403, [2015] IESC 53 ("*Sivsivadze*"), the Supreme Court (Murray J.) made clear (at 37) that the deportation made in respect of the relevant appellant:-

> *"…was an executive decision within the powers of the State, exercised by the Minister, as authorised by statute, to deny to the… appellant permission to enter or remain in the State. The judicial authorities to which I have referred make it quite clear that no alien has a right to enter or to remain in the State without lawful permission. So an alien who presents himself or herself at a point of entry to the State may be refused leave to land, or if found unlawfully within the State may be deported by order of the Minister on foot of an existing deportation order or a new one. Deporting an alien, such as the… appellant, in those circumstances, is no more than the application of the law and the exercise of sovereign powers to protect the integrity of the borders of the State by refusing permission to land or to stay. It is not in any sense a punishment or sanction, administrative or otherwise."* (emphasis added).

Arrangements for your removal / be deported

51. Reflecting the principles in the said authorities and on the understanding that the applicants "*…remained in the State without the permission of the Minister…*", the 9 November 2017 notification went on to state: -

> *"Having had regard to the factors set out in s. 3(6) the Immigration Act, 1999 (as amended), the Minister is satisfied that the interest of the public policy and the common good in maintaining the integrity of the asylum and immigration systems outweighs such features of your case as might tend to support your being granted leave to remain in this State.*
>
> ***The Deportation Order requires you to leave the State and to remain outside the State thereafter.***
>
> ***You are obliged to leave the State by 10 December 2017. Please advise this office of the travel arrangements that you make to comply with the Deportation Order.***
>
> ***If you do not leave the State by 10 December 2017 you are liable to be deported and the following requirements under the provisions of s. 3(9)(a)(i) of the Immigration Act, 1999 (as amended) must be observed:***
>
> - ***You are required to present yourself to the Member in Charge, Booth No. 1, Garda National Immigration Bureau, 13/14 Burgh Quay, Dublin 2 on Wednesday, 13 December 2017 at 10:00AM to make arrangements for your removal from the State.***
> - *You are required to produce at that appointment any travel documents, passports, travel tickets or other documentation in your possession which may facilitate your removal from the State.*

- *You are required to co-operate in any way necessary to enable a member of An Garda Siochana or Immigration Officer to obtain a travel document, passport, travel ticket or other document required for the purpose of such removal.*
- *You are required to reside at the above address pending your removal from the State."* (underlining added).

To leave and remain outside the State

52. At the risk of repetition, it is clear that the foregoing was based on and understanding of circumstances which differed greatly from the facts. In the foregoing manner, the explicit purpose of the decision to deport each of these applicants was to require them (i) to *leave* the State and (ii) to *remain outside* the State thereafter.

Removal

53. Consistent with this, the practical arrangements required of the applicants were directed towards securing their *removal* from the State.

Different circumstances

54. To illustrate how very *different* the position as understood by the Minister was from the true circumstances, the 9 November 2017 notification *required* that the applicants *reside* (pending their removal from the State) at an address where they had not resided for over 12 years (having removed themselves from the State in 2005).

Consequences of failure to leave – arrest and detain / effect your removal

55. This gulf between (i) the circumstances as then understood by the Minister; and (ii) the true position, is also underlined by the following extracts from the 9 November 2017 notification to each of the applicants (as regards the *consequences* of failure to *leave* the State): -

> *"Please also note that failure to leave the State by **10 December 2017** is a failure to comply with a provision of the Deportation Order. As a result, an Immigration Officer or a member of An Garda Síochána may arrest and detain you without warrant in accordance with s. 5(1) of the Immigration Act, 1999 (as amended).*
>
> …
>
> *If you fail to comply with any provisions of the Deportation Order, or with a requirement in this notice, an Immigration Officer or a member of An Garda Síochána may arrest and detain you without warrant in accordance with s. 5(1) of the Immigration Act, 1999 (as amended).*
>
> *It is also an offence of the Immigration Act, 1999 (as amended) to obstruct or hinder a person authorised by the Minister to effect your removal from the State…"* (emphasis added).

In this manner, the decision to deport each applicant focused on ensuring that, at the risk of arrest, the applicants be *removed from* and *remained outside* the State (whereas, unbeknownst to

the Minister, the applicants had left the State over 12 years earlier and had remained outside the State thereafter).

Registered post

56. The 9 November 2017 correspondence giving notice of, and enclosing, each deportation order was sent by registered post to the applicants' address, by way of *service.*

Returned by An Post

57. The said correspondence was subsequently returned by An Post. In other words, the deportation orders were not, in fact, *received* by the applicants.

Validity of service of the deportation orders

58. As regards the validity of the service of the deportation orders, s. 6 of the 1999 Act (as amended to 7 September 2006) provided:-

> *"(1) Where a notice is required or authorised by or under this Act to be served on or given to a person, it shall be addressed to him or her and shall be served on or given to him or her in one of the following ways:-*
>
> *(a) where it is addressed to him or her by name, by delivering it to him or her, or*
>
> *(b) by sending it by post in a prepaid registered letter, or by any other form of recorded delivery service prescribed by the Minister, addressed to him or her at the address most recently furnished by him or her to the Registration Officer pursuant to Article 11 of the Aliens Order, 1946 (S.R.&O., No. 395 of 1946) or s. 9 of the Immigration Act, 2004, or to the Refugee Applications Commissioner pursuant to s. 9(4A) of the Refugee Act, 1996 as the case may be or, in a case in which an address for service has been furnished, at that address.*
>
> *(2) Where a notice under this Act has been sent to a person in accordance with paragraph (b) of the foregone subsection, the notice shall be deemed to have been duly served on or given to the person on the third day after the day on which it was so sent.".*

"Deemed as good service"

59. The constitutionality of s. 6(2) was affirmed by the Supreme Court following a referral under Article 26 of the Constitution. In *The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360, [2000] IESC 19 Keane C.J. stated (pp. 395-96):-

> *"…It must be observed that a person seeking asylum or refugee status is the applicant for that status. There is an administrative procedure in place to carry out and assist him or her in the processing of that application. He or she is not a passive participant in that process. <u>It is not unreasonable for the State to require that such a person accept that an address given by him or her to the Minister or furnished by him or her specifically as an</u>*

address for service should be one at which service by a form of recorded delivery should be deemed as good service." (emphasis added).

60. Having regard to the foregoing, it seems to me that service of the deportation orders on these applicants was *valid,* as a matter of law. That said, service was not *effective,* as a matter of fact.

Circumstances as of Oct/Nov 2017

61. The applicants did not receive any notice of the deportation orders made in 2017. Once again, the reason for this stems from their failure to comply with notification requirements. However, this does not take away from the reality that, when the Deportation Orders were made in October 2017 and served in November 2017, relevant circumstances included:

(i) the applicants were unaware of the Minister's 2017 decision to deport them;
(ii) the applicants were unaware of the 2006 proposal to make deportation orders against them, and the 2008 reminder;
(iii) the Minister was unaware of the fact that the applicants were not in this State to be deported;
(iv) the Minister was unaware that applicants left the State over 12 years before, in 2005;
(v) the Minister was unaware that the applicants had remained outside the State thereafter.

Outside the State

62. Counsel for the respondent points out that, under s. 3 (5)(c) of the 1999 Act, the Minister enjoys the power to make a deportation order in respect of a person outside the State. This particular section makes clear that *"the provisions of s.s. (3)"* (under which a deportation order must be preceded by a proposal to deport) *"shall not apply to…. a person who is outside the State.".*

63. As regards the foregoing, the particular facts in this case demonstrate that the reason upon which the Minister relied when making each deportation order was (to quote from the 9 November 2017 notification to each applicant)*"…that you have remained in the State without the permission of the Minister…"* (emphasis added). The self-same reason appeared in the proposal to deport each applicant, which had been sent 11 years earlier (on 7 September 2006) namely *"…as you have no current permission to remain in the State"* (emphasis added). In other words, the respondent Minister made the deportation orders by reason of the applicants remaining *in* the State. This reason is also reflected in the terms of each deportation order, dated 27 October 2017, which required each applicant:*"…to leave the State within the period ending on the date specified in the notice served on or given to you… and to remain thereafter out of the State"* (emphasis added).

64. In the present case, it is not suggested the Minister was *aware* that the applicants were not in the State when deciding to make deportation orders against them. More importantly,

however, the question of whether the Minister enjoys the power to make a deportation order in respect of someone outside the State does not seem to me to arise in the present application, which is *not* a challenge to either deportation order. I now propose to continue with the chronology of relevant facts.

30 August 2021 – applicants see the deportation orders

65. At para. 9 of the verifying affidavit sworn by the first named applicant on 9 August 2023, he avers *inter alia* that *"Upon learning of an Irish deportation order in respect of me in the course of a U.K. visa application, I instructed my solicitors to obtain a copy of my file from the Department of Justice"*. The second named applicant makes similar averments at para. 9 of her verifying affidavit sworn on the same date. It is clear that the applicants' solicitors were instructed in 2021 and it is not in dispute that the applicants' solicitors made a "Freedom of Information" ("FOI") request on 5 August 2021. This was acknowledged on 10 August 2021, following which certain documentation was released on 30 August 2021. Both applicants aver that *"This was the first time I had seen the deportation order dated 27 October 2017"*. This evidence is uncontroverted.

30 August 2021 - change in circumstances for the applicants

66. In light of the foregoing uncontested averments, it can fairly be said that the 30 August 2021 brought about a material change in circumstances, insofar as the applicants are concerned. I take this view because, up to that point, the applicants were *unaware* that deportation orders had been made against them 4 years earlier, in 2017. Circumstances changed as of 30 August 2021 when they *became* aware of the foregoing. In the manner presently discussed, this is not the only change in circumstances which occurred in 2021 and, in due course, I will look at matters from the respondent's perspective.

6 December 2021 – applications to revoke deportation orders

67. Continuing with the chronology, it is not in dispute that, by letters to the respondent dated 6 December 2021, the applicants' solicitors, Messrs. Kevin Tunney solicitors, made an application to revoke each deportation order, pursuant to s. 3 (11) of the 1999 Act, as amended. The first named applicant's application to revoke stated *inter alia*:-

> *"Following the submission of his application for permission to remain under the IBC05 Scheme, our client instructs he returned to Nigeria in the hope that if successful in his application, he would return to live permanently in Ireland…*
>
> *….*
>
> *As our client's application was refused he did not return to the State but remained in Nigeria carrying out his business. Our client is a businessman who travels widely and had travelled to a number of countries since been* (sic) *in Ireland between 2002 and 2005. Our client did not appeal his IBC05 application and has not returned to Ireland since his application was refused. Our client was not aware a deportation order was issued against him in 2017 until recently when he was refused visa for business trip Europe on the basis that there was a deportation order against him from Ireland. On our clients instructions,*

we obtained copy of his file under the Freedom of Ireland Act which file discloses the existence of deportation order issued on the 27th October 2017...

…

Our client is making this application not with the intention of returning to Ireland but to remove the inhibition placed on him from entering Europe on the strength of this deportation order from Ireland. We are instructed the travel restriction to Europe which the deportation order has caused our client is impacting on our client's business negatively. Our client wishes to give undertaking not to apply for Irish visa nor visit Ireland illegally if that will satisfy the Minister…" (emphasis added).

68. The 6 December 2021 application made on behalf of the second named applicant stated *inter alia* the following:-

"…We are instructed the couple made the application with a view to getting permission to remain and relocate to live permanently in Ireland and since their applications were refused, our client and her husband continued to live their lives with their family including their Irish citizen child and his siblings in Nigeria. We are instructed the existing deportation order is inhibiting our client in getting visa to other European countries and same is affecting her quality of life. It is therefore our client's respectful application to the Minister to revoke the deportation order issued against her on the 27 October 2017. Our client has instructed us that she will not return to Ireland unless granted lawful entry visa. Our client and her family are successful in their business in Nigeria and will abide by any conditions the Minister might impose if the deportation is revoked…" (emphasis added).

8 December 2021 – request for further information

69. By email, dated 08 December 2021, the Repatriation Division acknowledged receipt of the first named applicant's application to revoke. The Repatriation Division requested further information and documentation, in particular, regarding travel from Ireland and throughout Europe. The 08 December 2021 email to the first named applicant's solicitors included the following:-

"From your representations I believe that you are stating that your client has left Ireland in 2005 after his application for Permission to Remain on the basis of being a parent of an Irish Citizen Child was refused and has not returned to Ireland since that point in time. Can you confirm that this is the case and supply evidence of the same?".

24 December 2021

70. The Repatriation Division sent an email, on 24 December 2021, to the same firm of solicitors in relation to the application to revoke, dated 6 December 2021, concerning the second named applicant's deportation order. This also sought further information and documentation and stated *inter alia*:-

"In response to your submissions it would be very useful for the processing of this case to provide an exact brief timeline of your client's travel inside and outside Ireland and supply proof of this travel…".

1 April 2022

71. On 01 April 2022, the first named applicant's solicitors wrote to the Repatriation Division stating *inter alia*:-

> *"As said in our correspondence of 6th December 2021, our client left the State for the last time subsequent to submission of his IBC/05 application form and have* (sic) *not returned to the State ever since. We are instructed neither our client nor his wife* [LM] *applied for asylum during their stay in Ireland and borne privately the medical and other costs associated with the birth of their Irish citizen child* [JN] *(dob 11/11/02) in the State. Our client and his family have remained in Nigeria since 2005 except for overseas travel in connection with his business or holidays with his family but have not stepped foot into Ireland since 2005. We are instructed our client's wife, Mrs.* [LM] *does most of the travels connected with their company [named] while our client runs the business in Nigeria. We are instructed our client's two previous Nigerian passports… for the relevant period were lost. Please find attached sworn affidavit and Nigerian police report of loss of these two passports by our client. Our client has regrettably has no boarding passes or flight tickets of the journeys made some sixteen years ago in 2005.*
>
> *Please find attached two subsequent Nigerian passports for our client for periods between 2011 to 2021 showing our client's visits to United Kingdom, U.S.A. and Brazil. Our client has never overstayed his visa period during these journeys but returned to his family and business in Nigeria within his visa period.*
> *Please find bio data page our client's Irish citizen child Passports ever held and sample academic reports in Nigeria where our client's Irish citizen child commenced and continued his education since attaining school going age. We are instructed there is no record of our client, his wife or any of his children in this jurisdiction since our client left the State in 2005…"* (emphasis added).

72. This letter itemised and enclosed a list of 15 documents intended to vouch the matters asserted in the letter, which went on to state *inter alia* the following:-

> *"We submit the attached documentation can only confirm that our client is a businessman and resides in Nigeria since 2005 and there is no way he could be living in Ireland since he left the State in 2005. We are instructed there is no record of our client working or receiving social welfare benefits nor attending G.P. or hospital appointments in the State since he left the State all of which no doubt establishes that our client has lived with his family and engages in his business in Nigeria, outside of Ireland. He has no record of deportation order being issued against him until a visa application was refused and told same was on the strength of a deportation order issued by Irish authority. We trust this is in order and should therefore be most obliged for recession of the deportation order against our client…"* (emphasis added).

10 April 2022

73. The same firm of solicitors wrote to the Repatriation Division on 10 April 2022 on behalf of the second named applicant stating *inter alia*:-

> *"As said in our previous correspondence, our client mother of Irish citizen child returned to Nigeria from Ireland for the last time on the 6th July 2005. Our client has been living in Nigeria since then and has not returned to Ireland. She is a director in a limited liability company* [named] *together with her husband Mr.* [EN] *and two older children. Please see Certificate of Incorporation of our client's company together with Memorandum and Article of Association of the company showing our client and her husband and their two children as directors. All our client's children live with her and her husband* [EN] *in Nigeria. We attach copy academic report of our client's Irish citizen child* [JN] *in Nigeria. We are instructed there is no record of any member of our client's family… living, working or receiving any form of social welfare assistance in the State nor attending any medical facilities in the State…".*

The letter went on to enclose copies of the second named applicant's previous Nigerian passports, a 'timeline' in relation to travel, and concluded with a request that the deportation order be revoked.

August 2022 – April 2023

74. From August 2022, the applicants' solicitors sought updates from the Repatriation Division and, from April 2023, emphasised how anxious the applicants were to receive a decision.

17 July 2023 decision

75. On 17 July 2023 the Repatriation Division of the respondent's Department wrote to the applicants' solicitors in identical terms as regards both applications, stating:-

> *"The representations received have been considered under s. 3 (11) of the Immigration Act, 1999, as amended. The outcome of the consideration is that the Minister's earlier decision to make a deportation order in respect of your client remains unchanged. Enclosed is a copy of the latest consideration for your information."* (emphasis added).

2023 Examination of file

76. The said "*consideration*" is comprised in a document entitled *"Examination of file under s. 3 (11) of the Immigration Act 1999, as amended"* ("the Examination"). The Examination in respect of the first named applicant ran to 6 pages. Page 1 set out the background and included:-

> *"On 7th December 2006, Mr.* [EA] *was advised that the Minister was proposing to make a Deportation Order in his name and of the options open to him at that time. No representations were received from, or on behalf of, Mr*. [EA], *notwithstanding a further reminder from the Minister on 8th April 2008, and his whereabouts, whether inside or outside the State, remained unknown at that time."* (emphasis added).

77. In objective terms the foregoing is an accurate description of matters. The first named applicant was, indeed, advised of both the proposal to deport him and of the options available to

him, in the sense that notice to him was validly served. The same is true in relation to the question of representations, in that the first named applicant was validly served with notice that he could make representations, and a reminder in that regard. However, it is also true to say that the first named applicant did not, in fact, receive any such notifications.

Whereabouts…remained unknown at that time

78. Given the information then available to, and the circumstances as then understood by, the Minister, it was also a matter of fact that the first named applicant's whereabouts *"…remained unknown at that time"*. In the manner examined earlier, this was because the first named applicant did not notify the Minister of his whereabouts. The Examination continued:-

> *"On 27th October 2017, following a full examination of Mr.* [EA]*'s file pursuant to s. 3 of the Immigration Act, 1999, as amended, a Deportation Order was made and Mr.* [EA] *was further advised, on 9th November 2017 that he was obliged to leave the State by 10th December 2017, or to present at the offices of the Garda National Immigration Bureau on 13th December 2017 to make arrangements for his removal from the State. Mr.* [EA] *failed to communicate with the Minister prior to or following the making of the Deportation Order and his whereabouts remained unknown until 6th December 2021 when an application pursuant to s. 3 (11) of the Immigration Act, 1999, as amended, seeking revocation of the Deportation Order made on 27th October 2017 was received."* (emphasis added).

79. Again, the first named applicant was certainly *"advised"* of the foregoing on 09 November 2017 in that the deportation order was validly served, albeit not, in fact, received. It is also true to say that, when the deportation order was made, the first named applicant's whereabouts "*remained unknown*" to the Minister. Consistent with this, the deportation order required the first named applicant to *leave* the State or to co-operate with the GNIB regarding arrangements to *remove* him from the State.

80. It is common case that it was not until 6 December 2021 that the Minister learned, for the first time, that the applicants left Ireland in 2005.

Whereabouts unknown *until* 6 December 2021

81. It is appropriate to point out that, in substance, the Examination notes a change in the *status quo,* at this point, namely, the fact that the whereabouts of the first named applicant remained unknown "*until 6th December 2021"* (emphasis added). This was when the application to revoke was made and, it was at this point that the Minister learned, for the first time, of the first named applicant's whereabouts, prior to and following the making of the deportation order. This was new information. This information, not available to the Respondent until 6 December 2021, materially altered what might be called the 'matrix of fact' against which these particular deportation orders were made in 2017.

Consideration of representations

82. Continuing to look at the Examination, pages 1 to 3 referred to the correspondence sent by the first named applicant's solicitors, beginning with their letter of 06 December 2021. Page 4, onwards, comprises the *"Consideration of representations submitted pursuant to s. 3 (11) of the Immigration Act 1999 (as amended)"* and began, as follows:-

> *"All documentation and information received from, or on behalf of, Mr. [EA] in support of his case have been read and fully considered.*
>
> *Mr. [EA] is asking the Minister to revoke the Deportation Order made against him on 27 October 2017, however, it must be noted that representations under s. 3 (11) of the Immigration Act, 1999, as amended, to revoke a Deportation Order, must advance matters which are truly materially different from those presented or capable of being presented earlier and in this regard I refer to C.R.A. and O.E.A. (a minor) suing by his mother and next friend C.R.A. v The Minister for Justice, Equality and Law Reform [2007] 3 I.R. 603, wherein MacMenamin J. stated the following at para. 87: -*
>
> > *'Thus, an applicant making representations to the Minister for leave to remain on humanitarian grounds is obliged actively to put his or her best case forward in such representations. To address the second issue directly, any such application under s. 3 (11) to revoke a deportation order made having considered such representations, must advance matters which are, truly materially different from those presented or capable of being presented in the earlier application. There must be, in the words of Clarke J. in Kouyape v Minister of Justice [2005] IEHC 380, (unreported, High Court, Clarke J. 9th November, 2005) 'unusual, special or changed circumstances'. Furthermore, the test in law must include one further test which is as to whether the material was capable of being presented earlier. To omit this latter aspect might have the effect of actually encouraging delay in the making of an application for humanitarian leave to remain and might permit the approach which was specifically criticised and rejected by Peart J. in Mamyko v Minister for Justice (unreported, High Court, Peart J., 6th November 2023)'*
>
> *It is noted that prior to the making of the deportation order on 27th October 2017, Mr. [EA] was notified that the Minister was proposing to make a Deportation Order in his name in correspondence dated 7th September 2006, and a further reminder on 8th April 2008. Mr. [EA]'s case was thereafter fully considered pursuant to s. 3 (6) of the Immigration Act, 1999, as amended and due regard was given to any refoulment – related issues. Additionally, full regard to his right to respect for private and family life pursuant to Article 8 of the ECHR was also considered on the basis of information submitted and available to the Minister at that time. It was concluded however that a Deportation Order would not involve a breach of these rights and a Deportation Order was made in respect of Mr. [N] on 27th October 2017.*

I acknowledge the written submissions and lengthy supporting documents advanced by Kevin Tunney, Solicitors, between 6th December 2021 and 26th April 2023, all of which has been read and fully considered at this time…" (emphasis added).

No representations

83. Before proceeding further, it is appropriate to recall that no representations were made to, or considered by, the Minister prior to the making of the deportation orders in question (because, albeit validly served, the applicants did not in fact *receive* notice of any proposal to deport or invitation to make representations/reminder). The factual position is that both applicants were in Nigeria and did not receive any of the respondent's communication (be that of the 07 September 2006; 08 April 2008; or 27 October 2017). Nor does the respondent take any issue with the applicants' account of how and when they first became aware of the deportation orders, following which they instructed solicitors in 2021 and saw them for the first time.

Not capable of being presented earlier

84. At this juncture it seems appropriate to say that, having regard to the particular facts in the present case, it could not be said that the representations made on behalf of the applicants could have been made *earlier*. I take this view given the fact that (i) the applicants never received the letters notifying them of the proposal to make deportation orders; (ii) were unaware of the invitation to make submissions; and (iii) did not learn of the existence of the deportation orders prior to 2021.

The respondent's position

85. As I understand it, the respondent does not suggest that *"material was capable of being presented earlier"* (*per* Clarke J. in *Kouyape*). Rather than make any such argument the respondent's position is that there are no "*unusual, special or changed circumstances*" since the deportation order was made in respect of each applicant.

The Minister's s. 3 (11) power

86. Given the respondent's position, it seems helpful to refer to certain authorities which examine the respondent's s.3(11) power before, returning to look at the Examination. The Supreme Court's decision in *Sivsivadze,* cited earlier, concerned an unsuccessful challenge to the constitutionality of s. 3 of the Immigration Act, 1999. Murray J. (as he then was) rejected the argument that a deportation order is unlimited in time and necessarily had a disproportionate impact on the family of those subject to same. Pointing to the Minister's power to revoke a deportation order, the learned judge stated:

"[50] …It is true that a deportation order is not made for a particular duration, such as a specified number of years, and is indefinite in that sense. To say however that this gives rise to a constitutional frailty is to misconceive, in my view, the very nature of a deportation order made in respect of an alien, as understood in the context of these proceedings.

[51] First, it should be said that a deportation order is not necessarily unlimited in time. It will not contain within itself a limitation, but the provisions of s. 3 (11) cannot be ignored. This provides:

> *'The Minister may by order amend or revoke an order made under this section including an order under this subsection.'*

[52] As is evident from that provision, although a deportation order made pursuant to s. 3 (1) does not contain any limitation period on the duration of the effect of the order, its effect may be brought to an end at any time should the Minister in his discretion consider it appropriate to do so… As Kearns P. directly pointed out in his judgment in the High Court in his case, s. 3 (11) is not to be confined to enabling the Minister to amend or revoke a deportation order only where 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 s. 3 (11) 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 of 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…" (emphasis added).

All the relevant circumstances

87. The applicants rely on the foregoing *dicta*, submitting that the obligation on the respondent was to consider *"all the relevant circumstances as they are at that time".* By contrast, the respondent argues (i) that an application to revoke a deportation order requires *"a change of circumstances"*; and (ii) that, in the present case, there has been no change.

Conflicting authorities

88. It would certainly appear that there are conflicting authorities on the question of whether the Minister's s. 3(11) power is limited, or not, to situations in which there has been a *change* in circumstances and what might be called a 'change of circumstances test' has been expressed in a range of judgments by this Court [See *OE v Minister for Justice* [2008] IEHC 68 (Irvine J. as she then was); *EB (a minor) v Minister for Justice* [2013] IEHC 246 (McDermott J.); *KI (a minor) v Minister for Justice* [2014] IEHC 83 (McDermott J.); *KRA v Minister for Justice* [2016] IEHC 289 (Humphreys J.); *EMO v Minister for Justice* [2016] IEHC 472 (Humphreys J.); *IRM v Minister for Justice (No. 2)* [2016] IEHC 478 (Humphreys J.); *JA v Minister for Justice* [2018] IEHC 343 (Humphreys J.); and *HA v Minister for Justice* [2019] IEHC 57 (Humphreys J.)].

Broad discretion

89. Counsel for the applicants drew the Court's attention to the recent in *AZ v Minister for Justice* [2022] IEHC 511, in which Ms. Justice Phelan appears to adopt the *Sivsivadze* formulation of the test along with Mr. Justice Fennelly's articulation of the general principle in *Cirpaci v Minister for Justice* [2005] 4 I.R. 109, [2005] IESC 42. At para. 51 of the learned judge's decision she stated:-

> *"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.'"* (emphasis added).

90. Although the Supreme Court accepted a 'leapfrog' appeal, the judgment of Mr. Justice Woulfe in *AZ v Minister for Justice* [2024] IESC 35 did not concern the scope of the Minister's s. 3(11) power.

91. In contending that *Sivsivadze* represents the correct analysis, the applicants point to para. 98 of the judgment of the European Court of Human Rights in *ZA v Ireland (Application No. 19632/20)*:-

> *"98. The Government stressed in this respect that the Minister could, in her discretion, bring the deportation order to an end at any time were she to consider it appropriate to do so. They further referred to the description of the operation of the provision by the Supreme Court in the Sivsivadze judgment (see paragraph 51 above), according to which the Minister's power is not limited to situations in which there has been a change in the circumstances of the person deported or other persons affected..."* (emphasis added).

92. It does not seem to be to be either possible or necessary to resolve the conflict which emerges from the authorities. It seems sufficient to say that, whilst there *are* conflicting authorities in relation to the scope of the Minster's s. 3(11) power, the respondent made her position very clear, namely that: (i) a 'change of circumstances test' applies; and (ii) there were no changed circumstances.

93. Keeping that in mind, it is useful to return to the Examination in order to identify the range of *facts*, as found on behalf of the Minister.

Facts set out in the Examination

94. Pages 4 and 5 of the Examination comprise a consideration of the first applicant's representations, wherein a range of facts are set out, with which the respondent takes no issue, including the following:-

- *"Mr.* [EA] *is a* [aged] *married national of Nigeria who has not resided in Ireland for over 18 years*." (emphasis added) (see pg. 4);

- *"While I acknowledge the Minister's correspondence sent to Mr.* [EA]*'s last known address on dates in 2008 and 2017 were returned undelivered by An Post, I also note that Mr.* [EA] *failed to engage or communicate with the Minister as to his whereabouts whether inside or outside the State, or indeed to advise the Minister that he had in fact departed the State, as he was obliged to do."* (emphasis added) (see pgs. 4/5);

- *"I have considered the information, previously unknown but now provided, that Mr.* [EA] *and his family left the State sometime after the birth of their son and returned to the State again in 2005 in order to submit an application for permission to remain in the State on the basis their parentage of an Irish citizen son. I have considered that Mr.* [EA] *returned to Nigeria, on an unknown date in 2005, thought to be July 2005 when his wife departed the State, where he has resided, and continues to reside, with his family."* (emphasis added) (see pg. 5);

- *"…while no information as to the whereabouts of his son has been provided documentary evidence that he completed his primary and secondary education in Nigeria has been provided in support of the claim that the family have never returned to Ireland since their departure in 2005."* (emphasis added) (see pg. 5);

- *"I acknowledge the claim that Mr.* [EA] *is now making his application, over 18 years later, for revocation of the deportation order to facilitate his travel to Europe for business purposes, and the claim that the restrictions imposed on him are impacting negatively on his business."* (emphasis added) (see pg. 5);

- *"I have considered that Mr.* [EA] *has not resided in the State for over 18 years, notwithstanding the information now provided that he had left the State after the birth of his son in November 2002, returning only for short periods while residing permanently and running his business, incorporated in 2001, from Nigeria."* (emphasis added) (see pg. 5).

Information previously unknown but now provided

95. In the foregoing manner, the Examination records facts which were not known to the Minister when the deportation orders were made in 2017, but are now know (in particular, that the applicant left Ireland in 2005 and has resided permanently in Nigeria ever since).

Reasonable to conclude

96. Indeed, the foregoing is expressed as a *conclusion* in the 6th June 2023 Examination, as follows:-

> *"It is reasonable to conclude therefore that Mr.* [EA], *notwithstanding he has an Irish citizen son, has remained in the State for minimal and temporary periods since the birth of his son on 11th November 2002, ultimately departing and residing permanently in Nigeria since 2005."* (emphasis added) (see pg. 6).

97. As a matter of fact, this conclusion (reached on 6 June 2023) recognises changed circumstances since the deportation orders were made (in October/November 2017).

98. In the manner examined earlier in this judgment, the Minister learned something new (in 2021) which the Minister did not know when the deportation orders were made (in 2017). The aforesaid conclusion is based on that new information. The foregoing was not a conclusion reached by the Minister when the deportation order was made, in 2017. Nor was it a conclusion the Minister was capable of reaching in 2017, given what was and was not known to the Minister, then. At that point, the circumstances as understood by the Minister were materially different. As of 2017, when making the deportation orders, the Minister did *not* know that (i) the applicants did not reside in this State; or (ii) that they had both left Ireland 12 years earlier, in 2005, to reside in Nigeria; or (iii) that they had remained outside the State, thereafter. This information was, as a matter of fact, new to the Minister who only received it in December 2021. In the manner previously examined, it was also information which could not have been provided *earlier.*

Changed circumstances - the respondent

99. In my view, there certainly were unusual, special or *changed* circumstances since the deportation orders were made. I take this view because information which did not become known to the respondent until December 2021 materially altered the factual position as understood by the Minister at the time of making the deportation orders, in October 2017. At the risk of repetition, the 09 November 2017 letters from the Repatriation Division of the respondent made clear that the Minister had decided to make deportation orders, relying on reasons which speak to fundamentally *different* circumstances (for convenience, I quote again):

- *"The reasons for the Ministers' decision are that you have remained in the State without the permission of the Minister for Justice and Equality."*; and

- *"The deportation order requires you to leave the State and to remain outside the State thereafter."* (emphasis added).

Changed circumstances – the applicants

100. There had also been a material change of circumstances from the perspective of both applicants. As of 2017, they were not aware that deportation orders were made against them. This remained the position for several years until they learned about the deportation orders in the context of applying for U.K. visas, following which their solicitor made an FOI request (which was succeeded by the 06 December 2021 application for revocation of the deportation orders).

"no unusual, special or changed circumstances since the making of the deportation order"

101. Bearing the foregoing in mind, I now return to the final paragraphs of the Examination, which (with respect to the first named applicant) states:-

> *"I have considered that Mr.* [EA] *became the subject of a Deportation Order on 27th October 2017, and on the basis of the information provided to the Minister at this time, and considered above, it is contended there are no unusual, special or changed circumstances since the making of the deportation order.*
>
> *Mr.* [EA] *has been given an individual assessment and due process in all respects. I have considered all of the information on file and the updated representations made pursuant to 3(11) of the Immigration Act 1999, as amended, and which have been considered within, and I find no reasons arising which would warrant the revocation of the deportation order.*
>
> *Therefore I conclude that the Deportation Order made in respect of* [EA] *on 27th October 2017 should be affirmed."* (emphasis added).

102. Before proceeding further, it is appropriate to say that the Examination both recognises that there were changed circumstances and expresses the view that there are no changed circumstances (deploying the latter as the basis for refusing to revoke). This internal inconsistency is irrational or illogical in the sense in which those terms are ordinarily understood.

Discussion and decision

103. To analyse the competing arguments deployed at the hearing it is necessary to begin with the Minister's s. 3(11) power. Leaving aside the conflict as to the scope of same, disclosed in various authorities, it is perfectly clear that the approach taken by the respondent in this case was to apply a 'change of circumstances test'. To quote, once more, from the Examination:

> *"…representations under section 3 (11) of the immigration Act, 1999, as amended, to revoke a Deportation Order must advance matters which are truly materially different from those presented or capable of being presented earlier…"* (emphasis added) [see p.4 of the Examination].

104. There is a material difference between, for example, the applicants being in the State (as the Minister understood in 2017) and having left the State a dozen years earlier without returning or seeking to (as the Minister learned for the first time in 2021).

S.3(5)(c)

105. In opposing the application it is emphasised that, by virtue of s. 3(5)(c) of the 1999 Act, the Minister is "*fully entitled"* to make a deportation order in respect of a person outside the State. Whilst both applicants had returned to Nigeria in 2005 and had remained outside the State thereafter, the deportation orders were made in circumstances which the Minister understood to be very different. The true position did not become known to the Minister until several years later, in 2021 (just as it was not until 2021 that the applicants learned that deportation orders had been (i) proposed in 2006; and (ii) made in 2017). However, as touched on earlier, the question of the Minister's power to make a deportation order concerning someone not in this State is not in issue in the present application, which does not challenge any deportation order.

106. The respondent's legal submissions emphasise the obligation on the applicants to keep the Minister informed of their up to date address. In this regard, reliance is placed on *D.P. v Governor of the Training Unit* [2001] IESC 113 (Keane C.J. at pp 6 – 7); *QW v Minister for Justice* [2012] IEHC 375 (Hogan J. at paras. 16, 17 and 19); and *MA (Pakistan) v Govern of Cloverhill Prison* [2018] IEHC 95 (Humphreys J. at paras. 51 – 53)). With regard to these authorities, the respondent submits *inter alia*:-

> *"To the extent that the Minister was not aware that the applicants were not present in the State at the time the deportation orders were made, that was because the applicants failed to inform the Minister that they had left the State. It is incumbent on applicants unlawfully present in the State who then leave the State and who wish to rely on their having left the State as a factor to prevent the deportation process being invoked against them to inform the Minister that they have left the State"* [See para. 16 of the respondent's written submissions].

107. I accept that the applicants were under a legal duty to keep the Minister informed of their up to date address. In the manner examined earlier, the applicants were in breach of Articles 11 and 18 of the 1946 Order. Furthermore, the applicants can be said to be in breach of s. 3(4)(b) of the Immigration Act, 1999 which provides that a notification of the Minister's proposal to make a deportation order shall include: *"(b) A statement that the person may leave the State before the Minister decides the matter and <u>shall require the person to so inform the Minister in writing and to furnish the Minister with information concerning his or her arrangements for leaving.</u>"* (emphasis added). The breach of s. 3(4) (b) flows from the validity of service (at the last known address of the applicants in the State) of the proposal to deport each of them, albeit proposals the applicants never in fact received, given that they had already left the State permanently.

Notification failures

108. The applicants' failure to comply with notification requirements is not in doubt (and, were this a challenge to the deportation orders themselves, the validity of service of, *inter alia*, the 2006 proposals to deport; the 2008 reminders; and the 2017 deportation orders might well be determinative). Despite the foregoing, it seems to me that sight cannot be lost of the fact that this is *not* a challenge to the deportation orders. It is a challenge to a refusal to revoke same. The fact that the applicants failed, *inter alia*, to inform the respondent, in 2005, that they had left the State and were no longer residing at any address within the State does not seem to me to alter the reality that there was a change in circumstances between (i) the making of the deportation orders and (ii) the application to revoke same, in the manner explained earlier.

109. In other words, *not* being a challenge to deportation orders, it seem to me that in this challenge to the refusal to revoke, this Court must engage with all relevant facts which emerge from the evidence. Facts which are not in dispute, include (i) the applicants did not become aware of the existence of the deportation orders, *until* 2021; and (ii) the respondent did not become aware, *until* 2021, that the applicants left the State in 2005, remaining outside the State thereafter.

The same circumstances

110. Para. 21 of the respondent's legal submission states:-

> *"The applicants' <u>circumstances were the same</u> in late 2021 when they made the s. 3(11) applications as they were in 2017 when the deportation orders were made. The only thing that changed was the applicants decided to notify the Minister that they had left the State – something that should have been done years earlier by the applicants."* (emphasis added).

Unduly narrow – the respondent's position

111. I accept the submission made on behalf of the applicants that the foregoing analysis is unduly narrow. The submission that the applicants' circumstances were the *same* in late 2021 (when they applied to revoke the deportation orders) as they were in 2017 (when the deportation orders were made) ignores the fact that, in 2017, the applicants were entirely unaware (i) that deportation orders had been made; and (ii) unaware that there had been a proposal, in 2006, to make those orders, which proposal invited representations.

112. Turning to the respondent, the said submission also ignores the difference between (i) the information available to the respondent Minister in 2017, on foot of which the deportation decisions/orders were made; and (ii) the information which was made available for the first time, in 2021. The said information demonstrated a material change (which post-dates the making of the deportation orders) in the circumstances as understood by the respondent, in 2017. In short, the circumstances known to the Minister, as of Oct/Nov 2017, were very different to the circumstances known to the Minister, from December 2021 onwards.

A change

113. Although, for obvious reasons, the respondent seek to minimise it, para. 21 of the Minister's written submissions recognises (very appropriately, in my view) that there was in fact a *change* between 2017 and 2023. As the submissions put it, the "…*only thing that changed was the applicants decided to notify the Minister that they had left the State…"* (emphasis added).

Had the applicants complied with notification obligations…

114. During the course of the hearing, Counsel for the respondent made a submission to the effect that, had the applicants complied with the relevant notification requirements (with the result that the Minister *had* been aware, in 2017, that they had returned to Nigeria in 2005 and had remained outside the State thereafter), it is very *unlikely* that a deportation order would have been made.

115. It seems to me that the foregoing involved no concession whatsoever on behalf of the respondent Minister. Rather, it was a very appropriate submission which recognised (i) the *purpose*, generally, of a deportation order; and (ii) the specific *reasons* relied upon by the Minister for making deportation orders in 2017 with regard to these particular applicants.

Fallen away

116. In other words, the aforesaid submission on behalf of the respondent seems to me to be no more than an appropriate recognition that, had the Minister known, in 2017, that these applicants had not been in Ireland since 2005 and had remained outside the State thereafter, the very *reasons* relied upon by the Minister and the central *purpose* of these deportation orders would have 'fallen away' entirely.

117. In making this submission, Counsel for the respondent was, of course, stressing the applicants' failure to comply with notification obligations. However, it seems to me that the analysis cannot stop there. Rather, and without condoning those failures, it seems to me that this Court's analysis must extend to circumstances as they pertained (i) when the deportation orders were made; and (ii) when the applications to revoke same were decided (including what the applicants and respondent knew, or did not know, as it emerges from the evidence). Put simply, I cannot agree with a proposition that the applicants' notification failures 'rule out' the existence of unusual, special, or changed circumstances, when these changed circumstances are matters of fact disclosed in the evidence.

118. This Court must look at the 2023 decision at the time it was made. When it was made, the Minister had become aware of facts (from December 2021) which were not known to the Minister in 2017. The gravamen of the respondents' argument is that this can be ignored by reference to the applicants' notification failures. In the manner explained in this judgment, I feel obliged to take a different view.

Other information

119. It seems fair to say that, at all material times, the respondent has known that a deportation order may prevent someone from entering another EU State in the future. Indeed, the foregoing was stated explicitly in the respondent's 7 September 2006 correspondence which gave notice of the proposals to make deportation orders (validly served on each applicant but not, in fact, received by them). Whilst the averments made by the applicants do not go as far as evidencing that the extant deportation orders prevent travel to other states, other information which only became available to the respondent in 2021, and with which no issue is taken, included (to quote from the Examination concerning the first applicant) *"that the restrictions imposed on him are impacting negatively on his business"* and that his application *"for revocation of the deportation order"* was *"to facilitate his travel to Europe for business purposes".*

Irrationality

120. Having touched on the common sense understanding of the term, it is fair to say that the principles relating to *irrationality* as understood in judicial review are well known. In the *State (Keegan) v Stardust Victims Compensation Tribunal* [1986] I.R. 642 Henchy J. stated:-

> *"I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties which requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."* (emphasis added).

121. In the foregoing manner, the learned judge linked irrationality to basic logic and common sense. In the later decision of the Supreme Court in *O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39, Finlay C.J. followed the decision in *Keegan* but also emphasised that: *"The circumstances under which the Court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare",* going on to state at (70):

> *"I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."* (emphasis added).

122. The Examination of file was doubtless conducted in good faith and nothing in this judgment is intended as any criticism of the dedication of anyone to their duties. However, the finding of *"no unusual, special, or changed circumstances since the making of the deportation order"* is impossible to reconcile with the contents of the decision itself which refers *inter alia* to the consideration of *"information, previously unknown but now provided"* and *"updated submissions and information now known to the Minister"* on foot of which it is concluded that the applicants

departed Ireland in 2005 *"residing permanently in Nigeria since"*. This *"previously unknown"* and *"information now known to the Minister",* in fact, discloses changed circumstances.

Conclusion inconsistent with premise

123. It will be recalled that the *"reasons"* for the 2017 deportation orders were that the applicants *"have remained in the State"* without the Minister's permission. In my view the conclusion (i.e. that the deportation orders should be affirmed because, on the basis of the information provided to the Minister as of 6 June 2023, *"there are no unusual, special or changed circumstances since the making of the deportation order*[s]") simply does not flow from, and is impossible to reconcile with, the earlier premise (i.e. that the applicants departed Ireland in 2005 and have been *"residing permanently in Nigeria since"*) something which was not known to the respondent *until* 2021.

Drip-feed

124. This is not a situation where the applicants withheld information from the Minister, only to provide it at a later stage. On the contrary, the evidence allows for a finding that the applicants acted with reasonable speed upon learning of the deportation orders and instructed solicitors who corresponded with the respondent on their behalf.

125. Nor is the present case one where there was a 'drip-feed' to the Minister of information available at an earlier date (something deprecated in *Smith v Minister for Justice* [2013] IESC 4 at para. 5.6. The uncontested evidence is to the effect that the applicants did not learn of the deportation orders until some four years after they were made.

126. On the particular facts of this case the information described in the 6 June 2023 Examination as *"previously unknown but now provided"* could not have been provided in response to either (i) the 07 September 2006 notice that the Minister proposed to make deportation orders; (ii) the 2008 reminder; or (iii) the 09 November 2017 notification that the Minister had decided to make deportation orders, none of which were, as a matter of fact, received by the applicants. The uncontested evidence is that the applicants had no knowledge of any proposals to deport them and did not learn of the deportation orders until some 4 years after they were made.

Regurgitation

127. Nor do the applicants' s. 3(11) applications consist of *"the regurgitation of old and rejected contentions"* [*per* Charleton J. in *PO & Anor. v The Minister for Justice and Equality & Ors.* [2015] IESC 64 ("*PO*") at para. 22)].

128. Mr Justice Charleton J. went onto state in *PO* (at para. 23): *"In considering whether to revoke a deportation order under section 3(11) any new information furnished by or on behalf of the applicant in seeking that such an order be set aside must also be taken into account.".* In the present case, despite acknowledging that the applicants had furnished *"information, previously unknown but now provided"* and referencing *"information now known to the Minister"* (i.e. *new*

information) an entirely inconsistent conclusion was made to the effect that there was *no* new information. In my view the foregoing constitutes irrationality in the judicial review sense and it was this irrationality which formed the basis for the recommendation to the Minister that the deportation orders should be affirmed, which recommendation was endorsed by the respondent.

No relevant material

129. From any common-sense perspective, the decision (that "*there are no unusual, special or changed circumstances…"*) was based on no relevant material. I take this view because the decision is entirely inconsistent with findings made by the respondent *of* changed circumstances. It is also a decision which is devoid of any purpose when looked at from the perspective of fundamental reason and common sense. The following analysis fortifies me in this view.

Purpose?

130. Given what was, and was not, known to the respondent in 2017 there was a rational and entirely obvious purpose in granting the deportation orders, namely, to require both applicants to *leave* the State and to *remain* outside the State thereafter. However, in light of the changed circumstances notified to the respondent in December 2021 (i.e. that the applicants left in 2005, remaining outside the State ever since) I ask, rhetorically, what was the *purpose* of the June 2023 decision to affirm the October 2017 deportation orders? Viewed in light of the new information available to the Minister when considering the application to revoke, the purpose of the deportation orders cannot have been to require the applicants to *leave* the State and to *remain* outside Ireland (because, as the respondent acknowledged in 2023, the foregoing has been the factual position since 2005, being 12 years *prior* to the making of the deportation orders and 18 years prior to the decision to affirm them).

Punishment?

131. Nor could the purpose of the deportation orders have been to punish the applicants for their failure to comply with notification obligations (the issue which featured most in the respondent's opposition to the claim). I say this having regard to the guidance given by the Supreme Court in *DP v The Govern of the Training Unit*, as to the nature and purpose of a deportation order, as well as the principles articulated by the Supreme Court in *Sivsivadze* (in particular at para. 37). As touched on earlier, these authorities make clear that a deportation order is a decision to deny permission to remain (or to enter) the State but *"it is not in any sense a punishment or sanction, administrative or otherwise"* (see *Sivsivadze*).

132. Whilst no authority was opened to me on the question of whether a decision to *affirm* a deportation order (as opposed to a decision to *make* a deportation order) can amount to a punishment or sanction, the principles in *DP v The Govern of the Training Unit* and in *Sivsivadze* would suggest that it cannot. More importantly, the respondent does not suggest that the decision to affirm the earlier deportation orders was intended, in any way, as a punishment or sanction.

133. Viewed through the lens of a 'changed circumstances test', the evidence discloses unusual, special or changed circumstances since the making of the deportation orders in 2017. The Minister's decision to the contrary is, in my view, irrational in the sense in which that term is used in judicial review. On any analysis, the information provided by the applicants' solicitors to the respondent and accepted on behalf of the Minister as fact, was materially different to the facts as understood by the Minister in 2017 (and was not information capable of being presented earlier).

Process

134. Judicial review is, of course, concerned not with outcome or merits, but with the process by which a decision is reached. Nothing in this judgment should be interpreted as this Court purporting to 'stand in the shoes' of the decision - maker. This Court has no such jurisdiction and is very aware of that. However, by taking the irrational view that there were no unusual, special or changed circumstances since the making of the deportation orders (despite acknowledging changed circumstances earlier in the same decision) the Minister cannot have had regard to all relevant factors when making the decision to revoke, or not. In short, the decision-making *process* was flawed.

135. Returning one final time to the applicants' notification failures, which featured so heavily in the respondent's opposition to this claim, I take the view the applicants undoubted failure to inform the Minister, in 2005, that they were returning permanently to Nigeria (and their continued failure to furnish this information up to and beyond the point at which deportation orders were made) does not render rational the Minister's 2023 decision (made at a point when he *knew* the respondents left Ireland permanently 18 years earlier) to refuse to revoke the 2017 deportation orders (made when the Minister did *not* know the relevant circumstances). Nothing in this judgment should be taken as condoning the applicants' failure to comply with notification obligations. Indeed, this failure gave rise to the making of a deportation order against each of them which might not have been made had they complied with relevant notification requirements.

136. For the reasons set out in this judgment, it seems to me that the present case involves one of those rare situations where the Court can and should intervene in circumstances where irrationality has been established.

Due deference

137. I have come to this view very conscious of the due deference which this Court must show in respect of decisions by the respondent. Although the Oireachtas has conferred decision-making powers on the respondent (*not* on this Court) the central issue arising in these proceedings would not appear to involve any specialised knowledge possessed by the decision-maker. In other words, on the 'binary' question of whether there were, or were not, *unusual, special, or changed circumstances since the making of the deportation orders*, it does not seem to me that specialised technical or administrative skills or knowledge were involved. In other words, the impugned decision enjoys the presumption of validity, consistent with this Court's respect for the 'separation of powers' principle, but it does not seem to me that the doctrine of curial deference plays any

significant part. To the extent that it is relevant, that doctrine cannot in my view, 'save' the decision which, for the reasons expressed in this judgment, has been found to be irrational, on an application of the *Keegan* and *O'Keeffe* principles.

138. For the reasons explained above, I am satisfied that the applicants have established an entitlement to judicial review on the grounds of irrationality, as pleaded in para. 3 of the legal grounds, set out at para. (e) of the applicants Statement dated 14 August 2023. This was, as I say, the main ground advanced and the argument which took up the majority of the time during the hearing.

Proportionality

139. For the sake of clarity and completeness, I want to emphasise that on the very particular facts of this case, the applicants have established irrationality in what might be called the 'pre-*Meadows*' sense. In *Meadows v Minister for Justice* [2010] 2 I.R. 701, [2010] IESC 3, the Supreme Court (Murray C.J.) re-formulated the test for unreasonableness, making clear that judicial review can encompass considerations of proportionality, stating: -

> *"In examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense I see no reason why the Court should not have recourse to the principle of proportionality in determining those issues. It is already well established that the Court may do so when considering whether the Oireachtas has exceeded its constitutional powers in the enactment of legislations. Application of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness. I do not find anything in the dicta of the court in Keegan or O'Keefe which would exclude the court from applying the principle of proportionality in cases where it could be considered to be relevant…".*

140. In her concurring judgment, Denham J. (as she then was) stated:-

> *"Where fundamental rights and freedoms are factors in a review, they are relevant in analysing the reasonableness of a decision. This is inherent in the test of whether a decision is reasonable. While the test of reasonableness as described in Keegan and in O'Keeffe did not expressly refer to the concept of proportionality, and while the term 'proportionality' is relatively new in this jurisdiction, it is inherent in any analysis of the reasonableness of a decision."* (emphasis added).

Denham J. also stated: -

> *"Any effect on rights should be within constitutional limitations, should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision.".*

141. Mr. Justice Fennelly J. also took the view that a decision may affect fundamental rights to such a disproportionate degree, having regard to public objectives pursued, that it may be found to be unreasonable in the *Keegan* and *O'Keeffe* sense, stating (at para. 71-72): -

> *"71. …this test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commiserate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J. [in the Keegan case] the applicant must discharge that burden by producing relevant and cogent evidence.*
>
> *72. This does not involve a modification of the existing test as properly understood. Rather it is an explanation of principles that were already implicit in our law."* (emphasis added).

Constitutional / fundamental rights

142. It seems to me that the clarification given by the Supreme Court in *Meadows* is that, in order for a decision which interferes with constitutional or fundamental rights to be considered reasonable, it must be proportionate. In other words, the principle of proportionality is relevant where fundamental or constitutional rights are engaged. What fundamental rights are engaged here? As discussed earlier, the applicants (i) are not Irish citizens; (ii) do not enjoy constitutional rights; (iii) do not reside in this State; and (iv) with their Irish citizen child left the State 18 years ago, never to return. The evidence also demonstrates that the respondent conducted a lawful assessment as regards their private life rights under Article 8 of the ECHR. Furthermore, in the manner presently discussed, the applicants have not established that Article 8 encompasses the effect of a deportation order on travel between third party countries. Thus, it does not seem to me that any constitutional or fundamental right is engaged. In light of the foregoing, I feel obliged to reject the oral submission made on behalf of the applicants that "*the refusal was irrational because it was disproportionate*" (emphasis added).

Secondary argument

143. Although Counsel for the applicants made clear from the outset that the foregoing was the main point in the case, I propose to address the secondary argument, lest I be wrong not to do so. This is to the effect that the impugned decisions interfere with the applicants' rights to respect for their private lives under Article 8(1) of the European Convention on Human Rights ("ECHR").

144. In light of the facts, it is clear that the applicants have never had any significant private lives in Ireland. The applicants themselves are not Irish citizens and, together with their Irish citizen child, they left the State in 2005 and have resided permanently in their home country of Nigeria since then.

Art. 8 ECHR

145. (1) Article 8 ECHR provides:-

"Right to respect for private and family life.

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.".*

146. The applicants have had no private lives in this State since 2005. Hence the only aspect of their private lives which can be relevant to Article 8 is such private life as they enjoyed while living in Ireland temporarily. The applicants take no issue with the accuracy of the description of their limited private lives in Ireland, prior to 2005, as set out in the examinations of file. Each examination of 06 June 2023 set out the respondent's careful consideration of the applicants rights under Article 8, which consideration (focusing on the first named applicant's examination of file) stated *inter alia*:-

> "*I have considered the information, previously unknown but now provided, that Mr.* [EA] *and his family left the State some time after the birth of their son and returned to the State again in 2005 in order to submit an application for permission to remain in the State on the basis their* (sic) *parentage of any Irish Citizen son. I have considered that Mr*. [EA] *returned to Nigeria, on an unknown date in 2005, though*[t] *to be July 2005 when his wife departed the State, where he had resided, and continues to reside, with his family. Mr.* [EA] *has no family connections in the State and while no information as to the whereabouts of his son has been provided, documentary evidence that he completed his primary and secondary education in Nigeria has been provided in support of the claim that the family have never returned to Ireland since their departure in 2005.*
>
> …
>
> *I acknowledge the submission that Mr.* [EA], *and his family, are currently residing in Nigeria where he and his wife and two adult sons run their business. I have considered that Mr.* [EA] *has not resided in the State for over eighteen years, notwithstanding the information now provided that he had left the State after the birth of his son in November 2002, returning only for short periods while residing permanently and running his business, incorporated in 2001, from Nigeria. I have considered the fact that Mr.* [EA]*'s application for permission to remain as the parent of an Irish citizen child was refused having failed to provide acceptable evidence of continuous residence in the State since the birth of his son in 2002, a fact that is clearly illustrated through the updated submissions and information now known to the Minister. It is reasonable to conclude therefore that Mr*. [EA] *notwithstanding he has an Irish citizen son, has remained in the State for minimal and temporary periods since the birth of his son on 11th November 2002, ultimately departing and residing permanently in Nigeria since 2005.*

Therefore, it is submitted, on the information available at this time, that a decision by the Minister to affirm the deportation order made in respect of Mr. [EA] *does not constitute an interference in the right to respect for private life, under Article 8(1) of the ECHR and is necessary in a democratic society, in pursuit of a pressing social need, and proportionate to the legitimate aim being pursued within the meaning of Article 8(2) of the ECHR*.".

Appropriate assessment

147. In the foregoing manner, the respondent conducted an appropriate assessment consistent with the State's duty to respect private lives within its borders.

Travel between third party countries

148. The applicants assert that the impugned decisions restrict their ability to undertake international travel. However, the applicants point to no authority that the ability to travel between third party countries, even if affected by an Irish deportation order, engages the State's duty under Article 8. I accept the submission by the respondent that: -

"Travel between Nigeria and third countries is not an aspect of the applicants' private lives for which the respondent or the State bears any type of extra territorial responsibility."
(See the respondent's written submissions, para. 24).

European Convention on Human Rights Act, 2003

149. It is also appropriate to quote as follows from paras. 25 and 26 of the respondent's written submissions: -

"The respondent is unaware of any Strasburg judgment where the Court has extended the scope of Article 8 to cover alleged effects of an expulsion measure on a person's ability to travel to other States. That being so, it is not open to the applicants to ask the High Court to develop the scope of Article 8 so that it covers the manner in which an expulsion measure may affect the person's ability to travel to other countries. Rights under the European Convention on Human Rights are relevant only insofar as the applicants can invoke specific provisions of the European Convention on Human Rights Act, 2003 in accordance with their current scope of interpretation by the Strasburg Court. The Convention has an effect in Irish law only through the medium of, and to the limited extent provided for in, the 2003 Act: J. McD. v P.L. [2009] IESC 81, [2010] 2 I.R. 199.".

Direct effect

150. In *J.McD. v P.L.* the Supreme Court considered an appeal in which the trial judge held *inter alia* that the notion of family life within the meaning of Article 8 ECHR was not confined to the family based on marriage, but might encompass other *de facto* family ties. At para. [311] of his judgment, Mr. Justice Fennelly stated: -

"The High Court judgment does not provide any basis by reference to the Act of 2003 or otherwise for the application in Irish law of the notion of de facto *family based on Article 8 of the Convention. It seems that the trial judge effectively gave direct effect to the*

Convention. That is not permissible, having regard to Article 29 of the Constitution. The Convention does not have direct effect in Irish law…".

151. The foregoing principle is particularly relevant in this case where the applicants are, in effect, asking this Court impermissibly to give direct effect to the Convention (albeit in what was put very much as a secondary argument). In *J.McD. v P.L.,* Fennelly J. went on to state the following (at pp. 316-17): -

> *"[327] It is vital to point out that the European Court of Human Rights has the prime responsibility of interpreting the Convention. Its decisions are binding on the contracting states. It is important that the Convention be interpreted consistently. The courts of the individual states should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence.*
>
> *[328] I am satisfied, for these reasons, that the very detailed and careful examination by the trial judge of the notion of de facto family cannot be relevant to the issues to be determined in this case. Neither the Constitution nor the law in force in Ireland recognise persons in the position of the respondents as constituting a family with the natural child of one of them. None of the foregoing means that the present legal situation will continue unaltered at either international or national level. National legislation may address these difficult problems. Changes in the Strasbourg jurisprudence are to be expected. The legal principle is important. The courts must respect the boundaries laid down by Article 29 of the Constitution. The Act of 2003 does not provide an open ended mechanism for our courts to outpace Strasbourg."* (emphasis added).

152. None of the authorities, domestic or European, cited from paras. 27 to 32 of the applicants' written legal submissions suggest that the scope of Article 8 encompasses the effect of a deportation order on travel between third party countries. In essence, the applicants' argument with respect to Article 8 ECHR amounts to an invitation to this Court to adopt an interpretation of the Convention which is at variance with, and would outpace, Strasbourg jurisprudence.

153. In these circumstances, I am satisfied that there was no error in the respondent's decision-making process and the applicants have not established an entitlement to judicial review on the secondary grounds advanced.

Conclusion

154. By way of a brief summary only, refusal to set aside the deportation orders is 'squarely' based on the decision, in 2023, that there were no unusual, special, or changed circumstances since the making of the deportation orders, in 2017. However, this decision is fundamentally at variance with the very facts accepted by the respondent in the same decision and the conclusion drawn from same, (i.e. that the applicants left Ireland permanently in 2005).

155. The fact that the applicants left Ireland in 2005 was not known to the respondent when the deportation orders were made in 2017. The fact that, since 2005, both applicants have remained outside the State was not known in 2017. These facts only became known to the respondent in 2021, just as the applicants only learned in 2021 that deportation orders had been made against them in 2017 and that proposals to deport them were made in 2006.

156. These constitute changed circumstances on any common sense analysis. To conclude otherwise seems to me to fly in the face of reason and common sense and is irrational. For the reasons set out in this decision, the applicants are entitled to relief on the "main" ground advanced.

157. On 24 March 2020, the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*.

158. Having regard to the foregoing, the parties are invited to agree the contents of a draft order, including with respect to costs, and to provide same by 5pm on 20 January 2025. My *preliminary* view is that because the applicants have been entirely successful in the main argument which was canvassed during the trial, they are entitled an order for costs on the basis that they 'follow the event' and having regard to s.169(1) of the Legal Services Regulation Act, 2015. In the event of a dispute on any issue, including as to costs, short written submissions should be provided within a further 7 days.