

**THE HIGH COURT
JUDICIAL REVIEW**

[2017 No. 767 J.R.]

BETWEEN

P.N.S. (CAMEROON)

APPLICANT

AND
THE MINISTER FOR JUSTICE AND EQUALITY,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

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[2018 No. 469 J.R.]

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K.J.M. (D.R. CONGO)

APPLICANT

AND
THE MINISTER FOR JUSTICE AND EQUALITY,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 16th day of July, 2018

1. The applicants in both of these cases assert a right to remain in the State pending an appeal against a rejection of a re-application for international protection and pending a formal refusal of the re-application by the Minister. Between them, the applicants have brought six High Court actions to date. This is the second such action by Mr. P.N.S. and the fourth by Mr. K.J.M. The primary question to be addressed in the present proceedings is whether the right claimed in fact exists.

Facts in P.N.S.

2. The applicant was born in Cameroon in 1974. In 2005, he became the father of a child with his partner at the time, Ms. V.N. In January, 2006, he applied for asylum. In 2008, he started a relationship with a Chadian national, Ms. C.S., who is now a lawful resident. His asylum application was refused in November, 2009. He then applied for subsidiary protection, which was refused on 17th May, 2010. A deportation order was made on 8th June, 2010.

3. He then evaded the GNIB for an approximately seven-year period. In 2011, he married a Ms. H.K.M., but later had an affair with Ms. C.S. and on 29th April, 2013, became the father of an Irish citizen child with the latter.

4. On 8th September, 2016, he applied for permission to reside in the State based on the parentage of the Irish citizen child. On 19th August, 2017, he applied for permission to re-enter the international protection system pursuant to s. 22 of the International Protection Act 2015.

5. In October, 2017, he began reporting to GNIB once again and the proceedings were commenced.

6. On 24th November, 2017, the International Protection Office (IPO) refused the s. 22 application.

7. I have heard helpful submissions from Mr. Paul O'Shea B.L. for the applicant and from Mr. Robert Barron S.C. and Ms. Emily Farrell B.L., who also addressed the court, for the respondents. At the original hearing I gave an *ex tempore* judgment granting limited relief to the applicant but shortly thereafter, and prior to the order being taken up, my attention was drawn to a provision of the procedures directive 2005/85/EC which had not been referred to by counsel for the applicant and which threw light on the issues involved. I therefore invited counsel on both sides to have the matter re-entered and re-argued, which they agreed to do. In *Lavery v. D.P.P. (No. 3)* [2018] IEHC 185 [2018] 3 JIC 1310 (Unreported, High Court, 13th March, 2018) at para. 9, I discussed the various situations in which a court can revisit a decision, and had there not been consent to doing so I would have found that a number of those situations apply here. Admittedly I now come to somewhat different conclusions but that possibility is inherent in the process of re-entry and re-argument, and arises primarily because I am factoring in hugely relevant provisions of the procedures directive that through oversight were unfortunately not drawn to my attention by the applicant at the end of the initial hearing.

8. Subsequent to the original hearing, the applicant received a negative decision on the s. 22 appeal to the International Protection Appeals Tribunal (IPAT) dated 23rd April, 2018, and has launched a further set of judicial review proceedings in relation to that decision [*P.N.S. v. Minister for Justice and Equality*, 2018 No. 413 J.R.]. That second action is currently listed for mention on 1st October, 2018. That judicial review relates to the appeal stage and does not seem to involve any right to remain in the State separate from the point being made in the present proceedings to the effect that the appeal should be viewed as part of the first instance procedure. The Minister has yet to make a formal decision on foot of the IPO recommendation, as affirmed by the IPAT.

Facts in K.J.M.

9. The applicant is a national of the DRC, born in 1972. On 24th January, 2005, he applied for asylum in the Netherlands. He made a second asylum application there on 10th February, 2005. These were rejected. He was the subject of a decision by the Dutch authorities to expel him to Cape Town on 27th April, 2005. He resisted removal, resulting in a delay in his being escorted to South Africa on 17th May, 2005.

10. On 31st May, 2011, he applied for asylum in Ireland. He falsely stated that he had previously been removed to the Congo, whereas in fact it was to South Africa. The State requested that the Dutch authorities take the applicant back on 9th June, 2011. This was refused. The applicant's Irish asylum claim was then processed here and refused by the Refugee Applications Commissioner. The applicant was so informed on 12th September, 2011. An appeal to the tribunal was lodged and rejected. The applicant was so informed on 30th December, 2011. The applicant then sought judicial review of the refusal on 23rd January, 2012 [*K.J.M. v. Minister for Justice and Equality* 2012 No. 45 JR]. That was struck out with no order on 15th December, 2014.

11. In the meantime, on 31st January, 2013, the applicant was refused entry to the Netherlands at Schiphol international airport. He

then once again applied for asylum there. In February, 2013, a take-back request was received from the Netherlands under art. 16(1) (c) of the Dublin II regulation. This was agreed to and the applicant was returned to Ireland.

12. On 5th May, 2015, the applicant applied for subsidiary protection here and that was refused on 19th September, 2016. An appeal was brought to the tribunal but was withdrawn on 17th October, 2016. In the meantime his partner, a Ms. C.M., and their two children, were granted stamp 4 residency as of 25th August, 2016.

13. A proposal to deport was then made. On 1st December, 2016, submissions against deportation were made. A deportation order was made on 13th January, 2017, and was not challenged.

14. On 23rd August, 2017, the applicant applied to revoke that order under s. 3(11) of the Immigration Act 1999, an application that remains outstanding. On 10th October, 2017, he applied to be readmitted to the protection process. That was rejected on 26th October, 2017, by the IPO. That was appealed by the applicant to the IPAT on 3rd November, 2017. That appeal remains pending before the IPAT.

15. The applicant had evaded following the deportation order but then presented again for a period. He then evaded again following a presentation on 31st May, 2018. He was arrested and detained in Limerick Prison.

16. On 1st June, 2018, he brought an Article 40 application [*K.J.M. v. Governor of Limerick Prison* 2018 No. 702 S.S.]. The applicant was released on bail on 1st June, 2018 and the Article 40 was compromised on technical grounds on 6th June, 2018 due to a possible defect in the warrant.

17. The applicant originally brought a plenary action [*K.J.M. v. Minister for Justice and Equality* 2018 No. 5283 P] raising the present complaints but when the procedural exclusivity of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 was pointed out to him, that action was struck out by consent and the present judicial review proceedings instituted instead.

18. I granted an injunction restraining the deportation of the applicant and continued that until the time of the present judgment.

19. I have heard helpful submissions from Ms. Rosario Boyle S.C. (with Mr. Michael McNamara B.L.) for the applicant and from Mr. Robert Barron S.C. (with Mr. John P. Gallagher B.L.) for the respondents.

Relief sought in P.N.S.

20. The primary substantive reliefs are declarations that deportation prior to either:

- (a) a decision on the application to re-enter the asylum process, or
- (b) the application for residency based on parentage of the minor citizen child, would be either unlawful or disproportionate respectively.

21. *Certiorari* of the subsidiary protection and deportation order decisions are massively out of time and helpfully those reliefs are not being pursued by Mr. O'Shea.

Relief sought in K.J.M.

22. The applicant in K.J.M. sought various declarations as to his legal position as well as an injunction against his removal from the state pending the Minister's decision under s. 22 of the 2015 Act.

Written submissions

23. As well as oral submissions from all parties I have received an embarrassment of written legal submissions as follows:

- (i). "Applicant's submissions" in *P.N.S.*, 21st March, 2018.
- (ii). "Outline submissions on the part of the Respondents" in *P.N.S.*, 1st May, 2018.
- (iii). "Applicant's submissions" in *P.N.S.*, 28th May, 2018.
- (iv). "Outline supplemental submissions on the part of the Respondents" in *P.N.S.*, 25th June, 2018.
- (v). "Applicant's legal submissions on his application for injunctive relief" in *K.J.M.*, 11th June, 2018.
- (vi). "Applicant's substantive submissions" in *K.J.M.*, 18th June, 2018.
- (vii). "Outline supplemental submissions on the part of the respondents" in *K.J.M.*, 25th June, 2018.

The entitlement to remain in the State pending refusal of a s. 22 application does not apply after an IPO recommendation has been made

24. Section 22 and related provisions of the 2015 Act are *inter alia* intended to give effect to the procedures directive, as appears from their terms and context and from the long title of the Act. A purposive interpretation, always important in any legal context, is doubly so in an EU-related context such as this one.

25. A right to remain pending a first instance decision is set out in art. 7(1) of the procedures directive. That right lasts "*until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III*". A determining authority means "*any quasi-judicial or administrative body in a member state responsible for examining applications for asylum and competent to take decisions at first instance in such cases, subject to Annex I*".

26. The respondents frame the question therefore as to "*whether or not the recommendation, determination or outcome of the investigation of the IPO under s. 22(5) amounts to a 'decision' within the meaning of art. 7 ... rather than relying on the label which the Oireachtas placed on the outcome of the consideration of the application by the IPO*" (para. 25 of submissions in *P.N.S.*). This emphasises the point that words in an EU context have their own autonomous meaning independently from how they might be viewed in a national context: see *Hampshire County Council v. C.E.* [2018] IECA 154 (Unreported, Court of Appeal, 7th June, 2018) *per*

Hogan J. at paras. 24 and 25.

27. Given the automatic nature of the Minister's approval of the recommendation under s. 22, that recommendation is in substance a decision. There is no obligation to use any particular form of words in legislation: *Hanafin v. Minister for the Environment* [1996] 2 I.L.R.M. 161 [1996] 2 I.R. 321 at 389-390. The IPO's recommendation or the conclusion of the IPAT "has all the characteristics of a decision" (*S.P.U.C. v. Grogan* [1989] I.R. 753 per Finlay C.J.; *Dublin Wellwoman Centre v. Ireland* [1995] 1 I.L.R.M. 408 at 417 per Denham J., as she then was).

28. The general doctrine of abuse of rights as a principle of EU law means that any right to remain under the directive does not apply if the application or re-application is abusive or is a repeated re-application (in effect a third or subsequent attempt to claim protection following the original application and the re-application envisaged by the directive).

29. In the absence of it being shown that the s. 22 application is repeated or abusive, the applicant has an entitlement to remain pending a first instance decision on a first re-application for international protection by virtue of art. 7(1) of the asylum procedures directive 2005/85/EC. A decision at first instance for those purposes includes a re-application (because a re-application under art. 32 arises under Chapter III, referenced in art. 7(1)): see *S.H.M. v. Minister for Justice and Equality* [2015] IEHC 829 [2015] 12 JIC 2115 (Unreported, High Court, 21st December, 2015) at paras. 16 to 18.

30. However, a re-application may be dealt with by way of a preliminary examination which derogates from the normal guarantees (arts. 24 and 32(3)), which raises the question as to whether the right under art. 7 is insufficiently unconditional and precise in this context to allow it to be directly effective (see para. 26 of *Edward Cussens v. T.G. Brosnan* Case C-251/16, ECLI:EU:C:2017:881, CJEU, 22nd November, 2017). Admittedly that is a slightly differently nuanced analysis to the one I arrived at in *S.H.M.* but the submission now made by counsel in the present case was not made in that case. A point not argued is a point not decided.

31. In *X.X. v. Minister for Justice and Equality* [2018] IECA 124 (Unreported, Court of Appeal 4th May, 2018), Hogan J. at para. 64 said that "One can, I think, leave to one side the provisions of the recast Asylum Procedures Directive (2012/32/EU) since it does not apply to Ireland. It could not, therefore, be relied for any purpose in interpreting the relevant provisions of s. 17(7)." But that does not necessarily mean that a clarifying (as opposed to an amending) recast directive on a particular subject could not in certain circumstances assist in a question of interpretation of an original directive. Such a question is one of general EU law which must have a uniform meaning throughout the Union. The happenstance that in a particular case the question falls for consideration in a country that has not signed up to the particular recast directive could not affect the objective meaning of the original directive. That is merely a particular instance of a more general point that a provision does not have to be directly legally applicable in order to be of interpretative assistance. Thus, for example, one can derive persuasive guidance from UK courts on common law issues, as Irish courts have throughout our history, or from foreign constitutional courts on human rights issues. Otherwise one would be retreating into an insular, little-Irelander, approach to consideration of legal questions.

32. For some reason, s. 22 of the 2015 Act calls the IPO determination a "recommendation" (see sub-ss. (4) to (15)), the IPAT's determination a "decision" (sub-ss. (9) to (12)) and the Minister's determination a "refus[al]" (sub-s. (15)). It is not obvious why the Oireachtas did not simply cut out the middleman and call the IPO determination a decision. Given that the IPAT affirmation of the "recommendation" is also called a "decision", the nomenclature is hardly consistent. Ms. Boyle endeavours to argue for a "literal meaning" of the word "recommendation" in reliance on the judgment of Kelly J. as he then was in *N.R.A. v. Celtic Roads Group (Dundalk) Ltd.* [2011] IEHC 71 (Unreported, High Court, 11th March, 2011) which she contends supports the theory that the primary interpretative rule is "literal interpretation". That is a misunderstanding. As Kelly J. makes clear, the primary interpretative principle is to give effect to the statutory intention. That intention is in the first instance to be gathered from the words used, but those words should be read in the context of "the subject matter with respect to which they are used and the object in view" (per Lord Blackburn in *Direct United States Cable Co v. Anglo-American Telegraph Co* (1877) 2 App. Cas. 394 cited in *Celtic Roads*). In addition the literal approach "does not preclude the court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole" (per Keane J. as he then was in *Mulcahy v Minister for the Marine* (Unreported, High Court, 4th November, 1994), cited in *Celtic Foods* and in *Monahan v. Legal Aid Board* [2008] IEHC 300 [2009] 3 I.R. 458). Inescapably, questions of legislative purpose and intent must be front and centre in any interpretative exercise (see *Gayle v. Governor of the Dóchas Centre* [2017] IEHC 718 para. 6). In *The Legal Process: Basic Problems in the Making and Application of Law* (C.U.P., 1958), Henry Hart and Albert Sacks identified the rationale for a purposive approach to the interpretation of any instrument, legal or constitutional, thusly: "Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living... Legal arrangements (laws) are provisions for the future in aid of this effort. Sane people do not make provisions for the future which are purposeless" (p. 148).

33. The pre-2015 Act procedure is expressly dealt with in Annex I of the procedures directive: "When implementing the provision of this Directive, Ireland may, insofar as the provisions of section 17(1) of the Refugee Act 1996 (as amended) continue to apply, consider that: — 'determining authority' provided for in Article 2(e) of this Directive shall, insofar as the examination of whether an applicant should or, as the case may be, should not be declared to be a refugee is concerned, mean the Office of the Refugee Applications Commissioner; and — 'decisions at first instance' provided for in Article 2(e) of this Directive shall include recommendations of the Refugee Applications Commissioner as to whether an applicant should or, as the case may be, should not be declared to be a refugee. Ireland will notify the Commission of any amendments to the provisions of section 17(1) of the Refugee Act 1996 (as amended)". It is accepted that there was no such notification. Mr. O'Shea accepts that if the case was being determined under the 1996 Act, Annex I would be a complete answer. But as the Act has been replaced by the 2015 Act, it does not formally apply. Mr. Barron states that the Annex has not been updated because there is no need to do so for the reason that the ministerial decision is no longer discretionary so there is no need for a clarifying declaration. That explanation seems to me to make a great deal of sense.

34. A key dimension to the present problem is the fact that the right to an effective remedy under art. 39(1)(c) is required in respect of a decision not to examine further a re-application. Therefore to construe the Irish legislation in a manner that is most consistent with the letter and spirit of the directive means that the IPO recommendation should be viewed as a "decision" for the purposes of art. 39(1)(c) and thus of art. 7(1), and that the IPAT appeal is the effective remedy therefrom. The Minister's "refusal" is simply a subsequent formalisation of that process. The mandatory nature of that refusal only reinforces that conclusion. It is a much more natural interpretation of the scheme of the legislation to construe it as a two-stage process of decision and effective remedy therefrom by way of appeal to the IPAT, rather than as a one stage process with no formal appeal and with judicial review standing as the effective remedy.

35. Such an interpretation has an effect much more compatible with the purposes of the directive than the applicant's interpretation. The applicant's interpretation would have the consequence that the right to remain, which was intended to apply for EU law purposes only during the first stage, would continue to have effect at an appeal stage contrary to the objectives of the directive. It is clear

that EU law, and art. 39 of the procedures directive in particular, does not require an appeal against summary rejection of a re-application to have suspensive effect: see Case C-239/14 *Tall v. Centre public d'action sociale de Huy*, ECLI:EU:C:2015:824, 17th December, 2015.

36. The applicant's submission would also have the effect that the whole procedure of IPAT appeals both in initial applications and re-applications is entirely unnecessary under EU law because judicial review of the Minister constitutes the "appeal procedure" under Chapter V.

37. An interpretation that regards the appeal as the effective remedy rather than as part of a first-instance process is also more compatible with the interpretative principle outlined at p. 898 of *Bennion on Statutory Interpretation*, 6th ed. (London, 2013) that "The court seeks to avoid a construction that leads to an artificial result, since this is unlikely to have been intended by Parliament." Here, to interpret the IPAT appeal as an unnecessary exuberance by an over-generous legislature, to be treated as merely a bolt-on within a single stage process, for which judicial review would stand as the "appeal", seems to me to be inherently artificial.

38. Huge reliance was placed on the fact that the Minister's "decision" could be judicially reviewed. That does not in itself establish very much. Indeed in terms of the psychology of forensic combat, those involved at any level in the court process generally benefit if they understand from the outset of their time in the law that there is no necessary relationship between the volume and temperature of hot air expended on a point in any given case and the inherent substance or even relevance of that point. In the context of the particular issue under discussion, one could imagine a circumstance where the Minister incorrectly departed from an IPO recommendation, an approach which would then warrant judicial review. The mere theoretical availability of judicial review does not in itself change the fact that the Minister's role in the process is minimal. As has been established in other contexts, though you would not know it from the applicants' submissions, the fact that something is *sometimes* appropriate does not mean that it is *always* appropriate.

39. In an endeavour to clarify what, thanks to the unflagging efforts of counsel for the applicants, might otherwise be a tangled area, I will attempt to set out the position as follows:

- (i). The first instance decision for the purposes of Chapter III of the procedures directive is that of the IPO.
- (ii). The appeal decision for the purposes of Chapter V of the procedures directive is that of the IPAT.
- (iii). The ministerial refusal under s. 22 (or s. 47) is a mere formality and does not constitute a first-instance decision for the purposes of Chapter III of the procedures directive.
- (iv). The general doctrine of abuse of rights as a principle of EU law (see e.g., *Cussens* paras. 25, 30) means that any right to remain under the directive does not apply if the application or re-application is abusive (even at the first time of asking) or is a repeated re-application (in effect a third or subsequent attempt to claim protection) (see S.H.M.).
- (v). An applicant has a right to remain under art. 7 of the procedures directive pending an IPO recommendation on a non-abusive protection application, covering both a first application for protection or, subject to the possibilities of exception or derogation (recital 15, art. 7(2), 24(1) and 32(3)) a first re-application.
- (vi). The right to remain under art. 7 of the procedures directive until the making of an IPO recommendation on a non-abusive first protection application is unconditional and sufficiently precise so as to be directly effective.
- (vii). In cases where the right to remain under art. 7 of the procedures directive applies, that right does not have effect after the IPO recommendation has been made. In particular the right to remain does not apply while the IPO recommendation is under appeal to the IPAT or during the process of judicial review, because art. 7 only applies to the first instance decision, not to an appeal or effective remedy under Chapter V (see also *Tall* at para. 49).
- (viii). The right to remain pending an IPO recommendation on a first protection application is also protected by domestic law in s. 16 of the 2015 Act. Insofar as s. 16 covers applications, whether abusive or otherwise, and also confers a right to remain pending the IPAT appeal, it goes considerably beyond what is required by EU law.
- (ix). The Irish legislation allows an abusive applicant (or re-applicant) to be detained (s. 20(1)(e) of 2015 Act) but does not allow such an applicant to be removed until the abusive application is formally rejected. This may be a lacuna.
- (x). Insofar as the right to remain relates to a first re-application for protection prior to the giving of ministerial consent, the possibility that a re-application may be dealt with by way of a preliminary examination which derogates from the normal guarantees (recital 15, art. 7(2), 24(1) and 32(3)) renders the right to remain to some extent unclear, putting its direct effect in question. It seems hard to make sense of the proposition that the derogation is only permitted after the adverse determination of the preliminary examination (as suggested by para. 48 of *Hall*) because at that point the first instance procedure is over and the question of exceptions under art. 7(2) no longer arises (unless a person refused re-admission is still to be considered an "applicant" under the directive despite this rejection). However, the academic point under this heading as to whether art. 7 is unconditional enough to confer a directly-effective right to remain in the case of a non-abusive first re-applicant pending an IPO recommendation would only arise in the case of an applicant who has not yet received such an IPO recommendation. That is not either of these applicants.
- (xi). Irish law provides that on the making of a re-application, the Minister shall either give (s. 22(13)) or refuse (s. 22(15)) consent to the re-application. If following consent the person makes an application, they become an "applicant" under s. 2 of the Act and thus has the protection against removal given under s. 16. There is no specific protection pending the determination of a first non-abusive re-application. The interval period between giving of ministerial consent and the formal making of the application under the 2015 Act appears to be one during which art. 7 of the procedures directive would apply in a clear and unconditional manner thus having direct effect.
- (xii). Irish law does not specifically provide for a right to remain between the making of a non-abusive application for ministerial permission to make a first re-application for protection and a first instance recommendation by the IPO. As regards the question whether simply saying nothing in the legislation about a right to remain during this period constitutes a valid derogation from the right to remain as envisaged by the directive, or alternatively whether the absence of a specific right to remain during this short interregnum period means that the directive has not been thoroughly transposed, judicial review is in principle available to resolve such issues (see *Secretary of State for the Home Department v. Rahman*

Case C-83/11, ECLI:EU:C:2012:519, CJEU, 5th September, 2012, para. 25). However, an applicant would only have standing to seek declaratory relief in that regard if threatened with removal pending the IPO recommendation. That does not apply to either of these applicants because in both cases the IPO has already made a decision, so any alleged directly-effective right to remain has long since expired.

(xiii). For completeness I should mention that *Hall* also dealt with appeals from return decisions at para. 58. This relates to the return directive 2008/115/EC, which does not apply to Ireland. The decision in the present case is not a return decision anyway; it is a refusal of a protection re-application. Art. 21 of the qualification directive dealing with non-*refoulement* only applies to recognised refugees or those who are being given subsidiary protection, not applicants (see heading of Chapter VII and art. 20.2). Outside of special contexts such as the EAW and exclusion orders, there is no EU law right to an effective remedy against a return decision because the deportation process is not an EU law one. Therefore arts. 19(2) and 47 of the Charter do not apply as the State is not implementing EU law in such a context (see art. 51 of the Charter).

Discretion

40. Independently of the foregoing, it seems to me that judicial review reliefs as a discretionary remedy in relation to any particular process should not normally be afforded to an applicant who has abused that process. Mr. K.J.M. has engaged in a massive abuse of the immigration system both of Ireland and the Netherlands, has used different names, evaded his presentation obligations, repeated points that could have been raised at an earlier point, withdrawn his subsidiary protection application (thereby impliedly abandoning a claim of real risk of harm), and finally only re-applied for protection some months after the deportation order, a sequence which is inferentially abusive of the process. Had I not refused his claim on the merits I would have refused it on a discretionary basis. The State did not (for whatever reason) argue the discretion point in *P.N.S.*

Entitlement to remain in the State pending a decision on the application regarding parentage of Irish citizen child.

41. I now move to the applicant's second point in the *P.N.S.* case, which is that he has an entitlement to remain in the State pending a determination of the application for leave to remain based on the birth of his Irish citizen child. I rejected this *ex tempore* and I now set out written reasons.

Declaratory relief as to unenforceability of a deportation order is covered by s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

42. The first problem for the applicant under this heading is that the relief sought is an indirect attack on a decision to which s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies. Any relief which indirectly attacks a decision subject to s. 5 is itself subject to s. 5: see *Nawaz v. Minister for Justice Equality and Law Reform* [2012] IESC 58 [2013] 1 I.R. 142 and my decision in *X.X. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 377 [2016] 6 JIC 2409 (Unreported, High Court, 24th June, 2016) at para. 62 to 64 where I cited a number of other decisions to the same effect, in particular, *Goonery v. Meath County Council* [1999] IEHC 15 (Unreported, High Court, Kelly J., 15th July, 1999), *F.O. v. Minister for Justice and Equality* [2013] IEHC 206 (Unreported, Mac Eochaidh J., 9th May, 2013) at para. 33, *K.R.A. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 289 [2016] 5 JIC 1214 (Unreported, High Court, 12th May, 2016) at para. 58, *E.M.S. v. Minister for Justice, Equality and Law Reform* [2004] IESC 36 [2004] 1 I.R. 536 at p. 542, *B.M.J.L. v. Minister for Justice and Equality* [2012] IEHC 74 (Unreported, Cross J., 14th February, 2012) at para. 3.18, *Mamyko v. Minister for Justice, Equality and Law Reform* [2003] IEHC 75 (Unreported, Peart J., 6th November, 2003), *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603 [2007] IEHC 19, *per MacMenamin J.*, *G.O. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 190 [2010] 2 I.R. 19, *per Birmingham J.*, *Kinsella v. Dundalk Town Council* [2004] IEHC 373 (Unreported, Kelly J., 3rd December, 2004). This principle is now extremely well-established in case law and has recently been upheld in *X.X. v. Minister for Justice and Equality* [2018] IECA 124 (Unreported, Court of Appeal, 4th May, 2018), *per Hogan J.* Thus an applicant who seeks declaratory or injunctive reliefs to the effect that a deportation order is unenforceable is subject to s. 5 of the 2000 Act and apart from anything else has to bring the challenge within the time limits thereby provided. As I said in *K.R.A. (No. 1)* at para. 58, an applicant cannot by challenging a later decision seek to nullify an early decision contrary to the system of time limits, nor indeed as discussed in my decision in *X.X.* can an applicant get around s. 5 by reframing the relief sought as a declaration rather than *certiorari*. The time limits run from when the grounds of unenforceability arise, which seems to me probably at the birth of the child. However, while it seems to me that that application must be out of time under s. 5, I will assume in favour of the applicant that I am wrong about that and will go on to consider it on its merits.

An application to revoke the deportation order is not suspensive

43. The second problem for the applicant here is that an application to revoke a deportation order, if in substance that is what the applicant's application was, is not suspensive. As John Stanley puts it in *Immigration and Citizenship Law* (Round Hall, 2017) at p. 489 "an application for revocation under s. 3(11) is non-suspensive of the underlying deportation order. Further, the Minister is not obliged to determine a revocation application before effecting deportation", citing *A.P. v. Minister for Justice and Equality* [2016] IEHC 669 [2016] 7 JIC 1904 (Unreported, High Court, 14th November, 2016) and *I.R.M. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 478 [2016] 7 JIC 2932 (Unreported, High Court, 29th July, 2016). It seems to me one cannot achieve the same result by the back door by holding that deportation prior to the making of a s. 3(11) decision will be disproportionate. That amounts to judicial review of the decision before it has been made. The fact that the grounds for the s. 3(11) application only arise because of the applicant's flagrant abuse of the immigration system does not hugely help his position. The Minister must of course be satisfied that no legal rights would be infringed by effecting deportation.

Case law on interlocutory injunctions does not assist in seeking what amounts to a substantive injunction

44. Mr. O'Shea submits that the "sins of the parent" should not be visited on the child and that this should be avoided by granting an interlocutory injunction, relying on *A.O. v. Minister for Justice and Equality (No. 2)* [2012] IEHC 79 (Unreported, Hogan J., 17th January, 2012) and *A.O. v. Minister for Justice and Equality (No. 3)* [2012] IEHC 104 (Unreported, Hogan J., 3rd April, 2012). However, the interlocutory injunction jurisprudence is of no relevance when an injunction is the substantive relief that the applicant is looking for. The injunctions as claimed in the statement of grounds are not interlocutory; they are substantive. Thus jurisprudence such as *K.R.A.* and *Okunade v. Minister for Justice and Equality* [2012] IESC 49 [2012] 3 I.R. 152, *per Clarke J.*, as he then was, is of minimal relevance, as that line of jurisprudence is about interlocutory stays on decisions being challenged pending the determination of that challenge, not about free-standing boot-strapping injunctive applications as substantive relief before any decision has been made.

Enforcement of a prima facie valid and unchallenged deportation order should not be restrained unless there are very exceptional circumstances

45. On established principles, the enforcement of a *prima facie* valid deportation order should not be restrained unless the most exceptional circumstances apply. As was put in *L.C. v. Minister for Justice, Equality and Law Reform* [2006] IESC 44 [2007] 2 I.R.

133, those are “*circumstances...hard to envisage*”, per McCracken J. at p. 155: see also *Margine v. Minister for Justice and Equality* [2004] IEHC 127 (Unreported, Peart J., 14th July, 2004). While the Supreme Court in an uncirculated *ex tempore* decision granted an interlocutory injunction pending determination of the appeal in the latter case, that court did not overturn the substantive decision as the appeal ultimately became moot: see also *E.O. v. Minister for Justice and Equality* [2014] IEHC 30 (Unreported, Clark J., 30th January, 2014). The birth of a child is not such a very exceptional circumstance. If the Minister decides the applicant should be allowed to be present in the State on that basis, he can be brought back.

46. If I am wrong and if the interests of the child should be considered in line with the *Okunade* jurisprudence, it seems to me that the applicant has failed to particularise what level of involvement he has in the child’s life. The mother’s statement is somewhat vague; the father’s affidavit is also very vague. A letter from the father exhibited says “*I always tried my best to look after her very well. I even made a contract on (sic) my name with Smiths Cablevision so that my baby will have to watch her favour (sic) programme. I am always there for my baby and not having a permanent address I use [C.S.’s] address to receive my letter*”. Certainly it has not been established that the role of the father in the child’s life in this case is of such weight and substance as to amount either to the “*circumstances...hard to envisage*” referred to in *L.C.* or of circumstances of such weight and substance as to warrant the grant of injunctive relief here. The decision in Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124, 8th March, 2011 is relied on but is of no relevance as there is no reason to think the child will be required to leave the European Union. Interlocutory relief properly so-called does not now arise as I have heard and determined the substantive application.

Request for a reference

47. It seems to me that the applicants’ points in each of the cases relate at best to Irish transposition of the procedures directive. No lack of clarity adverse to the applicants in the directive itself has been demonstrated. The language used in the Irish transposing legislation does not create an issue of EU law as such but more a question of relating the steps in the Irish legislation to those in the European legislation. Thus a reference to the CJEU is not appropriate. The application of EU law to the legal and factual matrix of a particular national system is not normally a matter for a reference to Luxembourg. Furthermore the CJEU has already substantially clarified in the *Tall* case that there is no right to remain pending an appeal. The high-water mark of the applicants’ submission under this heading is the possible assertion of a right to remain pending IPO findings on a non-abusive first re-application. That is all very interesting as an academic point but it does not apply to either of these applicants because the IPO has already made such findings – as it happens, rejecting the applicants’ claims in both cases.

Injunctions

48. The applicants have no right to remain under EU or Irish law at this stage of the process. Insofar as the applicants have either an appeal pending to the IPAT against the IPO recommendation or a judicial review pending in relation to the rejection of such an appeal, an applicant does not have a right to remain for the appellate or subsequent stages of the re-application procedure. Insofar as applications to revoke the deportation orders are pending, that does not give rise to an entitlement not to be removed.

49. For good measure, the lawful rejection of the re-applications at first instance indicates that (in the absence of anything solid to the contrary) there is no real risk such as to engage the law in relation to *refoulement*. No legal basis for an entitlement to an injunction emerges from such an analysis.

Order

50. For those reasons the order in each case will be:

- (i) that the proceedings be dismissed; and
- (ii) that the injunction restraining deportation be discharged.