



**UNAPPROVED
THE COURT OF APPEAL**

Neutral Citation Number [2021] IECA 50
Appeal Number: 2017/164

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

BETWEEN/

S. T.P.

**APPLICANT/
APPELLANT**

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 22nd day of February 2021

1. This appeal concerns a largely unsuccessful application for leave to seek judicial review by the appellant wherein he sought leave to seek an order, *inter alia*, of *certiorari* to quash the decision of the respondent (hereinafter “the Minister”) to make a deportation order against him.

Background

2. The appellant is a Nigerian national who arrived in the State in February 2013. Following a failed asylum application, by way of application made in October 2016 pursuant to s.3 of the Immigration Act 1999 as amended (“the 1999 Act”), the appellant applied for leave to remain in the State. The appellant has been in a relationship with his partner (a Zimbabwean National) since 2013. His partner arrived in the State in 2010. She

is also a failed asylum seeker. The appellant, his partner and her daughter have resided together as a family unit in the State since in or about 2013. It is common case that the applicant's partner and her child made an application to the Minister for leave to remain in the State some months prior to the appellant's leave to remain application. The appellant's application was determined in advance of his partner's application.

The decision on the appellant's leave to remain application

3. In a decision made on 17 February 2017 and notified on 1 March 2017, the Minister refused the appellant's application and he was issued with a deportation order dated 17 February 2017. Some nine months or so after the appellant received his decision, his partner and her child were granted leave to remain. While it is acknowledged by the appellant that this *post hoc* decision cannot assist him, the issues in this appeal largely relate to the appellant's contention that the decision made in respect of his application for leave to remain should be quashed because of the alleged failure of the Minister to determine his partner's application prior to or in tandem with his application, or failing that, afford him (when his application was being considered and when relevant factors were being weighed) the benefit of certain assumptions made by the decision-maker as to the outcome of his partner's application. It is in this context that the appellant appeals the judgment and Order the High Court of 31 March 2017, of which more anon.

The Examination of File

4. The Minister's considerations, pursuant to s.3 of the 1999 Act and s.5 of the Refugee Act 1996, of the appellant's application for leave to remain in the State are contained in the "Examination of File" which was provided to the appellant with the refusal letter. As required by s.3(6)(c) of the 1999 Act, the Examination of File commenced with the decision-maker noting the appellant's personal circumstances and his submission that he resided with his partner and her child in the same household since in or about 2013 and

that they had been treated and recognised as a family unit since that time by State authorities, including by the provision of accommodation for them as a family unit. It was noted that the appellant acted in *loco parentis* to his partner's child including attending parent/teacher meetings and helping her with homework. The fact that the appellant and his partner had undergone a religious marriage ceremony was also noted as was the fact that they had contacted the Civil Registration Office regarding their proposed civil marriage ceremony. It was noted that the appellant's partner was awaiting the outcome of her and her child's applications for leave to remain.

5. As required by s.3(6)(d) of the 1999 Act, the appellant's connection with the State was addressed. There was reference to his marriage to his partner and their living together in the same household as a family unit. Reference was made to the appellant's representation that his partner and her child were persons who were waiting in excess of five years for final decisions in relation to their status and his representation that he and his family had a legitimate expectation that as he and they had not come to the adverse attention of the gardaí, they would be granted leave to remain, in line with, what was asserted, was the practice of the Minister in this regard. Reference was made to the appellant's submission that if his family were to be deported they would be treated in a discriminatory and arbitrary manner in that persons in similar situations had been allowed to remain in the State. It was determined that the appellant's connection to the State lay in his failed protection claims in the State.

6. Pursuant to s.3(6)(e) and (f) of the 1999 Act, the "Examination of File" documented the appellant's employment record prior to his arrival in the State and his future plans and prospects, including his having engaged in voluntary work since 2015. While noting that his employment prospects were reasonable it was nonetheless concluded that the only employment which would be available to him would be positions which could be filled by

reference to an Irish or EU national, or a third country national with a right of residence in the State. Accordingly, it was considered that it was hardly in the interest of the common good that the appellant (with no right of residence in the State) would be enabled to take up employment in the State in positions of paid employment that could impact negatively on unemployed Irish and EU nationals.

7. Pursuant to s.3(6)(g), it was noted that the appellant had not come to the attention of the Gardaí during his time in the State.

8. Under s.3(6)(h) “Humanitarian Considerations”, the decision-maker referred to undated letters on file from the appellant’s partner and her child supporting his claim that they were a family unit. His partner’s poor health and the supportive role played by the appellant in this regard was noted albeit that no medical evidence had been produced to indicate the seriousness of his partner’s medical condition or her level of dependency on the appellant. With regard to the appellant’s own asserted depression and history of trauma, the decision-maker found it not possible to decipher if the author of a letter which suggested that the appellant had accessed counselling was competent to provide mental health services. The decision-maker again noted that the appellant placed reliance on the fact that his partner and her child had a legitimate expectation that as they had been in the asylum process in excess of five years, they would be granted leave to remain in the State. This representation was addressed in the following terms:

“... even if [the appellant’s partner and her child] are subsequently granted leave to remain in the State, leave to remain generally does not give rise to an entitlement to family reunification in the State”.

Albeit that there was no legally valid marriage between the appellant and his partner, it was accepted that they were residing together, and they intended to formalise their marriage.

The decision-maker observed that no evidence had been submitted to confirm the existence of the *loco parentis* role the appellant asserted he played in relation to his partner's child.

9. Overall, the decision-maker concluded that the humanitarian considerations in the case were not of such sufficient weight that the Minister should not deport the appellant.

10. The "Examination of File" went on to note representations on file which attested to the appellant's good character (s.3(6)(i)); that it was in the interest of the common good to uphold the integrity of the asylum and immigration procedures in the State (s.3(6)(j)); and that considerations of national and public policy (s.3(6)(k)) did not have a bearing on the case.

11. The decision-maker next addressed the requirements of s. 5 of the Refugee Act 1996. The issue of refoulement was addressed by reference to country of origin information in respect of Nigeria. It was concluded that the representations submitted on the appellant's behalf did not have sufficient weight to entitle him to protection in the State. The decision maker was also of the opinion that the appellant's partner and her child would not be exposed to serious harm if they returned with him to Nigeria and that were he and his partner to marry, his partner would be entitled to Nigerian citizenship upon her marriage.

12. Consideration then turned to the rights asserted by the appellant under Article 8 of the European Convention on Human Rights (ECHR). While acknowledging that the decision to deport the appellant had the potential to interfere with his rights in respect of his private life it was not considered that a decision to deport him would constitute a breach of the right to respect for private life under article 8 ECHR. The consideration of "Family Life" for the purpose of article 8 acknowledged that the appellant, his partner and her child lived together as a family unit with the appellant's assertion that he was in *loco parentis* to his partner's child again being noted. The decision maker went on to state:

“It is noted that [the appellant’s partner and her child] as of now have no permission to reside in the State”.

While noting that in *S.T.E. & Ors. v. Minister for Justice and Equality & Ors* [2016] IEHC 379, Humphreys J. had referred, *inter alia*, to the recommendation of the Working Group on Improvements to the Protection Process that persons who were in the State for over five years be given permission to remain, the decision-maker opined:

“Even if [the appellant’s partner and her child] are subsequently granted leave to remain in the State, leave to remain generally does not give an entitlement to family reunification in the State”.

Albeit acknowledging that the appellant and his partner intended to get married, and accepting that they had a legitimate interest in living together as a family unit, the decision-maker found that rights pursuant to the Constitution as asserted by the appellant not to be absolute and “may be restricted in the interests of an orderly immigration control system and that it was for the Minister to put those asserted rights into the balance against the State’s legitimate entitlement to enforce immigration control in a reasonable and proportionate manner”.

13. The “Examination of File” then stated:

[“The appellant’s partner’s and her child’s] immigration status in the State are not equally precarious to that of [the appellant] in that they may, as a result of the duration of their residence in the State, fall to be considered for the granting of permission to reside in the State. However, such permission if granted, will by no means entitle them to family reunification in this State.

...

It is appropriate to observe that there is no general obligation on a member state to respect a married couple’s choice of country in which to reside. Article 8 does not

impose on the State any general obligation to respect the choice of residence of a married couple.

...

Having considered the circumstances of [the appellant's] relationship with [his partner] taking into account the length of time he has been in the State, the precarious nature of [his partner's] immigration status and her ill health, and also his relationship with [his partner's child] who is 14 years old and who he has known only since 2013 and over whom he has no guardianship rights, I am of the opinion that the rights of [the appellant] and those of his family members are outweighed by the requirements of the State to enforce the immigration control system.

Furthermore, I am of the opinion that compelling justification is not required in this case to justify [the appellant's] removal from the State with regard to his family circumstances, taking into account the fact that he is not legally married and that he has not been appointed the guardian of his step-daughter.

I further note, having considered relevant country of origin information on Nigeria and the circumstances of the case, that no insurmountable obstacles exist that would prevent the family from continuing their family life in Nigeria should they wish to do so.

I am of the opinion that it would be reasonable to expect [the appellant] and his family to locate to Nigeria should they wish to continue their family life together. I have formed this opinion while noting that [the appellant's partner and her daughter] never resided in Nigeria in the past. Many families, for a range of reasons, are faced with the prospect of relocating to a foreign country with a view to continuing their family life together. As English is spoken in both Nigeria and Zimbabwe, [the

appellant's partner and her child] could be reasonably expected to integrate well into their Nigerian community.

It is the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring non-national persons in the State. It is consistent with the Minister's obligations to impose these controls and is in conformity with all domestic and international legal obligations. The jurisprudence of the European Court of Human Rights has established that a State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations".

It was thus recommended that the appellant be deported.

The leave application

14. On 31 March 2017, by way of motion *ex parte*, the appellant sought leave to apply for judicial review.

15. In summary, the grounds upon which leave was sought were that the Minister erred in law and acted in breach of the substantive rights of the appellant, his partner and her child, acted unreasonably and irrationally and in breach of the principles of fair procedures and natural and constitutional justice in:

- (i) Failing to treat the family unit as a collective entity and making a decision to deport the appellant as if that were a unilateral and stand-alone matter, while expressly leaving over the question what is to happen to the application pending before her in respect of the appellant's partner and child. The Minister was required to take a holistic view of the position of a family unit, and to decide on the fate of its members in a coherent and collective manner.

- (ii) Determining the application before her on the basis of a hypothesis and on the basis that she may or may not reach the opposite conclusion in the case of the applicant's partner and her child. This was an irrational approach and the Minister was under an obligation to consider the appellant, his partner and her child holistically as a family unit in terms of their collective fate as opposed to on a piecemeal and hypothetical basis. As a consequence of the approach adopted by the Minister the decision was void for uncertainty and the Minister fettered her own discretion in seeking to determine the application before her on the basis of a series of hypotheses.
- (iii) Deciding that compelling justification was not required to justify the appellant's removal from the State.
- (iv) Applying an inappropriate and incorrect test in deciding that to deport the appellant would not be breach of his, his partner's or her child's rights. In particular, the consideration relied upon by the Minister concerned itself with the issue of whether there were any "insurmountable obstacles" to the family living together in Nigeria. This was the incorrect test thereby invalidating the decision. Further, the test was applied in circumstances where the constitutional rights engaged were not identified or weighed in the balance.
- (v) Failing to consider the appellant's employment prospects in accordance with the law.

16. In his affidavit sworn 22 March 2017 verifying the statement of grounds, the appellant testified to being involved in a "committed relationship" with his partner and to having acted in *loco parentis* as regards her child. He averred to the fact that the Minister

housed his partner her child and himself as a family unit for a number of years. He further averred:

“My partner and her child have applied to the [Minister] for leave to remain in September or October 2016. Notwithstanding the fact that they applied before me the [Minister] has not decided their applications. I am advised that the jurisprudence of this honourable court is to the effect that applications should be dealt with in a holistic fashion. The [Minister] decided my application on an uncertain basis and on the basis that she may or may not decide the other applications differently and that if she does my partner and her child may act in a particular way or indeed may not. There is significant uncertainty in this approach in circumstances where the [Minister] had the capacity to decide the applications together and on a certain basis. I am of the view that the [Minister] intends to grant permission to my partner and her child but wishes to make a Deportation Order in respect of your Deponent before she does this. I can see no other justification for the decision to decide my application first even though it was received later in time. I am advised that if I am deported I will be excluded from the State and that this exclusion will be permanent in nature. My deportation ... would be a very stressful ordeal for my partner and ... would also be a matter of great distress to my partner’s child. If I am deported my partner and I are of the express view that irreparable harm will be visited upon the child. I currently assist my partner with the care of the child in the following ways:

I consider her to be my daughter and we share the parental obligations equally. I collect her from school, attend parent/teacher meetings assist with her homework and cook for her. I advise I do most of the cooking for the family and even taught [my partner’s daughter] how to cook, we have an extremely close bond. I am

advised that no lawful consideration of the application the subject of the within proceedings has to date taken place.”

17. In an *ex tempore* judgment dated 31 March 2017, the High Court (Mac Eochaidh J.) refused the appellant leave to seek judicial review on grounds (i), (ii) (iii) and (v) but granted leave on ground (iv). The trial judge noted that the main proposition advanced in the leave application was that the contested decision was unlawful because of breaches of the principles identified by Humphreys J. in *S.T.E. & Ors. v. Minister for Justice and Equality & Ors.* [2016] IEHC 379 including the requirement for the Minister to “treat the family unit collectively” and the requirement for “significant weight to be attached to the desirability of keeping the family together”. The claim advanced in the leave application was that the Minister had ignored these principles. This argument was rejected by Mac Eochaidh J. in the following terms:

“2. ... I have read the decision of the Minister in this case and I have come to the view that, as a matter of fact, and as a matter of law, it is not a proper criticism of the case to say that the principles described by Humphreys J. were breached. There is no suggestion in the extensive consideration given by the Minister and her officials to the interests of the applicant and his relationship to his step-daughter and to the mother of his step-daughter, there is no suggestion whatsoever that the position of the father was treated in isolation from the position of the young girl, who is fourteen, and her mother.

3. Insofar as I understand the phrase “to treat the family unit holistically”, it seems to me that that is what precisely happened in this case. ...

4. I asked Counsel whether he was saying that in a case such as this, what the Minister had to do was to take onto her desk the three files and decide all of them at the same time? He effectively said to me this is what she is required to do and that

she could not decide one without deciding the others at the same time or together. I do not believe there is any authority for that proposition.

5. My view is that the Minister did decide the rights of the father and the outcome of the application having regard to the circumstances of the other two individuals involved.

6. Counsel also confirmed that he was not saying that if the Minister granted permission to stay, as she indicates she might, to the mother and daughter she would then be required to grant permission to stay to the father. The principle described by Humphreys J., Counsel concedes, does not mean that the outcome of one must decide the outcome for all. Whatever the rule principles described by Humphreys J. mean, they could not possibly mean that.

7. I can find no breach of the principle described by Humphreys J. in the manner in which this decision was taken, and, therefore I am refusing leave on S. .. (I, II and III) of the pleading.”

18. Having set out that he was granting leave on ground (iv), Mac Eochaidh J. granted a certificate of appeal based upon the matters raised in grounds (i), (ii) and (iii) in circumstances where Humphreys J. had granted a certificate of appeal in *S.T.E.* Mac Eochaidh J. directed counsel for the appellant to indicate to the Court of Appeal that the within appeal might travel with the appeal in *S.T.E.* so that the cases could be decided together.

The appeal

19. The appellant’s notice of appeal advances four grounds of appeal. Ground one asserts that the trial judge erred in law and in fact in determining that the Minister did not fail in her duty to treat the family holistically. Ground two asserts that the trial judge erred in law and in fact in finding that the Minister did not err in law and act in breach of the

substantive rights of the appellant, his partner and her child in determining the appellant's application on the basis of hypothesis and on the basis that she may or may not reach the opposite conclusion in the case of the appellant's partner and her child. Ground three asserts that the trial judge erred in determining that the Minister did not breach the substantive rights of the appellant, his partner and her child in deciding that compelling justification was not required to justify the appellant's removal from the State. Ground four asserts that the trial judge erred in determining that the Minister did not fail in the duty to rationally treat the family unit collectively in the manner identified by Humphries J. in *S.T.E.*

20. In her notice opposing the appeal, the Minister asserts as follows:

- The trial judge was correct to refuse the appellant leave for judicial review having determined that no breach of the principles enunciated by Humphreys J. arose. The Minister asserts (without prejudice to whether or not the principles in *S.T.E.* were correct) that the determination of the trial judge was correct.
- The decision to deport the appellant was not arrived at on a stand-alone basis: The "Examination of File" made by the Minister in advance of the decision to deport considered the appellant's asserted family circumstances in detail and accepted that the appellant, his partner and her child constituted a family unit.
- The Minister was not obliged as a matter of law to consider the circumstances of the appellant and his partner and her child holistically as a family unit in terms of their fate and was entitled to treat different applications separately. All applications made by the appellant since his arrival in the State (including his leave to remain application (and the within proceedings) were made on an individual basis. As she was obliged to do, the Minister considered all of the

matters set out in s.3 of the 1999 Act, including representations made by the appellant in respect of his private and family life pursuant to article 8 ECHR.

- Without prejudice to the contention that the Minister was not obliged to do so, the appellant's family unit was considered holistically. All material facts as presented by the appellant were considered, including the ability of the family to reside together outside the State.
- The appellant's application was not determined on the basis of a hypothesis. The decision was arrived at on the basis of facts known to the Minister including as represented to her by the appellant. The Minister expressly considered the then status of the appellant's partner and her child, as persons without lawful permission to be in the State, as well as any potential status if granted permission to remain. The Minister was not obliged to unite applications which had at all times been advanced as separate applications, whether in respect of a claimed family relationship or otherwise. Insofar as the trial judge rejected the contention that the Minister was obliged to decide the applicant's and his partner's and her child's applications together, such rejection was correct.
- The Minister was entitled to reach different conclusions on any different applications made to her.
- A test of "compelling justification" was not required prior to any determination of the decision to deport persons in the position of the appellant.
- Insofar as the High Court judge could not find a breach of the principles enunciated by Humphreys J. in *S.T.E*, such conclusion was correct.

- The trial judge did not err in law or in fact in determining that the Minister did not fail in any asserted duty to treat the family unit collectively, whether as identified by Humphreys J. in *S.T.E.* or otherwise.
- In all the circumstances the appellant did not satisfy the requirement for substantial grounds for leave to be granted.

S.T.E. v. Minister for Justice

21. As already referred to, when he certified the within appeal, Mac Eochaidh J. directed that it was to be heard in conjunction with the Minister's appeal of the decision of Humphreys J. in *S.T.E.*

22. On 18 December 2019 the Court of Appeal delivered its unanimous judgment in *S.T.E.* ([2019] IECA 332) allowing the Minister's appeal against the decision of Humphreys J.

23. Before embarking on a consideration of the issues which arises in the within appeal, it is apposite to firstly turn to what was in issue in *S.T.E. & Ors. v. Minister for Justice and Equality & Ors.* [2016] IEHC 379.

24. *S.T.E.* involved a challenge to the Minister's refusal in February 2015 to revoke a deportation order which had been made on 5 July 2006 in respect of the first applicant (a native of Cameroon) following his failed asylum application. The second applicant in *S.T.E.* was a national of Morocco who arrived in the State in 2007 and who, like the first applicant, was a failed asylum seeker. The first and second applicants were not legally married but asserted that they had entered into a religious ceremony in August 2012 albeit they continued to reside separately. The third applicant was the child of the first and second applicant born in the State on 22 March 2013. On 21 August 2013 the second and third applicants were granted leave to remain in the State on a Stamp 4 permission.

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

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

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

27. He went on to state:

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

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

43. In the present case, on the material before me, the Minister simply failed in that duty. A decision was made on permission for the mother in isolation from a

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

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

“... Under those circumstances, it is simply not open to the Minister to make an atomised, blinkered decision in relation to one individual member of such a family group. While I would not suggest that there is an obligation to do so in relation to wider members of an extended family, the Minister must consider the position of an individual member of a nuclear family, married or not, in the context of a position of other members. To fail to do so is potentially irrational, in breach of the substantive rights of the family members concerned, and discriminatory.”

29. While accepting that the Minister was not obliged at all costs to facilitate the family remaining in the State, Humphreys J. observed (at para. 40) that both the first and second applicants were in a “precarious or unlawful position”. He opined (at para. 47) that had both been deported it was at least reasonably possible that they could have continued family life in Morocco but that the State had intervened of its own action to make that scenario significantly less likely “by giving permission to the mother to stay when there was no legal obligation to do so.” He found that that coupled with the deportation of the first applicant was “likely to have the practical effect of breaking up the family” even if the option of all parties moving to Morocco was theoretically open. In the view of Humphreys J., it was both irrational and contrary to the substantive rights of the applicants individually and collectively under article 8 ECHR and Article 40.3 of the Constitution “to actively break up a family by giving permission to remain to one member of an illegal or [precarious] couple and refusing such permission to the other partner without compelling justification.” (Para. 48) He found that the approach of the Minister was fundamentally flawed because the Minister had:

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

He also found that “such unjustified discrimination” as between the parents contravened article 14 ECHR taken in conjunction with article 8 and Article 40.1 of the Constitution and that the decision affirming the first applicant’s deportation order contravened the

substantive rights of the applicants under article 8 ECHR and Articles 40.3 and 42 of the Constitution.

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

30. The Court of Appeal considered the heart of the State’s appeal to be “what matters [the Minister] must take into account when considering an application for revocation of a Deportation Order in respect of an applicant where his partner and child have permission to reside within the State.” (at para.22). Writing for the Court, McGovern J. commenced his discussion by noting that the validity of the first applicant’s deportation order was not an issue and that the challenge was to a decision on a revocation application pursuant to s.3(11) of the 1999 Act. Citing the *dictum* of O’Neill J. in *Dada v. Minister for Justice and Law Reform* [2006] IEHC 166, where there was no challenge to the underlying deportation order McGovern J. (at para. 30) found the scope for review by the court “*is necessarily narrow*”.

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

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

“A ministerial decision that the interests of the immigration control system proportionately outweigh the private and family rights of an applicant under art. 8 or

Article 41, whether by reference to the relationship with a spouse, partner or child, is, like any immigration decision, a prima facie valid exercise of the executive power of the State, and should not be quashed in the absence of a clear illegality.”

He cited a number of other cases as authority for this proposition. He noted that as put by Denham J. in *Oguekwe v. Minister for Justice Equality and Law Reform* [2008] IESC 25, [2008] 3.I.R. 795, at para. 10, “[T]he State's rights require also to be considered.”

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

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

“42. ... In those circumstances [the State] did not accept that the decision to affirm the Deportation Order constituted a breach of the State's obligations to respect the private life of [the first named applicant] pursuant to article 8 of the ECHR. On the basis of the information before the Minister it is difficult to see how this decision could be deemed irrational or unsupported by evidence. The Minister's decision referred to the case of *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840 where the Court of Appeal in England and Wales found inter alia that the removal or exclusion of one family member from a State

where the other members of the family are lawfully resident, would not necessarily infringe article 8 provided that there are not insurmountable obstacles to the family living together in the country of origin of the family member excluded even where this involves a degree of hardship for some or all members of the family. [The Minister] considered the rights of [the applicants] to family life in the light of all the evidence. It was never suggested ... that [the applicants] could not live in Morocco, the country of origin of [the second named applicant]. The decision recites “No obstacle to [the first named applicant, the second named applicant] and their son establishing family life in Morocco have been submitted”.

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

35. Having reviewed the factual background as presented to the Minister, McGovern J. (at para. 45) considered it “difficult to see how the Minister was not entitled to make the decision refusing the revocation application submitted pursuant to s.3(11) of the 1999 Act.” He could not find anything irrational about the decision. He found that the question of discrimination did not arise as the first and second applicants clearly fell into different categories. Accordingly, the trial judge had erred in describing the family members as being “equally unlawful” and “equally precarious”. McGovern J. went on to state:

“46. In para. 43 of his judgment the High Court judge was in error in holding that [the first and second named applicants] were in an equal position and had an equally precarious status. At the time when leave was granted to bring the application for judicial review [the first named applicant] was the subject of a Deportation Order and was in the State illegally whereas [the second and third named applicants] had the benefit of a Stamp 4 permission to remain in the State. In short their legal status was radically different. It was this mischaracterisation of the status of [the applicants] which led the High Court judge to conclude that the Minister had acted in a way which was irrational, discriminatory and in breach of the respondents' article 8 ECHR and constitutional rights.

47. During the judicial review hearing the High Court judge accepted the submission of [the State] that, as [the first and second named applicants] were in a precarious or unlawful position during such time as they engaged in a family life, their article 8 rights were at best minimal. See *Dos Santos & ors v. Minister for Justice and Equality* [2013] IEHC 237. The High Court judge's decision that the family unit had to be treated holistically or collectively was based on an erroneous view that [the first and second named applicants] could not be treated differently. He expressed the view that [the State] had selected between two equally precarious parties to a relationship and decided that one could stay and the other must leave without compelling justification and then held that this involved the act of breaking up of the family by State action. In para. 45 of his judgment when he refers to making what he describes as an “atomised, blinkered decision in relation to one individual member of such a family group ...” [emphasis added] he appears to be referring back to a family whose members enjoy an equally precarious status when that was not, in fact, the case...

48. No legal authority was cited to the High Court judge to the effect that there was a requirement for a holistic treatment of a family in the circumstances in which [the applicants] found themselves. Having accepted that their article 8 ECHR rights were at best minimal (para. 40) and that their rights under article 8 of the ECHR (or Article 40.3 of the Constitution) are not terribly extensive (para. 42) he fell into error into making the determination set out in para. 48.

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

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

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

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

36. The applicants in *S.T.E.* duly applied to the Supreme Court for leave to appeal. By Determination dated 30 October 2020, the Supreme Court granted them leave to appeal the

judgment of the Court of Appeal on the basis that “the decision raises an issue of general importance as to whether there was any requirement to consider the differential treatment of the first and second-named applicants in the context of the first-named applicant’s application for revocation of the Deportation Order”.

37. The hearing of the matter and the decision of the Supreme Court in *S.T.E.* is awaited.

The issues in the within appeal

38. Essentially, the question for this Court is whether grounds (i), (ii) or (iii) of the Statement of Grounds amount to “substantial grounds” (as required by s.5 of the Immigration Act 2000) upon which leave should be given to the appellant for judicial review of the contested decision. In *Re Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360, the Supreme Court approved the interpretation of substantial grounds, as adopted in *MacNamara v. An Bord Plenala (No. 1)* [1995] 2 I.L.R.M. 125, as being equivalent to “reasonable” “arguable” “weighty”. As put by O’Neill J. in *O’Brien v. Dun Laoighaire Rathdown County Council* [2006] IEHC] 177, substantial grounds must equate with the establishment of “a reasonable chance of success”.

Discussion

39. While the judgments delivered by both the High Court and the Court of Appeal in *S.T.E.* loomed large in the submissions made by the parties, I do not consider that the issues which arise for consideration in the within appeal must await the outcome of the Supreme Court appeal in *S.T.E.* In the present case, there is really no debate about the appellant’s and his partner’s respective statuses. At the time the appellant applied for leave to remain in the State, neither he nor his partner had any lawful entitlement to be in the State, unlike the position of the first and second applicants in *S.T.E.*, as found by the McGovern J.

40. There is, however, some inconsistency in the contested decision as regards the view taken of the appellant's partner's status. At one point in the "Examination of File", the decision-maker took the view that the appellant's partner's and her child's immigration statuses "are not equally precarious [to that of the appellant] in that they might as a result of the duration of their residence in the State, fall to be considered for the granting of permission to reside in the State..." but at a later stage, the decision-maker referred to "the precarious nature of [the appellant's partner's] immigration status..." While this is contradictory, it remains the case that it cannot be gainsaid but that, at the relevant time, both the appellant and his partner had no lawful entitlement to be in the State, a fact acknowledged by counsel for the appellant. For this reason, nothing of note turns on the contradictory statements in the decision, to my mind.

41. In written and oral submissions, counsel for the appellant argued (but in truth did not pursue the argument in any significant regard) that given that the appellant's and his partner's respective legal statuses were the same in that they were at the same legal stage of the immigration process (no lawful residence in the State) when their applications for leave to remain in the State were made, the difference in the treatment afforded to them by reason of the different decisions that ensued amounted to discriminatory treatment. In so far as it was canvassed, I do not find any merit in the argument. The fact that a different outcome was arrived at in the appellant's partner's leave to remain application (determined some months after his) does not, to my mind, render it arguable, much less on a "substantial grounds" basis, that the different outcomes amounted to discriminatory treatment. In any event, alleged discriminatory treatment was not pleaded, nor advanced before the High Court and it ill-behoves the appellant to seek to argue this at the appeal stage.

42. I am also satisfied that no substantial grounds arise pursuant to ground (iii) of the Statement of Grounds. In fairness, in oral submissions, counsel confirmed that the argument that the decision-maker failed to apply the “*compelling justification*” test, as enunciated by Humphreys J. in *S.T.E. & Ors. v. Minister for Justice and Equality & Ors.* [2016] IEHC 379 was not being pursued in light of the conclusion by McGovern J. in *S.T.E. & Ors. v. Minister for Justice and Equality & Ors.* [2019] IECA 332 that “*compelling justification*” was not the applicable test.

43. In my view, this appeal thus turns on whether the High Court erred in not granting the appellant leave on grounds (i) and (ii) of the Statement of Grounds.

44. Before turning to the issues in the appeal it is apposite to consider the matters to which the Minister must have regard when considering making a deportation order. Firstly, a decision whether or not to make a deportation order must be addressed in accordance with the provisions of s.3(6) of the 1999 Act—a statutory process which has been deemed sufficiently wide-ranging to enable the Minister to exercise her duty to consider constitutional or ECHR rights for applicants in a family unit, as per Denham J. in *Bode v. Minister for Justice* [2008] 3 I.R. 663. Furthermore, each case must be determined on its own merits, as said by Denham J. in *Oguekwe v. Minister for Justice* [2008] 3 I.R. 79 when providing guidance on how the statutory function of the Minister pursuant to s.3 of the 1999 Act is to be performed. At para. 85, she opined:

“...Bearing in mind the Constitution, the Convention, the statutory law and the case law, I am satisfied that the following, while not an exhaustive list, includes matters relevant for consideration by the Minister when making a decision as to deportation under s.3 of the Act of 1999...

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

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

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

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

...

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

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

- (a) reside in the State,
- (b) be reared and educated with due regard to his welfare,
- (c) the society, care and company of his parents, and
- (d) protection of the family, pursuant to Article 41.

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

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

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

8. Neither Constitutional nor Convention rights of the applicants are absolute. They require to be considered in the context of the factual matrix of the case.

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

10. The State's rights require also to be considered. The State has the right to control the entry, presence, and exit of foreign nationals, subject to the Constitution and international agreements. Thus the State may consider issues of national security, public policy, the integrity of the Immigration Scheme, its consistency and fairness to persons and to the State. Fundamentally, also, the Minister should consider the common good, embracing both statutory and Constitutional principles, and the principles of the Convention in the European context.

11. The Minister should weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision. While the Irish born child has the right to reside in the State, there may be a substantial reason, associated with

the common good, for the Minister to make an order to deport a foreign national who is a parent of an Irish born child, even though the necessary consequence is that in order to remain a family unit the Irish born child must leave the State. However, the decision should not be disproportionate to the ends sought to be achieved.

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

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

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

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

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

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

45. As the starting point for the purposes of the application for leave for judicial review the appellant focuses on the fact that notwithstanding that his partner’s application for leave to remain in the State was first in time, his application was determined in advance of her application and, moreover, separately therefrom. It is argued that this had adverse consequences for him. It is asserted that the approach of the Minister was in the face of the acceptance in the “Examination of File” pertaining to the applicant’s decision that the applicant, his partner and her child constitute a family unit.

46. Counsel contends that the Minister should have taken a “holistic” approach to the application before her in circumstances where the appellant, his partner and her child comprised a family unit. It is submitted that in the absence of a holistic approach, the standard set by the Supreme Court in *Oguekwe v. Minister for Justice* [2008] 3 I.R. 79 for a deportation order to be lawful was not met. Counsel disputes the finding of the trial judge (at para. 3) that a holistic approach was in fact adopted by the Minister.

47. It is accepted by the appellant that a positive decision for his partner and her child could not of itself be determinative of his application for leave to remain in the State– the height of his case is that the Minister engaged in an unnecessary conjecture with regard to his partner’s leave to remain application in circumstances where had both applications being considered in tandem, the Minister would then have had before her the factual matrix of his partner and her child having been granted leave to remain and would thus have been aware in a more concrete way that deporting the appellant would sunder the family unit.

48. The appellant contends that in determining his leave to remain application in advance of that of his partner and her child, the Minister created a situation whereby his application to remain in the State could be determined without the Minister having to factor into her weighing exercise the fact that the appellant's partner and her child were granted leave to remain. It is submitted that the effect of the scheduling of the respective leave to remain applications (for which the Minister has not provided an explanation) created an artificiality, unlawful in all the circumstances. Counsel argues that by dint of the sequencing employed by the Minister, there was no requirement on her to consider the appellant's case from the perspective of a person who formed part of a family unit of which some members had received a permission to reside in the State. It is said that that the approach of the Minister was akin to a "divide and deport" strategy and that rather than determining both applications for leave to remain together, the Minister elected, in the course of determining the appellant's application, in engaging in unnecessary speculation as to whether his partner would get leave to remain.

49. It is argued that the consequence of the Minister's failure to consider both applications together left the appellant as presenting to the Minister as a failed asylum seeker whereas, had his and his partner's applications for leave being considered together, the appellant's connection with the State would have been as someone who had a *de facto* union with his partner and who played a *de facto locus parentis* role to her child (a role recognised by the Supreme Court in *X v. Minister for Justice* [2020] IESC 30) both of whom had permission to reside in the State.

50. It is asserted that the Minister erred in determining the appellant's leave to remain application on the basis of a hypothesis in circumstances where it was within the power of the Minister to address the appellant's partner's leave to remain application in tandem with that of the appellant, be that in March 2017 or October 2017 when his partner's application

was determined. It is further contended that in so far as the decision-maker engaged with the hypothesis that the appellant's partner would be given permission to reside in the State, that engagement was not conducted fairly or rationally.

51. The Minister's position is that the appellant has not identified what different effect his and his partner's applications being considered in tandem would have brought about in circumstances where the exercise which the Minister actually conducted was tantamount to having considered the appellant's, his partner's and her child's circumstances in a collective manner, including the consideration given to the possibility that his partner and her child might get leave to remain and the effect of that on the family unit.

It is submitted that the appellant's written and oral submissions fail to:

- (i) identify any legal authority which supports his argument that his and his partner's applications should have been considered together; and
- (ii) failed to identify any material difference that arose because the applications were not considered in tandem.

52. During the appeal hearing, there was much emphasis by counsel for the appellant on the Minister's failure to adopt the holistic approach enunciated by Humphreys J. in *S.T.E.* to the appellant's circumstances. Counsel for the Minister contended, however, that the decision-maker had in fact adopted such an approach and that McEochaidh found as much when refusing relief under grounds (i) and (ii) of the Statement of Grounds. There was debate between counsel as to whether the decision of this Court in *S.T.E.* specifically overturned Humphreys J.'s advocacy of a holistic approach, counsel for the appellant submitting that the *ratio* of this Court's decision in *S.T.E.* was that the trial judge erred in treating the first and second applicants in *S.T.E.* as being in a similar position when that was not the case in law or in fact, and not that Humphreys J. erred in advocating a holistic

approach to situations such as that of the applicants in *S.T.E.* or the appellant in the present case.

53. It is clear, however, that McGovern J. did not endorse the view expressed by Humphries J., as evident from para. 48 of the former's judgment where he states "[n]o legal authority was cited to the High Court judge to the effect that there was a requirement for a holistic treatment of a family in the circumstances in which [the applicants] found themselves." This is the position which the Minister urges on this Court.

54. I note, in passing, that in his judgment in *Gorry v. Minister for Justice* [2020] IESC 35, McKechnie J. (at para. 191) recorded the Minister as submitting in that case that "a general and holistic approach, which has been how such decisions have been approached since Oguekwe, permits all of the relevant legal and factual considerations to be fairly balanced without according pre-eminence to any one of them" (emphasis added). In any event, I see no benefit in grappling with what it is a "holistic" approach is actually meant to convey: the gravamen of the appellant's case is that given the factual matrix with which the Minister was presented *via* his leave to remain application, the Minister was obliged to consider the appellant's and his partner's applications collectively and, specifically, that the appellant's partner's application for leave to remain in the State should have been determined prior to a decision being taken on the appellant's application.

55. The first thing to be observed is that the appellant did not advance any legal authority, either before the High Court or this Court, in support of his proposition that his and his partner's files were required as a matter of law to be considered together. Moreover, in his representations to the Minister, he did not seek that such an approach would be adopted. It is argued on the appellant's behalf, however, that it was manifest from the representations he made to the Minister that he was seeking that such an approach

would be adopted by the Minister and that the factual matrix with which the Minister was presented required such an approach.

56. Irrespective of whether the Minister should have conducted the requisite analysis of the appellant's leave to remain application otherwise than in the manner it was conducted, in my view, it is not the case that the appellant's application was considered by the decision-maker as a "stand alone" application without reference to his relationship with his partner and her child or without reference to the partner's actual circumstances. It was accepted by the decision-maker that the appellant, his partner and her child constitute a family unit and had been accommodated as such by the State. It was accepted that the couple intended to formalise their religious marriage by entering into a civil ceremony. As counsel for the Minister observed, the "Examination of File" is replete with references to the family unit. In my view, whatever the merits of the appellant's arguments, the Minister did not adopt a "divide and deport" approach, as argued by the appellant. The appellant has not identified anywhere in the "Examination of File" where his application was considered in isolation from his family unit.

57. The issue to be determined is whether it is arguable to the requisite standard that given the particular factual matrix with which the Minister was presented *via* the representations made on behalf of the appellant, namely the existence of a *de facto* family unit and in respect of which two of whose members might (as proved to be the case) be granted permission to reside in the State by dint of their duration in the State (as per the recommendations of the Working Group on Improvement in the Protection Process), that should have impelled the decision-maker to consider the appellant's and his partner's applications in tandem and, specifically, determine the partner's application prior to giving consideration to that of the appellant.

58. At various stages in the “Examination of File”, the decision-maker adverted to the possibility that the appellant’s partner and her child might be allowed to remain in the State. This was in response to representations made on the appellant’s behalf that his partner might qualify for permission to reside in the State in accordance with the recommendations of the Working Group in Improvement in the Protection Process. When alluding to this possibility the decision-maker stated that if the appellant’s partner were to get leave to remain that would not “give rise to an entitlement to family reunification in the State”.

59. In oral submissions, counsel for the appellant argued that the analysis conducted by the Minister, in particular the conclusion that any positive outcome for the appellant’s partner would not give rise to any entitlement to family reunification, did not amount to a lawful consideration of the appellant’s and his partner’s collective situation in circumstances where what the appellant had posited was a *continuation* of his presence in the State based, *inter alia*, on his connection to and familial relationship with persons who might potentially be given leave to remain in the State, and not that at some point in the future an application might be made by his partner for family reunification with the appellant. It is asserted that the Minister’s analysis could not be said to constitute sufficient consideration since that analysis was only conducted through the prism of family reunification: it did not address the fuller picture for article 8 ECHR purposes, namely that the appellant would be deported at a time when his partner and her child had leave to remain in the State. Counsel advanced the proposition that insofar as the Minister engaged, in her decision on the appellant’s leave to remain application, in a consideration as to what the consequences would be for the appellant if his partner and her child were given permission to remain in the State, that exercise was not conducted in a rational or fair manner.

60. In the course of her submissions, counsel for the Minister contended that had the appellant's partner's application been determined first in time and in favour of leave to remain, that would have resulted in the appellant's and his partner's circumstances coming full square within the parameters enunciated by McGovern J. in *S.T.E. & Ors. v. Minister for Justice and Equality & Ors.* [2019] IECA 332, namely that by the time the Minister would then come to then determine the appellant's application, he and his partner would each have a different legal status and thus no discrimination could be said to arise in the treatment of their respective applications because of their respective different legal statuses.

61. To my mind, that is not a tenable argument in the circumstances of this case. The issues which arise do not fall to be determined on the basis of whether any discriminatory treatment arose, rather they turn on the alleged unfairness and/or irrationality of the Minister's approach. As I have said, the salient issue is whether the appellant has substantial grounds to argue that the appellant's circumstances and those of his partner, as made known to the Minister *via* the appellant's representations, required the Minister to first determine his partner's application before deciding his leave to remain application.

62. Bearing in mind, in particular, paras. 5 and 11 of the guidelines set by Denham J. at para. 85 of *Oguekwe*, in my view, in light of the information which the appellant had put before the Minister, and where she was specifically alerted to the possibility that his partner might be granted leave to remain in line with the recommendations of the Working Group on Improvement in the Protection Process, it is arguable, to the requisite threshold, that the decision-maker, as a matter of fairness and good administration, was required to actually decide the appellant's partner's leave to remain application first in time. Had this been done the decision-maker would have been in a position, when dealing with the appellant's leave to remain application, and when balancing the potential interference with

the family unit's article 8 ECHR rights that the deportation would bring about against the countervailing right of the State "to control the entry, presence, and exit of foreign nationals", to weigh that positive outcome in the balance.

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

64. It is thus arguable that the failure to decide the appellant's partner's application in advance of or in tandem with that of the appellant, rendered the decision made in respect of his application unfair and/or irrational.

65. It is axiomatic that the Minister was aware of the appellant's partner's application for leave to remain in the State and of the connection between her and the appellant. Thus, even if the Minister was not obliged to decide the appellant's partner's application prior to the appellant's, the question that nevertheless remains is whether a proper, fair and reasonable assessment of the appellant's application required the decision-maker, given the Minister's state of knowledge, and once the premise that the appellant's partner would be granted permission to remain in the State was engaged with (as indeed was the case, as

posited in the “Examination of File” by the decision-maker), to then positively weigh that positive outcome, when conducting the requisite balancing exercise, by reference to what the family unit’s circumstances would be were the appellant’s partner and her child granted permission to reside in the State and the appellant to be deported. In my opinion, given that the appellant’s partner had in fact made such application, it is arguable (to the requisite “substantial grounds” threshold) that the Minister was obliged to have regard to the possibility that, objectively, there was a good chance that she would be given permission to reside (as in fact turned out to be the case) and thus assess appropriately the effect of a deportation order being made against the appellant on that hypothesis.

66. The appellant further contends that the obligation on the decision-maker was not to embark on the requisite weighing exercise from the perspective of some future application for family reunification that might be made in the future when the appellant would no longer be in the State, but rather to weigh the positive outcome for the appellant’s partner from the perspective of the already established *de facto* family unit within the State to which the appellant’s and his partner’s circumstances gave rise.

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

68. As already said, while I accept that the observation made in the decision that a positive result for his partner would not necessarily lead to a positive result for the appellant was a perfectly lawful observation (and that even if the factor had been weighed the countervailing rights of the State might still prevail), the fact of the matter is that the consequences for the appellant of his partner obtaining a positive result was considered by the decision-maker only through the prism of a future application for *family reunification*. This was in circumstances where what the appellant was seeking was not family reunification but rather permission to *remain* in the State in the context of being part of a *de facto* family unit in the State. In my judgment, it is arguable, to the requisite “substantial grounds” threshold, that the limited basis upon which the decision-maker engaged with the hypothesis of the appellant’s partner obtaining leave to remain in the State deprived the appellant of a lawful consideration and rendered the decision to deport him unfair and/or irrational. In essence, albeit having engaged with the possibility that the appellant’s partner and her child might well be granted leave to remain (as ultimately transpired), the decision-maker did not weigh in the balance that their family life may well be sundered if the appellant’s partner and her child got leave to remain and he was deported. Indeed, far from concluding that the appellant ought to be deported even on the assumption that his partner would be granted leave to remain, the operative part of the “Examination of File” in fact emphasises “the precarious nature of [the appellant’s partner’s] immigration status (as well as referring, curiously, to her ill-health).

69. For the reasons set out above, therefore, I would grant leave for judicial review deriving from grounds (i) and(ii) of the Statement of Grounds, as reformulated below:

“The Minister erred in law and acted in breach of the substantive rights of the appellant, his partner and her child, acted unreasonably and irrationally and in

breach of the principles of fair procedures and natural and constitutional justice insofar as:

- (i) when presented with (and accepting of) the appellant's *de facto* family unit and the possibility that the appellant's partner's duration in the State might well lead to her and her child to receiving permission to reside in the State, she failed, as a matter of fairness and good administration, to first determine the appellant's partner's application prior to determining that of the appellant, thereby depriving the appellant (in the context of the requisite weighing exercise when considering his application) of the benefit of the favourable outcome for his partner;
- (ii) when she engaged (in the course of the requisite weighing exercise) with the hypothesis that the appellant's partner and her child would be granted leave to remain in the State, she did so in a manner that deprived the appellant of a lawful consideration of the benefit of that favourable factor by failing to weigh in the balance that their family life would be sundered if the appellant's partner and her child got leave to remain and he was deported, and by considering the favourable outcome for the appellant's partner's application solely through the prism of a future *family reunification* application in circumstances where what the appellant was seeking was permission to *remain* in the State in the context, *inter alia*, of being part of a *de facto* family unit in the State.

70. It follows that the Statement of Grounds must be amended to accord with the grounds upon which relief is being granted.

71. The appeal is thus allowed to the extent set out above.

72. The appellant has succeeded in this appeal. Accordingly, it follows that he should be entitled to his costs. If, however, either party wishes to seek some different costs order to

that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled, but any party seeking such a hearing will run the risk that if they are unsuccessful they may incur further costs. If no indication is received within the twenty-one-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

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