



AN CHÚIRT UACHTARACH

THE SUPREME COURT

Supreme Court Record No. 2023/37

[2024] IESC 35

**Dunne J.
Woulfe J.
Hogan J.
Collins J.
Donnelly J.**

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

Between

**A.Z., M.Z., AND C.Z. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND
M.Z.)**

Applicants/Respondents

AND

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent/Appellant

JUDGMENT of Mr Justice Woulfe delivered on the 25th day of July, 2024

Introduction

1. The appellant (hereinafter “the Minister”) appeals the order of the High Court (Phelan J.) made on the 2nd December, 2022, wherein the Court granted an order of *certiorari* quashing the Minister’s decision, notified under cover of letter dated the 13th July, 2021, which refused to revoke a deportation order made in respect of the first respondent dated the 26th June, 2019, under s. 3 of the Immigration Act 1999 (the “1999 Act”).

Background

2. The first and second respondents are a married couple since 2012 and are parents to the third respondent. The first respondent is an Albanian national who entered the State unlawfully, allegedly in March, 1995, and worked here without a work permit for a number of years using an alias. He formed a relationship with the second respondent, an Irish citizen, in 2005 and they had their first child together in 2006, who sadly was stillborn. In 2007, they had a second child, the third respondent. The first respondent is the primary carer of the third respondent, who suffers from hearing loss, as well as having additional needs and requiring a range of services due to an autism diagnosis made in February, 2013. The second respondent is a health care professional, and she is the sole bread winner for the family and works long hours.
3. The family has lived together continuously with the exception of a three-year period when the first respondent was imprisoned, after a conviction for offences arising out of an altercation with a co-worker in 2012 when he discharged 6 bullets from an illegally held firearm striking his colleague. He was sentenced to seven years imprisonment with three years suspended, and ultimately served three years of this sentence. The first and second respondents married shortly after the shooting incident took place.

4. On the 11th September, 2013, while charges were pending against the first respondent, his solicitors submitted an application on his behalf for a permission to remain in the State on the basis of his parentage of an Irish citizen child, the third respondent (a “*Zambrano application*”). As part of this application, the first respondent was required to submit documentation regarding any criminal record, in which he stated that he had no previous convictions in the State. This however was untrue, as he was previously in November, 2003 convicted for intoxication in a public place, contrary to s. 4 of the Criminal Justice (Public Order) Act, 1994 (as amended). A charge of threatening, abusive or insulting behaviour in a public place, contrary to s. 6 of the same Act, was taken into consideration. The first respondent did, however, correctly tick the box as to whether there were any charges pending against him in the State or abroad, but he did not provide details of the said charges.
5. In March, 2014 the first respondent was granted a “Stamp 4” permission for three years as a parent of an Irish citizen child (the “*Zambrano*” permission). This was granted under certain conditions, namely that he would obey the laws of the State and not engage in criminal activity. The Minister was not aware of any previous convictions, and it appears that no further enquiry was made regarding the nature of the pending charges. The first respondent was subsequently convicted of the offences as discussed above on the 15th July, 2014, and was released from prison on the 13th July, 2017. During his time in prison, the first respondent received weekly visits from the second and third respondents and had daily telephone contact. While in prison, the first respondent failed to renew his permission to be in the State.
6. On the 19th April, 2017, a proposal to deport pursuant to s. 3 of the 1999 Act was issued to the first respondent while he was still in prison. His solicitors submitted representations and supporting documentation on his behalf. In the submissions, heavy

reliance was placed on the rights of the family pursuant to Article 41 of the Constitution, and on the decision of the High Court in *Gorry v. Minister for Justice* [2014] IEHC 29 (“*Gorry*”) (later upheld in this Court: [2020] IESC 55), as well as on the rights of the family under EU law (with particular reliance on *R. v Bouchereau* [1977] ECR 1999; [1978] 66 Cr App R 2020), and the nature of the threat to public policy or public security required to justify interference with EU rights, or rights under Article 8 of the European Convention on Human Rights (the “ECHR”), which it was contended was not present in this case.

7. The submissions on behalf of the first respondent also focused heavily on the requirement to treat the child’s best interests as paramount in conducting a proportionality test. While there was reliance on international case law regarding the best interests of the child, strangely there was no mention of the third respondent’s special needs requirements, nor his autism diagnosis.
8. A deportation order in respect of the first respondent issued in October, 2017. The Examination of File document which accompanied the order reflects a consideration of the family and private life rights of the respondents with reference to Articles 40, 41 and 42 of the Constitution, Articles 7 and 24(2) of the Charter of Fundamental Rights of the European Union (the “Charter”) and Article 8 of the ECHR. There was no reference to Article 42A of the Constitution, but the Examination of File document stated that “consideration is given, in the best interest of the child, to all the specific circumstances arising”.
9. The Examination of File document “recognised that any further absence of Mr. Z. from his son’s life will inevitably lead to upheaval for the child, this is a factor which must be considered in the wider context of the threat Mr. Z may pose to society and the consequential right of the State to prevent disorder or crime”. However, it also noted

that the first respondent “has a propensity towards extreme and disproportionately violent outbursts” and that “there exists a genuine, present and sufficiently serious threat affecting a fundamental interest of society, which justifies, on the ground of protecting the requirements of public policy, in preventing disorder or crime, deportation of Mr. Z”. The decision was made in the absence of any information regarding the third respondent’s special needs or diagnosis of autism.

10. The 2017 deportation order was subsequently revoked on the 26th January, 2018, following the settlement of judicial review proceedings. It is unclear on what basis these proceedings were compromised. In November 2017, while these proceedings were extant, the first respondent sent the first of a series of threatening and abusive emails to the Department of Justice and Equality.
11. On the 21st February, 2018, a fresh proposal to deport was sent to the first respondent, and he was invited to submit additional representations. In the submissions made to the Minister, reliance was placed on the intervening decision of the Court of Appeal in *Gorry*, as well as on *P.H. v Child and Family Agency* [2016] IEHC 106, *Jeunesse v. Netherlands*, App No 12738/10 (ECtHR, 3 October 2014) (“*Jeunesse*”) and *Oguekwe v. Minister for Justice* [2008] 3 IR 795 (“*Oguekwe*”). It was contended that it would be disproportionate to deport the first respondent. In a letter in support of these submissions dated the 18th April, 2018, the second respondent stated that the third respondent was in receipt of speech and language therapy disability services that took a long time to put in place, and that deporting the first respondent would have a “huge effect” on the parent-child relationship, as well as on the family as a whole.
12. Following consideration of the first respondent’s file, a further deportation order was made in relation to him on the 26th June, 2019 (the “2019 deportation order”). The Examination of File document considered the family and private life rights of the

respondents as a family and personally under Articles 40, 41 and 42 of the Constitution and Article 8 ECHR. It also acknowledged the rights of the third respondent under Article 20 of the Treaty on the Functioning of the European Union (“TFEU”) and Articles 7 and 24(2) of the Charter. The document recited that consideration was given “in the best interests of the child, to all specific circumstances arising” and the involvement of the first respondent in the third respondent’s life was also set out. Despite apparent acknowledgment of the impact that a deportation order would have on the family life of the respondents, the Minister concluded that the nature and severity of the conviction and sentence and the propensity on the first respondent’s part towards extremely serious, violent conduct, together with more recent inappropriate email communication, demonstrated a pattern of behaviour characterised by disproportionate anger and unacceptable aggression, coupled with an apparent inability to fully grasp the potentially serious consequences of his actions. This all supported the conclusion that, when the competing interests were weighed, the State’s interests in protecting the public from disorder or crime and to protect the rights and freedoms of others outweighed those of the respondents.

- 13.** By letter dated the 26th July, 2019, the respondents’ current solicitors indicated that they were applying to revoke the 2019 deportation order pursuant to s. 3(11) of the 1999 Act. The respondents submitted representations in relation to Article 8 of the ECHR and to Article 41 of the Constitution, and documentation was submitted in support of same. Again, on this occasion, no reference was made in the submissions to Article 42A of the Constitution. Further, on the 29th July, 2019, the respondents’ solicitors were also instructed to apply for a permission to remain on the basis of the parentage of an Irish Citizen Child for a Non-EEA parent (a *Zambrano* application). It appears that no

reference was made in this application to the third respondent's diagnosis of autism, nor to his hearing loss.

- 14.** The *Zambrano* application was refused under cover of letter dated the 23rd September, 2019. The application under s. 3(11) of the 1999 Act was refused under cover of letter dated the 2nd October, 2019, and the validity of the 2019 deportation order was affirmed. That letter notified the first respondent that he was to attend at the Garda National Immigration Bureau (“GNIB”) offices on the 8th October, 2019 in order to make arrangements for his removal from the State. On the 28th November, 2019, the first respondent was arrested and brought to Cloverhill prison for the purpose of his removal from the State, and he was detained under s. 5 of the 1999 Act.
- 15.** On the 29th November, 2019, the respondents filed judicial review proceedings. They sought an extension of time to challenge the validity of the 2019 deportation order; dated the 26th June, 2019; to challenge the s. 3(11) decision dated the 2nd October, 2019; to challenge the decision to refuse the first respondent a *Zambrano* permission, and also sought an injunction. The leave application and the injunction application were put on notice to the Minister. On the 3rd December, 2019, Humphreys J. granted leave to seek the pleaded reliefs, extended the time and also granted a stay on removal of the first respondent from the jurisdiction pending the determination of the proceedings. The matter was transferred into the *Gorry* holding list pending the Supreme Court decision in the appeal in that case. On the 5th December, 2019, the first respondent was released on bail.
- 16.** In December, 2020, the judicial review proceedings in respect of the 2019 deportation order were compromised, whereby the s. 3(11) decision was quashed. As a term of settlement, it appears that the Minister agreed that “a fresh consideration” of the first respondent’s s. 3(11) application to revoke that order would be made within twenty

weeks of receipt of any additional representations made by the respondents. In further extensive submissions made by the respondents in March, 2021 it was recognised that the first respondent had committed a serious offence, and had made himself an unattractive applicant by subsequent intemperate emails. However, it was submitted that the risk posed by the first respondent to the public order and the public's right to be protected from crime was not such that would outweigh the respondent family's right to unity in Ireland. While no express mention of Article 42A was made in these submissions, letters were furnished from the third respondent's audiologist, and his speech and language therapist, along with a report from a psychologist confirming his autism diagnosis, hearing loss and additional needs.

- 17.** Under cover of letter dated the 13th of July, 2021, the first respondent was issued with the s. 3(11) decision dated the 28th of June, 2021, affirming the 2019 deportation order. The reasons for the decision were set out in a document entitled "Consideration of Further Representations under Section 3(11) of the Immigration Act, as amended" ("the consideration document"). It is clear from that document that new evidence had been furnished regarding the third respondent's diagnosis of autism, a significant hearing loss issue, and an increased dependency on his father for care needs as his mother had been involved in a road traffic accident, and also had heavy work commitments throughout the Covid-19 pandemic. The document considered separately the respondents' rights under Article 41 of the Constitution, the rights of the third respondent as an Irish citizen child, and the rights of the respondents under Article 8 of the ECHR and under Articles 7 and 24(2) of the Charter.
- 18.** The document accepted that the third respondent, who was thirteen years old at the time, had personal rights under Article 40 of the Constitution. These rights included his right to reside in the State; to be reared and educated with due regard to his welfare;

to the society, care and company of his parents; and to protection of the family, pursuant to Article 41. Rights also arose under Article 42 of the Constitution. The document cited principles set out by this Court in *Oguekwe*, to the effect that the Minister should deal expressly with the Constitution and Convention rights of the child in question, but that neither rights were absolute.

- 19.** Once again the document acknowledged the rights of the third respondent under Article 20 of the TFEU and under Article 7 of the Charter, which Article was considered in conjunction with “the obligation to take into account the child’s best interests, recognised in Article 24(2) of the Charter”. It repeated, however, that the rights of the third respondent were not absolute and that all rights require to be considered in the context of the factual matrix of the case. The State’s rights required also to be considered, and the Minister must weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision.
- 20.** The document acknowledged all submissions in respect of the third respondent’s social and medical issues. It acknowledged the level of care that the third respondent had required in respect of his hearing loss and diagnosis of autism, and the submission that the first respondent assisted with the care of his son when his wife was working. It was accepted that it was “in the best interest of (the third respondent) to have the care and company of both of his parents”. However, this had to be balanced against the overall public interest in the particular facts of the case.
- 21.** The consideration document concluded that having considered the overall facts of the case, the factors relating to the rights of the State outweighed the factors relating to the rights of the individual, including the rights of the first respondent’s Irish citizen wife and son. In this regard it was submitted that the first respondent’s deportation was not disproportionate, as the State had an obligation to protect the public from disorder and

crime and to protect the rights and freedoms of others. It was therefore submitted that a decision to affirm the deportation order in respect of the first respondent was not in breach of rights under Articles 40, 41 and 42 of the Constitution, Article 8 of the ECHR or Article 7 of the Charter.

The High Court

22. The respondents then sought to challenge the 2021 decision of the Minister to refuse to revoke the 2019 deportation order in a third set of judicial review proceedings, *i.e.* the proceedings which were appealed to this Court. A statement of grounds was filed on the 23rd July, 2021 and leave to proceed by way of judicial review was granted (Tara Burns J.) on the 28th July, 2021. The grounds advanced include, *inter alia*, that the Minister has failed to correctly recognise and/or identify and/or reasonably weigh the primacy of the rights of the third respondent as a child under national and European law and/or to consider his best interests; that the deportation of the father would be such as to unlawfully infringe the child's rights to citizenship of the EU as the father is the primary care giver and the child is autistic; and that the Minister has determined unreasonably that the first respondent presents a genuine and/or present and/or sufficiently serious threat affecting a fundamental interest of society justifying his deportation.

Scope of Challenge and Collateral Attack

23. In her judgment ([2022] IEHC 511) Phelan J. first considered the Minister's argument that these proceedings largely constitute a collateral attack on the 2019 deportation order, and on the decision dated the 23rd September, 2019, refusing to grant residence to the first respondent based on his parentage of the third respondent. It was contended

that the respondents had abandoned their challenges to those decisions in compromising the 2019 judicial review proceedings and, as a result, those decisions remained extant and valid in law. The respondents replied that they did not abandon their challenges as they succeeded in December, 2020 in having the first s. 3(11) decision quashed, and that the Minister agreed to carry out “a fresh consideration”.

- 24.** The trial judge held (at para. 55) that “the passage of time and factual developments during that time together with any clarification in the law, such as effected by the Supreme Court’s judgment in *Gorry*, require to be considered in the context of a fresh s. 3(11) analysis”. Further, while a decision to deport taken in 2019 might have met the requirements of a proportionality assessment, by 2021 changed circumstances added to the existing equation might lead to a different outcome on a fresh proportionality assessment. For those reasons the trial judge did not accept the Minister’s contention that a challenge to a fresh s. 3(11) decision constituted an improper collateral attack on the 2019 deportation order which remains extant, and can now be considered immune from challenge by reason of the compromise of earlier proceedings and the passage of time.

The Weight of Criminality as a Factor

- 25.** It was apparent to the trial judge from the terms of the s. 3(11) decision that the Minister had considered the nature of the criminal convictions in a careful analysis of all of the relevant circumstances. Phelan J. was satisfied that the Minister was entitled to regard the 2012 offence as grave, and as displaying a very serious and disproportionate level of violence and intemperate behaviour on the first respondent’s part. She was also quite satisfied that the Minister was entitled to take the view that the barrage of abusive emails sent by the first respondent were relevant in a consideration of a propensity to

violence and of questions of risk. In addition, she was satisfied that the Minister was entitled to have regard to the 2003 offence, together with the offending in 2012 and the aggressive email correspondence, and was fully entitled to consider that these cumulative features evidenced a serious propensity to violence. Overall, the Minister was entitled to adopt the position that the first respondent had demonstrated a lack of remorse and a disregard for the laws of the State.

26. Reading the impugned decision in the round, the trial judge was satisfied that it would be wrong in law, and on the basis of the Minister's detailed reasoning, for her to conclude that there had been a failure to properly assess the first and second respondents' rights. She was satisfied that the Minister had taken due cognisance of the fact that the making of a deportation order would most likely result in the separation of the family unit, as it is acknowledged in the decision that the second and third respondents would likely not move to Albania with the first respondent, or would encounter very significant difficulties in doing so. Accordingly, as regards the first and second respondents' position, it was her view that the respondents had not established a failure on the part of the Minister to reconsider relevant factors in accordance with law, or any disproportionality in the decision to refuse to revoke, notwithstanding the consequences for their personal and family rights. She felt, however, that a different position prevailed when it came to the rights of the Irish citizen child.

Consideration of the Rights of the Child

27. Phelan J. noted that considerable new information was provided to the Minister with regard to the position of the third respondent in the remitted s. 3(11) application. While it was clear from the Examination of File document that the Minister considered the rights of the child under a separate heading, and while Articles 40, 41 and 42 of the

Constitution were referred to under that heading, there was no reference to Article 42A of the Constitution. The trial judge stated that it was frankly difficult to comprehend a decision, which considers the constitutional rights of a child, being taken with express reference to Articles 40, 41 and 42 and without reference to Article 42A of the Constitution. That said, she accepted that it may be possible to read the Examination of File document as including a consideration of the child's rights under Article 42A without reference being made to that provision, where it is clear that the values enshrined in Article 42A are reflected in the Minister's considerations.

28. As regards Article 42A in an immigration context, the trial judge cited the decision of O'Donnell J. (as he then was) in *In Re JB v. KB* [2019] 1 I.R. 270 ("*In Re JB*") where he set out his understanding of the background to the then newly introduced Article 42A provision. She also cited *In Re JJ* [2021] IESC 1 ("*In Re JJ*") which also considered Article 42A. It appeared to Phelan J. that effective State protection for the rights of the child now required a greater focus on the child as an individual, separate from the family unit as a whole and not subordinate as part of the family unit. She held that the Supreme Court had found that Article 42A results in some recalibration of the protections which had already been available to children under the other provisions of the Constitution, not least Articles 40, 41 and 42 as referred to in the Examination of File.

29. While the trial judge felt that it was incontrovertible that Article 42A.4 gives an express constitutional status to the "best interests of the child" principle and the paramountcy of the child's rights in certain proceedings, what was less clear was whether the same best interests principle is a constitutional imperative in proceedings leading to and arising from a refusal to revoke a deportation order which would have the likely effect of separating an Irish citizen child from his non-national father. Article 42A had been

considered in other decisions involving the deportation of a parent to which the trial judge was referred during the High Court hearing, but none of the cases identified concerned a citizen child remaining in the State where a custodial parent was being deported as appeared likely in this case. However, Phelan J. noted that the decision of Humphreys J. in *OOA v. Minister for Justice* [2016] IEHC 468 (“*OOA*”) was such a case. Her review of these authorities will be considered in more detail later in this judgment.

- 30.** The trial judge stated that what was contended in this case was that the child’s individual rights require to be identified and weighed, separate from the rights of the family as a whole, and she considered that this flowed as a necessary consequence of the recalibration affected by Article 42A, as recognised in the more recent Supreme Court decisions. The issue was whether the correct test was identified and applied by the Minister when embarking upon an exercise in balancing competing interests, having regard to the particular protection of the child’s rights and interests in Irish law, including under Article 42A.
- 31.** The trial judge held that a lawful balancing exercise could only occur through a proper identification of the child’s rights in the first instance, and from her reading of the decision Phelan J. was not satisfied that the child’s rights in this case were considered under Article 42A.1 of the Constitution. Indeed, there was nothing to suggest that the Minister was aware that Article 42A had any relevance to the revocation decision at all. On the facts and circumstances of this case and in view of the terms in which the Examination of File were recorded, the trial judge was not satisfied that the Minister had due regard to the individual rights of the child protected under Article 42A.1.

Child's Interests a Paramount or Primary Consideration

- 32.** The trial judge felt that there was a strong case to be made that the primacy of the best interests consideration is constitutionally rooted, separate and distinct from the requirements of the ECHR, and requires to be considered as such in the decision-making process, albeit in circumstances where Article 42A.4 does not have strict application. This seemed to her to follow from the decision of the Supreme Court in *In Re JJ*. It also seemed to her to follow that, insofar as the constitutional rights of the child are concerned, there is an onus on every decision-maker to afford primary weight to the best interests of the child when conducting a proportionality assessment in connection with an interference with the child's rights.
- 33.** Given that it was established that the interests of the child must rank higher than any other and it is not merely one consideration that weighs in the balance alongside other competing factors, it seemed to the trial judge that the absence of any acknowledgement of the greater weight to be attached to the child's interests anywhere in the record of the impugned decision was evidence of a failure on the part of the Minister to properly consider the best interests of the third respondent in the revocation decision. Therefore, while it was clear that the Minister concluded that the requirements of the common good prevailed in this case, it did not appear from the record of the decision that the best interests of the child were identified as a paramount concern in the balancing exercise as required by law. Accordingly, she made an order of *certiorari* quashing the decision to refuse to revoke, and remitting the s. 3(11) application for further consideration in the light of the terms of her judgment.

Determination

- 34.** Following the High Court judgment, the Minister made an application for leave to appeal to this Court. This Court granted leave to appeal in a determination dated the 29th June, 2023 (see [2023] IESCDET 87). The Court considered that a matter of general public importance did arise regarding the effect of Article 42A on the Minister in her decision-making process, and that it was in the interests of justice that this Court considers the matters sought to be raised in the appeal. The Court further considered that exceptional circumstances had been demonstrated that warranted a direct appeal to this Court.
- 35.** The Court also considered that it would not be appropriate to grant leave in respect of some aspects of the appeal only, while leaving the other grounds of appeal to the Court of Appeal regarding the weight to be afforded to Article 42A and the best interests of the minor child, and whether the application was a collateral attack on an earlier order made by the Minister, as this would not be an appropriate use of Court resources and could result in an increased costs burden. Leave to appeal would therefore be granted in respect of all matters, and the particular and precise issues would be agreed or fixed in case management.

Submissions in this Appeal

Submissions of the Minister

Collateral attack and compromise of proceedings

- 36.** The Minister contended that the trial judge erred in finding that the respondents' challenge to the impugned decision did not constitute an improper and impermissible collateral attack on the 2019 deportation order. She suggests that this is particularly so

given that the trial judge accepted that the test includes a further inquiry to be made as to whether the material was capable of being presented earlier (para. 59). She submitted that the trial judge erred in not dismissing the proceedings *in limine* on that basis, given that she was satisfied that “there is very little scope for intervention by this Court as [the core complaints] were fully considered at the time of the deportation order was made”. (para. 55)

- 37.** The Minister contended that various authorities such as *Smith v Minister for Justice* [2013] IESC 4 (“*Smith*”) (at para 5.6), all supported the proposition that if what is asserted to be a significant and a materially new consideration was actually available to the respondents at the time of the previous application, then, in the absence of special circumstances, it would be difficult to see how the existence of such a consideration could properly be advanced as a new consideration requiring an active reassessment by the Minister of the substantive merits of the case.
- 38.** The Minister further contended that the respondents abandoned their challenges to the earlier decisions in compromising the 2019 judicial review proceedings, and as a result those decisions remain extant and valid in law. Accordingly, relying on *Nawaz v Minister for Justice* [2013] 1 I.R. 142, the Minister submitted that the respondents are not entitled to pursue grounds relating to the same findings and conclusions reached by the Minister in the earlier decisions. The respondent accepted the validity of the deportation decision and the *Zambrano* decision in agreeing that the Minister would quash the first s. 3(11) decision only. As a matter of law there is a valid deportation order in place, as well as a valid refusal to grant residence based on parentage of a Irish citizen child. It was submitted that it is self-evident that those decisions, and their bases, cannot be collaterally challenged in these proceedings.

The Respondents did not make a case under Article 42A nor was leave granted on this basis

- 39.** The Minister highlighted how Phelan J. noted that the respondents did not expressly rely on Article 42A, but stated that nonetheless it fell for the Court to consider the matter of its own motion. She stated that the respondents did not request the Minister to consider the s. 3(11) application on the basis of Article 42A, nor any of the subclauses within that Article. Leave was not sought in this regard from Burns J., and in fact the matter only arose on the second day of the hearing when the trial judge raised it of her own motion.
- 40.** Relying on the decision of Humphreys J. in *J.W. v Minister for Justice* [2020] IEHC 500, the Minister submitted that a judicial review applicant is confined to what is pleaded, and limited by the order granting leave. She also relied on the decision of this Court in *Middlekamp v Minister for Justice and Equality* [2022] IESC 2, where Hogan J. for the Court declined to grant leave to consider the issue at hand from the constitutional perspective when the matter had not been agitated before the Minister, and where the decision and proceedings were final and not interlocutory in nature. In the present case the plea in the statement of grounds in respect of the child's rights does not refer in any way to Article 42A.
- 41.** The Minister referred to O. 84, r. 20(3) of the Rules of the Superior Courts, as amended, which requires an applicant for judicial review to plead with specificity "each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground". She submitted that it is unfair for her to be the subject of a finding that she should have considered a specific matter that was not advanced.

Article 42A – application and required weight?

- 42.** The Minister submitted that the omission of any reference to Article 42A in the text of the impugned decision is not fatal, as the substance of the minor child’s rights, both within the family and as an individual possessing natural and imprescriptible rights, were in fact recognised and considered. She stated that how the new Article 42A provisions apply, if at all, to the rights of the child in the context of immigration, but more specifically, deportation, is important. If Article 42A.1 was said to apply, it was submitted that the Minister had on the face of the impugned decision respected the minor child’s rights in this case, and that there is no evidence to the contrary, even if the outcome of the decision to deport his father is adverse to him, and notwithstanding that no express reference is made to Article 42A.1 in the impugned decision.
- 43.** The Minister submitted that the correct starting point as regards the position of an Irish born child is that while he or she has a constitutional right to the company, care and parentage of his or her parents within the State, it is not an absolute and unqualified right. She cited *Fajajonu v. Minister for Justice* [1990] 2 I.R. 151, where the Supreme Court held that the Minister could order the deportation of a non-national parent of an Irish citizen child only if, after due and proper consideration, she was satisfied that the deportation was justified in the interests of the common good and by the need to protect the State and its society. She noted the decision in *Chigaru & Ors v Minister for Justice and Equality* [2015] IECA 167 (“*Chigaru*”) where the Court of Appeal held that it is clear that the right of children to the company and care of their parents is a core constitutional value which is inherent in the entire structure of Article 41, Article 42 and Article 42A of the Constitution. However, she contended, in an immigration context, these rights do not exist in an isolated vacuum.

44. The Minister notes that in *Oguekwe*, Denham J. (as she then was) affirmed the analysis of the High Court that the protection of the constitutional rights of the child under Article 40.3 encompassed a best interests test (at para. 25). She submitted that in identifying that best interests test, the Supreme Court did not refer to it as requiring that the best interests are considered as a primary or paramount consideration.
45. As regards case law post-dating the insertion of Article 42A into the Constitution, the Minister placed heavy reliance on the decision of the Court of Appeal in *Dos Santos v Minister for Justice* [2015] 3 IR 411 (“*Dos Santos*”). She contended that in that case Finlay Geoghegan J. clearly held that the requirement to consider the best interests of the child as “the paramount consideration” did not extend to immigration decisions taken by the Minister. The Minister notes that subsequent to the delivery of the High Court judgment in the present case, Hyland J. delivered judgment in *Achouri & Ors. v The Minister for Justice and Equality* [2022] IEHC 576 (“*Achouri*”), where she held (at para. 37) that “the existence of Article 42A does not extend the obligations of the [Minister] in this case and therefore does not require to be independently considered in my analysis”.
46. As regards the application of the Article 42A jurisprudence to the present case, the Minister contended that the trial judge found in substance, without expressly finding, that Article 42A.4 does apply to immigration matters, and was principally guided by her reliance on *In Re JJ*. She submitted that it is instructive that in *In Re JJ* this Court held that the addition of Article 42A did not alter the essential structure of the Constitution, in that Articles 41 and 42.1 were not changed. It was submitted that, in the present case, she appropriately considered the application to revoke the father’s deportation order in light of the matrix of the rights of his minor child, recognised both from the family and individual perspectives, having regard to Articles 41 and 40.3.

47. The Minister contended that from the trial judge’s reading of *In Re JJ*, the paramountcy or primacy of the best interests of the child enshrined in Article 42A.4.1 is now part of “the constitutional value structure”, but stated that this needs to be placed in its proper context. She submitted that Article 42A.4 does not appear to apply to immigration matters, and that the trial judge fell into error in exporting the words of Article 42A.4.1 into Article 42A.1. While the best interests test under Article 42A.4.1 has been considered in a number of previous cases, none of these concerned immigration matters.

Paramount weight / Paramount consideration

48. The Minister submitted that the trial judge erred in conflating any obligation to give paramount consideration to the interests of the minor child with an obligation to give paramount weight to the child’s rights. She cited the decision of Birmingham J. (as he then was) in *M.E. v Refugee Appeals Tribunal* [2008] IEHC 192, where it was decided that the weight (as opposed to the consideration) to be given to the evidence in immigration matters is quintessentially a matter for the decision maker. The Minister submitted that the trial judge at various times impermissibly trespassed into what were quintessentially matters of weight for the decision-maker, such as when she concluded that the Minister had failed to accord a “paramount or primary” weight to the child’s best interests.

Submissions of the Respondents

Collateral attack and compromise of proceedings

49. The respondents contended that the trial judge did not err in deciding that there was new information contained within the respondents’ submissions made in March, 2021, as part of the fresh consideration of the s. 3(11) application. They contended that

detailed and up to date information submitted regarding the minor's ongoing developmental and special needs was highly relevant to the application to revoke, and that the circumstances of the first respondent and the third respondent had changed significantly. They submitted that no lawful proportionality exercise could have been completed without consideration of that information and the third respondent's rights and his best interests. They contended that the Minister had compromised previous proceedings on the basis that further representations would be submitted, and therefore it was reasonable and open to the trial judge to find that new information as to the position of the Irish citizen child, the third respondent, should have been considered in a re-consideration of the s. 3(11) application to revoke.

50. As regards the proceedings constituting a collateral attack on earlier decisions, the respondents submitted that they did not abandon their challenge to various aspects of the s. 3(11) decision when the 2019 judicial review was settled, and that they obtained the reliefs sought in those proceedings, when they accepted the appellant's offer of compromise, which resulted in, *inter alia*, agreement that there would be "a fresh consideration" of the first respondent's application to revoke the deportation order within twenty weeks of receipt of further submissions.

51. The respondents cited the decision in *Sivsvivadze v. Minister for Justice* [2016] 2 I.R. 403 ("*Sivsvivadze*") where the Supreme Court considered the making of a decision to amend or revoke a deportation order as follows (at para. 52):

"In any event, the Minister, when the occasion arises for him to make a decision as to whether to amend or revoke such an order, is again bound to exercise his statutory power in a manner compatible with the Constitution. This means that he must take into account all relevant factors, including any fundamental rights concerning the family and any right to family life... Whether a decision to make

a deportation order (or not to revoke one) interferes with a person's fundamental rights depends on the circumstances of the case. More important, whether any such interference is proportionate or disproportionate must depend on the particular circumstances of the case.”

The respondents also cited *OOA* in support of this contention, stating that the Minister must “afford due and proper consideration to the constitutional and ECHR rights of the Irish citizen children”.

- 52.** The respondents highlighted the changed factual circumstances regarding the second respondent's car accident in 2020, as well as her work commitments as a health care professional throughout the pandemic, and how this caused the third respondent to have an increased dependence on the first respondent as his primary carer. They contended that the third respondent's increased needs since the 2018 submissions stemmed largely from his increased hearing loss and consequent difficulties, including with his speech and language. They also submitted that the older reports regarding his autism diagnosis and hearing loss were only furnished later because the up to date reports were furnished and implicitly made reference to them.
- 53.** The respondents submitted that it does not make sense to claim that they were accepting the validity of the deportation order when the application under s. 3(11) was made. That was why they made the s. 3(11) application: to submit further information and try to have the deportation order revoked. Circumstances had changed in the meantime, which the respondents believed could render the deportation order disproportionate.

The Respondents did not make a case under Article 42A nor was leave granted on this basis

54. It was not disputed by the respondents that they did not refer to Article 42A specifically in the pleadings before the High Court. However, it was their contention that the primacy of the third respondent's rights, including a right to have his best interests considered, under Irish and European law was the second ground for judicial review set out in the statement of grounds, and that it was on this basis that the trial judge quashed the impugned decision. They submitted that Article 42A.4 was clearly not determinative of the trial judge's quashing of the impugned decision, citing para. 115 of her judgment wherein she stated that the paramountcy of the best interests of the child, which is reflected in express terms in Article 42A.4, is not unique to Irish constitutional law and applies in any event.

The respondents' case and the trial judge's findings

55. The respondents cited the trial judge at para. 63 of her judgment, wherein she stated that their claim was that "it is both disproportionate and unnecessary to deport the first named [respondent] from the State, and that the [Minister's] finding that the first named [respondent] has a propensity for violence is unfounded on the facts". They contended that their main point was that proper and lawful consideration had not been given by the Minister to the third respondent's rights, and that his best interests had not been properly assessed and considered as a primary matter.

56. As regards the trial judge's treatment of *Dos Santos* in her decision, the respondents contended that the trial judge distinguished that authority, and in any event relied on the general applicability of Article 42A.1 as opposed to Article 42A.4, which makes reference to certain specific proceedings. It was submitted that even if Article 42A.4

only applies to certain areas and not to immigration/deportation decision-making, this does not mean that the best interests of the child, and in this case a disabled child, should not be a primary or a paramount consideration in the Minister's decision-making on deportation of his father/primary carer, or that Article 42A simply does not arise for consideration at all.

57. The respondents submitted that if the best interests of the child only have to be considered as a paramount consideration in family law, child care and adoption proceedings, then there clearly are two different best interests tests which is not what seems to be envisaged in the jurisprudence. They cited the judgment of Murray J. in *Sivsivadze*, wherein he stated (at para. 31) that the Court must have regard to Article 42A of the Constitution which affirms the rights of all children, and they submitted that these rights would include the child's right to have his or her best interests considered as a primary or paramount consideration in any decision which may affect his or her rights. They contended that the personal rights of the child are explicitly provided with the highest level of protection by virtue of Article 42A.1, and that a breach of, or interference with, these rights will not generally be in his or her best interests, and thus, *may* not be proportionate, depending on the circumstances.

58. It was contended that in this particular case the citizen child's close relationship with his father and primary carer is likely to be severed by his deportation. The third respondent is most unlikely to go to Albania with his father, given the particular circumstances that arise, nor is the second respondent. It was submitted that it is manifestly not in his best interests to deport his father and deportation, albeit based upon serious crimes committed in 2012, is unlikely to be proportionate. It was noted that the phrase "best interests of the child" only appeared twice in the Minister's decision to deport.

59. The respondents contended that it is clear that the trial judge's decision arose from the Minister's failure to properly consider the third respondent's rights, and, in particular, his best interests as a matter of primary or paramount importance, and thus a flawed proportionality assessment was carried out. They submitted that the trial judge did not err in concluding that the Minister's decision did not reflect a consideration of the values enshrined in Article 42A. It was the Minister's failure to weigh the child's rights in accordance with law that was determinative of the learned trial judge's order for *certiorari*.

Discussion

60. It seems to me from the appeal submissions that five issues, three preliminary or procedural and two substantive, arise for decision on this appeal:

- (i) Whether the proceedings constitute an impermissible collateral attack on the 2019 deportation order;
- (ii) Whether the compromise of the 2019 judicial review proceedings precludes the respondents from challenging the impugned decision in the present case;
- (iii) Whether the High Court ought to have considered the application of Article 42A of the Constitution at all, in circumstances where it is alleged that the respondents did not make a case under Article 42A nor was leave granted on this basis.
- (iv) Whether the trial judge erred in law in finding that Article 42A.1 applies in deportation decisions which concern a non-national who has an Irish born citizen child residing in the State; and

- (v) Whether the trial judge erred in her view that the Minister must consider the best interests of an Irish citizen child as a paramount or primary consideration in arriving at the decision whether to revoke the deportation order in this case.

The First and Second Issues

- 61.** The first and second issues are related. The Minister contended that the compromise of the 2019 proceedings which included a challenge to the earlier s. 3(11) decision dated the 2nd October, 2019, now precludes the respondents from challenging the validity of the later s. 3(11) decision dated the 28th June, 2021. The said compromise involved the quashing of the earlier s. 3(11) decision, and the Minister’s agreement that “a fresh consideration” of the s. 3(11) application would be made following any additional representations made by the respondents.
- 62.** The Minister submitted that in accepting that offer of compromise, however, the respondents abandoned other challenges which formed part of the 2019 proceedings, *i.e.* their challenges to the validity of the 2019 deportation order and the 2019 decision to refuse the first respondent a *Zambrano* permission to reside in the State. It is suggested that the trial judge erred in not striking out the current proceedings *in limine*, on the basis that they amount to a collateral attack on those 2019 decisions.
- 63.** In my opinion this ground of appeal by the Minister is misconceived. Section 3(11) of the 1999 Act provides that the Minister may by order amend or revoke any order made under s. 3, including a deportation order. An applicant may be able to persuade the Minister that the deportation should not proceed, usually as a result of providing new or additional information.

- 64.** Because of the availability of the s. 3(11) application, it was not necessary for the respondents to maintain a challenge to the validity of the 2019 deportation order. The respondents did not have to establish that the order was invalid when made, but instead could seek to establish that it should be revoked on the basis of their additional representations. In my opinion the Minister has herself recognised this reality in the terms of settlement of the 2019 proceedings, by agreeing that “a fresh consideration” of the s. 3(11) application would be made following receipt of any such additional representation.
- 65.** The Minister submitted that the trial judge fell into error on these issues for another reason, by not striking out the proceedings *in limine* on the basis that there was no “new consideration” requiring an active reassessment by her, as *per* the decision of this Court in *Smith*. It is necessary to consider this alternative argument in somewhat greater detail.
- 66.** In *Smith* the applicants, a husband and wife and their four children, sought leave to challenge a second s. 3(11) decision by the Minister to refuse to revoke a deportation order, in circumstances where no proceedings were instituted seeking to challenge either the validity of the deportation order or the first refusal to revoke it. In the High Court, Cooke J. stated as follows (at para. 14):
- “It is well settled that the Minister is not obliged to entertain an application for revocation under s. 3(11) unless it is based upon some new fact or information or some change of circumstance which has come about since the deportation order was made and which, if established, would render the implementation of the deportation order unlawful.”
- 67.** On appeal to this Court, it seemed to Clarke J. (as he then was) that the trial judge was correct in identifying the overall test by reference to which an application to revoke a

deportation order needs to be judged. He felt there were very sound reasons of policy why that test was appropriate, regarding the avoidance of further delays in the immigration system. He then continued as follows (at para. 5.4):

“While there are many aspects of the system which contribute to the delay of which I have spoken, there can be little doubt but that permitting persons to make repeated applications for revocation of deportation orders in the absence of significant new materials or circumstances would contribute to such delays and have an adverse effect on the orderly implementation of the Irish immigration system. It seems to me to follow that it is only where a relevant applicant can point to some significant feature, not present when the original deportation order was made, that there can be any obligation on the Minister to give detailed reconsideration to the question of deportation. It likewise follows that a similar situation arises where, as here, there is a second or subsequent application for revocation of a deportation order. Where, as here, neither the original deportation order nor the first or earlier application for revocation was challenged in the courts by judicial review (or where any such challenge failed), it must be assumed that the analysis of the Minister, on the basis of the facts, materials and considerations then before the Minister, was correct. It follows that the only basis on which a challenge to a second or subsequent refusal on the part of the Minister to revoke a deportation order can be brought is where reliance is placed on a suggestion that there were new circumstances not before the Minister when the deportation order or any previous decision not to revoke same was determined and where the challenge is directed to the consideration by the Minister of the application in the light of such new circumstances.”

68. Clarke J. later developed these principles further as follows (at para. 5.6):

“The second observation is that there is an obligation on persons seeking to invoke their right to invite the Minister to revoke a deportation order to put before the Minister all relevant materials and circumstances on which reliance is sought to be placed. The question of the presence of new and significantly material considerations such as might justify a reconsideration of a previous deportation decision (including a previous refusal to revoke) must be judged against that obligation. The mere fact that what is said to be a new consideration was not before the Minister when an earlier decision was made does not of itself render it the sort of consideration which requires the Minister to actively reconsider. If what is asserted to be a significant and material new consideration was actually available to the applicant at the time of the previous application, but was not advanced or brought to the Minister’s attention, then, in the absence of special circumstances, it is difficult to see how the existence of such a consideration can properly be advanced as a new consideration requiring an active reassessment by the Minister of the substantive merits of the case. For a new circumstance to require such a reassessment it must either have arisen after the earlier decision of the Minister or there must be a compelling explanation as to why, notwithstanding its existence at the relevant time, it was not then advanced.”

69. In the present case the first and second respondents were aware of the third respondent’s diagnosis of autism after receiving a psychological assessment report dated the 20th February, 2013. Despite this, no reference was made by the applicants to this report or diagnosis until the latest s. 3(11) application. In her letter (in support of submissions as to why a deportation order should not be made) dated the 18th April, 2018, the second respondent did state that the third respondent from the age of four had been under the

HSE’s “early intervention team” for speech and language therapy, and at that time was under their “speech and language therapy disability services for children aged 6 – 18” and their occupational therapy team. She added that he had to date a special needs assistant allocated to him, which had had a huge impact on his social and psychological needs.

70. The trial judge noted (at para. 77) that considerable new information was provided to the Minister with regard to the position of the third respondent in the remitted s. 3(11) application. This new information included a HSE report regarding the third respondent’s language and social skills dated the 20th October, 2020, a letter from his speech and language therapist dated the 11th April, 2014, a letter from Dublin Audiology dated the 3rd March, 2020, confirming his hearing loss including the need to wear hearing aids, and the psychological assessment report referred to above. The fact that better information in relation to the position of the child was not advanced earlier was of particular concern to the trial judge, and she stated (at para. 77) that it was of course “entirely unsatisfactory” that a 2013 diagnosis of autism and other difficulties were not fully referred to at any time before the most recent s. 3(11) application.

71. Phelan J. noted that it was clear from the authorities that the courts have criticised as undesirable a type of “drip feed” of information, where information which could have been communicated earlier is advanced late in the face of impending deportation. As stated by Clarke J. in *Smith*, permitting persons to make repeated applications for revocation of deportation orders in the absence of significant new materials or circumstances contributes to delays, and has an adverse effect on the orderly implementation of the immigration system. She went on to conclude on this issue as follows:

“61. As noted above, no explanation has been provided for the failure to refer to the third named [respondent’s] special needs at an earlier stage in the process. Reliance on material produced late on a s. 3(11) application which might have been submitted earlier could in itself, in appropriate circumstances, justify a court in refusing relief on discretionary grounds...Late submission of material can also undermine the credibility of that information or an applicant’s position and reliance on it. Each case will turn on an assessment of its own facts and circumstances.

62. Given the nature of the information in this case, which relates to the medical and educational needs of a child and in circumstances where the child is dependent on others to effectively communicate his position and also where the passage of time gives greater clarity as regards the extent of his needs and his diagnosis, it seems to me that there exists factors which mean that it would not be an appropriate exercise of discretion to refuse relief in judicial review proceedings on discretionary grounds because some of the new information submitted could have been provided earlier. It seems to me to be also relevant that in this case the [Minister] agreed, in compromise of earlier proceedings, to a fresh consideration of the s. 3(11) application. Accordingly, it would be wrong to see this as a repeat revocation application where the same grounds are advanced again without change. This distinguishes this case from cases such as *Smith* where a new application to revoke followed on from the refusal of a previous one but without challenging the previous one.”

72. I cannot accept the Minister’s submission that the trial judge erred in not dismissing the proceedings *in limine* on the basis of the principles set out in *Smith*. It is undoubtedly correct, as was accepted by the trial judge herself, that some of the new information

submitted could – and should – have been provided at an earlier stage, and that no explanation has been provided by the respondents for the failure to do so.

73. Notwithstanding same, as stated by the trial judge each case will turn on an assessment of its own facts and circumstances. In my opinion, Phelan J. was entitled to exercise her discretion in the manner she did as a result of the particular factors arising in this case, as carefully identified by her. These factors included the fact that it was only some of the new information that could have been provided earlier, and the nature of that information where the passage of time gives greater clarity as regards the extent of the child’s needs and his diagnosis. I also agree with the trial judge’s finding that it is relevant that in this case the Minister agreed, in compromise of earlier proceedings, to a fresh consideration of the s. 3(11) application, and that this distinguishes (at least in part) this case from cases such as *Smith*.

The Third Issue

74. The trial judge noted (at para. 64) that the claims made by the respondents related to alleged breaches of constitutional rights and rights under EU law. It was pleaded in the statement of grounds that the Minister “has failed to correctly recognise and/or identify and/or reasonably weigh the primacy of the rights of the third named applicant as a child under national and European law and/or to consider his best interests”. However, the respondents did not refer to Article 42A expressly in the pleadings.

75. At para. 80 of her judgment, Phelan J. stated as follows:

“As these proceedings are brought on the basis that there has been a failure to properly weigh the rights of the child and to have regard to and apply the best interests principle in the decision to refuse to revoke the deportation order, albeit without express reliance on Article 42A, 42A.1 or 42A.4 in either the pleadings

or the written submissions, it is necessary for me to consider whether the approach taken in the decision under review to the weighing of the rights and interests of the child reflects a proper application of Article 42A.1 and/or 42A.4”.

76. The Minister submitted that the trial judge erred in making the above finding, in circumstances where the plea in the statement of grounds does not refer to Article 42A in general or in particular. The respondents do not dispute that they did not refer to Article 42A specifically in the pleadings. However, they submit that the issue of the primacy of the child’s rights, including a right to have his best interests considered, was pleaded, and it was on this basis that the trial judge quashed the impugned decision.

77. I do not accept the Minister’s submission that the trial judge erred on this issue. This is because the issue of the child’s rights and his best interests was clearly a live issue at all times in the deportation process before the Minister, even if Article 42A was not expressly identified or relied upon. The same applies to these judicial review proceedings, as a result of what was pleaded in the statement of grounds, as set out above.

78. I might add that, if it were necessary to do so, I would consider whether any pleading point could displace the constitutional obligation placed upon the Courts deriving from Article 42A of the Constitution. In *Sivsvadze* this Court, *per* Murray J., stated as follows (at para. 31):

“Moreover, I think the Court must have regard to Article 42A of the Constitution (the 31st Amendment) which provides, *inter alia*,:

‘1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.’

This is an obligation placed on the branches of Government, described as organs of State in Article 6 of the Constitution, including the judicial branch of Government.”

79. Subsequently, in *P. O'T. v. CFA* [2016] IEHC 101, Humphreys J. held (at para. 28) that Article 42A imposes an autonomous duty on the Court to uphold the natural imprescriptible rights of the child independently of any positions adopted by the parties, citing *Sivsivadze*. In circumstances where it is not strictly necessary to endorse or not endorse this suggestion, and noting the contrary view expressed by Collins J. in his judgment herein, I would leave endorsement or otherwise to stand over to a future case where it may be necessary to deal with same. It may then be relevant to consider the approach adopted by this Court recently in *Delaney v. PIAB* [2024] IESC 10; see, for example, the judgment of Hogan J. at para. 69.

80. I would therefore reject this ground of appeal.

The Fourth Issue

81. Article 42A with the heading “Children”, as inserted into the Constitution in 2015, provides, *inter alia*, as follows:

“1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

...

4.1 Provision shall be made by law that in the resolution of all proceedings –

(i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

(ii) concerning the adoption, guardianship or custody of, or access to,
any child,

the best interests of the child shall be the paramount consideration.”

- 82.** In her judgment, Phelan J. reviewed a number of cases which considered the application of Article 42A to decisions involving the deportation of a parent, while noting that only one of the cases concerned a citizen child remaining in the State where a custodial parent was being deported, as appeared likely in the present case.
- 83.** The first such case was *Dos Santos* where the applicants were all Brazilian nationals and a family unit consisting of a father, mother, and five children, none of whom had permission to reside in the State. The Minister made a deportation order in respect of the applicants and they sought judicial review of that decision arguing, *inter alia*, that it amounted to a breach of the children’s personal right to a private life in the State protected by Article 40.3 of the Constitution, which included a right to remain in the State and continue to participate in a community life established while in the State.
- 84.** The Court of Appeal upheld the decision of the trial judge that he could not be satisfied that the applicant children, not being citizens of the State, have a personal right within the meaning of Article 40.3 to remain in the State and/or participate in community life in the State. Finlay Geoghegan J. stated (at para. 11) that it is the citizenship which grants such a constitutional right protected by Article 40.3, and the children in these proceedings did not have any such personal right within the meaning of Article 40.3. She went on to briefly consider Article 42A of the Constitution, which had come into force only after the High Court judgment in that case. She held (at para. 19) that the type of decisions in respect of which laws must be enacted to provide that the best interests of the child shall be “the paramount consideration” pursuant to Article 42A.4.1

does not include a decision such as that to be taken by the Minister in relation to the deportation of a child.

- 85.** Phelan J. noted that unlike the decision in *Dos Santos*, she was not required to consider a deportation order made in respect of a non-citizen child. In this case she was considering the lawfulness of an order which it was accepted would interfere with a citizen child's right of access and custody with his father, where his non-national father is deported and the child remains.
- 86.** The next case reviewed by Phelan J. was the Court of Appeal decision in *K.R.A. v. Minister for Justice and Equality* [2019] 1 I.R. 567 ("*K.R.A.*"), where the first applicant was a Nigerian national and her daughter, the second applicant, was born in Ireland but was not an Irish citizen. The Minister made deportation orders in respect of both applicants, and they subsequently applied unsuccessfully for revocation of same pursuant to s. 3(11) of the 1999 Act. They then challenged, by way of judicial review, the Minister's decision to affirm the deportation order.
- 87.** The applicants claimed that Article 42A.1 conferred on the second applicant constitutional rights, *inter alia*, to education which fell to be put into the balance against the interests of the State. The High Court (Humphreys J.) held that the refusal to revoke the deportation order was not invalidated by a failure to consider properly the second applicant's constitutional right to free primary education pursuant to Article 42A. That right existed independently of that Article which imposed no new obligations on the Minister in respect of immigration control, and which made no significant difference to issues of deportation. The obligation to protect the natural and imprescriptible rights of all children applies to immigration decisions. The right to education is one of such rights to be enjoyed by citizens and non-citizens alike. However, entitlement to

education does not create an entitlement to remain in the State if a person is here unlawfully.

- 88.** The Court of Appeal dismissed the applicants' appeal. Ryan P. held that in circumstances where there is a specific constitutional right dealing with the child's entitlement to free primary education, it was not a reasonable inference that the general provision of protection of rights in Article 42A of the Constitution should be considered to have altered the existing obligations of the State. In his view, the situation was clear. The trial judge was correct to hold that Article 42A does not amount to a bar to the deportation of a child who is undergoing primary education in the State. The new Article 42A did not give support to the claim made by the second applicant, and it did not actually make any material difference to her education rights. While she was undoubtedly entitled to avail herself of the right to education while she was living here, that did not mean that she had a right to live here in order to avail herself of education.
- 89.** The *K.R.A.* decision appeared to Phelan J. to have limited application to the facts of this case, where there was no proposal to deport a child in a manner which might interfere with rights the child enjoyed in the State. It was the deportation of the child's father, while the child remains in the State, which gave rise to the need for a consideration of the child's rights and best interests with regard to custody and access to his father.
- 90.** Phelan J. next reviewed *OOA*, which did involve an Irish citizen child whose non-national father enjoyed limited access rights on foot of a District Court order. The non-national father was the subject of a deportation order which the Minister had refused to revoke, and this refusal was challenged by way of judicial review proceedings instituted in September 2014, before Article 42A was inserted into the Constitution the following year.

91. Possibly perhaps of that timing factor, counsel for the applicants made a submission that the Minister was required to treat the best interests of a child as a primary consideration, not by virtue of Article 42A of the Constitution, but by virtue of Article 8 of the ECHR. At para. 37 of his judgment Humphreys J. commented as follows:

“The situation seems to me to be that the best interests of the child are a primary consideration, although not necessarily decisive, not by virtue of Article 42A.4 of the Constitution (which does not apply) but by reason of the Strasbourg jurisprudence on Article 8.”

92. Phelan J. stated that these cases in the immigration context now need to be read in the light of the more recent Supreme Court decisions in *In Re JB* and *In Re JJ*. What was contended in this case was that the child’s individual rights require to be identified and weighed, separate from the rights of the family as a whole. She considered that this requirement flowed as a necessary consequence of the recalibration of rights effected by Article 42A as recognised in *In Re JB* and *In Re JJ*, which she understood as requiring a consideration of the child’s rights from the separate, distinct and individual perspective of the child rather than the child as a member of the family. The issue with which she was concerned was not whether she considered it disproportionate to deport the first applicant having regard to the impact on the rights and interests of his son which would likely result, but rather whether the correct test was identified and applied by the Minister when embarking upon an exercise in balancing competing interests, having regard to the particular protection of the child’s rights and interests in Irish law, including under Article 42A.

93. The trial judge was satisfied that the rights of an Irish citizen child under Article 42A.1 require to be considered when deciding whether to deport his non-national father, with the likely effect that the child would be separated from the father. She had considered

whether, even though the third applicant's rights under Article 42A.1 were not expressly mentioned, she could nonetheless be satisfied that the Minister had properly considered the child's interests in the decision to refuse to revoke. From her reading of the decision, she was not satisfied that the child's rights under Article 42A.1 were considered in this case. Indeed, there was nothing to suggest that the Minister was aware that Article 42A had any relevance to the decision on the revocation application at all.

94. The Minister submitted that the trial judge erred in law in finding that Article 42A.1 applies in deportation decisions which concern a non-national who has an Irish born citizen child residing in the State. She relied on *Dos Santos* and *OOA*, and cited additional authorities to the effect that Article 42A.4 is not applicable to these type of immigration proceedings. She highlighted in particular the judgment of Hyland J. in *Achouri*, delivered after Phelan J. delivered her judgment in the present case.

95. In *Achouri*, the second and third applicants were Irish citizen children of the first applicant, a Tunisian national. He had a number of criminal convictions and the Minister made an order for his deportation. The applicants challenged that order in judicial review proceedings, on the basis *inter alia* that the Minister failed to adequately consider the impact of his deportation on the second and third applicants.

96. After the conclusion of the substantive hearing of the matter, Hyland J. requested that the parties provide her with written submissions on the relevance, if any, of Article 42A of the Constitution to the resolution of the proceedings. In her judgment she stated as follows:

“36. It is clear to me that having read the submissions of both parties that the law is well settled in respect of the application of Article 42A to deportation decisions. The Court of Appeal in *Dos Santos*...held:

‘18. ...the type of decisions in respect of which laws must be enacted to provide that the best interests of the child shall be “the paramount consideration” pursuant to Article 42A.4.1 does not include a decision such as that to be taken by the Minister in relation to the deportation of a child.’

37. This case does not involve the deportation of a child but does involve the deportation of a parent. *Dos Santos* has been consistently applied to exclude the operation of Article 42A to the deportation of parents (see *e.g. OOA*, and *J.W. v. Minister for Justice* [2020] IEHC 500). Therefore, I am satisfied that the existence of Article 42A does not extend the obligations of the respondent in this case and therefore does not require to be independently considered in my analysis.”

- 97.** It should be noted that Hyland J. went on nonetheless to quash the Minister’s decision on the basis that she could not be satisfied that the Minister had discharged her duty to consider the facts relating to the personal rights of the citizen children, but she referred (at para. 61) to those rights as “protected by Article 40.3 of the Constitution” rather than by Article 42A.
- 98.** The Minister submitted that the trial judge has in substance found, without expressly finding, that Article 42A.4 does apply to immigration matters. She contended that, in reality, Phelan J. does appear to have found that Article 42A.1 requires the Minister to give “the paramount consideration” to the best interests of the child, when that requirement arises in a different context under Article 42A.4.1.
- 99.** The respondents note how Phelan J. distinguished the decision in *Dos Santos*, as set out at para. 85 above. They submitted that the trial judge, in any event, also relied upon the general applicability of Article 42A.1 rather than Article 42A.4, the specific provision

providing for provision to be made by law to ensure that in proceedings relating to child protection, or proceedings concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

100.In my opinion, the trial judge did not err in finding that Article 42A.1 applies in deportation decisions which concern a non-national who has an Irish born citizen child residing in the State, for the following reasons.

101.Firstly, approaching the issue from first principles, Article 42A.1 is of general application so that the rights of an Irish citizen child, including the welfare of the child, require consideration when the Minister is making deportation decisions which may seriously affect the child. It seems to me that the obligation placed on the courts to have regard to Article 42A.1 of the Constitution, as referred to by Murray J. in *Sivsvivadze* and set out at para. 78 above, is of very wide application and includes application to these type of immigration decisions which may seriously affect children. In my opinion the Minister is under a similar obligation by virtue of Article 42A.1 to take appropriate account of these welfare considerations. In the present case this meant that she was required to take account of the special circumstances arising, with the father being the principal care giver of a child with very special needs.

102.Secondly, I do not accept the Minister's submissions that the trial judge in substance found, without expressly finding, that Article 42A.4 does apply to immigration matters, and that her judgment appears to conflate Article 42A.1 with Article 42A.4. In my opinion, Phelan J. clearly recognised the limitations inherent in the latter provision (such as the reference only to certain types of proceedings), and she relied instead on the general applicability of the former provision, for example at paras. 100 and 105 of her judgment. I might add that, as *per* the judgment of this Court in *In Re JJ* (at para. 141), Article 42A.4.1 appears to me to be a mandatory provision obliging the State to

legislate to provide for a certain principle in certain types of proceedings involving a child. However, this latter provision can be seen as really a type of *lex specialis* which does not take from the general applicability of the former provision.

103. Thirdly, I do not think that the outcome of this approach from first principles is inconsistent with any authorities which were binding on the trial judge. I think that Phelan J. was entitled and correct to distinguish *Dos Santos* and *K.R.A.*, for the reasons as stated by her. I prefer her approach to that of Hyland J. in *Achouri*. I note that her approach is consistent with comments made by Ryan P. in *K.R.A.*, where he stated as regards Article 42A (at para. 29):

“The...provision is not specific to education or to immigration but applies generally in respect of rights in children. It is not that it does not apply to those areas but rather that it is not particular to them.”

The Fifth Issue

104. The final issue is whether the Minister, in considering the rights of the child under Article 42A.1 of the Constitution, must consider the best interests of the child as a primary or paramount consideration. It may be useful first to recall the position before the adoption of Article 42A, as *per* the decision of this Court in *Oguekwe*.

105. In *Oguekwe*, the first and second applicants, who were Nigerian nationals, were the parents of the third applicant, an Irish citizen born in Ireland. The first applicant entered the State in February, 2005, his child having been born here in June, 2003. He applied for permission to remain in the State under a particular scheme on the basis of his Irish born child. The Minister refused the said application, and ordered the deportation of the first applicant, and both decisions were challenged by the applicants in judicial review proceedings.

106. The High Court granted the orders of *certiorari* sought. The Court held that the refusal under the scheme, without a consideration of the citizen child's rights, amounted to a breach of the third applicant's rights under Article 40.3 of the Constitution and Article 8 of the ECHR. The Court further held that the decision to deport the first applicant breached the citizen child's constitutional rights, as there was no adequate consideration of the facts and factors relating to the personal rights of the citizen child or to his welfare. The Minister appealed both orders, and the Supreme Court allowed the appeal against the order quashing the Minister's decision on the application under the scheme, but dismissed the appeal against the order quashing the deportation order.

107. In considering the personal constitutional rights of the citizen child, Denham J. stated as follows:

“56. The High Court identified personal rights of an Irish citizen child, within Article 40.3.1 of the Constitution, which the Minister was obliged to have regard to as:

- ‘1. The right to live in the State.
2. The right to be reared and educated with due regard to his/her welfare including a right to have his/her welfare considered in the sense of what is in his/her best interests in decisions affecting him/her.
3. Where as in the case of the applicants herein the parents are married to each other the rights which as an individual, the child derives from being a member of a family within the meaning of Article 41.’

57. I would affirm this non-exhaustive list of rights. However, the rights are not absolute, they have to be weighed and balanced in all the circumstances of the case.”

108. Denham J. later added as follows (at para. 65):

“65. The High Court held:

‘It is difficult to state in the abstract in clear terms the nature of the consideration which must be given by the respondent, to the facts relevant to the rights of the citizen child to live in the State and to be educated and reared with due regard for its welfare and have its welfare, including what is in its best interest, taken into account in the decision making. It will always depend to some extent upon the factual circumstances of the citizen child and his parent or parents in the State.’

I would affirm this analysis. There can be no exclusive list of factors for the Minister to consider. Each case should be determined on its own circumstances in accordance with law.”

109. Pausing here for a moment, it is true, as submitted by the Minister and accepted by the trial judge (at para. 111), that in identifying a best interest consideration in *Oguekwe*, the Supreme Court did not expressly refer to same as a primary or paramount consideration. Notwithstanding same, it seems to me to be implicit from the structure, language and tone of the Court’s judgment that it was treating the best interests of the child as a primary or important consideration, as opposed to a secondary or unimportant consideration.

110. The trial judge, having cited *Oguekwe*, also cited a passage from the judgment of this Court in *In Re JJ*. In that passage the Court was considering a decision in relation to the medical treatment of a child which might have to be taken by the Court in place of the parents, pursuant to Article 42A.2.1 of the Constitution. The Court observed (at para. 142) that any such decision “must be compatible with the Constitution and the values it espouses, and Article 42A.4.1 is a part of that constitutional value structure”.

111.Phelan J. stated (at para. 111) that it was clear from the decision in *In Re JJ* that the paramountcy or primacy of the best interests of the child enshrined in Article 42A.4.1 is now a part of “the constitutional value structure”. She noted that the *OOA* case appeared to have been argued on the basis of Article 8 of the ECHR considerations alone. It seemed to her that there was certainly a strong case to be made that the primacy of the best interest consideration is constitutionally rooted, separate and distinct from the requirements of the ECHR, and requires to be considered as such in the decision-making process, albeit in circumstances where Article 42A.4 does not have strict application. That seemed to follow from the decision of the Supreme Court in *In Re JJ*. She held that where immigration proceedings concern an order which impacts on custody and access, such as in this case, then as a matter of Irish constitutional law the best interests of the child require to be weighed as a paramount or primary concern.

112.The trial judge went on to consider one of the reasons why Article 42A.4 does not have “strict application” and she then continued as follows (at para. 115):

“It is not necessary, however, to decide the question of whether the best interests test applies as a constitutional imperative under Article 42A.4 or derives under Article 40.3 for the purpose of this application because, as acknowledged in *O.O.A...*, the paramountcy of the best interests of the child which is reflected in express terms in Article 42A.4 is not unique to Irish constitutional law and applies in any event. Accordingly, whether under Articles 40.3 and/or 42A.4 of the Constitution and/or Article 8 of the ECHR (and given effect to by s. 3 of the European Convention on Human Rights Act, 2003) or otherwise, the respondent was bound by the best interests principle and the heavier weight to be attached to a child’s rights in her approach to the proportionality assessment conducted when considering whether to revoke the 2019 deportation order.”

113. The Minister submitted that the trial judge erred in finding that *Oguekwe* and *In Re JJ* are authorities for the proposition that the paramountcy of the child’s best interest test is already encompassed within the constitutional protection of the rights of the child. She relied on a plain and literal meaning of Article 42A.1, which does not contain the words “best interests” or “paramount consideration”, words found only in Article 42A.4.1. She submitted that the reference in *In Re JJ* to “the constitutional value structure” needs to be placed in its proper context, and that context was Article 42A.2.1 and Article 42A.4.1, whereas neither of those provisions appear to apply to immigration matters.

114. Without prejudice to the foregoing, the Minister submitted that if this Court finds that she was required to consider the child’s best interests as the paramount consideration as a matter of Irish constitutional law, the trial judge nonetheless fell into error in conflating the obligation to give *paramount consideration* to the interests of the minor child with an obligation to give *paramount weight* to his rights.

115. I am satisfied that the trial judge did not err in finding that the Minister must consider the best interests of an Irish citizen child as a primary consideration in arriving at the decision whether to revoke the deportation order in this case, for the following reasons.

116. Firstly, I do not accept the Minister’s submission that the trial judge erred in relying upon *Oguekwe* as an authority to support the above findings. It seems to me that the same rights of the child, previously found in *Oguekwe* to arise under Article 40.3.1 of the Constitution, can now be seen as more specifically arising or located under Article 42A. These rights include the right to have his/her welfare considered, in the sense of what is in his/her best interests, in immigration decisions which impact upon custody and access.

117. As stated at para. 109 above, it seems to me implicit from *Oguekwe* that this Court regarded the best interest consideration as a primary consideration when it arose pursuant to Article 40.3 of the Constitution, and in my opinion the same requirement must apply when it now arises pursuant to Article 42A. As a matter of first principles, I am satisfied that where, as here, the obligation placed on the courts to protect and vindicate the rights of the child encompasses the best interest consideration, then that obligation must normally extend to treating that consideration as a primary consideration. I cannot accept that this obligation could normally be met by treating same as a secondary consideration.

118. For my part, I would emphasise the distinction between the Minister's obligation to consider the child's best interests as a primary consideration rather than as a (or the) paramount consideration, given that "paramount" may be seen as meaning more important than anything else. While the child's best interests are a primary consideration, this does not necessarily dictate the outcome, as in many cases there may also be other important considerations which the Minister must weigh in the balance in arriving at deportation decisions.

119. The trial judge referred in her judgment (at paras. 115 – 116) to the UK case of *Z.H. (Tanzania) v. Secretary of State for the Home Department* [2011] 2 A.C. 166. In his judgment Lord Kerr referred (at para. 46) to according a primacy of importance to a child's best interests, and stated that it "is not necessary to express this in terms of presumption", but what "is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present". I agree with the first part of this statement, but disagree with the second part. In my opinion the requirement that the Minister must consider the best interests of the child as a primary consideration does

not give rise to any presumption against deportation, and does not dictate the outcome of cases, for the reasons stated in the previous paragraph.

120. Secondly, I also do not accept the Minister’s submission that the reference in *In Re JJ* to the part of the “constitutional value structure” found in Article 42A.4.1 should be narrowly confined to the specific context in which it arose in that case. It seems to me that this Court was referring to the fact that while the values set out in Article 42A.4.1 might not be directly applicable outside the scope of that provision, nonetheless those values could indirectly inform the correct interpretation and operation of Article 42A.2.1. In the same way those values can also indirectly inform the correct interpretation and operation of Article 42A.1. In my opinion this was how Phelan J. essentially approached the matter (noting her reference at para. 112 to “circumstances where Article 42A.4 does not have strict application”), and I believe she was justified in adopting this approach.

121. In this context it is worth emphasising that Article 42A.4.1 states that legislation must be enacted by the Oireachtas which provides that in proceedings involving the safety and welfare of the child, or in cases concerning the adoption, guardianship or custody of or access to any child, “the best interests of the child shall be the paramount consideration”. Here I would distinguish between those cases (such as the present one) where the best interests of the child are *a primary* consideration as distinct from those special category of cases where the best interests are *the paramount* consideration, for which special provision has been made by Article 42A.4.1. After all, the latter category of cases involves the welfare, long-term interests and (in the case of adoption) even the status of the child. It is only appropriate that in these types of cases the best interests of the child are “the paramount consideration” (“ní ró-thábhachtach”), so that all other

relevant considerations (such as, for example, the views of parents or prospective adopters) are subordinated to this dominant consideration of the child's best interest.

122.One may note that the language of paramountcy of best interests is *not* replicated in the more general provision in Article 42A.1, dealing with the natural and imprescriptible rights of all children in all *other* types of cases apart from those itemised in the special category of cases covered by Article 42A.4.1. I have held above that these general Article 42A.1 constitutional rights may well be engaged by an immigration decision involving the parent of a child who is not an Irish citizen. In this context the best interests of the child are *a primary* consideration for the Minister, but unlike the special category of Article 42A.4.1 cases, they are not *the paramount* consideration. As stated above, the Minister would therefore be perfectly entitled to have regard to many other primary considerations, not least the public interest in deporting non-nationals who have committed serious crimes of violence. I repeat that the fact that the Minister must have regard to the child's best interests as a primary consideration in such cases does not in any sense create some form of presumption against the making of a deportation order, or any other immigration order, which may have the practical effect of sundering parental ties with the child. Article 42A.1 does, however, mean that the Minister must have regard to the child's best interests, and her decision must engage in this regard with the child's constitutional rights.

123.Thirdly, I do not accept the Minister's alternative submission that the trial judge impermissibly trespassed into what were quintessentially matters of weight for the decision maker. It seems clear from an overall reading of her judgment that Phelan J. was saying that the child's best interests must be considered *in principle* "to have a particular weight which flows from the fact the child's interests are a primary...concern" (see, for example, at para. 120). However, she also made it clear

that the actual weighing of those interests against the competing interests of the State, on the facts and circumstances of a given case, is a matter for the judgment of the Minister, and that the Court can only intervene if the decision is unlawful (at para. 98).

124. In this case the trial judge concluded that the Minister had failed to consider the third respondent's rights under Article 42A.1 of the Constitution, and had not accorded a primary weight to the child's best interests in arriving at the decision to refuse to revoke the deportation order. In my opinion she had ample justification for these conclusions, based on her fair and careful assessment of the 2021 consideration document which underlies the Minister's decision.

125. Phelan J. added the caveat that her decision did not mean that affording primacy to the third respondent's best interests would necessarily lead to a decision in conformity with those interests, as whether the competing concerns are sufficiently substantial and significant to outweigh the third respondent's best interests right to the company and care of his father is a matter for the Minister. That said, the decision on an application to revoke the deportation order was one which must be taken having due regard to the special weight afforded the child's rights as properly identified. I agree with her analysis in this regard, which accords with my opinion set out above that a requirement to consider the best interests of the child as a primary consideration does not dictate the outcome of cases.

Conclusion

126. In conclusion, I would uphold the order of the trial judge quashing the Minister's decision to refuse to revoke the deportation order. I would therefore dismiss the appeal.