THE HIGH COURT

[2022] IEHC 576

RECORD NO. 2021/813/JR

BETWEEN

MEDHI ACHOURI, SARAH SOPHIA ACHOURI (A MINOR SUING BY HER FATHER AND NEXT FRIEND MEDHI ACHOURI) AND HOLLY ALIA ACHOURI (A MINOR SUING BY HER FATHER AND NEXT FRIEND MEDHI ACHOURI)

APPLICANTS

- and -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 12 October 2022

Introduction

1. This case concerns the applicants' challenge to a deportation order issued by the respondent to the first applicant. The applicants challenge the decision principally on the basis that the Minister (hereafter the "respondent") incorrectly considered the criminal convictions of the first applicant, failed to adequately consider the impact of his deportation on his two daughters (the second and third applicants) and failed to adequately assess his employment prospects. For the reasons set out in this judgment, I have concluded that the respondent erred in her approach to the impact of the

deportation on the second and third applicants and I therefore quash the decision of the respondent the subject matter of these proceedings.

Facts and background

2. The first named applicant is a Tunisian national who arrived lawfully in the State on foot of a spousal visa in 2004. He married an Irish national on 17 September 2004. He then held an almost continuous Stamp 4 permission to live and work in Ireland from 29 December 2004 until 17 August 2017. They had two children, the second applicant on 1 February 2006 and the third applicant on 17 September 2008. Both children are Irish citizens.
3. On 28 July 2017, the first applicant pleaded guilty to two counts of assault contrary to s.2 of the Non-Fatal Offences Against the Person Act 1997 (the "1997 Act"), one count of threatening to kill or cause serious harm contrary to s.5 of the 1997 Act and one count of burglary contrary to s.12(1)(b) of the Criminal Justice (Theft & Fraud Offences) Act 2001 (the "2001 Act"), committed against a former girlfriend of the applicant and her partner on 24 September 2016. He was sentenced in Cork Circuit Court to three years imprisonment, with the last two years suspended for a period of two years. The first applicant also has convictions for minor road traffic offences, namely two from January 2012 for no insurance and a failure to display a tax disc, one dating from November 2012 for no insurance, two for failure to display tax and insurance in November 2012 and one from July 2017, again for failure to display a tax disc.
4. On or around 22 November 2017, the first applicant received a proposal to deport him pursuant to s.3 of the Immigration Act 1999 (the "1999 Act") issued on 20 November 2017. He made submissions to the respondent in response to this proposal. An examination of file was completed on 11 May 2021. This was followed by a

recommendation of 29 July 2021 that a deportation order be issued. The deportation order was made on 4 August 2021 and under cover of a letter of 20 August 2021, the respondent rejected the first applicant's submissions and enclosed the deportation order. The applicant seeks to challenge that decision in these proceedings.

Proceedings

5. On 15 September 2021, leave was sought and obtained to bring the within proceedings. The applicants' Statement of Grounds was filed on 14 September 2021 and was grounded on an affidavit of the applicant sworn on 13 September 2021. Mr. Kirwan, solicitor for the applicant, swore an affidavit on 14 September 2021. On 1 October 2021, Ms. Osborne, solicitor for the applicant swore an affidavit. On 14 January 2022, Joanne King, Assistant Principal Officer in the Department of Justice swore a replying affidavit. A Statement of Opposition was filed in December 2021.

Arguments of the applicants

6. The applicants impugn the respondent's decision under s.3 of the 1999 Act in two principal respects. The first is in relation to the consideration of the first applicant's criminal convictions and the second relates to the consideration of his status as the father of, and provider for, the second and third applicants. I should note at this point that, while the written legal submissions of the applicants detail an argument with respect to the EU law rights of the second and third applicants, no claim on that ground was ultimately advanced. I do not therefore need to address same.

Criminal convictions

7. In respect of this ground, the applicants submit broadly that the consideration of criminal offences in the context of a deportation decision must be a careful and discriminating analysis and draw my attention to the European Court of Human Rights

(the "ECtHR") decision in *Boultif v Switzerland* [2001] ECHR 497.They set out that the ECtHR identified six separate criteria to be considered in a proportionality analysis in respect of a deportation decision on the ground of criminality.

8. The submissions in relation to the first five of those criteria are brief so I will set them out here in full:

> *"(i) The nature and seriousness of the offence committed by the applicant.*
>
> *It is accepted that this is a serious incident however the First Named Applicant has now served his time in custody, he was an enhanced prisoner and he has shown remorse.*
>
> *(ii) The duration of the applicant's stay in the country from which s/he is going to be expelled;*
>
> *The First Named Applicant has lived in Ireland for 17 years, nearly all of his adult life.*
>
> *(iii) The time which has elapsed since the commission of the offence and the applicant's conduct during the period;*
>
> *Five years have elapsed since the offence and the applicant has not come to adverse garda attention in that time.*
>
> *(iv) The nationalities of the various persons concerned;*
>
> *The victim was his Irish ex-girlfriend and her Canadian partner.*
>
> *(v) The applicant's family situation, such as the length of the marriage;*
>
> *The First Named Applicant is divorced from the mother of his children who are 15 and 13 years old."*

9. The sixth and final criteria consists of "*other factors revealing whether the couple led a real and genuine family life*". The first applicant submits that prior to his imprisonment he had a close relationship with his children and that despite his being

prevented from seeing them after his conviction, he has continuously supported them financially and he has instructed solicitors with the aim of regaining access.

10. Beyond the criteria identified above, the first applicant submits that an important factor in the examination of criminal activity is the propensity for further such activity in the context of the State's interest in protecting society and public order. It is noted that, while the first applicant has a number of minor road traffic convictions resulting in minor fines, the serious offences all arose in one isolated incident. It is argued that the five years without incident that have passed since that date are of particular significance and constitute strong evidence that it was an isolated incident. It is further claimed that the respondent's reference to the first applicant's disregard for the laws of the State and the safety and welfare of the public in the examination of file is not evidenced by the conduct of the first applicant, either before or after the one serious incident for which he has been sanctioned and which has not recurred.

11. The first applicant therefore argues that there is little to no support for an argument that he will engage in further criminal activity should he be permitted to remain in the State. In particular he relies on the following extract from Case 30/77 *R. v Bouchereau* (ECLI:EU:C:1977:172) quoted with approval by McDermott J. in *PR & Ors v Minister for Justice & Equality* [2015] IEHC 201:

> *"28. The existence of a previous criminal conviction can, therefore, only be taken into account insofar as the circumstances which gave rise to that conviction or evidence of personal conduct constitute a present threat to the requirements of public policy."*

12. In addition to the foregoing, he further relies on *A.W. Khan v The United Kingdom* [2010] ECHR 27 in support of an argument that the decision was disproportionate, noting that the ECtHR held:

"[H]aving particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the United Kingdom and the fact that the applicant had not reoffended following his release from prison in 2006, the Court finds that the applicant's deportation from the United Kingdom would not be proportionate to the legitimate aim pursued and would therefore not be necessary in a democratic society."

13. It is submitted that the first applicant has been in Ireland for 17 years, the majority of his adult life. It is argued that, in all the circumstances, where there is no evidence he is an ongoing risk but rather significant evidence to the contrary, and where he is needed by his children, it would be disproportionate to deport him to Tunisia.

14. Finally, in this vein the applicants make reference to the ECtHR case of *Unuane v United Kingdom* [2020] ECHR 832 where the Court, in holding a deportation decision was in contravention of Article 8, determined that "*the applicant's deportation was disproportionate to the legitimate aim pursued and as such was not "necessary in a democratic society'*"". In this light the applicant contends that the respondent applied the incorrect test in failing to consider whether the deportation was necessary.

Father and provider for Irish citizen children

15. As regards this ground the first applicant relies on the judgment of the Supreme Court in *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] IESC 25 discussed below. The first applicant submits that there was no consideration given to how he could maintain a relationship with his children or the financial impact that a deportation order would have on them.

Employment prospects

16. The first applicant also addresses the respondent's contention that he has poor employment prospects due to his lack of permission to remain in the State, his criminal convictions and his limited skills, noting that he is a highly skilled electrical engineer who earns a decent salary and who has consistently supported his children. In this light he submits that it is uncontested by the respondent that if he is deported to Tunisia, he would not be able to provide financial support for his children as he continues to do. Beyond this, specifically in relation to the reference to his lack of permission to remain in the State in the examination of file, the first applicant refers to *Talukder v Minister for Justice* [2021] IEHC 835, arguing that it is incorrect to rely on the fact that there is no permission to remain in deciding that an applicant has limited employment prospects.

Arguments of the respondent

17. The respondent formulates her arguments in response to four discrete questions raised by the applicants' submissions. The first, as to whether EU law applies to the decision to deport, will not be addressed in circumstances where the applicants did not ultimately pursue that line of argument. The three remaining questions are first, whether the respondent was only permitted to consider the first applicant's propensity for criminal activity as opposed to his past offences, second, did the respondent rationally balance the constitutional and European Convention of Human Rights (the "ECHR") rights of the applicants, and finally, did the respondent permissibly consider the first applicant's employment prospects under s.3 of the 1999 Act.

Propensity for criminal activity

18. The respondent submits that the core of the applicants' argument on the consideration of criminal activity in deportation decisions is that such activity is only relevant where the person has a propensity for further such activity or that deportation is only permissible where it can be shown there is such a propensity. They claim that both of those propositions are incorrect.

19. The respondent notes that there is no dispute that the applicable considerations are set out under s.3 of the 1999 Act and that the first applicant is a relevant person under s.3(2) to whom the respondent is empowered to issue a deportation order. She acknowledges that the discretion to issue such orders under s.3 is trammelled by the requirements of constitutional justice but submits that there is nothing irrational, arbitrary or capricious about taking into account criminal offences. The respondent draws attention specifically to s.3(6)(g) which requires the respondent to have regard to "*the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);"*. She submits that as a matter of statutory construction it is incorrect to contend that the respondent is precluded from ignoring past offences unless a propensity for further offending can be shown.

20. The respondent acknowledges that not every offence can justify a deportation, particularly in circumstances such as those of the first applicant who has a history of lawful residence in the State and who has Irish citizen children. However, despite this acknowledgment, the respondent strongly contends that there is no authority for the proposition that it is only the propensity to commit criminal offences that can be considered and not the offences themselves. She submits there is no such constraint required by the Constitution and further, the statue explicitly permits the consideration of prior offences. Additionally, the respondent identifies a line of case law in the

superior courts that rejects the "propensity only" view, namely, *F.E. v Minister for Justice* [2013] IEHC 93, *P.S.M. v Minister for Justice, Equality and Law Reform* [2016] IEHC 474 and *Z.A. v Minister for Justice* [2019] IEHC 376.

21. Finally, the respondent submits that the position under the ECHR, as applicable under s.3 of the European Convention on Human Rights Act 2003, is similar to that found in our domestic regime, with the ECtHR consistently accepting that criminal convictions are a relevant consideration in the context of deportation. She highlights by way of example the ECtHR's decision in *Boujlifa v France* [1997] ECHR 83 where the Court held that the deportation of a resident who had lived the vast majority of his life in France was proportionate following a conviction for armed robbery.

Did the respondent rationally balance the applicants' constitutional and ECHR rights?

22. In respect of this ground the respondent accepts that her decision affected the constitutional and ECHR rights of the applicants and that any such decision must be proportionate.

23. The respondent identifies, as the applicants have done, that Denham J. (as she then was) in *Oguekwe* established that there must be a substantial reason for the deportation of the parent of an Irish child but draws particular attention to the summary of the obligations on the Minister set out by Cooke J. in *Ugbelase v Minister for Justice* [2010] 4 IR 233 at paragraph 26;

> *"26…Firstly, the [Minister] must consider all facts relevant to the personal constitutional rights of the child and secondly, the respondent must identify a "substantial reason" which requires the deportation of the non-national parent. Having ascertained "the facts and factors affecting the family" and the child in each case "by due inquiry" he must consider the circumstances in a fair and*

proper manner so as to arrive at a decision which is reasonable and proportionate in all of those circumstances.

27. In other words, the personal and Convention rights of the child and of the family are not absolute but may be required to yield, or be subordinated to, the public interest of the State in the common good in controlling its frontiers where after due investigation and consideration a reasonable and proportionate decision is made that there is substantial reason for interfering with those rights."

24. The respondent argues that in accordance with the first limb of this test, the examination of file correctly identifies the rights to be considered as follows;

"[T]he right of the child to reside in the State, to be reared and educated with due regard to the child's welfare; to the society, care and company of the child's parents; and to protection of the family; pursuant to Article 41. Rights also arise under Article 42 of the Constitution."

25. The respondent further submits that the exercise of balancing the rights identified is not an abstract one, that the strength of the rights in question necessarily depends on the fact specific circumstances of the case. She relies on the following analysis of McDermott J. in *K.I. v Minister for Justice* [2014] IEHC 83*;*

"[W]hen considering whether to deport a non-national parent of a family based on marriage under Article 41…similar consideration should be given when assessing the effect of the deportation on children whether their rights arise under Article 41 or Article 40.3. The core element of any such consideration is the effect of the disruption of family life and its consequences for R.O.'s children when they or their other parent are otherwise entitled to lawful residence in the State."

26. The respondent contends that in this case there is no discernible disruption to family life given the "*complete dearth of any information*" provided by the first applicant as to his relationship with his children.

27. In turning to the second limb of *Ugbelase*, the respondent submits that, as she has argued above, previous criminal activity can constitute a substantial reason in the context of a deportation. It is noted that one serious offence (as in *F.E.)* or a series of more minor offences (as in *Falvey v Minister for Justice* [2009] IEHC 528) can constitute such a reason, and that ultimately it is a fact specific exercise. The respondent submits that the offences committed by the applicant in this case are, *prima facie*, serious enough to constitute a substantial reason. She again refers to the decision of McDermott J. in *F.E*. where he held that a conviction and 18-month imprisonment for sexual assault was sufficient to constitute a substantial reason. Beyond this it is submitted that the examination of file discloses a number of other reasons adverse to the applicant's case, namely a lack of remorse, the first applicant's history of road traffic offences and his poor employment prospects.

28. In seeking to refute the applicants' arguments that the decision was broadly disproportionate, the respondent makes two substantive points; one, that the balancing of rights is primarily a question for the respondent to determine and two, that the applicants have misconstrued the relevant test established by the ECtHR.

29. As regards the first point, the respondent relies on the decision of Humphreys J. in *O.O.A. v Minister for Justice and Equality* [2016] IEHC 468 where it was held that the counterbalancing of the rights of the child and the right of the State to administer an orderly immigration system is principally a task for the respondent, and per Clarke J. (as he then was) in *Okunande v Minister for Justice and Equality* [2012] IESC 49,

"*significant weight*" must be attached to a *prima facie* valid decision of the respondent in this respect.

30. In the context of the foregoing, the respondent dismisses the first applicant's claim that the respondent did not consider the financial impact of the deportation on the second and third applicants, noting that the decision explicitly accepts that the first applicant pays maintenance of €120 a week. Similarly, the respondent dismisses the claim that no consideration was given to the fact that the children would be unable to maintain a relationship with the first applicant. She argues that their rights and the potential detrimental impact upon them was acknowledged but ultimately it was considered the interest of the State outweighed the rights of the family in this case and stresses once again that such a determination is primarily one within her purview.

31. The respondent notes that of particular relevance to the broad proportionality argument is the fact that by way of letter dated 22 March 2018 the respondent requested from the first applicant further information, testimony or contact details of persons who could give evidence in respect of his relationship with his children. The respondent emphasised that no response was provided from any such persons (although it is true that, as detailed below, substantial information was given by Nasc on behalf of the first applicant in response to other matters requested by the respondent).

32. Further it is argued that the applicants have misconstrued the jurisprudence of the ECtHR as requiring a deportation order be "necessary". The respondent notes that that the applicants have cited *Unuane* in support of this proposition but argues that this is a misconstruction of the conclusion of the Court. She argues that the use of the phrase "necessary" must be understood in the context of the ECtHR jurisprudence and refers to the explanation of that term in *Unuane* itself;

> *"[D]ecisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued"*

Thus, she contends that *Unuane* cannot stand as authority for the contention that there is some stricter test of "necessity" beyond the proportionality requirement identified and discussed previously.

The consideration of the first applicant's employment prospects

33. In respect of the argument that the respondent impermissibly considered the fact that the first applicant does not have permission to work in the State when considering his employment prospects, the respondent argues that this is predicated on an incorrect interpretation of my decision in *Talukder* in the context of its consideration of the decisions of Burns J. in *MAH v Minister for Justice* [2021] IEHC 302 and *ANA v Minister for Justice* [2021] IEHC 589.

34. The respondent submits that this decision falls clearly into a category of cases identified in a decision of Burns J. in *ANA* i.e. where the lack of permission to work is simply noted as a fact, but it is not used to negate the statutory factor. She submits that the words "*in any event*" must be interpreted as highlighting that the factors listed afterwards are the material factors bearing on the decision and are capable of sustaining the decision entirely independently of the foregoing facts. Beyond this, it is submitted that even if the case is one that falls into the *MAH* and *Talukder* category it should not sustain *certiorari* because separate, independent reasons are provided which are self-evidently lawful. Finally, it is argued that if there is any ambiguity in the decision,

which is denied, it should be read to render it valid in accordance with that principle as set out in the case law.

Article 42A of the Constitution

35. After the conclusion of the substantive hearing of this matter I requested that the parties provide me with short written submissions on the relevance, if any, of Article 42A of the Constitution to the resolution of the proceedings. Article 42A provides:

> *"ARTICLE 42A*
>
> *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.*
>
> *2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."*

36. It is clear to me 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 v MJE* [2015] 3 IR 411 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. *O.O.A.*, 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.

Analysis

Propensity for future offences

38. The applicants argue that the decision was flawed because a criminal conviction may only be used to justify deportation where it has been shown the convicted person has a propensity for violence and is likely to re-offend, and no such evidence existed in the present case. As a matter of law, the proposition that there must be a propensity for further violence to justify a decision under s.3(6) to deport a person on the basis of his or her criminal record is incorrect. No such requirement exists in Irish law-see *F.E.*, *P.S.M.* and *Z.A* as cited by the respondent in this respect.

39. Moreover, it is accepted by the applicants that the existence of a previous criminal conviction can be taken into account if the circumstances giving rise to that conviction constitute a threat to the requirements of public policy. That does not mean the

respondent must establish that the person in question has a propensity for future violence in order to justify a deportation decision. The respondent's discretion is wide insofar as the requirements of public policy are concerned. Given the facts as set out below, there is no basis for me to interfere with the conclusion of the respondent that the conviction represented such a threat.

40. Here, in respect of the assault on his former girlfriend and the man with her, the applicant was charged with 4 offences as set out in the introduction to this judgment, being burglary, threatening to kill or cause serious harm and two counts of assault. He was tried on indictment in the Circuit Court. This was, by any reckoning, a serious assault. The applicant was convicted on a plea of guilty of burglary. He entered the house of his girlfriend or former girlfriend, he saw her in bed with a man, he went downstairs, he got a knife he went back up to the bedroom and he threatened her and the man with the knife. He then left the bedroom, ran out of the house and pushed his girlfriend to the ground. None of these could be considered to be trivial or immaterial offences. The sentence imposed reflected that reality, being 3 years with 2 years suspended. I accept the submission of the respondent that one must look at the headline sentence rather than time served.

41. The respondent has an explicit statutory entitlement under s.3(6)(g) to have regard to *"the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions)".* The applicant has failed to establish either that this evaluation must establish a propensity for future violence or that there was insufficient evidence to ground the respondent's conclusion. Accordingly, his arguments challenging her conclusions in this respect must fail.

42. In relation to proportionality, the case law of ECHR indicates a court should interfere with a decision to deport if same is manifestly disproportionate. Evidence of such

disproportionality is lacking here. It is true that the applicant has been living in Ireland for a significant period, was married for a time, and had a family. Nonetheless, that must be balanced against the nature of the conviction. Each case is fact specific. Given the nature of the applicant's convictions in respect of the violent offences he committed, as detailed above, that the applicant has failed to establish that the respondent has acted disproportionately.

43. Finally, the applicants have made some specific criticisms of the respondent's decision i.e. that the evaluation in relation to the remorse of the applicant was incorrect and that the evaluation in relation to road traffic offences was incorrect. The examination of file notes at page 19 that the applicant claims to be remorseful for his criminal behaviour but concludes that in his correspondence, the applicant in fact seeks to justify and minimise the behaviour by (a) characterising the incident as one where he was trying to calm the other parties down (b) attempting to justify entering his girlfriend's house (c) giving an utterly implausible account of the sequence of events (d) seeking to present himself as acting in self-defence and (e) seeking to blame his victims for the assault.

44. Again, the scope of my review must be borne in mind. A different reader of the letter might take a different view as to whether the applicant's approach connoted a lack of remorse or whether it could be seen as an attempt to justify his behaviour that was not necessarily inconsistent with remorse. However, it cannot be said that the material contained in the letter was not capable of being construed as a lack of remorse or that there was no material upon which the respondent could conclude there was a lack of remorse. In the circumstances, there is no basis for me to interfere with the respondent's decision in this respect.

45. In respect of the evaluation of road traffic offences, the applicants argue that it was irrational to take those offences into account when all but a failure to display a tax disc occurred in 2012 and such a failure could not be considered to be determinative of the issue of a deportation order. It should be noted that two of the road traffic offences were lack of insurance, both in 2012. The consequence of the second conviction in that respect was that the applicant was disqualified from driving for four years. It is hard to characterise an inclusion of those offences as irrational on the part of the respondent. Moreover, this criticism fails to engage with the substance of the respondent's decision which focuses on the violent offences committed by the applicant. Given that, in my view, the 2016 convictions were sufficient in and of themselves to justify a deportation, it is hard to see how a reference to road traffic offences as an additional factor could render the decision unlawful.

Employment analysis

46. The applicants have raised a complaint about the employment analysis carried out by the respondent. I do not consider these complaints well grounded. This seems to me to be a situation rather like that in *ANA*, where as a matter of fact, the basis for the conclusion that the applicant was unlikely to obtain employment was not because of the deportation decision but because of other factors. The relevant passage in the examination of file reads as follows:

> *"Mehdi Achouri states that he has skills in instrumental engineering, which are in short supply and needed by the Irish economy. He states that he has excellent prospects and is a qualified chef and electrician. He states that his degree enables him to work in automation, instrumentation, control, validation, manufacturing quality, and production in the pharmaceutical, food and*

beverage industries and in the petrochemical industry. He states that he has always worked and that he is confident in his continuing ability to find work.

Mehdi Achouri is not permitted by the Minister to reside or work or engage in business in a self-employed capacity in the State. In any event, in light of the impact that the COVID-19 pandemic has had on the economy and on employment figures, and as no information or documentation has been submitted to show that Mehdi Achouri has any specialist skills that are in deficit in this State, and taking into account his criminal convictions as set out in section 3(6)(g) below, it is reasonable to conclude that his employment prospects are limited."

47. It is true that it is stated that the applicant is not permitted by the respondent to reside or work or engage in business in a self-employed capacity. However, immediately following that it is stated that, in any event, it is reasonable to conclude his employment prospects are limited because of (a) the impact that Covid-19 has had on the economy and employment figures, (b) that no information or documentation has been submitted to show that the applicant has any specialist skills in deficit in the State and (c) his criminal convictions arising out of the offences committed in September 2016.

48. In those circumstances, I agree with the respondent that this decision falls into the category of cases identified in *ANA* i.e. where the lack of permission to work is simply noted as a fact, but it is not used to negate the statutory factor. The three factors listed after the words "in any event" that are likely to negatively impact his employment prospects makes that clear. Accordingly, the proper interpretation of the respondent's decision is that a stand-alone conclusion was reached to the effect that his employment prospects were limited, based on objective factors referable to the applicant's particular

situation and quite separate to his lack of permission to reside or work. That reasoning is capable of sustaining the respondent's decision independently. In the premises, this is not a situation like that in *Talukder*, where the sole basis for the negative conclusion on employment was the status of the applicant. Accordingly, the applicants cannot succeed on this ground.

Impact of deportation upon second and third applicants

49. In my view, the core question raised by the applicants is whether the conclusion of the respondent to deport the first applicant been reached after a proper balancing exercise whereby, on the one hand, the respondent has considered the interests of the State in deporting a person with a criminal record and, on the other hand, has considered his and in particular, his children's right to family life. That obligation is particularly acute in circumstances where his two daughters were aged 13 and 15 at the time of the making of the decision to deport the first applicant, are Irish born citizens and the first applicant was married to their mother, an Irish national and is therefore their father and guardian.

50. In *Oguekwe* the Supreme Court set out a non-exhaustive list of criteria to be considered by the Minister when deciding whether to deport the parents of a minor Irish child, essentially affirming that if the Minister was to determine that a deportation was appropriate, he or she would have to:

> *"a. consider the facts relevant to the personal rights of the citizen child protected by Article 40.3 of the Constitution if necessary by due enquiry in a fair and proper manner.*
>
> *b. identify a substantial reason which requires the deportation of a foreign national parent of an Irish born child and;*
>
> *c. make a reasonable and proportionate decision."*

51. In *OOA v Minister for Justice and Equality* [2011] IEHC 78, Clark J. observed that, before the Minister proceeds to conclude a deportation order is necessary, reasonable, and proportionate, he or she must "*afford due and proper consideration to the constitutional and Convention rights of the citizen children and to their personal circumstances, insofar as they are known to him*."

52. It must be remembered that the balancing of the rights of the child on the one hand, and the right of the State to administer an orderly immigration system on the other, is principally a task for the Minister (*O.O.A.*), and "*significant weight*" must be attached to a prima facie valid decision of the Minister in this respect (see *Okunande*). The obligation on the respondent is to consider fully the rights of the children and the impact of the deportation on those rights, and to balance that impact against the relevant policy considerations dictating deportation when making the decision. The outcome of that decision is not one that a court should generally interfere with provided there has been a full consideration of the children's rights. It is perhaps unnecessary to observe that a court is not entitled to interfere with the substantive evaluation of the Minister and quash a decision on the basis that the Court would have taken a different view of the outcome of the balancing exercise.

53. The applicant complains that the respondent carried out the exercise unlawfully, as no consideration was given to how he could maintain a relationship with his children, or the financial impact that a deportation order would have on them. In those circumstances, I must carefully consider the nature of the exercise that the respondent has carried out in her balancing of the relevant interests. To evaluate this complaint, it is necessary to identify the evidence before the respondent and consider her evaluation of same.

54. From 2008 to 2018, the applicant provided maintenance to his daughters. The payment is evidenced by Courts Accounting System records detailing consistent transfers of funds made between 4 April 2008 up to 26 April 2018, two days after he was released from prison. The applicant also provided evidence to the respondent of the loan he took out in 2017 just before he went to prison to ensure that he could continue to support his daughters. The proposal to deport was made in November 2017, some months after the applicant entered prison. Submissions were made by the applicant's representative, *inter alia*, by letter of 20 December 2017 where it was submitted that prior to 28 July 2017 he saw his daughters at least twice weekly. He was asked by letter of 22 March 2018 for further information in relation to his relationship with his children, including evidence of maintenance payments up to the present date, his participation in, and attendance at, his daughters' extra-curricular activities and the loan he took out to continue making maintenance payments. By letter of 15 May 2018, evidence was submitted of the credit agreement he entered into to pay maintenance while he was in prison, of maintenance payments made up to 26 April 2018, and of his relationship with his daughters, in the form of photos of activities with them.

55. A detailed examination of file was made on 11 May 2021. Following the examination of file decision, a recommendation of file decision of 24 June 2021 was made whereby it was recommended that a deportation order should not be made in respect of the applicant. However, that decision was reversed by a recommendation of file of 29 July 2021 which recommended that the applicant be deported. That recommendation stated, *inter alia*, that consideration was given to private and family rights under Article 8 of the ECHR.

56. On 20 August 2021, the applicant was informed that the respondent had decided to make a deportation order under s.3 of the 1999 Act. It states that having had regard to

the factors set out in s.3(6) of the 1999 Act, the Minister was satisfied that the interest of public policy, and the common good in maintaining the integrity of the asylum and immigration systems outweighed such features of the case as might tend to support the applicant being granted leave to remain in the State. That letter enclosed a deportation order.

57. Both parties agree that I must assume that the first applicant continued to make maintenance payments up to the date of the decision in 2021. There is no controversy about the fact that, should he be deported, he will no longer be able to provide for his children since he will not be able to make the kind of living in Tunisia that he is able to make in Ireland. Equally, there is no controversy about the fact that the mother of the two girls is acting as a carer for her uncle and does not appear to be in receipt of any wage and will not be able to pay for trips to the coast to Tunisia.

58. I am treating the examination of file as containing the analysis underpinning the respondent's decision, as this is the only part of the file that contains a description of the applicant's circumstances and a consideration of same. I have come to the conclusion after carefully reading the statement of file decision, which runs to some 27 pages and considers the position under s.3(6) of the 1999 Act, the position under Article 41 of the Constitution and under Article 8 of the ECHR, that the respondent has failed to engage in a sufficient consideration of the rights of the second and third applicants under the Constitution and the Convention. I have so concluded where the decision in its operative part refers in only five lines to the position of the applicants as follows:

> "*It is accepted that a decision to deport Mehdi Achouri would have a detrimental impact upon his ability to enjoy a close relationship with his children. However, Mehdi Achouri's own criminal actions have already*

restricted the ability to nurture such a relationship during his time in prison. The nature of his relationship following his release from prison is unclear."

59. The examination of file records fully the submissions of the applicant in relation to the maintenance he provided to his daughters and it is clear that the respondent was well aware of the position in this regard. However, the evaluation of that evidence contained in five lines does not disclose the requisite balancing, as it fails to identify and consider the fact that the first applicant's deportation will adversely affect the financial position of the second and third applicants. The applicant is maintaining them and has done so consistently, as evidenced by the record of maintenance payments submitted by Nasc on his behalf. Imprisonment did not affect his ability to provide for them. Their mother is in a precarious financial situation. The second and third applicants will undoubtedly be significantly worse off if their father can no longer contribute towards their maintenance. In those circumstances, there is an obligation on the respondent to at least reference the impact upon their income that the deportation of their father will occasion, and to set that against the reason requiring the deportation of their father.

60. No such analysis appears from the evaluation of file. There is no identification of the adverse financial impact upon the applicant's children of his deportation. Nor is there any balancing of the adverse financial impact upon the children as against the reasons for the applicant's deportation. I should stress that the outcome of that balancing exercise is a matter for the respondent. However, the Court is entitled to ensure the appropriate exercise has been carried out. The failure to analyse in any way the impact on the applicant's daughters of a significant loss of maintenance is such an important deficit that the balancing exercise must be considered incomplete.

61. In summary, because of the complete absence of any reference to, let alone analysis of, the financial impact of the deportation upon the applicant's daughters, I cannot be

satisfied that the respondent has discharged her duty to consider the facts relating to the personal rights of the citizen child protected by Article 40.3 of the Constitution. It is for this reason that I have decided to quash the deportation decision and order.

62. By way of observation, I note that the comment in the evaluation of file that "the nature of his relationship following his release from prison is unclear" is hard to understand given that the respondent expressly refused the first applicant's representative the opportunity for additional time to provide information on 24 April 2018. Further information had been sought from the applicant on 22 March 2018 and two extensions of time had been sought by the applicant's representatives on the basis that, while the applicant remained in prison, he could not obtain the documents sought, but that he would be released on 26 April and would be able to gather the documents sought by the respondent at that stage. On 24 April the respondent refused a further time extension. In fact, most of the information sought by the respondent was provided by the applicant's representative on 15 May 2018 and was considered by the respondent. However, the applicant was given no opportunity to submit material on his relationship with his daughters post his imprisonment. This was significant as the respondent did not make a decision until over three years later, on 20 August 2021.

63. In those circumstances, the fact that the nature of the applicant's relations with his daughters post prison is unclear must be attributed, at least in part, to the respondent's decision not to permit the applicant to make representations post 24 April 2018. If the respondent wished to consider the post prison period, it ought to have made it clear to the first applicant that it was reversing its earlier decision to refuse to extend time for further submissions and permitted him to make submissions as to the state of the relationship between him and his daughters during that time. There is an obvious unfairness in the respondent on the one hand precluding the applicant from making

further submissions in respect of the period post prison, while simultaneously adversely commenting on the lack of information in respect to the relationship post prison.

Conclusion

64. For the reasons set out above, I will quash the decision of 20 August 2021. I will hear oral submissions on any application for costs and other relief, including remittal if appropriate.

65. I propose **21 October** at **10.00am remotely** for those submissions. The parties have liberty to apply for a different date but if they wish to do so, they should agree a date in advance and provide same to the registrar.