Neutral Citation Number [2006] IEHC 211

**THE HIGH COURT**
**JUDICIAL REVIEW**

**[2006 No 371 J.R.]**

**BETWEEN**

**OLUKUNLE ELUKANLO AND ADAM HUGHES ELUKANLO (AN INFANT SUING BY HIS FATHER AND NEXT FRIEND) OLUKUNLE ELUKANLO**

**APPLICANTS**

**AND**

**THE MINSTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENT**

**Judgment of Ms. Justice Dunne delivered on the 4th day of July 2006**

1. The applicants herein seek judicial review of the decision of the respondent to the Court the first named applicant herein. Without setting out all of the reliefs sought, the relief claimed could be summarised as follows:

> 1. The applicants seek declarations that the deportation of the first named applicant would infringe their rights to a private and family life as guaranteed by Article 8 of the European Convention on Human Rights.
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> 2. The applicants seek declarations that the deportation would infringe certain constitutional rights of the applicants.
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> 3. A declaration that the respondent in refusing to revoke the deportation order made on 15th March, 2006 failed to have regard to the rights of the first and second named applicants under the European Convention on Human Rights and the Constitution and failed to have regard to the provisions of s. 3(6) of the Immigration Act, 1999.

2. The grounds upon which relief is sought can be summarised as follows:

> On 14th March, 2006, the first named applicant informed the respondent of the imminent birth of the second named applicant and asked that the respondent refrain from executing the decision to deport pending a reconsideration of the decision to deport. By a decision made on 15th March, 2006, the respondent affirmed the earlier decision and confirmed the decision not to vary or rescind the deportation order notwithstanding the imminent birth. The second named applicant was born on 23rd/24th March, 2006. The first named applicant and one Alison Hughes are the parents of the second named applicant. Alison Hughes was born on 4th June, 1986, is now twenty years of age and is an Irish citizen, permanently resident and domiciled in the State. The second named applicant is an Irish citizen.

3. It is stated that the first named applicant is entitled to a parental relationship with his child and that the second named applicant is entitled to have a relationship with his father with the various obligations and benefits flowing from the relationship of father and child.

4. If the first named applicant is deported it will be impossible to sustain any meaningful relationship with the child and for the child to have a meaningful relationship with his father. Further the first named applicant has no home in Nigeria and no means of earning an income to contribute to the maintenance of his son.

5. The mother intends to raise her child in Ireland. She has no connection with Nigeria. The child has an extended family in Ireland on his mother’s side.

6. The first named applicant complained that having asked the respondent to reconsider the matter he had expected to be afforded a reasonable opportunity to make detailed submissions as to why the deportation order should be varied or amended.

7. By virtue of the speed of the decision the respondent has excluded from his consideration all matters relating to the health and welfare of the child and has excluded any assessment of family and domestic circumstances. It is stated that the respondent’s decision to refrain from executing the deportation order coupled with prejudgment of the matter has deprived the first named applicant of the opportunity to make effective representations. Finally it is stated that the respondent failed to have any regard to the rights of the second named applicant.

8. Cormac Ó Dúlacháin appeared on behalf of the first named applicant and Dervla Browne, SC appeared on behalf of the second named applicant, both instructed by the same solicitors. Brian O’Moore SC appeared on behalf of the respondent.

9. An interim order restraining the first named applicant’s deportation was made on 24th March, 2006, and thereafter a full hearing of an application for leave to apply for judicial review took place on 5th and 6th April, 2006. A number of affidavits were filed on behalf of the parties herein.

**First affidavit of the first named applicant**

10. In his affidavit the first named applicant stated that he was a national of Nigeria born on 10th January, 1985. He originally came to Ireland on 26th February, 2002, and applied for refugee status, his application was refused and he went through the appeal process and having been refused applied to be allowed to remain which application was also refused. A deportation order issued in 2005 and he was deported to Nigeria around 14th March, 2005. He states that after public demonstrations and appeals on his behalf from classmates at Palmerstown Secondary School the respondent re-admitted him to the State for a period of six months to enable him to complete his Leaving Certificate.

11. In October, 2005 the respondent invited the first named applicant to make representations to him in relation to his then position in the State. Representations were made on his behalf by his solicitors by letter dated 28th October, 2005. On 24th January, 2006, the respondent wrote to the first named applicant declining his application and indicating that he proposed to issue a deportation order. Further submissions were invited and they were filed on 10th February, 2006. By letter dated 14th March, 2006, the first named applicant was advised that having considered his submissions the respondent had decided to make a deportation order and the order was enclosed therewith.

12. The first named applicant explained that he had known Ms. Alison Hughes since 2004. They became boyfriend and girlfriend in April, 2005, and in August 2005, she became pregnant with the baby boy born on 23rd/24th March, 2006.

13. The first named applicant set out that consideration was given when making further submissions to the respondent on 10th February, 2006, as to whether or not the fact that his girlfriend was pregnant should or should not be mentioned. He explained that she did not want the fact of her pregnancy to be disclosed in any submissions and that he had given her an undertaking in that regard. This was to avoid the possibility of pressure on her as a result of media attention. She was having difficulty in the circumstances in which she found herself. He stated that part of the reason for his concern in this regard related to information furnished to the Immigration Service of the Department of Justice having made its way to the media and to a number of Articles which had appeared in particular in the Evening Herald newspaper which referred to "sources" in the Department of Justice. In the circumstances the only reference to any form of relationship on the part of the first named applicant was in the following general terms "he is in a relationship with an Irish citizen and his deportation would have adverse consequences for both of them".

14. He went on to state that following the receipt of the letter from the Department enclosing the deportation order dated 14th March, 2006, the matter was again discussed with Alison Hughes and her parents and it was agreed then that the Minister should be informed of the current situation and fresh application made to have the deportation order set aside. Accordingly the solicitors for the applicant wrote to the respondent by letter dated 15th March, 2006.

15. The respondent by letter dated 16th March, 2006, wrote to the solicitors for the applicant and affirmed the deportation order.

16. A number of points are then made by the applicant. He states that he and his partner are traumatised and distressed by the affirmation of the deportation order. He expresses a concern as to the manner of the consideration of his application. He states that no regard was had to the imminent birth of the second named applicant and that the affirmation of the deportation order is unreasonable and arbitrary and without any due and proper consideration of the best interests of the second named applicant or indeed of the needs of Ms. Hughes. He then sets out details of the circumstances that await him in Nigeria. He points out that Ms. Hughes has no connection with Nigeria. He added that he and Alison Hughes had not made any long term plans as to their future. At that point she was returning to live with her parents and he indicated that he proposed to support her and the second named applicant. He added that his deportation would infringe his rights and the rights of the second named applicant pursuant to the European Convention on Human Rights and the constitutional rights.

17. In the course of his affidavit certain correspondence was exhibited and I will refer to that correspondence at a later stage.

**Affidavit of Janet Core**
18. Janet Core is an apprentice solicitor in the firm of Colgan & Company, Solicitors, who represent the first named applicant herein. She has dealt with him on a number of occasions. She stated that in late November, 2005, she met the first named applicant who informed her that he had an Irish girlfriend and that she was then pregnant and that the baby was due to be born in or about 4th April, 2006. She explained that this was a relevant matter that could effect the respondent's decision whether or not to grant him leave to stay in the State. She stated that he was "hesitant about this" as the parents of his Irish girlfriend were not aware of the pregnancy. She advised him to discuss the matter and to let her know the decision. She then outlined how she met with the first named applicant on a number of occasions during January and discussed the matter further. His girlfriend had still not told her parents. She was terrified of having to tell her parents about the situation and was trying to come to terms with being pregnant. The first named applicant instructed that the matter should not be mentioned in the submission being drafted to the Minister. The matter was again discussed in detail in late January with the first named applicant in the company of the sister of his girlfriend. Her parents were upset and in shock. It was their belief that it was not in their daughter's interest that any reference be made to the pregnancy in the submission to the Minister. At a subsequent consultation with counsel the matter was again considered with the first named applicant and his girlfriend's sister. Again it was indicated that her family did not want any reference to the baby in any submissions. The matter was discussed again on 1st February and on 10th February, 2006. Submissions were then forwarded to the respondent but reference to the pregnancy was not contained in the submissions.

19. Ms. Core then outlined the circumstances that followed from the service of the deportation order. Ms. Core then received a phone call from the mother of Alison Hughes. She indicated that it was now in everyone's best interest to inform the respondent of the position and accordingly that information was furnished to the respondent by hand delivered letter on the afternoon of 15th March, 2006. She expressed surprise to receive a decision by letter dated 16th March, 2006, from the Minister. She expressed the view that she could not see how the matter was considered at all.

**Affidavit of Dan Kelleher**
20. Dan Kelleher is an Assistant Principal Officer in the Department of Justice, Equality and Law Reform and his affidavit was sworn on 29th March, 2006 on behalf of the respondent. He refuted the allegation that any information was divulged to the media about the applicant.

21. He set out the background to the revocation of the first deportation order in relation to the first named applicant and the fact that the first named applicant had been given permission to enter and remain in the State until 30th September, 2005, on the basis of a study visa. On 1st September, 2005, the respondent wrote to the first named applicant. He was advised his permission to remain in the State was due to expire and asked if he wished to have his permission extended and, if so to set out any matters which should be taken into account in deciding the application for permission to remain.

22. A letter dated 15th September, 2005, on behalf of the first named applicant requested an extension of his permission to remain pending a substantive decision on his application. An extension to remain was granted on foot of that representation until 28th October, 2005, and the period for making representations was extended to 14th October, 2005. On 29th September, 2005, the respondent wrote to the first named applicant's solicitor enclosing all information on the respondent's file which it was proposed to consider in the course of making the decision as to whether or not to extend the first named applicant's permission to remain in the State. On 28th October, 2005, representations were made on behalf of the first named applicant by his solicitors seeking further permission for him to remain on foot of the study visa. A letter written by the first named applicant was enclosed with those representations. There was some correspondence as to whether or not the first named applicant's file had been received by his solicitor and I do not think it is necessary to set out the details of that correspondence, save to say that the first named applicant's solicitor acknowledged receipt of same on 2nd November, 2005. Following further correspondence it was confirmed by letter dated 4th November, 2005, that the first named applicant did not wish to make any further submissions.

23. On 20th January, 2006, the respondent decided not to grant further permission to the first named applicant to remain in the State. The respondent gave reasons why it was proposed to make a deportation order namely:

> 1. The original permission on which the first named applicant entered the State was for the purpose of having an asylum application processed, which claim was unsuccessful both at first instance and on appeal;

2. Following his deportation he was re-admitted to the State for the purpose of completing his leaving certificate and which had been completed;

3. He had not been in compliance with the laws of the State either before his deportation or since;

4. The granting of an extension to the first named applicant's permission to remain would be contrary to the common good in that it would have implications for the integrity of a coherent and efficient immigration and asylum system.

24. The first named applicant was invited by letter dated 24th January, 2006, to make written representations setting out the reasons why he should be allowed leave to remain in the State. Further representations were then made by letter dated 10th February, 2006, by Messrs Colgan & Company on behalf of the first named applicant. A deportation order was made on 14th March, 2006, and the first named applicant was personally served with same on 14th March, 2006, and other relevant documentation. By letter dated 15th March, 2006, the first named applicant's solicitors requested the respondent to reconsider the deportation order and the respondent was warned that, unless the first named applicant heard from the respondent by 1 pm on 20th March, proceedings would issue. Thus, the matter was considered on 15th March, 2006, and a written record was made of the decision by the respondent. Mr. Kelleher refers to a typographical error in the written record of the decision in that it refers to a letter from Messrs Colgan & Company of 14th March. The only letter was that of 15th March.

25. Mr. Kelleher then was critical of the first named applicant for "deliberately" withholding the information surrounding the fact that Ms. Hughes was pregnant both prior to the making of the decision on 24th January, 2006, and prior to the making of the deportation order. He stated that he had been advised that withholding of information should be taken into account by this Court in exercising discretion to grant the injunctive relief sought. He also took issue with the assumption that if the deportation order is enforced the first named applicant will have no legal options as regard visiting his child in Ireland.

**Supplemental affidavit of Olukunle Elukanlo**
26. The supplemental affidavit was sworn on 3rd April, 2006. In that affidavit the first named applicant said that the withholding of information as to the birth of the second named applicant was not because of any improper motive but because of the circumstances then prevailing.

27. He noted the assertion by Mr. Kelleher that information concerning his case was not divulged from the Department. He exhibited a number of newspaper Articles which referred to sources in the Department.

28. He took issue with the assertion that the rights in issue in the proceedings can be honoured by granting him limited rights to enter the State from time to time. He also asserted that that view took no consideration of the nature of his relationship with the second named applicant or his mother Alison. He then set out details of that relationship. Having set out details of his contact with the second named applicant, his mother Alison, he stated that he believed that it would be detrimental to the development of his relationship with his son if he were to be deported. He stated his belief that an occasional visit from Nigeria was no substitute for the relationship he wished to have with his son or for the support he wished to give his son and Ms. Hughes.

**Affidavit of Dr. Gerard Byrne**
29. Dr. Gerard Byrne a consultant child psychiatrist swore an affidavit herein on behalf of the second named applicant herein on 4th April, 2006. Having set out his qualifications he went on to say that he believes that a child needs contact with his father on the basis that if an attachment is to be formed the child needs ongoing regular contact with the "attachment figure" on a daily or alternate day basis. The attachment figure needs to be involved in the care giving role to the child. He also needs to be involved in play with the child. He went on the say that he believed that the first year of the child's life is of very great importance in relation to forming attachment. In order for the child to have a meaningful relationship with his father he should see him on a daily or alternate day basis. In circumstances where the relationship between the mother and father is a loving one and both are mutually supportive of each other he added that there was no reason why the child should not benefit from the fathers care giving role. He stated his belief that this was highly important from the second named applicant's point if view. In the event that the first named applicant is deported the child will not be in a position to develop his attachment to him. He added that research had shown that where both parents have a continuing committed relationship during the child's life and have a meaningful involvement in the upbringing of the child, even if they do not live together such a child does better psychologically and educationally than in other cases.

**Affidavit of Alison Hughes**
30. Alison Hughes in her affidavit sworn herein on 4th April, 2006, stated that she was the mother of the second named applicant. She became pregnant in or about the month of August, 2005, having had a relationship with the first named applicant since 2005. She said that the pregnancy was unplanned and that the first named applicant has been very supportive throughout the entire pregnancy and birth. She added that the first named applicant has been fully involved in the baby's life since the second named applicant had been born. She expressed the view that it is in the best interests of the second named applicant to have continuous contact with his father and to develop strong emotional bonds and a relationship with him. She expressed the view that she was supportive of the first named applicant in his application to remain in Ireland. That concluded the affidavits.

**Submissions**
31. Mr. Ó Dúlacháin SC on behalf of the first named applicant submitted that having made the deportation order on 14th March, 2006, the respondents in considering the matter again on 15th March, 2006, at the request of the first named applicant in the light of the new information contained in the letter dated 15th March, 2006, from his solicitors to the respondent, namely the imminent birth of a child, failed to have regard to the rights of the first named applicant under Article 8 of the European Convention on Human Rights. Article 8 provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

32. He referred to two decisions in support of his contention that family ties exist between the first named applicant and the second named applicant such as to engage the provisions of Article 8 thereby requiring the respondent to have regard to those rights. He referred to *Keegan v. Ireland*, ECJ a judgment of 26th May, 1994, that case concerned the right of a father, who was not married to the mother, to have a say in a decision as to whether or not the child should be adopted. Mr. Ó Dúlacháin referred to a passage commencing at paragraph 42 on p. 11 of the judgment as follows:-

"The government maintains that the sporadic and unstable relationship between the applicant and the mother had come to an end before the birth of the child and did not have the minimum levels of seriousness, depth and commitment to cross the threshold into family life within the meaning of Article 8. Moreover there was no period during the life of the child in which a recognised family life involving her had been in existence. In their view neither a mere blood link nor a sincere and heartfelt desire for family life were enough to create it.

43. For both the applicant and the commission, on the other hand, his link with the child was sufficient to establish family life. They stressed that his daughter was the fruit a planned decision taken in the context of a loving relationship.

44. The Court recalls that the notion of the "family" in this provision is not combined solely to marriage based relationships and may encompass other de facto "family" ties where the parties are living together outside of marriage… a child born out of such a relationship is ipso iure part of that "family" unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended…

45. In the present case the relationship between the applicant and the child's mother lasted for two years during one of which they co-habited. Moreover, the conception of their child was the result of a deliberate decision and they had also planned to get married…Their relationship at this time had thus the hallmark of family life for the purposes of Article 8. The fact that it subsequently broke down does not alter this conclusion anymore than it would for a couple who are lawfully married and in a similar situation. It follows that from the moment of the child's birth there existed between the applicant and his daughter a bond amounting to family life."

33. Counsel for the first named applicant also relied on the decision in the case of L*ebbink v. The Netherlands*, ECJ, judgment of 1st September, 2004 at p. 7:

"36. The court reiterates that the notion of "family life" under Article 8 of the Convention is not confined to marriage based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso iure* part of that family unit from the moment, and by the very fact of its birth. Thus there exists between the child and the parents a relationship amounting to family life (see *Keegan v. Ireland*…)

36. Although as a rule, co-habitation may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* "family ties" (see *Kroon and Others v. The Netherlands* judgment of 27th October 1994…). The existence or non-existence of family life for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties…. Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth.

37. In the present case, the court notes that,… the applicant has not sought to recognise Amber and he has never formed a "family unit" with Amber and her mother as they have never co-habited. Consequently, the question arises whether there are other factors demonstrating that the applicant's relationship with Amber has sufficient constancy and substance to create *de facto* "family ties". The Court does not agree with the applicant that a mere biological kinship without any further legal or factual elements indicating the existence of a close personal relationship, should be regarded as sufficient to attract the protection of Article 8.

38. However in the instant case the Court notes that Amber was born from a genuine relationship between the applicant and Ms. B. that lasted for about three years and that, until this function was abolished when Amber was about seven months old, the applicant was Amber's auxiliary guardian. It observes that the applicant's relationship with Ms. B. ended in August, 1996, when Amber was about sixteen months old.

39. The Court further notes that, although the applicant never co-habited with Ms. B. and Amber, he was present when Amber was born, that from Amber's birth until August, 1996, when his relationship with Amber's mother ended – he visited Ms. B. and Amber at unspecified regular intervals, that he changed Amber's nappy a few times and babysat her once or twice and that on several occasions he had contact with Ms. B. about Amber's impaired hearing.

40. In these circumstances, the Court concludes that when the applicant's relationship with Ms. B. ended, there existed – in addition to biological kinship – certain ties between the applicant and Amber which were sufficient to attract the protection of Article 8 of the Convention."

34. Thus counsel submitted that the relationship between the first named applicant and the second named applicant is such that it engages Article 8 of the European Convention on Human Rights.

35. Counsel for the first named applicant then referred to the decision in the case of *Kozhukarov and Others v. The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* (Unreported, High Court, 14th December, 2005). As in the present case the applicants in that case sought leave to challenge deportation orders and refusal to revoke such orders in circumstances where the applicants had been through the asylum process. In the course of his judgment, having referred to the provisions of s. 3(6) of the Immigration Act, 1999, Clarke J. at p. 7 of his judgment noted:

"It seems to me that it is arguable, sufficient for the purposes of leave that, in principle, an independent ground for seeking to challenge a deportation order (that is to say a ground independent of any contention that the Minister failed to properly consider s. 3(6) of the 1999, Act) may be to the effect that the making of a deportation order by the Minister in all the circumstances of the case concerned would amount to an impermissible infringement of the rights which the party concerned might have under the Convention. While, as I pointed out in *Kouaype*, the weighting of the various matters specified in

s. 3(6) of the 1999 Act, is, in accordance with the authorities cited in that case and as a matter of pure domestic law, entirely a matter for the Minister, that does not mean that there are not cases where, in order that he act in a manner sufficient to ensure that the State comply with its obligations under the Convention as brought into effect in domestic law, the Minister may be obliged as a matter of Irish law, to refrain from making the deportation order concerned or, in appropriate cases may be obliged to revoke such an order."

36. Counsel also referred to two passages at p. 10 of the judgment of Clarke J.:

> "It is at least arguable sufficient for the purposes of leave that in considering such matters a proportionality test applies. In those circumstances it follows that it is similarly arguable that a lesser degree of interference with family life would suffice to make a deportation impermissible, where the only ground put forward for that deportation was immigration control. A greater degree of interference with the rights of the individual concerned may be required to render a deportation disproportionate where the legitimate aim of the State was one such as the prevention of disorder or crime…
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> Finally it seems to me, that, as a matter of principle, the application of the proportionality test, which is required in respect of deportation where Article 8 rights may be interfered with, may require the Minister, in an appropriate case, to postpone deportation even though the circumstances may be such as would be sufficient to render it disproportionate to refuse to allow the person concerned to remain in the State indefinitely. There may be short or medium term circumstances which would render it disproportionate to impose an immediate deportation but where, on the basis of the facts of the individual case, circumstances were likely to change so as to permit the Minister, in a proportionate manner, to make a deportation order on a subsequent occasion.

37. Counsel then referred to the decision of the High Court in the case of *Agbonlahor and Others v. The Minister for Justice, Equality and Law Reform and the Attorney General* (Unreported, 3rd March, 2006.) That was a case in which the applicants sought to challenge a decision of the Minister under s. 3(11) of the Immigration Act, 1999, as to the amendment or revocation of deportation orders. In that case it had been argued that the provisions of s. 5(1) of the Illegal Immigrants (Trafficking) Act, 2000, were applicable to a decision under s. 3(11). In that case Herbert J. held that the operation of s. 5 did not embrace s. 3(11) of the Act of 1999. On that basis, counsel argued that the standard of proof in this case was that which applied to an ordinary application for judicial review under Order 84, Rule 20 of the Rules of the Superior Courts.

38. One further issue was dealt with at some length by counsel for the first named applicant. He posed the question as to whether the fact that the second named applicant was not born at the time of the decision made by the respondent herein on 15th March, 2006, was material. He reiterated the reasons set out in the affidavits sworn on behalf of the first named applicant as to why the respondent was not told of the relationship with Alison Hughes apart from the brief mention in the submissions of 10th February, 2006, already referred to above. He noted the extent to which Mr. Kelleher on behalf of the respondent took issue with the first named applicant on this point. Counsel stated that the non-disclosure was not *mala fides* in that there was no improper reason for not disclosing the information or any material benefit. On the contrary the situation was one which had to be considered in the circumstances of those concerned. He accepted that it was legitimate to raise the issue as Mr. Kelleher had done but contended that were ample reasons for not disclosing the pregnancy. Counsel urged that any decision not to revoke the deportation order must be proportionate, that insofar as the issue of non-disclosure arose, that issue had to balanced with the fact that there was a relationship between the first named applicant and the second named applicant and that must be balanced against the argument that there has been an abuse of the process.

39. Counsel also reiterated in his submissions the point made in the affidavit of Janet Core as to the speed with which the respondent answered the request made on 15th March, 2006. It was contended that that speed in effect precluded the first named applicant from making submissions on the effect of the birth of the second named applicant.

40. Finally insofar as the question of injunctive relief was concerned, counsel refereed to the balance of convenience and the matters to be taken into consideration in that regard.

41. Ms. Browne SC on behalf of the second named applicant contended that there was an entitlement on the part of the second named applicant to be represented separately. She too relied on the provisions of Article 8 of the ECHR. She also referred to the provisions of the Constitution and referred to the decision of the Supreme Court in the case of *G. v. An Bord Uchtála* [1980] I.R. 32 which referred to the rights of a child to have its welfare safeguarded, which right was a personal right within the meaning of Article 40, s. 3 of the Constitution.

42. Counsel also referred to the decision in the case of *North Western Health Board v. H.W.* [2001] 3 I.R. 622 in which it was held, *inter alia*, that a child had constitutional rights both as part of the unit of the family and as an individual.

43. The child's unenumerated rights as set out by the High Court (Finlay P.) in *G. v. An Board Uchtála* referred to above were expressly approved by Keane C. J. who quoted the following passage from the judgment of Finlay P. at p. 44 in that case:

> "A constitutional right to bodily integrity and … an unenumerated right to an opportunity to be reared with due regard to [his or] her religious, moral, intellectual, physical and social welfare. The State, having regard to the provisions of Article 40, s. 3(1) of the Constitution must by its laws defend and vindicate those rights as far as practicable."

44. Although the judgment of Keane C.J. was a dissenting judgment in the case, the passage quoted by him from *G. v. An Bord Uchtála* was also approved by Denham J. in her judgment in that case. On that basis, Ms. Browne submits that the rights of a child born outside marriage have been recognised under the Constitution. She also referred to a passage from the judgment of Walsh J. in *G. v. An Bord Uchtála* at p. 69:

> "Not only has the child born out of lawful wedlock the natural right to have its welfare and health guarded no less well than that of a child born in lawful wedlock, but a fortiori it has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth. The child's natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion and to follow his or her conscience.… The child's natural right to life and all that flows from that right are independent of any right of the parent as such…. In these respects the child born out of lawful wedlock is in precisely the same position as the child born in lawful wedlock."

45. Counsel also referred to the decision in *Keegan v. Ireland* referred to above and she pointed out that under the provisions of Article 8 the concept of the family was more flexible than under the Constitution. She referred in addition to the case of *Berrehab v. The Netherlands*, ECJ, judgment of 21st June, 1988. A passage at p. 9 of that judgment considered the possibility of a break in family ties. It was stated therein:

> "Subsequent events, of course, may break that tie, but this was not so in the instant case. Certainly Mr. Berrehab and Mrs. Coster, who had divorced, were no longer living together at the time of Rebecca's birth and did not resume co-habitation afterwards. That does not alter the fact that, until his expulsion from the Netherlands, Mr. Berrehab saw his

> daughter four times a week for several hours at a time; the frequency and regularity of his meetings with her… proved that he valued them very greatly. It cannot therefore be maintained that the ties of "family life" between them had been broken."

46. She went on to refer to another passage in the judgment which having acknowledged the difficulties for the applicant in that case who had been expelled from the Netherlands to Morocco and having regard to financial problems caused by his enforced return to his home country noted the submission by the Dutch Government that nothing prevented him from exercising his right of access by travelling from Morocco to the Netherlands on a temporary visa and commented as follows:

> "Like the Commission, the Court recognises that this possibility was a somewhat theoretical one in the circumstances of the case; moreover, Mr. Berrehab was given such a visa only after an initial refusal…. The two disputed measures thus in practice prevented the applicants from maintaining regular contacts with each other, although such contacts were essential as the child was very young. The measures accordingly amounted to interference with the exercise of a right secured in paragraph 1 of Article 8 and fall to be considered under paragraph 2."

47. Counsel referred to a judgment of the High Court in the case of *T.C. and A.C. v. The Minister for Justice, Equality and Law Reform* (Unreported, 21st December, 2004) in which that case it was conceded on behalf of the second named applicant that the position of a child had not been considered at all in the context of that case. Quirke J. quoted at p. 23 from the decision in the case of *A.O. and D.L. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 in which Murray J. (as he then was) having referred to the case of *Fajujonu v. Minister for Justice, Equality and Law Reform* [1990] 2 I.R. 151 at p. 84 went on:

> "of particular relevance to the facts of this case he went on immediately to emphasise that:
>
>> 'The point being that, unlike a family of non-nationals who can be deported simply because they are non-nationals, having no personal rights whatsoever to be within the State (where rights arising under the immigration and asylum systems have been excluded) the Minister *must* take into account in a case such as the present one, the *prima facie* constitutional rights deriving from the citizenship of the infants and consider whether, notwithstanding those rights, there are, in the circumstances of the case, good and sufficient reasons associated with the common good for the deportation of their parents with the inevitable consequences for their child.'
>
> Accepting, as I of course do without hesitation, that final paragraph as a clear statement of the law and of the respondent's obligation when considering the potential deportation of non-nationals and adopting the principle identified as being applicable equally to applications made to the respondent pursuant to s. 3(11) of the Act of 1999 it follows that the decision of the respondent to refuse to revoke the deportation order in respect or R.C. was and remains invalid."

48. On the basis of that authority, Ms. Browne contends that the facts of the instant case are similar so far as the second named applicant is concerned. In other words the position of the child has not been considered at all.

49. Ms. Browne then referred to the affidavit of Dr. Byrne which had been sworn on behalf of the second named applicant. Although some reference to limited visa access had been made by Mr. Kelleher in his affidavit she contended that this was clearly not sufficient in the light of Dr. Byrne's affidavit. Again she referred to the decision in the case of *NWHB v. H.W.* as an authority for the proposition that under the Constitution the child's welfare is guarded and protected. Finally she made the point that whilst there may have been an abuse of process on the part of the first named applicant in failing to disclose the imminent birth of the second named applicant that any abuse of process on his part couldn't affect her claim. Finally she dealt with the question of injunctive relief and the balance of convenience.

50. Mr. O'Moore SC commenced his argument by pointing out that the first named applicant had entered the country some considerable time ago for the purpose of seeking asylum. Having been refused asylum, he was deported but subsequently readmitted for a fixed period up to the 1st September, 2005. During that period he took no steps to extend his visa until contacted by the respondent. He was critical of the first named applicant for failure to make full disclosure. He pointed out that the first named applicant in his first affidavit stated that he was invited to make representations in or about October, 2005. That affidavit failed to exhibit or refer to the letter dated the 1st September, 2005, from the Department of Justice, Equality and Law Reform which pointed out that his permission to remain in the State would expire on the 30th September, 2005. It requested the first named applicant if he intended to apply for an extension to indicate in writing that fact and any matter or reasons which should be taken into account by the Minister in deciding on the application. Counsel for the respondent pointed out that at that stage as is now known, the said Ms. Hughes was already pregnant. Counsel pointed out that it is not known to the respondent when the first named applicant became aware of the pregnancy. That information has not been disclosed either in the original affidavit or indeed in the supplemental affidavit sworn by the first named applicant on the 3rd April. All that that affidavit confirms is that the first named applicant and the said Ms. Hughes have been in a relationship since April, 2005. On that basis, counsel submitted that there has been a conscious suppression of information and that the first named applicant must have known at a certain stage that Ms. Hughes was pregnant.

51. Counsel also referred to the letter from Colgan and Company Solicitors to the respondent's Department dated the 15th September, 2005, in which it was stated as follows:

> "We are anxious to make a detailed submission on his behalf, however we require a reply to our letter of the 24th March and the 4th August, addressed to the Minister enclosing the documentation sought. We would also request copies of any additional information, which may be before the Minister and, which will bear on a consideration of Mr. Elukanlo's application."

52. In response to that letter the Department replied and indicated that it was decided to extend the first named applicant's permission to remain for a period of 28 days from the date of expiry of his then current permission namely the 30th September, 2005 and it was further indicated that all information on the first named applicant's file would be transmitted to the solicitors for the first named applicant and finally the Minister reiterated the request that the solicitors for the first named applicant indicate in writing any matter which they wished to have taken into account by the Minister in deciding whether a further extension should be granted. It was explained that the purpose of the extension of time was for the making of representations. On the basis of that correspondence, counsel submitted that the respondent had "bent over backwards" in dealing with this matter. He pointed out that there was no suggestion whatsoever of any procedural impropriety made against the respondent.

53. Counsel for the respondent then referred to the representations that had in fact been made on behalf of the first named applicant herein by his solicitor under cover of a letter dated the 28th October, 2005. Enclosed with the representations was a letter addressed by the first named applicant to the respondent entitled "My Life Story". There was no reference at all in those documents to the

possible birth of a child. In the letter from his solicitors of that date a request for a further short extension of his current permission was made to enable his solicitors to consider the file which was being transmitted from the respondent to them in the event that anything arose from that file. It was indicated by way of response that the file had already been transmitted to the solicitors for the first named applicant and receipt of same was acknowledged by letter dated the 2nd November, 2005. In fact they had received the file on the 29th September. A further copy of the letter dated the 28th October, 2005, but bearing the date the 2nd November, 2005, was then sent to the respondent. By letter dated the 3rd November, 2005, the respondent requested confirmation that the letter of the 28th October, 2005 and its enclosures represented the entire detailed submission which had been referred to in the letter of the 15th September, 2005, from the first named applicant's solicitors. By reply dated the 4th November, 2005, the solicitors for the first named applicant confirmed that their letter and enclosures represented the entire detailed submissions referred to in their letter of the 15th September.

54. Counsel then submitted that it was clear from the affidavit sworn herein by Janet Core of the first named applicant's solicitors that by the end of November, 2005, they had been informed by the first named applicant of his girlfriend's pregnancy and further it is clear that the fact that that was relevant and could affect the Ministers decision was explained to him at that time. Notwithstanding this the Minister was not informed of the situation and a decision was made by the Minister that he was not prepared to grant permission to the first named applicant to remain and that he proposed to made a deportation order. Notification of that intention was furnished to the first named applicant by letter dated the 24th January, 2006. Again representations as to why the first named applicant should be allowed to remain temporarily in the State were invited by the respondent. In response, further submissions were made on behalf of the first named applicant. Those submissions were made on the 10th February, 2006, some eight weeks before the due date of the second named applicant. It was in those submissions that the reference was made to his relationship. Nonetheless there was no reference to the pregnancy notwithstanding the fact that the importance in relevance of that issue was known to the first named applicant.

55. Counsel made the point that it was simply not open to an individual to stand by, say nothing and decline to make the case to the person deciding the issue of status without putting then on notice of the case actually intended to be made. Counsel took issue with the concept that the alleged leaks justified the first named applicant in not disclosing relevant information. Counsel suggested that if there was a concern as to a breach of confidence in respect of Ms. Hughes there was no need even in the letter of the 15th March, 2006, to name her. It is clear from the affidavit of Janet Core referred to above that a consultation was held with the first named applicant to consider whether the respondent should be told and a conscious decision was made at that time not to disclose the information.

56. It was only on the 15th March, 2006, the respondent received for the fist time the information contained in the letter of even date to the effect that the birth of the second named applicant was imminent and at that point in time the respondent was asked to reconsider the position in relation to the status of the first named applicant and to refrain from executing the deportation order until the matter had been reconsidered. That letter requested that the respondent reply by 1.00 p.m. on Monday the 20th March and it was indicated that if there was no response from the respondent by 1.00 p.m. on Monday the 20th it may become necessary to issue proceedings to protect the interests of the first named applicant. In those circumstances the respondent reconsidered the position as requested and having done so decided not to vary the order.

57. Counsel for the respondent having thus referred to the facts of the case commented that the Minister had done what he was asked to do. At all stages he had sought appropriate representations from the first named applicant. Having made the deportation order he was asked to reconsider the position. He did reconsider the position and having done so decided not to vary the order. In essence, counsel submitted that the first named applicant seeks to challenge a decision which he doesn't like but not a decision wrongly made.

58. Counsel for the respondent referred to a number of authorities in support of his arguments. He pointed out that in *Lelimo v. Minister for Justice, Equality and Law Reform* [2004] 2 I.R. 178 Laffoy J. at p. 190 of her judgment made the comment:

> "Such authority as any organ of State has to enforce the deportation order derives solely from the deportation order. The enforcement process cannot be severed from, and has no basis in law distinct from, the order itself. The decision to make the deportation order and the order itself both predate the coming into operation of s. 3(1). They are immune from challenge under the Act of 2003. Therefore, in terms of the application of the Act of 2003, it must be assumed that the deportation order is valid."

59. In reliance on that authority he argued that the first named applicant was not entitled to the relief sought at para. D2 namely a declaration that the deportation of the first named applicant would infringe the first named applicant's entitlement to respect for his private and family life as guaranteed by Article 8 of the European Convention on Human Rights. In other words the deportation order and the process of execution under the order are one and the same if the order cannot be challenged, then the execution thereof likewise cannot be challenged. He identified the relief sought at paras. D6 and D7 of the statement required to ground the application as being the significant questions in these proceedings. In regard to those two issues he referred to the case of *A.O. and D.L. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 a decision of the Supreme Court in which it was held that the constitutional right of the Irish born applicant in each case to the company care and parentage of its parents within the State was not absolute and unqualified and further that pursuant to the provisions of the Dublin Convention the United Kingdom was the proper country where the applicant's applications for asylum were to be decided. Therefore the respondent was entitled to make orders deporting the applicants to the United Kingdom, even though the consequence was that in order to remain as a family unit the members of the family, including Irish citizens, in respect of whom no deportation orders have been made might also have to leave the State. Counsel referred to a passage from the judgment of Hardiman J. at p. 130 as to the terminology used in that case where he stated:

> "Accordingly, it is claimed that the birth of an Irish born child transforms the entitlement of his or her parents and siblings to remain in the country. The dramatic nature of this transformation is reflected in the language used in arguing the case. The Irish born child was described by counsel for the applicants as 'the anchor child', presumably because he or she is seen as the anchor securing the rest of the family to this country. The birth of such a child was contended to have a dramatic effect on the position of family members who were at the time of the birth liable to deportation. It is said to make such deportation virtually impossible since (again in the words of counsel for the applicants) 'the immigration stork has landed'. Counsel for the respondent, who regarded the same development as having a much less dramatic effect, characterised the birth of the child and the argument it opens to the parents as 'a fortuity'."

60. Counsel argued on the basis of that decision that this was a similar situation in which purely by virtue of the fortuitous circumstances of the birth of a child, the first named applicant seeks to stop the execution of a deportation order. He also referred to the decision in the case of *Margine v. The Minister for Justice, Equality and Law Reform, Ireland, The Attorney General and Governor*

*of Mountjoy Prison* (Unreported, High Court, 14th July, 2004). Similar issues arose in that case and in his conclusions Peart J. said as follows at paragraph 12:

> "I am completely satisfied that a valid Deportation Order was made in this case and that the applicant was properly notified of the proposal to make such an order prior to its making, and of its making thereafter, since the Minister complied with the statutory requirement to send such notification to the last address notified to the authorities. That was done, and it is no fault of the part of the authorities that the applicant moved address without complying with his obligation to notify his change of address. I am also satisfied that the applicant must have been aware of the fact in May, 2003, that a Deportation Order was made on the 29th May, 2002, because he had obviously gone into his solicitor in May, 2003 and asked him to find out what the position was in relation to his application. I note that this letter made no mention of what must have been the case by May, 2003, that he was about to become the father of an Irish born child and that he wished that new fact to be taken into account and considered before any Deportation Order was made. In any event, the applicant chose to put his head in the sand, so to speak and continued to lie low until he was eventually arrested as an evader on the 18th December, 2003. If it had been necessary to do so I would have found it possible to decide that in this case, the applicant, by his undisputed conduct, has failed to demonstrate the necessary candour and bona fides to entitle him to the relief he seeks. As it happens this is not the decisive factor since I have decided against him in any event on the merits of the application.
>
> Through new solicitors he has now made applications for residency on the basis of the child and for revocation of the deportation and he submits that it is a breach of his constitutional and Convention rights if he is required to leave the country while these applications are considered and determined. I will not set out again the submissions of the respondent as to why that is not a correct submission. I will confine myself to saying that I agree with all the submissions put forward by Mr. O'Higgins, and in particular I accept completely the right of the State to control and regulate its borders and that the Minister is entitled to take such reasonable and proportionate steps to maintain and uphold the integrity of the asylum process as he thinks fit. The objective of upholding the integrity of the asylum process has been strongly recognised as a legitimate objective. In my view it is clear from the majority judgments in the case of *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* that that objective was considered to be of sufficient weight to outweigh the asserted family rights, which are not absolute rights, of the applicants."

61. Counsel for the respondent having referred to that decision made the comment in relation to the constitutional rights invoked by the first named applicant that as can be seen from that decision and indeed *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* that all of the rights under the Constitution are qualified rights.

62. Counsel for the respondent then dealt with the relief sought at paragraph 9 and 10 to the effect that having asked the respondent to reconsider the matter of his deportation having regard to the birth actually having taken place and that by reason of the speed of his decision the respondent has effectively excluded from his consideration all matters relating to the health and welfare of the child and has excluded any assessment of family and domestic circumstances and has effectively deprived the first named applicant of the opportunity to make effective representations in a manner provided for by s. 3(11). Counsel disagreed with the contention that the respondent excluded from his consideration matter by reason of speed. He again criticised the first named applicant for having failed to bring to the attention of the Minister the relevant information in the various submissions made on his behalf. He referred to the decision in *Cirpaciv. Minister for Justice, Equal;ity and Law Reform* (Unreported, Supreme Court, 20th June, 2005), in which the effect of Article 8 of the European Convention on Human Rights was considered. In the course of his judgment in that case, Fennelly J. referred to the decision in the case of *Abdulaziz v. United Kingdom* [1985] 7 EHRR 471 in which the European Court noted as follows:

> "The notion of respect (for family life) is not clear cut: having regard to the diversity of the practice as followed and the situations obtaining in the contracting states, the notions requirements will vary considerably from case to case. Accordingly this is an area in which the contracting parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the convention with due regard to the needs and resources of the community and of individuals. In particular, in the area now under consideration, the extent of a state's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved. Moreover the court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well established international law and subject to its treaty obligations, a state has the right to control the entry of non nationals into its territory."

63. Fennelly J. concluded at p. 18 of his judgment in summary:

> "I believe that the Minister has been shown to have given due weight to all relevant information placed before him, that it has not been shown that he acted in pursuit of a fixed or inflexible policy or that his decision was unreasonable or disproportionate. Furthermore given the particular facts of the case, his decision fell well within the margin of appreciation allowed to Member States by the European Convention."

64. In this context counsel also referred to the judgment of Quirke J. in the case referred to above of *T.C. v. The Minister for Justice, Equality and Law Reform*. Having referred to those authorities, it was submitted by counsel that the respondent had given due weight to the information before him. So far as the first named applicant may have rights under the Constitution and the Convention he argued that there had been no breaches of those rights.

65. Counsel then referred to the affidavit sworn herein by Dr. Gerry Byrne. He noted that it was not stated in that affidavit that the first named applicant should be here for any particular period of time. The case made is for an indefinite stay or postponement of the operation of the deportation order. He noted the decision in the case of *Kozhukarov* referred to above.

66. Counsel then referred to a number of decisions for the purpose of contending that the first named applicant herein is not a passive participant in the process and has a responsibility to make his submissions known to the respondent in any given case. In particular he referred in that regard to the decision in *Lupascu v. Minister for Justice, Equality and Law Reform, Ireland the Attorney General* (Unreported, High Court, 21st December, 2004) and in particular to a passage at p. 8 in the judgment of Peart J., in the *Margine* case referred to above and to the judgment of the Supreme Court in the *Article 26 Reference* [2002] I.R. 360. Further he pointed out that the first named applicant was entitled to renew his application under s. 3(11) from outside the State if he wished.

67. Counsel then referred at some length to the decision in the case of *A.O. and D.L*. referred to above. In that case, one of the arguments raised was that while the minor applicants in that case were citizens they would be unable in practical terms to enjoy their right of residence in the State unless their parents were also resident in the State and thus it was argued that the deportation of the

other members of their family constituted an attack on the rights of minors as members of a family. (See judgment of Keane C.J. at p. 15.) Having noted that argument Keane C.J. at p. 24 noted as follows:

> "The inherent power of Ireland as a sovereign State to expel or deport non-nationals (formerly described in our statute law as "aliens") is beyond argument."

68. Keane C.J. continued by refering to the judgment of Gannon J. in *Osheku v. Ireland* [1986] I.R. 733 in which a statement of Gannon J. was expressly approved by the Supreme Court in the case of *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26. In the course of the passage that was approved, Gannon J. said at p. 746 as follows:

> "That it is in the interests of the common good of the State that it should have control of the entry of aliens, their departure and their activities and duration of their stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter.

69. In this case, counsel submits that there is nothing to show that the exercise of discretion by the respondent was wrong. He also referred to a passage in the *A.O. and D.L.* case from the judgment of Denham J. at p. 58 where she noted that the children in cases such as this have personal rights but they are not absolute rights. She too referred with approval to the judgment of Gannon J. in the case of *Osheku*. Whilst recognising the personal rights of children she commented that 'personal rights guaranteed under the Constitution are not absolute' social order and the common good may require restriction of such rights.

70. Similar views were echoed in the judgment of Murray J. (as he then was) at p. 76 of his judgment. In the course of his judgment in the same case Hardiman J. also referred to the balancing of family and State rights. He did so both in the context of constitutional rights and Convention rights. Counsel for the respondent noted in particular the comments of Hardiman J. having referred to the decision in the case of *North Western Health Board. v. H.W.* referred to above. He noted as follows:

> "What is unusual about the present case is that the child has a right, which is not shared by the parents, which he is at present incapable of exercising. Accordingly, he will be bound by whatever decision the parents may lawfully make in his regard. A decision about a child's medical treatment is, prima facie, within the authority of his family. A decision about an alien parents desire to live in the State is not."

71. Finally, counsel for the respondent concluded by referring to the question of injunctive relief sought herein and to the balance of convenience. He argued that if an injunction was granted that it would send out the signal that it was quite open to withhold information until the last minute from the Minister in relations to decision under s. 3(11). As such the integrity of the system would be damaged. This was a case in which the first named applicant was actively involved in concealing information from the Minister.

72. In his replies, counsel on behalf of the first named applicant stated that it was clear that the rights of the family are not absolute but likewise, the rights of the State are not absolute. The rights of the State are expressly curtailed by the provisions of Article 8. What is involved is a balancing act. Insofar as it had been suggested that there was a lack of candour on the part of the first named applicant he took issue with that and pointed out that the first named applicant had in making his case advanced information to his detriment namely he set out the details of the advices given by his solicitors in the affidavit of Ms. Core which is before the Court. It was accepted that the respondent was not told but as set out previously this was not due to *mala fides.*

73. He accepted that the letter of 15th March, 2006, from his solicitors to the Minister might be open to the interpretation contended for on behalf of the respondent and that in the circumstances the Minister could have interpreted that as requiring a decision to be made without further submissions being made but insofar as the Minister had reconsidered the issue, counsel contended that this was done in a "limbo of fact".

74. Mr. Ó Dúlacháin referred to a number of the authorities opened by counsel for the respondent and said that whilst the decision in the case of *A.O. and D.L.* was very persuasive it was not conclusive. He argued that there was no case that dealt with the exceptional circumstances of this case.

75. Ms. Browne on behalf of the second named applicant that her client had a separate interest from that of the first named applicant. She referred to the matters set out in the affidavit of Gerry Byrne and emphasised that the right she relied on was her client's right to have its health and welfare guarded by the State. She pointed that the facts of this case involved an entirely different situation to that in the *A.O.* case where non–nationals came to this jurisdiction to give birth in the light of the fact that by doing so those children would be entitled to citizenship. She made the point that the situation was that her constitutional rights had to be considered and it was clear that they had not been. She also referred again to the issue of the balance of convenience and pointed out that on the evidence before the court the evidence disclosed no risk to the State in the event that injunctive relief was granted but there was a risk to the child's relationship with its father and thus the balance of convenience favoured injunctive relief being granted. That concluded the submissions in the case.

**Conclusions**

76. This is a case in which the matter came before the Court on notice. As is clear form the judgment of Herbert J. in the case of *Agbonlahor* referred to above an application under s. 3(11) does not come within the provisions of s. 5(1) of the Illegal Immigrants (Trafficking) Act, 2000. I therefore propose to deal with this matter on the basis that s. 5 is not applicable.

77. The first named applicant herein has been in the State since 2002. He sought asylum here, his application was refused and his appeal against that decision was unsuccessful. A deportation order was served on him, executed and in the circumstances described previously in this judgment he was readmitted to the State for the purpose of completing his Leaving Certificate examination. There has not been a challenge to the decisions made in the asylum process prior to these proceedings. The first named applicant has not contended and never has contended that there was any flaw in the procedure leading up to the making of the deportation order on 14th March 2006. There is nothing in the papers before me of any kind whatsoever to suggest any failure to observe appropriate procedures on the part of the respondent, his servants and agents, up to the date of the making of the deportation order on 14th March 2006. In those circumstances it seems to me that certain of the relief sought by the first named applicant herein could not be the subject of judicial review. I accept the submissions of counsel for the respondent to the effect that leave to apply for judicial review could not be granted in respect of the various declarations sought at paragraphs 2, 3, 4, 5 of the statement of grounds to apply for judicial review herein in that those declarations amount to an attack on the deportation order itself. As was pointed out in the *Lelimo* judgment referred to above:

> "The enforcement process cannot be severed from and has no basis in law distinct from the order itself."

78. For leave to be granted therefore in respect of the declarations sought would not be appropriate and is not permissible.

79. I think it would be fair to say that from the correspondence commencing with the letter from the respondent dated 1st September, 2005, the respondent, his servants and agents have extended every reasonable facility and opportunity to the first named applicant to make representations on his status within the State and indeed have been pro-active in that respect.

80. In essence, the core of the first named applicant's case centres on paragraph 6 of the statement of grounds to apply for judicial review namely that the respondent in refusing on or about 15th March, 2006, to vary and/or amend the deportation order as provided for by s. 3(11) failed to have due regard to the first and second named applicants' rights under the European Convention on Human Rights and the second named applicant's constitutional rights and failed to have regard to the matters set out at s. 3(6) of the Immigration Act, 1999.

81. I propose to deal with this issue from the point of view of the first named applicant in the first instance. It is clear from the authorities before me that the father of a non-marital child has certain rights under Article 8 of the European Convention. The extent of those rights will vary from case to case depending upon the circumstances in each case. For example, a father who has been involved in a long term loving relationship with a partner with whom he co-habits during the course of which a planned pregnancy takes place, following which the father continues to co-habit with his partner and who has involvement with his child over a period of time clearly has far greater rights than a person who becomes a father of a non-marital child following a fleeting relationship not involving co-habitation and who has little or no contact with the child. (see for example, that passage quoted from *Lebbink*

82. referred to above.) Thus it is necessary to consider in this particular case the extent of the rights of the first named applicant herein. In this case a relationship existed between the first named applicant and the mother of the child for some four to five months before an unplanned pregnancy occurred. The parties were not co-habiting. At the time of making of the decision, on 15th March, 2006, the child had not been born, so obviously it would not have been possible to come to any conclusion on the basis of any contact between the father and the child. Thus it seems to me that insofar as the first named applicant has rights under Article 8 those rights would appear to be at the lower end of the scale of such rights. Nonetheless, I have no doubt that the first named applicant has rights under Article 8 of the Convention which, having regard to the jurisprudence of the European Court of Justice as exemplified in cases such as *Berrehab* referred to above, have it be considered in the context of a decision under s.3 (11).

83. It is also clear from the authorities cited to me that the rights of a father under Article 8 when being considered by the respondent must be weighed against the rights of the State to regulate its immigration and asylum system. The need for such a balancing exercise to be carried out has been referred to in a number of decisions which have been cited and referred to above. (See for Example, *Kozhukarov* referred to above). At this point it may be useful to look at the actual decision made herein on 15th March, 2006. Having referred to the letter dated 15th March, 2006, from Colgan & Company, Solicitors, the respondent went on to refer to the new information contained in that letter. He noted that the mother to be and the first named applicant are in a loving relationship. He then referred to the matter as follows:

> "I am of the opinion that the fact that Kunle entered into a relationship and has fathered an unborn child is not sufficient to cause me to rescind my decision or to vary it.
>
> I would have made the decision already made even if I had been aware that the relationship had led to a pregnancy at the time I made it.
>
> I am affirming the decision made by me.
>
> I wish, in the context of this indication of possible court proceedings being instituted, to reiterate that I have given this case every possible care and sympathetic consideration and I am of the clear view that the common good requires that I should not vary the order that I have made. To vary it or rescind it would, in my opinion, be gravely injurious to the common good."

84. The decision is then signed by the respondent.

85. The deportation order in this case was made on 14th March, 2006, following a process during which the first named applicant was requested to and had every opportunity to make full representations to the respondent as to why he should be allowed to remain in the State. That matter was fully considered by the Minister and it has never been suggested that in reaching the conclusion he did on 14th March, 2006, that the Minister had failed to do so properly. On receipt of the further information on 15th March, 2006, the respondent considered the further information provided. It seems to me to be manifestly clear from that decision that in coming to the view that he would not rescind his decision or vary it that the respondent clearly weighed the rights of the first named applicant as a father against the rights of the State. In other words he carried out a balancing exercise. Nothing has been put before me to suggest that this is not so. He clearly considered the first named applicant's rights as a father which had just been made known to him and decided that was not sufficient to tip the balance in favour of the first named applicant.

86. It seems to me that the only real attack that could be mounted on the respondent's decision relates to the issue of the speed with which that decision was reached and whether as a result of the speed of that decision the first named applicant was deprived of the right to make submissions on that issue. Counsel for the first named applicant fairly conceded that the letter of 15th March, 2006, from Colgan & Co, was possibly open to the interpretation that a speedy response on that issue was required by the first named applicant. In my view, no other reasonable interpretation could be put on the letter. The Minister was given a deadline by which he had to respond and there was no suggestion in the letter from Colgan & Company that further submissions would be forthcoming or that further time was required in which to make such submissions. I find it somewhat ironic that complaint is made about the speed of the decision in circumstances where such a short deadline had been given. Accordingly I am satisfied that throughout the process since 1st September, 2005, the respondent herein has at every stage given an opportunity to the first named applicant to make submissions and has considered those submissions in full. So far as the first named applicant has rights by virtue of Article 8 of the Convention, those rights are not absolute rights and were properly weighed in the decision by the respondent not to rescind or vary the deportation order. Accordingly I can see no basis upon which leave could be granted to the first named applicant.

87. Even if I had not reached that decision, an issue was raised to the lack of candour on the part of the first named applicant herein. In the *Margine* case referred to above Peart J. as I have already noted commented on the fact that in that case he would have found it possible to decide that the applicant by his conduct had failed to demonstrate the necessary candour and bona fides to entitle him to the relief he seeks. I am satisfied that an applicant for judicial review may be disentitled to relief by reason of a lack of candour during the asylum process. In this case, it is undoubtedly the fact that the first named applicant herein was aware of the importance and relevance of the issue of his relationship which had resulted in the pregnancy of Ms. Hughes. It is clear that he was

so advised by his solicitors and indeed counsel as to the relevance and importance of that information being made known to the respondent. He chose not to make that information known. I can accept that the first named applicant may have felt that he was under some degree of obligation to his girlfriend and her family in relation to their privacy and I have no doubt that they had some difficulty in coming to terms with the situation which that had occurred. Notwithstanding any sense of obligation that the first named applicant felt he owed to his girlfriend and her family, the applicant was nonetheless under an obligation to make the information known to the respondent. He could have done so without revealing the identity of his girlfriend and her family. If further information had been requested then by the respondent no doubt arrangements could have been made to provide the information on a confidential basis. The issue of "leaks" from the Department whether such leaks occured or not, was not such as to override the requirement on that part of the first named applicant to put the respondent on notice of material matters which should have been considered by the respondent in the first instance in reaching his conclusions. It may be that in certain cases, in order to ensure the integrity of the process, the courts may refuse to grant relief because of a lack of candour. Obviously, every case would have to be carefully considered in the light of the facts in that case the importance of the issues in respect of which there had been a lack of candour and their relevance to the final decision. In this case the lack of candour concerned a significant issue that could have been legitimately relied on by the first named applicant in his application under s. 3(11) and was concealed by him until after the deportation order was made. It was only at that point that the first named applicant disclosed his hand. As I have already indicated I have decided this application on the basis of the merits of the application and thus it is not strictly speaking necessary for me to make any decision on this particular point. Nonetheless I am satisfied that it would have opened to me to decide this application against the first named applicant on the basis of the lack of candour demonstrated herein.

88. In addition to the lack of candour complained of during the process, complaint was also made of the failure of the first named applicant to refer to correspondence from the respondent prior or October 2005. A party swearing an affidavit to ground an application for leave to seek judicial review is under a duty to disclose material information. An order granting leave may be set aside in the event of a material nno-disclosure. (See for example, *Voluntary Purchasing v. Insurco Limited* [1995] 2 ILRM 145.) However, I do not think that the failure to refer to the earlier correspondence on its own was such as to disentitle the first named applicant relief.

89. That does not conclude the issue. Ms. Browne SC on behalf of the second named applicant has raised a number of issues on behalf of her client. She has raised the issue of the entitlement of someone in the position of the second named applicant to challenge the decision of the respondent under s. 3(11). It may well be considered that it is not open to a child born at the time of making of a particular order or decision to challenge it but in this case, the child at the centre of the decision may have such a right. In those circumstances, I am of the view that there is at least an arguable issue to be tried as to whether or not a child who is not born at the time of the making of the decision is entitled to have its rights considered under s. 3(11). Such a child by virtue of Article 8 and indeed under the provisions of the Constitution, has rights which have to be safeguarded and considered. Those rights are not absolute rights as has been pointed out in a number of the authorities open to me.

90. Nonetheless it seems to me that Ms. Browne has crossed the threshold necessary to apply for leave to argue that consideration should be given to those rights.

91. Counsel for the respondent had referred to the judgment in the *AO and DL* case referred to above. The judgments in that case were expressed in trenchant terms as to the rights of a citizen child but whilst there are some similar circumstances, I think it is arguable that eh facts of that case can be distinguished from the facts of the instant case.

92. It seems to me to follow that the second named applicant is entitled to argue that the respondent did not consider at all the rights of the second named applicant in reaching his decision under s. 3 (1). It also appears to me to be open to her to raise the issue that the rights of the second named applicant were not given due regard by the respondent in reaching the decision under s. 3(11).

93. That being so I propose to grant leave to the second named applicant to challenge the decision of the respondent made on the 15th March 2006.

94. Finally I should note that having regard to the affidavit of Dr. Gerry Byrne, it does seem to me that if the matters set out by him in his affidavit are correct then the balance of convenience favours grant of injunctive relief to restrain the execution of the deportation order pending consideration of the second named applicant's case. He made the point in his affidavit that for the child to have a meaningful relationship with his father he should see him on a daily or alternate day basis. He added that in the event that the first named applicant was deported the child would not be in a position to develop his attachment to him. In those circumstances as I have indicated the balance of convenience lies in favour of the second named applicant.

95. I will hear further from counsel as to how this matter should now proceed.