Neutral Citation: [2014] IEHC 503

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 404 J.R.]

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

BETWEEN

A. L.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

AND

COMMISIONER OF AN GARDA SÍOCHÁNA AND HUMAN RIGHTS COMMISSION

NOTICE PARTIES

JUDGMENT of Mr. Justice Barr delivered on the 1st day of October, 2014

Background

1. The applicant was born on 3rd November, 1984, and is a Chinese citizen. She entered Ireland on the basis of a student visa on 20th January, 2004. This visa permitted her to remain in the state on condition that she was pursuing a fulltime course of study and did not work more than twenty hours per week. Her permission expired on 28th February, 2005. She has been illegally in the state since that time. She gave birth to a daughter, Roisin, in the state on 11th September, 2008. The daughter, Roisin, who is not an Irish citizen, now lives with her grandparents in China in accordance with family tradition.

2. The applicant first came to the attention of An Garda Síochána on 4th April, 2008. A proposal to deport her was issued on 29th September, 2008, on the grounds that the applicant was unlawfully present in the state and the Minister was of the view that the applicant's removal would be conducive to the common good. By letter dated 17th October, 2008, the applicant through her solicitors submitted representation setting out the reasons why she felt a deportation order should not be issued in respect of her. For reasons not altogether clear, no decision was taken on foot of these representations until 2013.

3. On 3rd November, 2011, during a routine inspection of a shop premises run by the applicant known as Sky Mobile Centre, the applicant again came to the attention of the Gardaí. She had no documentation and was asked to accompany the Gardaí to the immigration office. A search of the Garda National Immigration Bureau system showed that the applicant had been illegally in the state since February, 2005. At this point, the applicant's partner, Mr. Q.L. (who she later married on 28th August, 2012) contacted the applicant and was asked to come to the immigration office with identification for himself and the applicant. The applicant's partner was found never to have been in the state legally.

4. On 5th April, 2013, the Minister proceeded to consider the applicant's October, 2008 representations under s. 3(6) of the Immigration Act 1999, and decided to reject her representations. By letter dated 20th May, 2013, the Minister notified the applicant of his decision to make a deportation order in respect of her. The deportation order in respect of the applicant was signed on 10th May, 2013.

The Applicant's Submissions

5. The core of the applicant's case was that the absence of a gap between the considering of the representations made by the applicant leading to the rejection of those representations and the making of a deportation order, without an opportunity for the applicant to leave the country voluntarily without a deportation order being made, was an impediment to the applicant's rights to make representations pursuant to Article 41 of the Constitution and the Article 8 of the European Convention on Human Rights.

6. The applicant submitted that the point raised by the applicant was considered in the Supreme Court decision in *Haq Nawaz v. Minister for Justice* [2012] IESC 58. This case came before the court on a procedural point as to whether the challenge to s. 3 should have been brought by plenary summons, or by judicial review subject to the requirements of s. 5 of the Illegal Immigrants (Trafficking) Act 2000. The Supreme Court accepted the Minister's contention that a person challenging the section is in substance challenging each of the steps taken under s. 3, and so s. 5 applied. Clarke J. held that any of the steps taken under s. 3 is open to challenge together with a challenge to the validity of the section:-

> *"6.9 I can see no reason why, on the facts of this case, a single challenge, brought by judicial review, to any of the measures adopted or to be adopted under s.3 of the 1999 Act coupled with a challenge to the validity of that section could not have been brought. For example a judicial review proceeding in which a declaration was sought that the Minister was obliged to provide for a suitable gap between the notification of an adverse decision on humanitarian leave and the making of a deportation order could have been brought. Such a proceeding could have sought a declaration that any deportation order made without providing for such a gap would be invalid. The application could further have suggested that a constitutional construction of s.3 required that such a gap necessarily be implied but that if, contrary to that assertion, the section mandated that no such gap be allowed, the section was inconsistent with the Constitution. Variations on that theme could also, of course, have been contemplated."*

7. The applicant noted that the reference to a declaration that the Minister is obliged to provide for a gap arose out of discussion in

arguendo during the hearing of the appeal. However, the applicant submitted that it does not appear possible to give s. 3 a compliant construction while remaining faithful to the language of the section.

8. The applicant then turned to deal with the question of her human rights. It was submitted that the applicant is a wife of Mr. Q.L., who is in the same situation as the applicant and does have the benefit of a current legal permission. It was submitted that the applicant was part of the family unit with rights protected under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights. The applicant relies on the length of time in the state, in this case ten years, in which time she started a family and married.

9. The applicant relies on *E.B. (Kosovo) v. Secretary of State for the Home Department* [2009] 1 A.C. 1159 as authority for the proposition that delay in the decision making process might be relevant to a decision in that the applicant might during the period of delay have developed closer personal and social ties and developed deeper roots in the community than she could have shown earlier, the sense of impermanence with which relationships might have been imbued might have failed. It was stated that the applicant wishes to make representations to the Minister that she fulfils the criteria set out in the *E.B.* case and that her rights can be vindicated only by permitting her to reside in the state.

10. The applicant also submitted that her human rights fall to be considered as part of the deportation process. It was submitted that the Minister is not obliged to consider an immigrant's constitutional and Convention rights until representations are made under section 3. That proposition was set down by the Supreme Court in *Bode v. Minister for Justice* [2008] 3 I.R. 663:-

> *"92 The appropriate process within which to consider constitutional or convention rights of applicants is the process under s. 3 of the Act of 1999. This is the relevant statutory scheme.*
>
> *…*
>
> *95 Consequently, it is my view that there is no free standing right of the second applicant to apply to the Minister. The appropriate procedure is under s. 3 of the Act of 1999, as amended, with the potential right to apply under s. 3(11) in the future if the need to make such an application should arise.*
>
> *…*
>
> *99 The Oireachtas has established a statutory scheme providing that the Minister, in considering the situation of foreign nationals, shall have regard to a wide range of issues when making a decision under s. 3 of the Immigration Act 1999, as amended. Constitutional and convention rights are appropriately considered at that stage. If there is a change of circumstances then an application may be made to the Minister to consider further matters under s. 3(11) of the Immigration Act 1999, as amended."*

11. The applicant then turned to look at the provisions of s. 3 itself. Section 3(3)(a) states that where the Minister proposes to make a deportation order he must notify the immigrant of that proposal. Section 3(4) requires the notification to give the immigrant the following three options: the person may make representations in writing to the Minister within fifteen working days; or the person may leave this State before the Minister decides the matter, or the person may consent to the making of a deportation order.

12. Where the immigrant makes representations, the Minister must consider them in the light of the factors set out in s. 3(6). The Minister will either be persuaded to alter his original proposal to deport, or he will not and if not he proceeds to make a deportation order. It was submitted that s. 3 does not allow for a gap between the rejection of representations, even those based on human rights considerations and the making of the deportation order. Therefore, the price of advancing a human rights claim is the risk of a deportation order. That risk can be avoided only by electing for the option contained in s. 3(4)(b) of voluntarily leaving the state without having the human rights claim considered.

13. The applicant submitted that she must establish that she has a right inhering in the Constitution and/or the Convention to have her human rights based application considered. The court is not concerned with whether or not she should succeed in an application to the Minister to remain on human rights grounds: that is a matter for the Minister. It was submitted that the infirmity in s. 3 is that it imposes an unnecessary impediment on the right to apply to the Minister: the failure to allow a gap between the rejection of representations and the making of a deportation order.

14. The applicant contends that she has a right inhering under the Constitution and the Convention to apply to remain based on human rights grounds (a) in order to render the substantive rights to family life effective and/or (b) as a freestanding right under Article 40.3.1 of the Constitution and/or (c) as a right to remain based on the passage of time.

15. In relation to the first alternative, the applicant submitted that the existence of a substantive right carries with it a right to apply to the appropriate forum to vindicate that right. In the case of the Convention the principle of effectiveness is expressly guaranteed by Article 13. The case law of the European Court of Human Rights reasons by reference to the principle of effectiveness, *e.g*. in *Airey v. Ireland* [1979] 58 ILRM 624, the court emphasised the principle of effectiveness of the exercise of a right when it held:-

> *"24. The Government contend that the applicant does enjoy access to the High Court since she is free to go before that court without the assistance of a lawyer. The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily."*

16. The applicant submitted that the guarantee of family life in Article 8 implies a right to apply to the appropriate forum to vindicate that right.

17. The applicant submitted that while the Constitution did not contain an express guarantee of effectiveness, nevertheless the case law whereby the courts will grant an injunction to restrain the breach of constitutional rights shows that the substantive rights will be rendered effective. It was submitted that this was expressly considered by Hogan J. in *Sullivan v. Boylan* [2012] IEHC 389, which echoed the language in *Airey*, in holding that the courts must craft the appropriate remedy to make constitutional rights effective and not merely illusory:-

> *"21. While the courts are generally reluctant to grant injunctions to enforce the criminal law (cf. the judgment of the Supreme Court in Attorney General v. Lee [2000] IESC 80, [2000] 4 I.R. 65), different considerations obtain where that illegal conduct violates the constitutional rights of a private individual: see, e.g., the judgment of the Supreme Court in Lovett v. Gogan [1995] 3 I.R. 132 and, by analogy, the judgment of Macken J. in Pierce v. Dublin Cemeteries Committee (No.1) [2009] IESC 47, [2010] 2 I.L.R.M. 73. The fact, moreover, that Mr. McCartan unblushingly continued with his practice of harassing the plaintiff even after the Gardaí had spoken to him points to the objective necessity for judicial intervention if the plaintiff's right to secure the protection of her person (Article 40.3.2) and her dwelling (Article 40.5) is to be effective and not merely illusory."*

18. On this basis the applicant submits that her rights under Article 41 of the Constitution and Article 8 of the Convention imply a right to apply to the appropriate forum (the Minister) to consider those rights.

19. The applicant also contended that she had a right of access to the Minister provided for under Article 40.3.1.

20. The applicant submitted that in addition to the right to apply as ancillary to Article 41 and Article 8, the applicant contends that she has a right under Article 41 to apply to the appropriate forum in order to vindicate her rights, be they constitutional or convention rights. The applicant submitted that the cases on rights ancillary to court proceedings are relevant to the applicant's situation because in each type of case there was a forum for the determination of rights, but an impediment to accessing it. The applicant pointed to the decision in *McCauley v. Minister for Post and Telegraphs* [1966] I.R. 345 where the fiat of the Attorney General was required to commence actions against Ministers of State. The requirement was challenged in that case. Kenny J. held that the requirement for the fiat was an unconstitutional fetter on the right of access to the courts. He held:-

> *"That there is a right to have recourse to the High Court to defend and vindicate a legal right and that it is one of the personal rights of the citizen included in the general guarantee in Article 40, sect. 3, seems to me to be a necessary inference from Article 34, sect. 3, sub-sect. 1, of the Constitution which provides:—'The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.' If the High Court has this full original jurisdiction to determine all matters and questions (and this includes the validity of any law having regard to the provisions of the Constitution), it must follow that the citizens have a right to have recourse to that Court to question the validity of any law having regard to the provisions of the Constitution or for the purpose of asserting or defending a right given by the Constitution for if it did not exist, the guarantees and rights in the Constitution would be worthless."*

21. In McCauley, the forum was the High Court; in the applicant's case it is the Minister. It was submitted that *McCauley* is authority for the proposition that Article 40.3.1 of the Constitution gives a right of access to the appropriate forum. That is amplified by *O'Donoghue v. Legal Aid Board* [2006] 4 I.R. 204, in which the right to a prompt decision on an application for legal aid was "*based primarily on Article 40.3 of the Constitution*".

22. In the *State (Healy) v. Donoghue* [1976] I.R. 325, it was held that there is a right to legal aid. The Supreme Court held that a person cannot be "*shut out*" of the opportunity of putting his best case forward and declared a right to legal aid as a means of vindicating that right. Henchy J. held at p. 353:-

> *"'When the Constitution states that "no person shall be tried on any criminal charge save in due course of law'—(Article 38. s. 1), that 'the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen'—(Article 40, s. 3, sub-s. 1), that 'the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen'—(Article 40, s. 3, sub-s. 2), and that 'no citizen shall be deprived of his personal liberty save in accordance with law'—(Article 40, s. 4, sub-s. 1), it necessarily implies, at the very least, a guarantee that a citizen shall not be deprived of his liberty as a result of a criminal trial conducted in a manner, or in circumstances, calculated to shut him out from a reasonable opportunity of establishing his innocence; or, where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances."*

23. The applicant also submitted that there is no impediment to non-citizens relying on rights protected by Article 40.3.1. It was submitted that this was established in the *case Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360. It was stated as follows:-

> *"It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights. In Murphy v. Greene [1990] 2 I.R. 566 at p. 578 Griffin J. observed 'it is beyond question that every individual, be he a citizen or not, has a constitutional right of access to the courts. Stated in its broadest terms, this is a right to initiate litigation in the courts …'"*

24. The applicant contended that the principles concerning the right of access to the courts to litigate a rights based claim were in substance the same as those governing the right of access to the Minister to advance a human rights based application.

25. The applicant contended that she has a right inhering in the Constitution (as ancillary to Article 41 and/or under Article 40.3.1) and under the Convention (under Article 8 and/or Article 13) to have access to the Minister to make her case for leave to remain based on her human rights under Article 41 and Article 8.

26. The applicant then submitted that s. 3 disproportionately interfered with the applicant's rights to make a human rights based application for leave to remain. The applicant conceded that the Minister was entitled to restrict the right to make even a human rights based application where it is proportionate with the end to be achieved. Where it is not proportionate, a restriction on the right will render the enactment repugnant to the constitution and/incompatible with the convention.

27. It was submitted that the test for proportionality was set out in the judgment of Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593, where the test was stated as follows:-

> *"In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is*

a test frequently adopted by the European Court of Human Rights (see, for example Times Newspapers Ltd. v. United Kingdom (1979) 2 E.H.R.R. 245) and has recently been formulated by the Supreme Court in Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right as little as possible, and

(c) be such that their effects on rights are proportional to the objective."

28. The applicant cited as authority for this proposition the decision in *King v. Minister for the Environment (No. 2)* [2007] 1 I.R. 296, where the impugned provision contained a requirement that a non-party candidate for election must marshal 30 nominators to sign his nomination papers. There is no constitutional right to have a particular mode of nomination for election. However, there is a constitutional right to run for election and the plaintiff contended that the restriction contained in the enactment impeded him from exercising that right. It was not impossible for him to gather the nominators, but it was difficult. The Supreme Court agreed that the impediment was disproportionate.

29. In the present case, the impediment that the applicant complains of is the absence of a gap between the rejections of representations and the making of a deportation order. The applicant contended that there was no good reason for that absence and it was therefore arbitrary and unfair. It was submitted that it impaired the right significantly by making her decide whether to gamble on not having a permanent deportation order issued so she could return to the State in which she has spent over a third of her life for the possibility of having her representations accepted by the Minister. It was submitted that it is difficult to apply the test at (c) in *Heaney* because it is not easy to discern an objective for the absence of the gap.

The Respondent's Submissions

30. The respondent dealt firstly with the question as to whether the applicant enjoyed an "*entitlement to reside in the State*" pursuant to Article 41 of the Constitution and/or Article 8 of the European Convention on Human Rights. It was submitted that Article 41 of the Constitution incorporates a number of rights enjoyed by members of a "*family*" for the purposes of that article. For example, married couples are entitled to the company and society of each other. Parents are entitled to the care and custody of their children and the children have a concomitant right. However, it was submitted that Article 41 of the Constitution does not confer a right on non-nationals to enter and/or reside in the State. As it was put in the Article 8 case law (see *Abdulaziz v. United Kingdom* [1985] 7 HER 471) States are not obliged to respect the choice of residence of a married couple.

31. It was submitted that this statement was approved as good law in considering the rights of Irish citizens in *A.O. v. Minister for Justice* [2003] 1 I.R. 1. The respondent submitted that it was notable that in *A.O.*, the Supreme Court was considering a situation where the parents of Irish citizen infants might be deported and confirmed that provided a sufficiently serious reason (such as the common good in regulating immigration) was identified, this could be done. Obviously a full and detailed analysis of the circumstances of the family, where the effect of a deportation order is to separate a family because one of them is an Irish citizen, requires to be undertaken.

32. It was submitted that in the present case, the applicant's family appeared to comprise at the very least her infant daughter who resides in China with her parents in law and her husband who is to be deported with her. No separation of the applicant from any of her family members is going to recur as a result of the deportation order.

33. It was further submitted that even if there were a separation, the Supreme Court decision of *T.C. v. Minister for Justice* [2005] 4 I.R. 109, is authority for the view that there is no constitutional right even for an Irish citizen to have a non-citizen spouse reside with him or her in the State.

34. It was submitted that as was stated in the case law under Article 8 where the immigration status of one member of a couple is precarious (a word which refers not to a legal status but to short term permissions to remain as opposed to settled immigrant status), the knowledge on the part of one spouse at the time of entering the relationship that the status of the other was precarious will militate against a finding of a breach of Article 8 rights. In this case it was submitted that both spouses enjoy, not a precarious status in the State (this is the type of status the applicant enjoyed when she was here on a temporary basis on foot of a student visa) but have been in the State on a completely unlawful basis for a long number of years. It was submitted that in these circumstances, Article 41 and Article 8 are not engaged by the making of the deportation order, as the only issue is the right of residence in the State and these articles do not confer any such right.

35. The argument was made by the applicant that as she had been in the State for such a long period of time, it was a breach of her rights to deport her. The respondents noted that the vast majority of the applicant's time in the State was unlawful and that at no stage was she "*resident*". Feeney J. stated in *Agbonlahor* [2007] 4 I.R 309:-

"It is also of significance that in considering the issue of family life that it is appropriate to have regard to the lawfulness and length of stay as being significant factors in seeking to identify the exceptional cases where a state might be prevented from exercising the state's unquestioned entitlement to impose immigration control."

36. In *BIS v. Minister for Justice* [2007] IEHC 398, Dunne J. approved the statement of Feeney J. in *Agbonlahor* that the applicant was "*in truth asserting a choice of the state in which he would like to reside, as opposed to an interference by the State with their rights under article 8*".

37. The respondent submitted that the applicant has no entitlement to choose to move to Ireland, to live here and then to assert a right to remain here. She entered the State lawfully and did not seek to renew her permission after it expired. She had an entitlement to apply to the Minister to "*enter or be*" in the State and she chose never to exercise it. The availability of that remedy is also material to the consideration of the adequacy of s. 3 in circumstances where constitutional or convention rights are genuinely affected by the making of a deportation order which is not the case here.

38. It was submitted that mere lengthy unlawful residence in the State does not confer rights. The lawfulness of that residence is the key issue. Where a State has conferred a series of permissions on a non-national, allowing them to lawfully settle and put down roots, issues may arise. However, that situation has no application on the facts of this case and the applicant has no *locus standi* to raise this issue.

39. The respondents also submitted that the issue of proportionality did not arise, for the reason that there is no interference with the applicant's rights under either Article 41 or Article 8. Proportionality is a test to judge whether the interference with rights can be justified. The respondents also submitted without prejudice to that submission, as stated in *Agbonlahor*, even if proportionality were an issue, legitimate immigration control would, in any event, save in very limited cases justify the making of a deportation order against a non-national who is unlawfully present in the State.

40. The respondent then turned to look at the adequacy of the procedures pursuant to s. 3 of the Immigration Act 1999. The Minister submitted that because no constitutional or indeed convention rights of the applicant are engaged as their family life and/or family rights will not be affected by the deportation, then the applicant is not in a position to point to any constitutional right which may be breached by the alleged inadequacies in s. 3 of the Immigration Act 1999 and the applicant therefore has no standing to challenge the constitutionality on the basis of such rights.

41. Without prejudice to the generality of this statement, it was accepted that s. 3(3) of the Immigration Act 1999, creates a situation where if representations made pursuant to that section do not persuade the Minister not to make a deportation order, he will then immediately proceed to make one. The applicant complains that an additional layer or administrative procedure should be interposed at this point. However, that is not what the section provides for. The respondent submitted that from subs. (3) alone, it was relatively clear that the procedure which is in question here is a simple proposal to make a deportation order with a consideration of representations. The key decision, and indeed the only decision which is being made is whether or not to make a deportation order pursuant to s. 3 of the Act of 1999. The respondent further submitted that s. 3 is concerned with the making of deportation orders. It confers a power to make such orders and identifies the classes of persons in respect of whom they can be made. It also identifies the procedures to be employed and, in line with the principles identified in *East Donegal Co-Op v. Attorney General*, those provisions are supplemented by such procedures as are required to observe the principles of natural and constitutional justice. Otherwise, the situation is covered by the statute in question.

42. It would, therefore, appear that the practice for granting permission to remain in the State flows from the general position that no non-national may be in the State without permission of the Minister; see ss. 4 and 5 of the Immigration Act 2004. The nature of what is in fact under consideration in the s. 3 procedure was described by Hardiman J. in *F.P. v. Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164, as follows:-

> *"The applicants had been entitled…to apply for asylum and to remain in Ireland while awaiting a decision on this application. Once it was held that they were not entitled to asylum, their position in the State naturally falls to be considered afresh, at the respondent's discretion. There was no other legal basis on which they could then be entitled to remain in the State other than as a result of a consideration of s. 3(6) of the Act of 1999. In my view, having regard to the nature of the matters set out at sub-paras. (a) to (h) of that subsection, the decision could be aptly described as relating to whether there are personal or other factors which, notwithstanding the ineligibility for asylum, would render it unduly harsh or inhumane to proceed to deportation. This must be judged on assessment of the relevant factors as, having considered the representations of the person in question, they appear to the respondent. These factors must be considered in the context of the requirements of the common good, public policy, and where it arises, national security.*
>
> *To put this another way, each of the applicants was, at the time of making representations, a person without title to remain in the State. This fact constrains the nature of the decision to be made. The legislative scheme is that such a person may be deported. If this were not so, such persons would be enabled in effect to bypass the normal system of application for entry into the country, made from outside."*

43. The respondent submitted that the net issue, is whether a person who has remained in the State unlawfully for many years, is entitled in the context of the s. 3 procedure to a two-stage procedure. It is said that this flows from the constitutional and/or convention rights.

44. As stated by Dunne J. in *BIS v. Minister for Justice* [2007] IEHC 398, Article 8 of the European Convention on Human Rights does not prescribe any particular domestic procedure by reference to which Article 8 must be vindicated. A similar view has been taken of Article 41 rights in *Bode v. Minister for Justice* [2008] 3 I.R. 663. In both cases, the court was satisfied that the s. 3 procedure was adequate to respect and/or vindicate the rights in question.

45. The respondent submitted that the applicant had misstated the effects of *Bode* in her written submissions: that decision does not state that s. 3 is the only procedure by reference to which Article 41 rights may be considered. However, it does state that the s. 3 procedure is adequate for that purpose. That case concerned an infant citizen and the Supreme Court explicitly rejected the suggestion that the constitutional rights of the child must be considered in a prior application for permission to remain in the State before the deportation order process could be engaged in.

46. It was submitted that that case is therefore authority for the proposition that, in order to vindicate constitutional rights under Article 41 (and these were undoubtedly engaged in that case because the child might have been separated from his parents, who were non-nationals and subject to a deportation order) it would be perfectly adequate to consider those rights in the context of a s. 3 procedure. That authority was binding on the court and it disposes of the issue raised in the within proceedings.

47. The respondents further submitted that the *Haq Nawaz* case, is only authority for the proposition that the type of declaration sought in those proceedings must be sought by way of judicial review rather than by way of plenary summons. The only point decided by the Supreme Court was that this type of declaration must be sought by way of judicial review in compliance with s. 5 of the Illegal Immigrants (Trafficking) Act 2000, as it was in reality an attack on the deportation order.

48. The respondent submitted that the "*right of access*" which is dealt with at paras. 16 – 28 of the applicant's written submissions is a right of access to the courts. It was submitted that this issue is irrelevant to s. 3 of the Immigration Act 1999. However, it was noted that the applicant had in fact exercised that right by bringing the within proceedings.

49. In conclusion, the respondent submitted that the applicant has failed to demonstrate that she enjoys any constitutional or Convention rights which are affected or engaged in the within proceedings. They submitted that it was well established that where there is a proposal to deport an entire family of non-nationals, no issues pursuant to Article 8 arise.

50. It was submitted that in those circumstances, the applicant does not enjoy a constitutional or convention right which is engaged or interfered with by the s. 3 procedure. If she enjoyed a convention right then the State is still bound by the clear words of s. 3 of the Immigration Act 1999 and the applicant would be entitled to a declaration of incompatibility but the deportation order would not be affected.

Dellway Investments v. National Asset Management Agency [2011] 4 I.R. 1
51. This case was not opened by either party to the present proceedings. However, it is an important Supreme Court authority of relevance to the present case and this court must therefore have regard to it.

52. The issue arising in *Dellway Investments* was whether the applicant borrowers were entitled to be heard before NAMA decided to acquire the applicant's loans pursuant to s. 84 of the National Asset Management Agency Act 2009. Section 84 did not expressly give borrowers, whose loans were being acquired, an opportunity to make representations to NAMA prior to a decision to acquire being made. NAMA proposed to make a decision on this issue without hearing from the applicants at all. The Supreme Court held that the constitutionally guaranteed right to fair procedures encompasses a right to make representations to a public decision maker who is taking a decision that affects one's rights or interests and that the procedures under s. 84, in order to conform to constitutional justice, must be read as including a right to be heard.

53. Hardiman J. at para. 299 of the report quoted with approval the following passage from De Smith's internationally used work on judicial review of administrative action (6th Ed. 2009, Sweet and Maxwell) by Woolf, Jowell and Le Sueur:-

> *The term 'natural justice' has largely been replaced by a general duty to act fairly which is a key element of procedural propriety. On occasion, the term 'due process' has been invoked. Whichever term is used, the entitlement to fair procedures no longer depends upon the adjudicative analogy, nor whether the authority is required or empowered to decide matters analogous to a legal action between two parties. The law has moved on; not to the state where the entitlement to procedural protection can be extracted with certainty from a computer, but to where the courts are able to insist upon some degree of participation in reaching most official decisions by those whom the decisions will affect in widely different situations, subject only to well established exceptions"*

54. The learned judge held that this passage represented the law in Ireland. Hardiman J. further held that the trigger for the right to fair procedures is that "*the person claiming them is a person 'affected' by the decision*" or has "*an interest in the outcome*". Having reviewed the relevant case law, Hardiman J. held that this has been the trigger for fair procedures in Ireland for at least 40 years.

55. The learned judge concluded that a person "*affected*" by the exercise of a discretionary power by a public authority is entitled to be notified and heard before the power is exercised in a manner to which he takes exception. Hardiman J. went on to endorse the judgment of Hamilton C.J. in *Haughey v. Moriarty* [1999] 3 I.R. 1, as follows:-

> *"[332] Although not cited to us on the hearing of this appeal, my colleagues Fennelly and Macken JJ. have attached considerable importance to the decision of this court in Haughey v. Moriarty [1999] 3 I.R. 1 and, on reflection, I agree with what they say and would adopt the portions cited by them. This case was, of course, grounded in a context quite different to the present one. The applicants complained that a tribunal of inquiry had infringed their constitutional rights by addressing orders for wide ranging discovery to a number of financial institutions with which they did business without notice to them. Hamilton C.J., in giving the judgment of this court said at p. 75:-*
>
> > *'Fair procedures require that before making such orders, particularly orders of the nature of the orders made in this case, the person or persons likely to be affected thereby should be given notice by the Tribunal of its intention to make such order, and should have been afforded the opportunity prior to the making of such order of making representations with regard thereto.'*
>
> *[333] The similarity in phrasing, in defining the class of persons whose rights to a hearing were triggered, is manifestly very similar to the 'affected person' language used in the other cases cited."*

56. Fennelly J. held at para. 460 of his judgment:-

> *"It does not appear to me that it has been established that the right to be heard before a contemplated decision is made depends on establishing interference with a specific and identifiable legal right. It is difficult to discern a principled basis for restricting the right in that way. The courts have never laid down rigid rules for determining when the need to observe fair procedures applies. Everything depends on the circumstances and the subject matter. The fundamental underlying principle is fairness. If a decision made concerning me or my property is liable to affect my interests in a material way, it is fair and reasonable that I should be allowed to put forward reasons why it should not be made or that it should take a particular form. It would be unjust to exclude me from being heard."*

57. Dellway Investments is authority for the proposition that there is a constitutional right to fair procedures in the making of a discretionary decision by a public official or officials, based on the status of the person claiming such fair procedures as a person who is or may be 'affected' or 'adversely affected' by such a decision, and that that right encompasses the right to be heard. It is not necessary to establish that the decision at issue will affect legal or constitutional rights in order for the right to fair procedures to be triggered. The applicant, consequently, does not have to show that she has family rights; it is sufficient that she is a person who will be "*affected*" by the Minister's decision under section 3. The applicant clearly is such a person. Accordingly, she has a constitutional right to fair procedures and that right encompasses the right to make representations.

Conclusions
58. There is a constitutional right to make representations to the Minister in advance of his taking a decision to make a deportation order. The applicant has a right under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights, to have her circumstances considered by the Minister prior to making the deportation order. This is catered for in s. 3 of the 1999 Act which provides that a person can make written representations within 15 days of receiving notification that the Minister intends making a deportation order. In the *Bode* case, the Supreme Court made it clear that the making of representations pursuant to s. 3 of the 1999 Act was the appropriate forum to have such representations considered by the Minister. In this case, the applicant made written submissions which were considered by the Minister in advance of the making of the deportation order.

59. The fact that, if unsuccessful in her representations, the Minister will then go on to make a deportation order without any further option allowing the applicant to voluntarily leave the State, is not an impediment to the applicant's right to make representations to the Minister. While it is a possible consequence of the making of representations, and while it may operate as a deterrent to some applicants and may be a deterrent to the applicant in this case, it is not an unconstitutional or unlawful interference in the exercise of her right to make representations to the Minister as to why a deportation order should not be made in her case.

60. It is similar to the exercise by a plaintiff of his right of access to the courts to litigate a civil claim. If he is unsuccessful, he may suffer an award of costs against him. That is a possible consequence which he may face. It is something that must be weighed up

when deciding whether or not to commence litigation. It may well be a deterrent to his mounting of the action, but it is not an interference in the exercise of his right of access to the courts.

61. Accordingly, I am of the view that the scheme provided for in s. 3 of the Immigration Act 1999, safeguarded the right for the applicant to make representations to the Minister prior to any deportation being made. This was a sufficient protection to the applicant to make representations under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights. The absence of a gap between the considering of the representations and if unsuccessful, the making of the deportation order is not a breach of the applicant's constitutional rights or rights under Article 8 of the ECHR. For these reasons, I refuse the applicant's application for the reliefs herein.