



**UNAPPROVED  
THE COURT OF APPEAL**

Neutral Citation Number [2021] IECA 119  
Appeal Number: 2017/376

**Whelan J.  
Faherty J.  
Collins J.**

**BETWEEN/**

**F.E.C., P.N.C., E.C., D.C., S.C.Z.C. (THE THIRD TO FIFTH APPLICANTS ARE  
MINORS SUING BY THEIR NEXT FIREND P.N.C.)**

**APPELLANTS/APPLICANTS**

**- AND -**

**MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Ms. Justice Faherty delivered on the 16<sup>th</sup> day of April 2021**

1. The appellants appeal the refusal of the High Court (Mac Eochaidh J.), by judgment dated 25 July 2016 and Order perfected on 26 July 2016, to grant them leave to apply for judicial review of the decision of the respondent (hereinafter “the Minister”) dated 6 October 2015 to refuse to revoke a Deportation Order made in respect of the first appellant in 2005.

**Material facts and background**

2. The first and second appellants are Nigerian nationals. They entered the State in 2004 and applied for asylum on 21 September 2004. Those applications were refused, and Deportation Orders issued against both appellants on 29 November 2005.

3. Their first child (the third appellant) was born on 27 October 2006 and is a Nigerian national. An application for asylum was made on his behalf and the second appellant was permitted to remain in the State pending the issue of a decision on the asylum application.

4. The first appellant was deported on 19 December 2007. According to his affidavit evidence in the within proceedings, he stayed in Lagos for a number of months before returning to the State illegally and in secret in or around June 2008. He entered the State using a passport in the name of a third party, F. E. E. The first appellant asserts that he has remained in the State since that time without permission.

5. The fourth appellant was born in the State on 9 October 2008 and, again, an application for asylum was made on his behalf by the second appellant. On 3 March 2010, the second appellant gave birth to a third child (the fifth appellant). The second appellant asserts that the fifth appellant's father is a Latvian national and a Latvian passport for the child has been produced.

6. In 2013, the second appellant applied for her Deportation Order to be revoked. On 10 February 2014, the Deportation Order which had issued against the second appellant in 2005 was revoked. On 25 February 2014, she was granted a Stamp 4 permission to remain in the State, which extended to her Nigerian national sons (the third and fourth appellants). At the time of the revocation application in respect of the second appellant, the fact that the first appellant had purportedly returned to the State in 2008 was not disclosed to the Minister, either by the first appellant or the second appellant.

7. On 27 March 2014, the second appellant and her children left the direct provision centre in the South East of the country where they were resident from 2008 to 2014 and went to reside in Dublin.

8. On 26 November 2014, the first appellant applied to have the existing Deportation Order against him revoked. In his application, his solicitors asserted that from the time he

entered the State illegally in or around mid-2008 he visited his children in the direct provision centre as often as he could and that after the second appellant's relationship with the fifth appellant's father broke down he began visiting the second appellant and the children regularly. It was asserted that throughout the intervening years he provided emotional and financial support to the children, including the fifth appellant whom the first appellant considered and treated as his own child. It was asserted that following the grant of permission to the second appellant to reside in the State and her leaving the direct provision centre, the family moved in together at a named address in Dublin.

9. The Minister was advised that the first appellant had managed to find informal jobs which had allowed him to provide for his family. It was asserted that the first appellant was discharging his moral and legal obligations to his family, that all three children saw him as their father. His solicitors submitted that the Minister, in deciding the application, "ought to take into account the children's best interests and that such interests would best be preserved and served by allowing the children's father to remain in the State..." It was asserted that the denial of permission to the first appellant to remain in the State "would amount to an unlawful interference" with the family's right to respect for their private and family life as guaranteed by the Constitution and Article 8 of the European Convention on Human Rights (ECHR) and that to require the first appellant to leave the State, in spite of his having resided in the State without permission for six years "would be disproportionate and an unlawful breach of the children's right to have the love, care, and company of their father." The revocation application was accompanied by:

- Personal statements from the first and second appellants;
- A letter dated 14 July 2014 stating the first appellant was known to the author for nine years having been ordained a deacon of the Faith Christian Fellowship Ministry in Galway in 2005. It was said that first appellant's leadership qualities

had earned him the headship of another (named) branch of the Church in the West of Ireland and that the Church would be in a position to offer him work if he was permitted to stay in the State.

- A letter (undated) from a named individual stating that the first appellant was a member of and a minister in the Cornerstone Tabernacle Ministries Church in Dublin.
- A letter dated 25 June 2014 from the Principal of the third and fourth appellants' national school stating that the first appellant was supportive of school policies and procedures; and
- A letter from Vodafone dated 16 September 2014 by way of proof of address.

**10.** Further representations were submitted between April 2015 and October 2015. In a letter dated 27 July 2015 by way of response to queries raised by the Minister as to how the first appellant had entered the State and seeking details of his living and working arrangements, the first appellant's solicitors outlined that the first appellant had used the services of an agent to apply for a false passport in Nigeria and an Irish Tourist Visa. It was asserted that the first appellant had returned the passport to the agent upon arrival in the State. It was outlined that the first appellant's situation in Nigeria was "desperate", that he had no family or social ties there, that he could not be separated from his family and that he was unable to return to his home state in Nigeria because he feared for his life. The first appellant's apologies for having broken the State's immigration laws were conveyed: it was explained that he had felt compelled to return to the State as his wife and children were more important. The solicitors enclosed another Vodafone bill dated 16 July 2015 as proof of the first appellant's residence with the second to fifth appellants. It was asserted that the first appellant was discharging most of the parental duties as the second appellant

had returned to full-time education. His role as *de facto* father to the fifth appellant was again highlighted.

11. It was submitted that deporting the first appellant would breach the fifth appellant's (an EU citizen) rights under Article 20 TFEU. It was again emphasised that the deportation would breach the family's constitutional and EU rights and would be disproportionate.

12. Reference was made to the first appellant's employment prospects as previously set out, and that the second appellant's employment prospects after completion of her studies would allow the family to become financially self-sufficient.

13. The Minister was again entreated to take account of the best interests of the third to fifth appellants which, it was submitted, should be given "primary consideration" and that the children would "suffer adversely by not having the care, company, support and love of their father."

#### **The decision**

14. By letter of 19 October 2015 the Minister communicated her refusal of the first appellant's revocation application. The Examination of File under s.3(11) of the Immigration Act 1999 as amended ("the 1999 Act"), dated 6 October 2015, contains the basis upon which the decision was made. It commenced by reference to the first appellant's background, including his arrival in the State in 2004, his failed asylum application and subsequent Deportation Order and the execution of that Order in 2007. Reference was made to the first appellant's revocation application and the various representations in that regard received by the Minister over the course of 2014-2015.

15. It was noted that the first appellant "has submitted no supporting documentation to substantiate his assertions that he has resided in the State *at all times* since 2008, i.e. utility bills, tenancy agreements, bank statements etcetera. [The first appellant] has failed to

make any contact with the Minister from 2008-2014. As such, it cannot be stated with any certainty how long he has remained in the State”.

**16.** The decision-maker noted two un-dated letters from a named individual offering the first appellant employment but that no further information had been submitted regarding this offer. It was also noted that there was correspondence dated 21 September 2015 from a Dublin city hotel manager which stated that the first appellant was working as part of its cleaning team during weekends and that the first appellant had shown himself to be an honest, trustworthy and very committed employee. The decision-maker observed however that the first appellant had no permission to be employed in the State “and has therefore been showing a flagrant disregard for the laws of the State by entering into, and remaining in, employment”.

**17.** It was noted that numerous representations were submitted on the first appellant’s behalf attesting to his good character and conduct and that the second appellant had submitted letters requesting that he be permitted to remain in the State and describing the role he plays in her family life. It was stated that due consideration was given to all representations and correspondence on file, including that from the children’s school and the utility bill dated 14 September 2014 in his name.

**18.** Article 8 ECHR considerations commenced under “Private life” by reference to the first appellant’s social ties in the State and his personal development since his arrival and the correspondence received attesting to such ties. While noting his claim to have been in the State on a continuous basis since 2008, reference was made to the fact that no evidence by way of passport or tenancy agreements had been put forward to substantiate this claim. Following a consideration and weighing of the facts it was not accepted that a decision to affirm the Deportation Order in respect of the first appellant would constitute a breach to respect for private life under Article 8 ECHR.

**19.** Under the heading “Family Life”, the appellants’ history in the State was noted including the second appellant’s temporary permission to remain in the State after her Deportation Order was revoked in 2014. It was noted that the first and second appellants were a married couple and they had two biological children and that the fifth appellant’s biological father was a Latvian national. The first appellant’s statement that he acts as a *de facto* father to this child was noted albeit it was observed that no further evidence had been submitted regarding this assertion. As set out in the Examination of File, the second appellant was requested by the Minister in 2012 to provide DNA evidence confirming the child’s parentage but no such evidence was received at that time or since. It was observed that the fifth appellant as an EU citizen “can remain in the State with his mother and brothers, if they choose to do so”.

**20.** With reference to the first appellant’s involvement, spiritually, educationally and financially with the children, the decision-maker stated that “due consideration has been given to all representations on file, which state that [the first appellant] is playing an active role in the lives of his children”. It was noted that the correspondence from the primary school of the third and fourth appellants confirmed that the first appellant was known to the school.

**21.** After noting that when the second appellant requested in 2013 that she and her children be permitted to continue living in the State she had never mentioned that the first appellant had returned to the State, the decision maker went on to remark:

“While [the first appellant] may wish to assert a choice of residency in this State, the Minister is not obliged to respect his choice of residency. He was permitted to be in the State approximately 11 years ago only because he claimed to be a fugitive from persecution and/or serious harm in Nigeria and that he was, therefore, entitled to international protection. Following the appropriate investigations, that claim was

found to be without substance. The Minister made a deportation order in respect of him in 2005 and he was removed from the State in 2007. [He] claims that he proceeded to re-enter the State in 2008 and by doing so has shown a flagrant disregard for the immigration laws of the State and has knowingly circumvented the immigration process. [He] then failed to make contact with the GNIB or the Minister from 2008 to 2014, a period of approximately 6 years. While [he] states that he has remained in the State constantly since 2008, he has submitted no supporting documentation to substantiate his assertions that he had resided at all times in the State.”

**22.** Having observed that the information that had been furnished pointed to the first appellant only commencing to reside with his family in September 2014, the decision-maker stated:

“...It is submitted that the disruption to [the appellants’] family life would not have the same impact as it would had they been living as a family unit for a much longer time.

It is submitted in this regard that the Minister is not obliged to respect the choice of residence of [the first appellant]. The jurisprudence of the European Court of Human Rights has established that a State has a right to under international law control the entry of non-nationals into its territory, subject always to its treaty obligations. The State also has the right to ensure the economic well being of the State. Consideration is also given the impact of granting permission to remain to [the first appellant] on the health and welfare systems in the State and how such a decision may lead to similar decision in other cases.”

**23.** Under the heading “Balancing rights”, the decision continued:

“I have considered the fact that [the first appellant’s] wife and children... were granted permission to remain in the State. I have also considered that the [first appellant] states that he acts as a ‘de facto’ father to his wife’s third child... who is eligible for Nigerian and Latvian citizenship. I also note that [the first appellant] is a Nigerian national, as is his wife, and I have considered that their children are eligible for Nigerian citizenship, and that they would be able to visit him, or indeed relocate, if they so wished, to Nigeria. I further note that it is stated that [the fifth appellant’s] biological father, a Latvian national, is not stated to be involved in his son’s life and his whereabouts remain unknown.

[The first appellant] states that he has remained in the State constantly since 2008. To date, however, it must be noted that he has submitted no supporting documentation to substantiate his assertions that he has resided *at all times* in the State since 2008, i.e. his passport, utility bills, tenancy agreements, bank statements etc. While [the first appellant] claims to have remained in the State from 2008 to the present date, he also submits that he has lived with his family since 2014 only. Therefore, it is submitted that the disruption to their family life would not have the same impact as it would had they been living as a family unit for a much longer time. No further submissions have been received which clarify exactly how long he has remained in the State, backed up by any documentary evidence. While it is acknowledged that [the first appellant] and his family may have developed family life in the State, consideration must be given to the rights of the State to maintain control of its own borders and to operate a regulated system for the control, processing and monitoring of non-national persons in the State. It is consistent with the Minister’s obligations to [impose] those controls and is in conformity with

all domestic and international legal obligations. The State also has the right to ensure the economic well-being of the country.

I have taken into consideration the best interest of [the first appellant's] children... which undoubtedly includes having the care and company of their parents. While the Minister must consider the best interests of the children, he is not obliged to act in the best interests of the children.

...

Also of importance is the fact that the level of unemployment in the State is still substantial and the current economic climate, while slowly improving, is still fragile. Also of relevance is the impact of granting permission to remain to [the first appellant] on the health and welfare systems in the State. Although each case is considered on its own merits, having regard to the rights of all those concerned, consideration is also given to how a decision to grant [the first appellant] permission to remain may lead to similar decisions in other cases.

I have also considered that [the second appellant] has been granted permission to remain in this State and note that she can choose to remain in the State for as long as she has permission to do so, and that there are no insurmountable obstacles which would cause her to be unable to relocate to Nigeria with her children, if she so chooses, in order to maintain family life. While [the first appellant] may wish to assert a choice of residency in this State, the Minister is not obliged to respect this choice of residency. I again refer to the fact that a deportation order made in respect of [the first appellant] in 2005 and he was subsequently removed from the State, only to return to the State without permission. He has knowingly circumvented the immigration process and the State has the right and the legitimate

aim to maintain control of its own borders and to operate a regulated system for the control, processing and monitoring of non-national persons in the State.

I have taken into account all the representations made in [the] case, including all personal statements, references, and representations submitted.

Having considered the overall facts of the case, I have concluded that the factors relating to the rights of the State to maintain control of its own borders, and operate a regulated system for the control, processing and monitoring of non-national persons in the State, and to ensure the economic well being of the State, are weightier than those factors relating to the rights of [the first appellant] and the individual family.”

**24.** The decision-maker went on to assert that the deportation of the first appellant was not disproportionate in all the circumstances.

***The leave application***

**25.** Ground one of the Statement of Grounds asserts as follows:

“1. In refusing to revoke the deportation order against the first applicant, the respondent breached the applicants’ rights to respect for private and family life pursuant to Article 8 ECHR. The respondent placed undue weight on the interest of the state in protecting the integrity of the immigration and asylum system and failed to place sufficient weight on other factors pertinent to the particular facts of this case...”

**26.** The High Court judge found that this ground was formulated “*as one might plead an appeal point, framed in a general way*”. The High Court judge was unable “*to detect what precise legal complaint is said to undermine the decision in suit*”. Insofar as written submissions were made to the effect that there was “no consideration of the fact that the family unit would effectively be ruptured...”, the trial judge found that no such case was

made to the Minister and that insofar as submissions on the rights of the children to the companionship of the first appellant were made same had been expressly identified and considered in the decision.

**27.** He found that no illegality could attach to the failure of the Minister to take into account that the first appellant had not been deported following a criminal conviction – an entirely irrelevant feature, in the view of the Court. He also rejected the complaint that there had been no consideration of the fact that the first and second appellants had been married before entering the State, and that it was therefore not a case of family life being created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the State would from the outset be precarious. The High Court judge considered that the Minister was not obliged to consider irrelevant factors such as the contracting of an Irish marriage in Ireland and that, in any event, family life had in fact been created and extended by the birth of the children in the State, a factor which was fully considered by the Minister.

**28.** Insofar as it was argued that the best interests of the children were not subject to “adequate analysis”, MacEochaidh J. found that that plea failed to identify a legal error in the decision in the face of the express statement in the decision that the best interests of the children had been considered.

**29.** Ground 2 stated:

“In treating the first applicant in a different manner to the second applicant in circumstances where they are in the same situation in all respects except for their sex, the respondent breached the prohibition on discrimination under Article 14 ECHR.”

The trial judge found that the complaint that the Minister breached both Articles 8 and 14 ECHR had to fail because there was no evidence that the only difference between the

circumstances of the first and second appellant was gender. He noted that it was clear from the papers that the Minister had decided that the second appellant was to have temporary permission to remain in the State.

**30.** The third ground upon which leave was sought concerned the principle of “the paramount importance of the best interests of the child”, and the asserted lack of adequate analysis as to how that principle had been applied to the appellants by the Minister. The trial judge found the ground not to be made out stating, *inter alia*, “*insufficient particularity of pleading renders it impossible to appreciate how it is that the decision failed to consider the best interests of the children when the decision expressly states that it has done so.*”

**31.** The fourth ground alleged a breach of constitutional fair procedures on the part of the Minister in her failure to bring to the attention of the first appellant the lack of documentation attesting to the fact that he had been in the State since 2008. The trial judge found that there was copious case law which set out that the Minister was not obliged to revert to the first appellant “*to discuss weaknesses in his application for revocation*”.

**32.** The fifth ground asserted that the failure to revoke the Deportation Order breached the fifth appellant’s rights as a citizen of the EU under Article 20 TFEU. In finding that substantial grounds were not made out for leave on this ground, the trial judge noted that no case had ever been made to the Minister that the fifth appellant would be deprived of his EU rights if the first appellant was deported and that, furthermore, that case had not been made on affidavit.

**33.** The sixth ground related to alleged breaches of Articles 6 and 7 of Council Directive 2005/85 E.C. on minimum standards on procedures in Member States for granting and withdrawing refugee status. The trial judge found that this ground was not made out to the requisite standard for leave to be granted on the basis that he could find no submission to

the Minister which argued that the Deportation Order should be revoked in view of outstanding asylum applications of minor applicants.

**The appeal**

**34.** As required by the provisions of s.5 of the Illegal Immigrants (Trafficking) Act 2000 as amended, the appellants sought a certificate for leave to appeal which was granted on 5 December 2016 on the following ground:

“Whether, in deciding on an application made by one member of a family (including parents and a child exercising family life under Article 8 ECHR), each of which is originally in an equally precarious position (having no entitlement to be in the State save such discretionary permission if any as the Minister might grant), the Minister is required to take a holistic view of the collective fate of the family, and in particular is required not to direct one member of such a family group to leave the State while permitting another member to stay without compelling justification...”

It appears that Mac Eochaidh J. granted a certificate of appeal in circumstances where Humphreys J. had granted a certificate of appeal in *S.T.E. v. Minister for Justice and Equality* [2016] IEHC 544.

**35.** In summary, the Notice of Appeal asserts as follows:

- i. In determining the legality of the decision to affirm the Deportation Order made in respect of the first appellant, the judge erred in law in failing to have due regard to the fact that the second appellant was given permission to remain in the State despite her equally precarious position to that of the first appellant.
- ii. The trial judge erred in law in failing to have regard to the Minister’s duty to take a holistic view of the family in assessing whether the first appellant should be deported.

- iii. The trial judge erred in law on the question of whether the decision to affirm the Deportation Order was unlawful discrimination.
- iv. The trial judge erred in law on the question of whether the Minister was obliged to consider the rights of a minor Union citizen under Article 20 TFEU where the Minister relied in part on a finding that it was open to that minor Union citizen to relocate outside of the Union in order to remain in the care of their *de facto* father.
- v. The trial judge erred in law in failing to have regard to the fundamental status of Union citizenship, which gave rise to a rebuttable presumption that it would be unreasonable to expect a minor Union citizen to relocate to a third country outside the territory of the European Union in order for their family to remain together as a family unit.

**36.** The appellants seek from this Court the substitution of the High Court Order with an Order granting them leave to apply for judicial review.

**37.** By the time this appeal came on for hearing, this Court had delivered its unanimous judgment in *S.T.E v. Minister for Justice and Equality* [2019] IECA 332-the judgment mentioned in the appeal certificate- allowing the Minister's appeal against the decision of Humphreys J. *S.T.E. v. Minister for Justice and Equality* [2016] IEHC 319.

**38.** Before embarking on a consideration of the issues which arises in the within appeal, I turn firstly turn to what was in issue in that case. *S.T.E* involved a challenge to the Minister's refusal in February 2015 to revoke a Deportation Order which had been made on 5 July 2006 in respect of the first applicant (a native of Cameroon) following his failed asylum application. The second applicant in *S.T.E* was a national of Morocco who arrived in the State in 2007 and who, like the first applicant, was a failed asylum seeker. The first and second applicants were not legally married but asserted that they had entered into a

religious ceremony in August 2012 albeit they continued to reside separately. The third applicant was the child of the first and second applicants born in the State on 22 March 2013. On 21 August 2013 the second and third applicants were granted leave to remain in the State on a Stamp 4 permission.

**39.** Subsequently, the first applicant applied pursuant to s.3(11) of the 1999 Act to revoke his Deportation Order. His application was refused. The applicants challenged the refusal in the High Court. Humphreys J. refused relief on a number of grounds but held that the Minister had acted irrationally and contrary to Article 8 ECHR and Article 40.3 of the Constitution in granting leave to the second applicant to remain in the State while refusing to revoke the Deportation Order of the first named applicant, thereby breaking up the family unit.

**40.** At para. 39 of his judgment, Humphreys J. opined:

*“In the present case, the Minister gave the mother permission to be in the State at a time when, immediately prior to such permission, both parties were present in the State on a precarious and, in fact, unlawful, basis. Furthermore, the Minister was aware that the parties constituted a family unit... They certainly have family rights under art. 8 of the ECHR; and the flexibility of living constitutional law should make one slow to accept the proposition that the Constitution should now be construed as less protective of the rights of the individual than international law.”*

**41.** He went on to state:

*“41... In the present case, the Minister failed to treat the family unit as a collective entity, and made a decision giving the mother permission to remain, as if that were a unilateral and stand-alone matter, while requiring the father to be expelled from the State.*

*42. In short, the Minister has failed to rationally treat the family unit collectively. Even if their rights under art. 8 of the ECHR (or Article 40.3 of the Constitution) are not terribly extensive, one thing they do extend to is the right to have significant weight to be attached to the desirability of keeping the family together.*

*43. In the present case, on the material before me, the Minister simply failed in that duty. A decision was made on permission for the mother in isolation from a decision on the father's situation. Unless there is significant reason to the contrary, the Minister is required to take a holistic view of the position of a family unit, and to decide on the fate of its members in a coherent and collective manner. If some compelling reason was presented as to why one of two equally unlawful parties to a relationship should be allowed stay and the other be required to leave, that would be one thing. Of course, here, no such reason has been put forward. And if one of the parties had a right to be present independently of the Minister's decision, that would also be a different thing. Again, here, neither party had such an entitlement. But to select between two equally precarious parties to a relationship and decide that one can stay and the other must leave, without compelling justification, is to actively break up the family by State action. Deporting the spouse or partner of a person with a right to remain independently of the Minister's decision (such as an Irish or EU citizen) does not pose such a problem because it is the nature of the situation and the illegality of the other party's presence rather than any ministerial decision as such that gives rise to a parting of the ways”*

**42.** Noting that the Minister was aware that she was dealing with two parents and a child, Humphreys J. opined, at para. 45:

*“... Under those circumstances, it is simply not open to the Minister to make an atomised, blinkered decision in relation to one individual member of such a family*

*group. While I would not suggest that there is an obligation to do so in relation to wider members of an extended family, the Minister must consider the position of an individual member of a nuclear family, married or not, in the context of a position of other members. To fail to do so is potentially irrational, in breach of the substantive rights of the family members concerned, and discriminatory.”*

43. While accepting that the Minister was not obliged at all costs to facilitate the family remaining in the State, Humphreys J. observed that both the first and second applicants were in a *“precarious or unlawful position”*. He opined that had both been deported it was at least reasonably possible that they could have continued family life in Morocco but that the State had intervened of its own action to make that scenario significantly less likely *“by giving permission to the mother to stay, when there was no legal obligation to do so.”* He found that that coupled with the deportation of the first applicant was *“likely to have the practical effect of breaking up the family”* even if the option of all parties moving to Morocco was theoretically open. In the view of Humphreys J., it was both irrational and contrary to the substantive rights of the applicants individually and collectively under Article 8 ECHR and Article 40.3 of the Constitution *“to actively break up a family by giving permission to remain to one member of an illegal or [precarious] couple and refusing such permission to the other partner without compelling justification.”* He found that the approach of the Minister was fundamentally flawed because the Minister had:

- Failed to consider the applicants holistically as a family unit in terms of their collective fate;
- Failed to have due regard to the desirability of enabling the applicants to remain together;
- Irrationally gave permission to one parent to be in the State while refusing it to the other parent.

44. He also found that “*such unjustified discrimination*” as between the parents contravened Article 14 ECHR taken in conjunction with Article 8 and Article 40.1 of the Constitution and that the decision affirming the first applicant’s Deportation Order contravened the substantive rights of the applicants under Article 8 ECHR and Articles 40.3 and 42 of the Constitution.

**The judgment of the Court of Appeal in *S.T.E.***

45. The Court of Appeal considered the heart of the State’s appeal to be “*what matters [the Minister] must take into account when considering an application for revocation of a deportation order in respect of an applicant where his partner and child have permission to reside within the State.*” (at para.22). Writing for the Court, McGovern J. commenced his discussion by noting that the validity of the first applicant’s Deportation Order was not an issue and that the challenge was to a decision on a revocation application pursuant to s.3(11) of the 1999 Act. Citing the *dictum* of O’Neill J. in *Dada v. Minister for Justice and Law Reform* [2006] IEHC 140, where there was no challenge to the underlying Deportation Order, McGovern J. found the scope for review by the court “*is necessarily narrow*”.

46. McGovern J. noted that the applicants had not made a coordinated application to the Minister as a family unit nor had they had they sought residential accommodation in the State as a family unit. He noted that the first applicant had at all times been treated as a single male by the Reception and Integration Agency of the State and that he had not complained about being accommodated in Dublin in circumstances where the second and third applicants were housed in Cork.

47. Addressing the applicable legal principles, McGovern J. identified that the weighing of evidence and the making of decisions in matters concerning asylum and deportation were part of the executive function of the Minister. He cited with approval the *dictum* of Humphreys J. in *O.O.A. v. Minister for Justice and Equality* [2016] IEHC 468:

*“A ministerial decision that the interests of the immigration control system proportionately outweigh the private and family rights of an applicant under art. 8 or Article 41, whether by reference to the relationship with a spouse, partner or child, is, like any immigration decision, a prima facie valid exercise of the executive power of the State, and should not be quashed in the absence of a clear illegality.”*

**48.** He cited a number of other cases as authority for this proposition. He noted that as put by Denham J. in *Oguekwe v. Minister for Justice Equality and Law Reform* [2008] IESC 25, [2008] 3 I.R. 795, at para. 85, *“[T]he State's rights require also to be considered.”*

**49.** He noted that in many of the authorities where the rights of the State were recognised one or more family members were an Irish citizen and the proposed deportation involved a parent of that Irish citizen. In *S.T.E.*, there were no Irish citizens involved.

**50.** Turning then to the Minister's decision not to revoke, McGovern J. stated that the decision showed the Minister had weighed up all the various matters put before her in considering that the Deportation Order should be affirmed, including country of origin information in respect of Cameroon. With regard to Article 8 ECHR rights, McGovern J. noted that the Minister had taken into account that the first applicant had not resided in Cameroon for eleven years, that he had been notified of the Deportation Order in 2006 and that he had failed to leave the State as required *“thereby showing a disregard for the laws of the State”*. McGovern J. went on to state:

*“42. ... In those circumstances [the State] did not accept that the decision to affirm the Deportation Order constituted a breach of the State's obligations to respect the private life of [the first named applicant] pursuant to article 8 of the ECHR. On the basis of the information before the Minister it is difficult to see how this decision*

*could be deemed irrational or unsupported by evidence. The Minister's decision referred to the case of R (Mahmood) v. Secretary of State for the Home Department [2001] 1 W.L.R. 840 where the Court of Appeal in England and Wales found inter alia that the removal or exclusion of one family member from a State where the other members of the family are lawfully resident, would not necessarily infringe article 8 provided that there are not insurmountable obstacles to the family living together in the country of origin of the family member excluded even where this involves a degree of hardship for some or all members of the family. [The Minister] considered the rights of [the applicants] to family life in the light of all the evidence. It was never suggested ...that [the applicants] could not live in Morocco, the country of origin of [the second named applicant]. The decision recites "No obstacle to [the first named applicant, the second named applicant] and their son establishing family life in Morocco have been submitted".*

**51.** In analysing the manner in which the Minister had balanced the rights of the applicants against the rights of the State, McGovern J. made reference to the fact that the decision-maker had expressly noted that the first applicant had no legal basis to be in the State, which was known to the second applicant when the couple's relationship commenced and which was again reconfirmed when the first applicant's application for revocation was refused. He observed that the second applicant had undertaken to accept, as part of the conditions of her permission to remain, that the granting/renewal of her permission to remain in the State did not confer any entitlement or legitimate expectation on any other person, whether related to her or not, to enter or remain in the State.

**52.** Having reviewed the factual background as presented to the Minister, McGovern J. considered it "*difficult to see how the Minister was not entitled to make the decision refusing the revocation application submitted pursuant to s.3(11) of the 1999 Act, as*

*amended.*” He could not find anything irrational about the decision. He found that the question of discrimination did not arise as the first and second applicants clearly fell into different categories. Accordingly, the trial judge had erred in describing the family members as being “*equally unlawful*” and “*equally precarious*”.

**53.** McGovern J. found that the High Court judge was in error in holding that the first and second applicants were in an equal position and had an equally precarious status. At the time when leave was granted in *S.T.E.* to bring the application for judicial review the first applicant was the subject of a deportation order and was in the State illegally whereas the second and third applicants had the benefit of a Stamp 4 permission to reside in the State. Accordingly, their legal status was radically different. Thus, it was a mischaracterisation of the status of the applicants which had led the High Court judge to conclude that the Minister had acted in a way which was irrational, discriminatory, and in breach of their Article 8 ECHR and constitutional rights. McGovern J. went on to find that the High Court judge’s decision that the family unit had to be treated holistically or collectively was based on an erroneous view that the first and second applicants could not be treated differently. As the first and second applicants in *S.T.E.* had an entirely different legal status the question of discrimination did not arise. He opined that “*[n]o legal authority was cited to the High Court judge to the effect that there was a requirement for a holistic treatment of a family in the circumstances in which [the applicants] found themselves.*”

**54.** McGovern J. ultimately concluded:

*“49. As [the first and second named applicants] had an entirely different legal status the question of discrimination did not arise. [The Minister] [was] entitled to treat them differently and did so for reasons stated in the decision.*

50. *In my view the High Court judge was in error in introducing into his judgment a requirement that the Minister must identify a ‘compelling reason’ or ‘compelling circumstances’ before the State’s rights could outweigh those of the respondents. This has never been the test applicable and no submission was made on this point in the High Court.*

51. *There was no basis for the findings of the trial judge that the decision of [the Minister] was either irrational or contrary to the substantive rights of [the applicants] individually and/or collectively under article 8 of the ECHR or Article 40.3 of the Constitution.*

52. *The finding of the High Court judge that there was no objective justification for [the Minister’s] decision was entirely against the weight of the evidence. The decision [...] had set out in detail all the relevant facts and balanced the interests of [the applicants] against the interests of the State in accordance with established legal principles.”*

55. The applicants in *S.T.E.* duly applied to the Supreme Court for leave to appeal. By Determination dated 30 October 2020, the Supreme Court granted them leave to appeal the judgment of the Court of Appeal on the basis that *“the decision... raises an issue of general importance as to whether there was any requirement to consider the differential treatment of the first and second-named applicants in the context of the first-named applicant’s application for revocation of the deportation order”*.

56. On 2 March 2021, the Supreme Court dismissed the appeal as moot, without a written judgment, the second applicant having been granted citizenship in March 2020.

### **Discussion**

57. As required by s. 5 of the 2000 Act, to obtain leave for judicial review the appellants must establish that the grounds upon which they seek leave amount to “substantial

grounds”. In *Re Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360, the Supreme Court approved the interpretation of substantial grounds, as adopted in *MacNamara v. An Bord Plenala (No. 1)* [1995] 2 I.L.R.M. 125, as being equivalent to “reasonable”, “arguable” and “weighty”. As put by O’Neill J. in *O’Brien v. Dun Laoighaire Rathdown County Council* [2006] IEHC 177, substantial grounds must equate with the establishment of “a reasonable chance of success”.

**58.** The basis of the Minister’s decision in this case was pursuant to s.3(11) of the 1999 Act. This section confers a power on the Minister to either amend or revoke a deportation order. In making such a decision, the Minister does not have to consider whether the first appellant should be deported or not, but rather decide if there is a sufficient reason to justify the revocation of the order. The obligation of the Minister under s.3(11) is one confined to lawfully considering the application for revocation and issuing a decision. As stated by O’Neill J. in *Dada v. Minister for Justice* [2006] IEHC 140:

*“It is clear that the nature and extent of the inquiry which is appropriate in this later phase of the process, thus described, is significantly more restricted than for example in the asylum phase... The scope for review by this court of a decision to revoke a deportation order under s.3(11) is, if anything more restricted still.”*

**59.** There remains a valid Deportation Order operative since 29 November 2005 which has never been challenged and which cannot now be challenged. In such circumstances, the scope of review for the court is necessarily narrow in cases where there has been no challenge to the underlying deportation order (see *O.O. v. Minister for Justice* [2008] IEHC 325, *Irfan v. Minister for Justice* [2010] IEHC 422 and *Y.Y. v. Minister for Justice and Equality* [2017] IEHC 176).

**60.** However, when an application to revoke a deportation order is made the Minister must act having regard to all the pertinent circumstances of the case. As with the making of

a deportation order, the question of whether a decision not to revoke a deportation order interferes with a person's fundamental rights will depend on the circumstances of the case. More fundamentally, whether any such interference is proportionate or disproportionate will depend on the particular circumstances of the case.

**61.** Thus, in a case such as the present what is required of a decision-maker is that set out by Denham J. in *Oguekwe*, where she refers to the constitutional and Convention rights of applicants requiring to be "*considered in the context of the factual matrix of the case*". It is accepted by both sides that the principles enunciated by Denham J. at para. 85 of *Oguekwe* are applicable to the present case. They merit reciting:

*"1. The Minister should consider the circumstances of each case by due inquiry in a fair and proper manner as to the facts and factors affecting the family.*

*2. Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the department. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances.*

*3. In a case such as this, where the father of an Irish born child citizen, the mother (who has been given residency), and the Irish born citizen child are applicants, the relevant factual matrix includes the facts relating to the personal rights of the Irish born citizen child, and of the family unit.*

*4. The facts to be considered include those expressly referred to in the relevant statutory scheme, which in this case is the [Immigration Act, 1999] so far as they appear or are known to the Minister.*

...

5. *The Minister should consider the potential interference with rights of the applicants. This will include consideration of the nature and history of the family unit.*

6. *The Minister should consider expressly the Constitutional rights, including the personal rights, of the Irish born child. These rights include the right of the Irish born child to:-*

*(a) reside in the State,*

*(b) be reared and educated with due regard to his welfare,*

*(c) the society, care and company of his parents, and*

*(d) protection of the family, pursuant to Article 41.*

*The Minister should deal expressly with the rights of the child in any decision.*

*Specific reference to the position of an Irish born child of a foreign national parent is required in decisions and documents relating to any decision to deport such foreign national parent.*

7. *The Minister should also consider the Convention rights of the applicants, including those of the Irish born child. These rights overlap to some extent and may be considered together with the Constitutional rights.*

8. *Neither Constitutional nor Convention rights of the applicants are absolute.*

*They require to be considered in the context of the factual matrix of the case.*

9. *The Minister is not obliged to respect the choice of residence of a married couple.*

10. *The State's rights require also to be considered. The State has the right to control the entry, presence, and exit of foreign nationals, subject to the Constitution and international agreements. Thus the State may consider issues of national*

*security, public policy, the integrity of the immigration scheme, its consistency and fairness to persons and to the State. Fundamentally, also, the Minister should consider the common good, embracing both statutory and Constitutional principles, and the principles of the Convention in the European context.*

*11. The Minister should weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision. While the Irish born child has the right to reside in the State, there may be a substantial reason, associated with the common good, for the Minister to make an order to deport a foreign national who is a parent of an Irish born child, even though the necessary consequence is that in order to remain a family unit the Irish born child must leave the State. However, the decision should not be disproportionate to the ends sought to be achieved.*

*12. The Minister should consider whether in all the circumstances of the case there is a substantial reason associated with the common good which requires the deportation of the foreign national parent.*

*In such circumstances the Minister should take into consideration the personal circumstances of the Irish born child and the foreign national parents, including, in this case, whether it would be reasonable to expect family members to follow the first named applicant to Nigeria.*

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

*14. The Minister should also take into account the common good and policy considerations which would lead to similar decisions in other cases.*

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

*16. On judicial review of a decision of the Minister to make an order of deportation, the court does not exercise and substitute its own discretion. The court reviews the decision of the Minister to determine whether it is permitted by law, the Constitution, and the Convention.”*

***The issues in the appeal***

**62.** In broad brush, counsel for the appellant advances three discrete bases upon which he contends that it is arguable, to the requisite threshold, that the decision not to revoke the first appellant’s Deportation Order was unlawful, and that in refusing leave for judicial review, the High Court judge erred. Each of these arguments will be considered in turn.

***The best interests of the children (Grounds 1 and 3 of the Statement of Grounds)***

**63.** The appellants wish to argue, if leave for judicial review is obtained, that in arriving at her decision, the Minister did not properly weigh the best interests of the children. It is submitted that the reference in the decision to the Minister having “taken into consideration the best interests of the children... which undoubtedly includes having the care and company of their parents” was not a valid assessment of the children’s best interests in circumstances where the factual matrix was that by that time the second appellant had been granted residence in the State. Accordingly, a “holistic” view of the best interests of the children was what was required so as to ensure their best interests were given sufficient weight.

**64.** The appellants say that a holistic approach is consistent with the approach of the European Court of Human Rights (“ECtHR”) in *Jeunesse v. The Netherlands (App. No. 127/38/10)* (2015) 60 E.H.R.R. 17, relied on as authority for the proposition that the Minister was required to afford paramount status to the best interests of the third to fifth

appellants, given the factual matrix with which she was presented. It is contended that a “*fair balance*”, as required by *Jeunesse*, was not struck between the competing interests at stake in this case, namely the personal interests of the appellants in maintaining family life in Ireland and the public order interests of the State in controlling immigration.

**65.** Counsel for the appellants calls in aid Article 7 of the EU Charter of Fundamental Rights, which similarly to Article 8 ECHR, recognises the right to respect for private and family life. He also points to Article 24 (2) of the Charter which provides that “[*i*]n all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration” and Article 24 (3) which provides that “[*e*]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his and her parents, unless that is contrary to his or her interests”. Insofar as reliance is placed on Article 7 and 24 of the EU Charter to underpin the primacy of the best interests principle, it is by now well-settled in jurisprudence that the EU Charter does not apply to deportation decisions given that the 1999 Act comprises purely domestic law. Even in the context of the argument (discussed later in this judgment) that the refusal to revoke the deportation order would result in the fifth appellant, an EU citizen, having to leave the territory of the EU, the rights set out in the Charter would not need to be invoked given the absolute protection afforded by Article 20 TFEU, once the threshold set by the CJEU in *Ruiz Zambrano v. Office national de l’emploi (ONEm)* (Case C-34/09) [2011] E.C.R. I-1177 and the subsequent jurisprudence is met.

**66.** As I have outlined, the appellants’ principal argument is that there was no consideration in the decision as to why the State’s interests in respect of maintaining the integrity of the immigration system outweighed their interests in remaining together as a family unit and, more notably, the children’s best interests in having the company of both

parents. It is asserted that while all the relevant factors were listed in the decision, there was no appreciation of the gravity of the effective rupture of the family unit and no consideration of the fact that the first and second appellants had been married before entering the State and thus that it was not a case of family life being created at a time when the persons involved were aware that the immigration status of one of them was precarious.

**67.** The Minister does not accept that the contested decision omitted any relevant matters, or that the best interests of the children were not considered. She submits that it is not an arguable proposition that the only decision that could lawfully have been arrived at is one permitting the first appellant to reside in the State based on the best interests of the children: the Minister found substantial reasons to refuse to revoke the first appellant's Deportation Order, namely the rights of the State to maintain control over its own borders and operate a regulated system for the control, processing and monitoring of non-national persons in the State, and to ensure the economic well-being of the State. It is further submitted that the Minister was entitled to consider those reasons to be weightier than the factors relating to the rights of the appellants. It is disputed by the Minister that the facts of the present case are on par with the specific factual matrix that pertained in *Jeunesse*.

**68.** In the first instance, in my view, the appellants' contention that what was required was a "holistic" approach to the consideration of the children's best interests does not add anything of benefit to what falls to be decided in the appeal. In *S.T.E.*, McGovern J. did not endorse this approach, as evident from para. 48 of his judgment where he states "[n]o legal authority was cited to the High Court judge to the effect that there was a requirement for a holistic treatment of a family in the circumstances in which [the applicants] found themselves."

69. That being said, I note, in passing, that in his judgment in *Gorry v. Minister for Justice* [2020] IESC 55, McKechnie J. recorded the Minister as submitting in that case that “a general and holistic approach, which has been how such decisions have been approached since *Oguekwe*, permits all of the relevant legal and factual considerations to be fairly balanced without according pre-eminence to any one of them” (emphasis added). In any event, I see no benefit in grappling with what it is a “holistic” approach is actually meant to convey. The question at issue is whether there are substantial grounds to argue that the best interests of the children were not properly taken account of by the Minister.

70. I turn now to the appellants’ arguments based on the decision of the ECtHR in *Jeunesse*. In that case, the applicant, a Surinamese national, made five unsuccessful attempts for a Netherlands visa to visit a relative. In 1997, on her sixth attempt, she was granted a 45-day visa in the Netherlands. She failed to return to Suriname upon its expiry. She married and had a child in September 2000. Her husband (also a Surinamese national and with whom she had a relationship before she came to the Netherlands) had entered the Netherlands in 1991 on a visitor’s visa to visit his father. In 1993 he was granted Dutch nationality. Between 1997 and 2010 the applicant made five applications for a residence permit, all of which were unsuccessful. By 2005 she had given birth to a second child. By 2010, the Dutch authorities had decided to expel her, and her appeals of that decision were unsuccessful. Before the ECtHR, the applicant alleged that the refusal of the Dutch authorities to exempt her from the obligation to hold a provisional residence visa, and their refusal to admit her to the Netherlands, breached her rights under Article 8 ECHR. She claimed that to refuse her a residence permit would inevitably result in the family becoming separated. Addressing the claim, the ECtHR stated:

*"107. Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their*

*matrimonial residence or to authorise family reunification on its territory.*

*Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion ...*

*108. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well-established case law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 ..."*

**71.** It went on to opine:

*"109. Where children are involved, their best interests must be taken into account ... On this particular point, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in*

*principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it.*

**72.** As regards the actual circumstances in *Jeunesse*, the ECtHR went on to observe that the requisite balancing exercise required the best interests of the applicant's children to be considered, stating:

*“118. ...[w]hilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents...*

*119. Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant's husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been.”*

**73.** In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the Court was not convinced that actual evidence on such

matters was considered and assessed by the domestic authorities and thus concluded that insufficient weight had been given to the best interests of the applicant's children in the decision of the domestic authorities to refuse her request for a residence permit. The Court stated:

*“121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. In view of the particular circumstances of the case, it is questionable whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing the applicant residence in the Netherlands.”*

**74.** Whilst great reliance was placed on *Jeunesse* by the appellants, I do not find that judgment authority for the proposition that the third to fifth appellants' best interests must be the *paramount* consideration. Insofar as the ECtHR refers to the best interests of children as being *“of paramount importance”* which must be afforded *“significant weight”*, it is also the case that *“alone, they cannot be decisive”*. Unquestionably, therefore, the best interests of children may be outweighed by other countervailing interests. What the ECtHR does is to mandate decision-makers *“to advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non national in order to give effective protection and sufficient weight to the best interests of the children affected by [such decisions].”*

**75.** It seems to me that *Jeunesse* does not in any significant regard compel a decision-maker to do otherwise than what is already mandated by the jurisprudence of the Irish

courts. I note that in *Oguekwe*, Denham J. describes the personal rights of a child as including “*a right to have his/her welfare considered in the sense of what is in his/her best interests in decisions affecting him/her.*” Thus, it is not the case that the best interests of children are not a significant consideration in deciding whether to revoke a deportation order. They must rank highly, as mandated by *Oguekwe*. However, as said by Denham J. at para. 85 of *Oguekwe*, (and indeed as acknowledged in *Jeunesse*) the State’s rights must also be considered.

**76.** It is accepted by counsel for the appellants that the Minister was not obliged to grant the first appellant residence in the State just because residency had been granted to the second, third and fourth appellants. It goes without saying, however, that the fact that the second appellant and her two Nigerian citizen children had residency in the State by the time of the first appellant’s revocation application was a significant factor to be weighed in his favour in the course of the weighing exercise in which the Minister was obliged to engage. It is however also the case that there were other factors which the Minister was entitled to (and did) weigh, including the first appellant’s immigration record and his knowing circumvention of the laws of the State and (per *Oguekwe*) other substantial reasons associated with the common good, namely, border control, the right of the State to ensure the economic well-being of the country, the impact on the State’s health and welfare systems and the precedent that such a decision would cause in the future.

**77.** It is clear that the decision-maker considered fully the factual matrix that had been outlined in the representations and documents which had been furnished by the first appellant. As evident from the Examination of File, the Minister conducted a fact-specific assessment. She accepted that Article 8 rights were engaged. As observed by the trial judge, the decision expressly stated that the best interests of the children, and their right to the companionship of the first appellant, were considered. This was in the context where

all the information which the first appellant had put before the Minister was addressed. His ties to the State were similarly addressed. It was considered, however, in the necessary balancing exercise, that family rights were outweighed by the rights of the State. It has not been suggested in this case by the appellants that all relevant factors were not considered.

**78.** In this regard, the case can be distinguished from what was in issue in *S.T.P. v. Minister for Justice* (Unreported Faherty J., 22 February 2021), where this Court allowed S.T.P.'s appeal against the refusal of the High Court to grant leave for judicial review of the deportation order made in respect of him.

**79.** S.T.P., a Nigerian national, arrived in the State in 2013. He was refused asylum. His partner, a Zimbabwean national, (also a failed asylum seeker) had arrived in the State in 2010. S.T.P. commenced residing with his partner and her infant daughter in 2013. In October 2016, S.T.P. applied for leave to remain in the State. His partner had made a similar application some months previously. S.T.P.'s application was refused, having been determined prior to that of his partner.

**80.** This Court allowed S.T.P.'s appeal, finding that it was arguable, to the requisite substantial grounds threshold, that the Minister erred in failing to first determine S.T.P.'s partner's leave to remain application. At various stages in the "Examination of File", the decision-maker had adverted to the possibility that S.T.P.'s partner and her child might be allowed to remain in the State. This was in response to representations made on S.T.P.'s behalf that his partner might qualify for permission to reside in the State in accordance with the recommendations of the Working Group in Improvement in the Protection Process. Furthermore, the decision to deal with S.T.P.'s leave to remain application ahead of his partner's had been taken in circumstances where the Minister was aware of the existence of a *de facto* family unit and the role played by S.T.P. as a *de facto* parent to his

partner's child. Leave to remain was in fact ultimately granted to S.T.P.'s partner. As I said in *S.T.P.*:

*“63. It is worth noting that if in fact the appellant’s partner’s application had been decided first, and determined with the same outcome as ultimately occurred, undoubtedly that would have been a significant factor (albeit, I emphasise, not the determining factor given that the weighting of all factors is a matter solely for the Minister) for the Minister to weigh in the appellant’s favour when determining his application for leave to remain. Indeed, whether the appellant’s partner’s application to remain in the State was either positive or negative, it was going to have a material effect on his application and thus could never be said to be a neutral concept. As I have said, the positive outcome for his partner would not, of course, necessarily have led to a decision being made to allow the appellant to remain in the State (thus avoiding deportation) but it would have been a factor which the Minister would have to consider, which would have weighed against deportation and which could have been decisive.*

...

*67. ...insofar as the Minister engaged (as she so obviously did) with the hypothesis that the appellant’s partner would in fact be permitted to reside in the State, it is arguable, to the requisite standard, she was then obliged to fairly and properly consider the appellant’s leave to remain application against that positive hypothetical backdrop. Albeit it was accepted by the decision-maker that the appellant, his partner and her child were a de facto family unit, nowhere in the “Examination of File” is it said that the Minister actually weighed the (hypothetical) positive outcome for the appellant’s partner as a factor in the decision. It is arguable that the Minister should have asked herself whether, on the*

*premise that the appellant's partner and her child were given leave to remain, a deportation order ought nonetheless to be made in respect of the appellant."*

**81.** In essence, having regard to the factual matrix that presented in *S.T.P.*, this Court determined that it was arguable that the requisite weighing exercise was not conducted.

**82.** For the reasons already set out, the present case is different. As is clear from the Examination of File, all relevant factors were weighed in the balance, including the fact that the second, third and fourth appellants had been granted leave to remain in the State and the consideration that the appellants' family life would be sundered if the first appellant were deported and the second appellant chose to remain in the State. Unlike what occurred in *S.T.P.*, in the context of the weighing exercise that was carried out here, the first appellant had the benefit of the positive outcome of the second appellant's leave to remain application as a factor to be considered by the Minister in favour of a positive outcome for his leave to remain application. Ultimately, however, the rights of the State were found to be weightier than those of the appellants. Absent any unlawfulness in the treatment of the information put before her, or in the requisite weighing exercise (which the Court does not find), it is not for the Court to substitute its view of what the outcome of the necessary weighing exercise should be. That is a function solely for the Minister.

**83.** As effectively conceded by counsel for the appellants, it is not the case that the arrangement by the first and second appellants of their affairs between 2008 and 2014 in a manner that frustrated the immigration policy of the State should now amount to a *fait accompli* so as to prevent the Minister from doing anything except permitting the first appellant to reside in the State, or that the Minister should disregard the first appellant's breach of the State's immigration laws, or indeed other factors which the Minister was entitled to and did weigh in the balance.

**84.** Part of the argument made in this appeal is that the Minister unlawfully prioritised the interests of the State over the appellants' Article 8 rights. In aid of his submission, counsel referred to the view expressed by the ECtHR in *Jeunesse* that "*it is questionable whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing the applicant residence in the Netherlands*".

**85.** I cannot accept that "*general immigration policy considerations*" alone informed the decision in issue here. As is clear from the decision, the Minister had regard to how the first appellant came to be in the State, which, it is said, was by way of re-entry in 2008 in clear breach of an extant Deportation Order said to be on foot of a passport in the name of a fictitious third party and by way of a fraudulent application for an Irish tourist visa. Thus, the Minister did not rely solely or primarily on "*general immigration policy*" to reach her decision in this case. She took account, as she was entitled to do, of specific breaches of the State's immigration laws by the first appellant. This was not, however, done to the exclusion of other important considerations. As I have observed, the decision refers extensively to the circumstances of the second to fifth appellants and the role the first appellant was playing in their lives. It was acknowledged by the decision-maker that it would be in the children's best interests to have the care and company of their father. Thus, the first appellant's application for revocation was fully considered and the Minister was aware of the precise factual matrix and the consequences that any decision adverse to the first appellant would have on the children. The decision-maker was cognisant of guidance given by the courts as to how applications such as that in issue here should be approached. The decision referred to *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840 where the Court of Appeal in England and Wales found, *inter alia*, that the removal or exclusion of one family member from a State where the other members of the family are lawfully resident, would not necessarily infringe Article 8

provided that there are not insurmountable obstacles to the family living together in the country of origin of the family member being deported even where this involves a degree of hardship for some or all members of the family. Moreover, the decision had regard to the decision of the ECtHR in *Nunez v. Norway* (App. No. 5559 7/09) (2014) 58 E.H.R.R. 17, where it is stated that “*Article 8 does not entail a general obligation for a State to respect immigrants’ choice of the country of their residence...*”

**86.** The Minister makes the case, which I accept, that the first appellant did not contend that the refusal to revoke the Deportation Order would result in a sundering of the family unit or that they could not all return to Nigeria. No concrete information was put before the Minister demonstrating any obstacles to the family residing with the first appellant in Nigeria. There was thus no evidence before the Minister of the “gravity of the effective rupture of the family”, as now contended for by the appellants.

**87.** The Minister was, in the words of Denham J. in *Oguekwe* required to “*weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision*”. Insofar as there may be “*a substantial reason, associated with the common good*” for the Minister not to revoke a deportation order, any such decision will be lawful, on *Oguekwe* principles, once it is “*not disproportionate to the ends sought to be achieved*”.

**88.** Counsel for the appellants asserts that there are substantial grounds to argue that the decision not to revoke the Deportation Order was unlawful, from the perspective of the best interests of the children, when one compares the first appellant’s circumstances with the factual matrix in *Jeunesse*. It is argued that the information which was put before the Minister between November 2014 and October 2015 points to the similarity of the first appellant’s circumstances with those of the applicant in *Jeunesse*. It is contended that the

information supplied to the Minister is testament to the role which the first appellant has played in the lives of the third to fifth appellants since his return to the State in mid-2008.

**89.** However, the decision-maker found that there was no evidence to satisfy the decision-maker that the first appellant lived with the family “*at all times*” between 2008 and 2014, or that that he had assumed a role of carer for the children from 2008 onwards, or indeed that he was present in the State at all relevant times between 2008 and September 2014. In my view, that was a conclusion the decision-maker was entitled to arrive at, based on the factual matrix before him, particularly in light of the observations made in these regards, as recited in the decision.

**90.** Contrary to the appellants’ submissions, I consider the factual matrix that pertained in *Jeunesse* to be quite different. There, the mother’s role as a primary and constant carer for her children was known to the Dutch authorities. That cannot be said of the present case when it is the assertion of both the first and second appellants that the first appellant lived his life effectively “below the radar” between 2008 and 2014.

**91.** Moreover, I note that the issue in *Jeunesse* concerned the mother overstaying a visa - a fact also known and tolerated by the Member State in question. There was no question of tolerance here, as the Minister was unaware of the first appellant’s asserted presence in the state until in or about November 2014. Furthermore, unlike the first appellant, the mother in *Jeunesse* did not return to the Netherlands unlawfully after deportation and thereafter live in secret. The Dutch authorities knew at all times of her presence in the Netherlands as she had made multiple applications for a residence permit. Thus, I am not satisfied that the first appellant’s circumstances are such as to put him on par with the situation that pertained in *Jeunesse*. I accept the Minister’s argument that the present case does not have the exceptionality factor found by the ECtHR to exist in *Jeunesse*.

**92.** For all of the reasons set out above, I do not find that substantial grounds have been established to render it arguable that a “*fair balance*”, as referred to at para. 121 of *Jeunesse*, was not struck in this case as far as the best interests of the third to fifth appellants were concerned. Grounds 1 and 3 of the Statement of Grounds have not been established to the requisite threshold for leave for judicial review to be granted.

***Alleged discriminatory treatment (Ground 2 of the Statement of Grounds)***

**93.** What is pleaded in the Statement of Grounds is that in circumstances where the first and second appellants were in the same situation in all respects except for their sex, the difference in the treatment afforded them breached the prohibition on discrimination contained in Article 14 ECHR.

**94.** This ground was rejected by MacEochaidh J. on the basis that the first appellant could not assert Article 14 discrimination as there was no evidence that the only difference between their circumstances were gender. He found that at the time of the consideration of the first appellant’s revocation application it could not be said that his circumstances were the same as that of the second appellant, who had been granted temporary permission to be in the State.

**95.** In their original written submissions to this Court, in asserting discriminatory treatment on the basis that the first and second appellants had at all material times a similar immigration status, the appellants relied on the *dictum* of Humphreys J. in *S.T.E* as support for his argument that the Minister breached Article 14 ECHR.

**96.** The supplemental written submissions filed post the decision of this Court in *S.T.E*. assert that the first and second appellants were treated differently despite being in the same precarious position “at two significant junctures”. Firstly, counsel points to the fact that despite extant Deportation Orders in respect of both the first and second appellants in 2005, the second appellant was permitted to remain in the State while the couple’s eldest

child's (the third appellant) asylum application was being progressed, yet the first appellant was deported.

**97.** It is asserted that the second significant difference in treatment arose when the Deportation Order against the second appellant was revoked in February 2014, yet when the first appellant applied for his Deportation Order to be revoked in a similar way, that was refused. It is contended that there was no reason other than the first appellant's gender for the Minister to have treated him differently to his wife (the second appellant) in relation to his enjoyment of the right to respect for family life under Article 8 ECHR, and that the treatment afforded the first appellant breached the provisions of Article 14 ECHR. It is contended that "the [Minister] effectively selected between several equally precarious members of the family and decided three could stay and the other must leave, without compelling justification".

**98.** Furthermore, the appellants' supplemental submissions point to what is said are significant and material distinctions between the facts in the present case and those in *S.T.E.* In *S.T.E.*, the first and second applicants were not legally married and the first applicant had at all material times been treated as a single male by the State's Reception and Integration Agency. That, the appellants say, is to be contrasted with the first and second appellants' circumstances: they entered the State as a married couple and applied for and progressed through the asylum process as a married couple with both ultimately refused international protection. The appellants also point to the fact that in *S.T.E.*, a deportation order had been made against the first applicant before the second applicant had even entered the State and before any family life was commenced.

**99.** In her supplemental written submissions, the Minister asserts that there is no basis to distinguish the present case from the decision of this Court in *S.T.E.* (where a discrimination argument was also made) and that the decision of this Court in *S.T.E.* is

entirely applicable to the within appeal given that McGovern J. rejected the argument that the first and second applicants in *S.T.E.* had an equally precarious immigration status and found that Humphreys J. erred in so finding.

**100.** In oral submissions, counsel for the Minister contends that *S.T.E.* is applicable in the present case in circumstances where the first appellant was subject to a Deportation Order in 2005 and was deported in 2007. Thus, his immigration status at the time of his revocation application could not be said to be on par with that of the second appellant who had by the time of the first appellant's revocation application permission to reside in the State. It is argued that that the first and second appellants' different legal status subsists irrespective of whether the first appellant resided outside the State since 2007, or in the alternative, and as the first appellant contends, he has been resident in the State since 2008.

**101.** I agree with the Minister's submission that there is no merit in the appellants' argument that the *ratio* of this Court in *S.T.E.* should be confined to the factual matrix in that case. As effectively acknowledged by counsel for the appellants, post the decision of this Court in *S.T.E.*, he cannot argue that at the material time the first and second appellants' legal statuses were similar.

**102.** In their oral submissions to this Court, the focus of the appellants' discrimination argument shifted considerably from that advanced in the High Court, and indeed as set out in the supplementary written submissions. What is posited in oral submissions is that, if leave for judicial review is granted, the appellants wish to argue that notwithstanding the different legal statuses of the first appellant and the second appellant at the time of the former's revocation application, the Minister was obliged to consider the revocation application from the vantage point of the children's best interests.

**103.** It is submitted that that consideration required the Minister to commence her assessment of the first appellant's revocation application by regarding the first and second

appellants as being in an analogous position, namely as persons who were both parenting the children in the State. It is thus contended that to have differentiated between them solely on the basis that the second appellant (the mother) had been granted residency in the State was arguably discriminatory, not a proportionate response, and not reflective of their equal status as parents to their children. Albeit that it is accepted that at the time of the Minister's decision the immigration status of the first and second appellants was not equal, it is submitted that there are substantial grounds to argue, post-leave, that the best interests of the children underpin the discrimination ground which the appellants wish to argue, namely that there was substantially different treatment afforded to first appellant, when that difference in treatment is viewed from the perspective of the children's best interests. It is said that this is in circumstances where it cannot be said that there is any difference between the first and second appellants insofar as their parental roles are concerned. It is argued that given that the second appellant was never able to assert a legal entitlement to residency in the State (and was at all times reliant on the discretion of the Minister), it begs the question as to why the first appellant was treated differently when the Minister was called upon to exercise a similar discretion in his favour.

**104.** It is contended that there is an arguable case to be made that the "weight of evidence" in the present case tilted the balance such as to require an objective justification for the difference in treatment as between the mother and father of a family unit residing in the State. It is further submitted that while the case law in respect of Article 8 ECHR analysis *simpliciter* does not require the identification of a "compelling reason" for the difference in treatment as between the mother and father of a family unit, such a reason is required where the right to non-discrimination is at issue. Counsel contends that even if it could be said that the Minister conducted an analysis in accordance with the requirements of Article 8 ECHR (which is not accepted), that analysis was not sufficient for the purposes

of Article 14 in conjunction with Article 8 ECHR given the requirement on a decision-maker to take into consideration the full interests of a family's background when weighing the interests of the family against those of the State. What is sought to be argued is that when viewed from the perspective of the best interests of the third to fifth appellants, the difference in the first and second appellants' legal statuses was not so compelling as to weigh against the first appellant's application to be allowed remain in the State.

**105.** The appellants thus assert that it is arguable to the requisite standard that the Minister embarked on an unduly narrow analysis of the first and second appellants' relative immigration statuses when the appropriate analysis required the Minister to consider, in circumstances where both parents were resident in the State, whether there was an objective justification for treating one parent (the first appellant) differently to the children's mother, in the knowledge that the consequence of the differential treatment would result in the sundering of the family unit.

**106.** Notwithstanding the extensive submissions, written and oral, advanced by counsel for the appellants, I cannot find that substantial grounds have been established such as to grant leave to argue that the first appellant has been discriminated against for reasons of gender or *qua* his status as father to the third to fifth appellants.

**107.** Firstly, the appellants have not identified any authority for the proposition that the Minister must identify a "compelling reason" or "compelling circumstances" before the State's rights could outweigh those of the appellants. In *S.T.E.*, this Court did not endorse that test. Nor did it endorse the finding of Humphreys J. that there was no objective justification for the Minister's decision. McGovern J. opined that Humphreys J.'s finding was entirely against the weight of evidence as the decision had set out in detail all the relevant facts and balanced the interests of the applicants against the interests of the State in accordance with established legal principles.

**108.** With regard to the argument that albeit the legal statuses of the first and second appellants were different at the material time, the first appellant had an equal status to that of the second appellant *qua* parent to the third to fifth appellants and this factor was not weighed (in the context of the children's best interests) in the decision as it ought to have been, as I have already observed, this was not the argument made to the High Court in the course of the leave application. As the High Court judgment shows, what was advocated in the High Court was that the Minister breached Articles 8 and 14 ECHR in refusing to revoke the first appellant's Deportation Order in circumstances where the second appellant's Deportation Order was revoked and where at all material times both appellants had been in similar positions, save their sex, as far as their immigration status was concerned, an argument rejected by MacEochaidh J.

**109.** Somewhat surprisingly (given the arguments set out in the supplemental written submissions), I also note that, save for the bare assertion to "unlawful discrimination" the Notice of Appeal does not assert that the first appellant was treated differently from the second appellant because of his gender or in his role as parent to the third to fifth appellants.

**110.** In any event, in my view, no discrimination can be said to arise in this case since there were factors, unrelated to the first appellant's gender or indeed his status as parent to the children, which put him into an entirely different category to his wife. In the first instance, the first appellant had in fact been deported from the State. Albeit that she was the subject of a Deportation Order until February 2014, the second appellant was not as a matter of fact ever deported from the State. Insofar as complaint is made that the first appellant was in fact deported in 2007 but not the second appellant, I cannot conceive that it could be argued that discriminatory treatment arose just because the State (no doubt conscious of its international protection obligations) permitted the second appellant to

remain in the State while the third and fourth appellants' respective asylum applications were being processed. Even if a discrimination argument could be maintained regarding the events of 2007, I fail to see (and indeed counsel for the appellants fairly conceded the point in his oral submissions) how the first appellant can raise this matter at this remove when no challenge was ever made to his Deportation Order in 2005 or indeed to his being removed from the State in 2007.

**111.** Secondly, by the time she applied for revocation of her Deportation Order in 2013, the second appellant had been in the State for almost nine years, a fact known to the Minister. Essentially, her position was such that by the time of her application to revoke, her open presence in the State with her three children could be said to have been tolerated by the Minister for a considerable number of years, presumably a not insignificant factor when it came to a decision on her application for residency. (It also appears from the second appellant's affidavit evidence that there were delays in the processing of the third and fourth appellants' asylum applications). Because of the asserted circumstances of the first appellant's presence in the State, it cannot be said that his presence was tolerated by the Minister since he only made his presence known to the Minister in or about November 2014. Thirdly, unlike the first appellant, the second appellant never re-entered the State unlawfully. Fourthly, and more fundamentally, by the time of the first appellant's revocation application in November 2014, the Minister had agreed to allow the second appellant to reside in the State. All of this means that the first and second appellants did not fall into the same situation as each other, legally or factually.

**112.** To my mind, counsel's submissions harken back to the arguments which he has made pursuant to Grounds 1 and 3 of the Statement of Grounds regarding the best interests of the children. In effect, he seeks, impermissibly in my view, to inject into those grounds an argument that the decision-maker considered the best interests of the children in a way

that offended Article 8 in conjunction with Article 14 ECHR, a claim never made in the Statement of Grounds.

**113.** For reasons set out earlier in this judgment, I have already found that the best interests of the children were fully considered and that the decision-maker, in the course of the requisite weighing exercise, had regard to the role being played by the first appellant as parent and carer to the children within the family unit. I found that for those reasons substantial grounds had not been established for the appellants to argue in judicial review that the best interests of the children were not considered. Given that finding, and for the reasons I have just now outlined, including that the Minister was entitled to take account of the first appellant's immigration history, the discrimination ground relied on must also be considered not to satisfy the requisite substantial grounds threshold for leave for judicial review to be granted.

***Alleged breach of the fifth appellant's Article 20 TFEU rights (Ground 5 of the Statement of Grounds)***

**114.** There was material placed before the Minister prior to the making of the contested decision which showed that the fifth appellant was a Latvian citizen and thus a citizen of the EU. In this regard, his passport was submitted. While it was not accepted by the Minister for the purposes of the within proceedings that the fifth appellant is the biological child of the named Latvian national, it is the case that for the purposes of the contested decision, the child was regarded as a Latvian national and thus a citizen of the EU.

**115.** Ground 5 of the Statement of Grounds asserts that the fifth appellant would be deprived of the genuine enjoyment of the substance of his EU citizenship rights if his *de facto* father (the first appellant) is deported.

**116.** The appellants assert that the decision of the Minister on this issue was to the effect that as the second appellant had been granted permission to remain in the State she could

choose to remain in the State for as long as she had permission to do so, or alternatively, that there were no insurmountable obstacles which would cause her to be unable to relocate to Nigeria with her children, if she so chose, in order to maintain family life. It is submitted that this reasoning fails to have proper regard for the rights of the fifth appellant, an EU citizen.

**117.** It is submitted that were the family to be obliged to move to Nigeria in order to remain together as a family unit, and thus be outside the territory of the EU, the fifth appellant would be deprived of the genuine enjoyment of the substance of his rights as an EU citizen. In aid of his submissions, counsel relies on the jurisprudence of the CJEU in *Ruiz Zambrano, Dereci & Ors. v. Bundesministerium für Inneres (Case C-256/11)* [2011] E.C.R. 1-11315 and *O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L. (Joined Case-C356/11 and 357/11)* [2013] 2 W.L.R. 1093.

**118.** The Minister denies any infringement of the fifth appellant's EU rights.

**119.** The CJEU has made clear in *Zambrano, Dereci* and *O. and S.* that it is for the national court to analyse whether the deportation of a third country national on which an EU citizen is dependent would, in fact, force the EU citizen to leave the territory of the Union. Thus, the question is whether the appellants have substantial grounds to argue that the refusal to revoke his Deportation Order in fact requires the fifth appellant to leave the territory of the EU such as to confer a derivative right on the first appellant to have the Deportation Order revoked.

**120.** Even taking at its height the asserted level of dependency of the fifth appellant on the first appellant, as effectively conceded by counsel for the appellants before this Court (and as found by MacEochaidh J.) there was no submission made to the Minister that the decision not to revoke the first appellant's Deportation Order would have the effect of requiring the fifth appellant to leave the territory of the EU. The height of the

representations made was that it would be in breach of the fifth appellant's EU rights if the first appellant were to be deported. Albeit the prospect of the fifth appellant having to leave the territory of the EU was alluded to in the affidavit evidence of both the first and second appellants, there was no evidence put before the High Court, or this Court, that should the first appellant be deported, the fifth appellant would in fact leave the territory of the EU. There is nothing in the second appellant's affidavit evidence to suggest that this will in fact occur. Thus, insofar as the appellants rely on the *Zambrano* line of jurisprudence, such reliance is misplaced.

**121.** In fairness, in oral submissions, counsel for the appellants sought to restrict his argument to maintaining that it was unlawful and impermissible in all the circumstances for the Minister to have considered it reasonable for the family to move to Nigeria as a unit, as an alternative to being separated, when that consideration involved an EU citizen child. He cited the decision of the UK Upper Tribunal in *Sanade v. Secretary of State for the Home Department* [2012] UKUT 48 (IAC) in support of his submission. I do not find that there is any basis to argue that the decision maker acted unlawfully. I agree with counsel for the Minister that the Strasbourg jurisprudence does not suggest that the long-established "insurmountable obstacles" test in terms of maintaining family unity is somehow inappropriate when one of the family members is an EU citizen child. In any event, there was no question of the Minister *requiring* either the EU child or the other family members to relocate to Nigeria, as the decision makes clear. As I have made clear (and as effectively conceded by counsel for the appellants), in the absence of any case having been made that the fifth appellant would as a matter of fact have to leave the State if the first appellant was deported, the decision-maker was not required to conduct the analysis mandated by the CJEU in the *Zambrano* line of jurisprudence.

**122.** In all the circumstances, substantial grounds pursuant to Ground 5 of the Statement of Grounds have not been established such as to warrant the grant of leave.

**Summary**

**123.** The appellants have not made out substantial grounds for leave for judicial review to be granted. Accordingly, the appeal must be dismissed. The Order of the High Court is thus affirmed.

**124.** The appellants have not succeeded in this appeal. Accordingly, it follows that the Minister should be entitled to her costs. If, however, either party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled. If no indication is received within the twenty-one-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

**125.** As this judgment is being delivered electronically, Whelan J. and Collins J. have indicated their agreement therewith and the order I propose.