[2019] IEHC 701

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 42 J.R.]

BETWEEN

L.A.I. (NIGERIA) AND B.J.

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of October, 2019

1. The second-named applicant arrived in the State in or around 2002 and applied for international protection. He was granted leave to remain in 2004 and Irish citizenship in 2007. He then got married on a date unknown and had a hitherto unspecified number of children, although counsel now states that his instructions were that there were four of them. He separated from his wife on an unspecified date, but apparently around 2016 to 2017. The wife and children now reside in the UK.

2. The first-named applicant is a national of Nigeria who came into the story when she arrived in Ireland on 16th September, 2016, falsely claiming to be an unaccompanied minor. On 10th October, 2016, she disclosed that she was in fact 21. Her aunt is an Irish citizen. On 9th June, 2017, her application for international protection was rejected and on 10th July, 2017, she was refused permission to remain. She appealed the protection decision to the International Protection Appeals Tribunal, and that appeal was rejected in a decision that was notified on 22nd February, 2018. On 17th July, 2018, the first-named applicant sought a review of the permission to remain refusal, and enclosed further representations, including a letter from a Mr. L.K.C., dated 22nd February, 2018, who is apparently an Irish citizen and who stated that he was in a loving relationship with the first-named applicant *"for some months now"*. The first-named applicant now claims in these proceedings to have been in a loving relationship with the second-named applicant since March or April, 2018. That naturally enough raises the question as to why the first-named applicant wrote to the Minister in July, 2018, enclosing the letter from Mr. C, stating that she was in a loving relationship with him and had been for some time. Counsel for the applicants is now saying, although it has not been specifically deposed to, that the relationship with Mr. C ended in March, 2018 but that the first-named applicant did not tell her solicitors, and they unwittingly forwarded on the letter to the Minister, unaware of the change of circumstances. That is certainly a sub-optimal situation although not the fault of the applicants' lawyers.

3. In any event, following the review, the first-named applicant was notified on 12th November, 2018 that she had been refused permission to remain. A deportation order was made on 30th November, 2018 and notified to the first-named applicant on 18th December, 2018. On 16th January, 2019, she applied for revocation of the deportation order on the grounds that in December, 2018 she had become pregnant by the second-named applicant. An undertaking that she would not be deported was sought and on 17th January, 2019 that undertaking was refused on behalf of the respondents. The

revocation application itself has yet to be determined. I am informed that her due date was 7th September, 2019.

Procedural history

4. The statement of grounds was filed on 21st January, 2019. The applicants were given liberty to move an application for an interim injunction on 22nd January, 2019. That injunction was granted until 28th January, 2019, on which date a further injunction was granted until 11th February, 2019. The applicants at that point did not move the leave application as they were awaiting an affidavit from the second-named applicant.

5. On 8th February, 2019, written legal submissions seeking leave were served on the respondents, which referred to a possible joinder of the unborn child as a potential third-named applicant. On 11th February, 2019, leave was granted along with an interlocutory injunction and the matter was adjourned ultimately to 11th March, 2019 when the issue of joining the unborn child was raised again. The case was then adjourned until 25th March, 2019 while this matter was considered and again adjourned to allow further consideration of this point to 8th April, 2019. This matter was then adjourned until 24th June, 2019, at which point the applicants withdrew the application to join the unborn child, seemingly because they thought that the respondents were opposing that. That was of course a voluntary approach on their part in the sense that the mere fact that an application is opposed does not mean that it is necessarily going to be unsuccessful.

6. The matter was then adjourned to 8th July, 2019 for a statement of opposition. Given the looming threat of mootness in the proceedings in the event of the birth of the child I was anxious to give the case a date before the first-named applicant's due date, so accordingly fixed a hearing date of 31st July, 2019 with directions for filing of opposition papers and exchange of submissions. The statement of opposition was delivered on 16th July, 2019. The case was heard on 31st July, 2019 and resumed on 4th September, 2019, on which latter date I delivered an *ex tempore* ruling granting certain relief to the applicants. I now take the opportunity to give a formal written judgment.

Application for amendment of pleadings

7. I have received helpful submissions from Mr. Michael Conlon S.C. (with Mr. Paul O'Shea B.L.) for the applicants and from Ms. Nuala Butler S.C. (with Mr. Alexander Caffrey B.L.) for the respondents. At the initial hearing date on 31st July, 2019, an application to amend the statement of grounds was made. I offered the parties a resumed hearing date in August to deal with the proposed amendment, but that did not suit counsel for the respondents, so I adjourned the matter to 4th September, 2019, when an amended statement of claim was produced. (The fact that the resumed hearing did not occur in August as a convenience to their counsel did not prevent the respondents from subsequently complaining that the applicants were delaying matters and "*gaming the system",* a complaint which perhaps gives one a flavour of the all-guns-blazing manner in which this case has been approached on behalf of the State.)

8. The proposed amendment was opposed on behalf of the respondents essentially on three grounds. Firstly, the respondents submitted in effect that the applicants should only be

allowed to make points they think of themselves, rather than ones they realised could be made having had their pleadings queried by the court. It is perhaps fair comment to say that the applicants' lawyers did not think of all of the points raised in the amended statement of grounds initially, and that the desirability or otherwise of making those points occurred to them when some of the shortcomings of their original pleadings emerged during the hearing. But that is not a reason not to allow an amendment and misunderstands the process of engagement with the court. Ms. Butler editorialised somewhat on a straight-jacketed conception of the judicial role, which she claimed I was going beyond. But that is a misconception. By asking counsel what precisely his or her real point is, teasing out its implications, and identifying whether and to what extent that point is adequately covered in the pleadings (whether in terms of the statement of grounds or opposition), the court is not encouraging people to make amendments. On the contrary, it is part of the normal debate between counsel and the court to work out what the real issues are and what is and is not covered by the pleadings. That normal debate represents the close relationship between the judiciary and advocates; and the spirit of intellectual and professional equality that should characterise their exchanges. While Ms. Butler postulated a vast gulf between the two, there should only be a short distance between judges and advocates, particularly those at the inner bar; but only in professional and intellectual terms of course – their legal and constitutional roles are very distinct. While the adversarial system is unquestionably the framework within which common law litigation operates, like anything it should not be viewed in a rigid, mechanical and literal manner. The interests of justice must be the core preoccupation for the court, which requires something beyond a totally uncompromising adversarial approach because counsel and parties are not required to prioritise such interests. The court must constantly bear in mind the principle of O. 28 r. 1 of the Rules of the Superior Courts that the *real issues* should be determined and that any question of amendments should be approached in that light of that guiding principle. That is not a deviation from the judicial role – it *is* the judicial role. Indeed active case management and demanding that parties cut through the thicket of verbiage of pleadings, documents and submissions that may be standing in the way of a just outcome, and explain simply what their point actually is, must be a core feature of the judicial landscape. The court's role is more than passive reaction to external stimuli, whether we are talking about managing the proceedings, moving them forward, identifying the real points, or streamlining the disposition of those points. Chief Judge Alfred P. Murrah put it thus*: "While the case is in the hands of the lawyers before it has been filed in court, it is their business - but after it reaches the court, it is the public's business, and it is the duty of all to see that it is moved along to final disposition"* (quoted in an explanation of the Pre-Trial Conference accompanying the uniform pre-trial order, in Alvin B. Rubin, Pre-trial Procedure, in Seminars for Newly Appointed United States District Judges Conducted by the Federal Judicial Center, 1973, 1974, and 1975, at 311 (1976), at 323, cited in A. Leo Levin and Russell R. Wheeler, "Judge Rubin and Judicial Management of the Docket", *Louisiana Law Review,* Vol. 52, Number 6, July 1992, at 1494; see also Charleton J. and Saoirse Molloy, "Case Management: Fairness for the Litigants, Justice for the Parties" *Bar Review*, Vol. 20

Issue 3, p. 59 (June, 2015) and Evan Bell, "Judicial Case Management", *Judicial Studies Institute Journal*, Vol. 2, 2009).

9. I discussed the law in relation to amendment of pleadings *in Habte v. Minster for Justice and Equality* [2019] IEHC 47 [2019] 2 JIC 0405 (Unreported, High Court, 4th February, 2019) (under appeal), and by way of postscript it is possibly worth repeating the core of that discussion here. As discussed in *B.W. v. Refugee Appeals Tribunal* [2015] IEHC 725 [2015] 11 JIC 1703 (Unreported, High Court, 17th November, 2015) (an approach to amendment upheld on appeal, *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 (Unreported, Court of Appeal, 15th November, 2017) para. 78) in any application to amend proceedings, it is clear that the interests of justice and the protection of the applicant's right of access to the courts are of paramount importance, as is the need for the court to ensure that the real issues in dispute are determined (see *Keegan v. Garda Siochána Ombudsman Commission* [2012] 2 I.R. 580 [2012] IESC 29 *per* Fennelly J. at paras. 29 and 47 and *O'Neill v. Appelbe* [2014] IESC 31 (Unreported, Supreme Court, 10th April, 2014) *per* O'Donnell J. at para. 14). In addition, the right of access to the court is supplemented by the right to an effective remedy pursuant to art. 13 of the European Convention on Human Rights and art. 47 of the Charter of Fundamental Rights of the European Union.

10. The need to ensure that the real issues in the case were addressed, when considering an application to amend, and also that some prejudice could be dealt with by costs orders, was also stressed by Geoghegan J*. in Croke v. Waterford Crystal Ltd*. [2005] 2 I.R. 383, citing the view of Lynch J. in *D.P.P. v Corbett* [1992] I.L.R.M. 674 at 678 that "*the day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party"*.

11. *B.W*. relied on the fact that in *Keegan* the Supreme Court gave leave to amend judicial review proceedings to include a legal point that was simply "*overlooked"* by the applicant's lawyers prior to the application for the amendment (para. 39). The amendment was *"an entirely new ground in law*" which *"substantively enlarge[d]"* the application (para. 38). The amendment was sought well outside the time period for application for judicial review. Nonetheless, the Court held that *"[t]he appellant should not, without good reason, be deprived of the right to argue a very significant point of law"* (para. 46).

12. A similar approach was taken by Posner J. *in Reed v. Illinois* (Case 14-1749, U.S. Court of Appeals for the 7th Circuit, 30th October, 2015) at p. 9: *"What is unfair in the present context is to deny, without a good reason, a party's right to press a potentially winning argument" (see W.T. v. Minister for Justice and Equality* [2016] IEHC 108 (Unreported, High Court, 15th February, 2016) at para. 23 (under appeal)).

13. O'Donnell J. in *O'Neill* at para. 14 emphasised that *"The High Court, and this Court on appeal, has a very extensive power of amendment where it is necessary to permit the real issues in dispute to be determined.*" The Court of Appeal in *B.W*. expressly approved the conceptualisation that on the basis of *Keegan,* there are three elements that an

applicant should address. Firstly, that the point should be arguable (para. 38), secondly, that there be an "*explanation*" for the point not having been pleaded (para. 39), and thirdly, that the other party should not be unfairly prejudiced (see para. 32), which, given the court's power to remedy any unfairness, would in practice amount to a test that he or she should not be irremediably prejudiced.

14. It is a matter entirely for the parties as to what points they make or don't make. The court's role in its respectful dialogue with counsel is to test matters out but not to make decisions about what points should be made. So any exchange with the court, whether in this case or any case, should not be viewed as encouragement to make any particular point: that is in the exclusive and non-delegable sphere of the parties themselves. (There may be unusual exceptions but they don't arise here.) For that reason, while I would not in any event encourage a slavishly literal approach to adversarialism, this case did not deviate from the adversary process because it was in the end a matter for the applicants alone to decide what points to advance. Ms. Butler's complaint as to what a bystander would think has to be judged in the context that the hypothetical bystander, if he or she wants to be taken seriously, must be an independent, balanced and reasonable person in full possession of all relevant information. Robust exchanges with counsel and a teasing out of the implications of the case would be understood as legitimate, necessary and appropriate by any such independent, balanced, reasonable and well-informed person.

15. Ms. Butler coupled that complaint with an equally strident plea for "Respondents' Rights". Her clients were entitled to know the case and so forth, a proposition which is not in dispute. The problem is not so much that principle, but what is to happen if it is not complied with. In such a situation, the interests of justice must come into central focus, and the question is whether irremediable prejudice is thereby caused or whether the respondents can in fact deal with the case as proposed to be amended (*see B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 [2018] 2 I.L.R.M. 56). Respondents who oppose amendments will *always* claim prejudice, but here it was a fairly weak claim, not least because Ms. Butler conceded that her existing statement of opposition adequately traversed the new complaints.

16. The second objection was that no affidavit had been provided to ground the amendment, especially given the context of a lack of detail and inconsistency regarding the applicant's family circumstances. There is, in fairness, some merit to the complaint of lack of detail and inconsistency regarding the applicant's family circumstances and the lack of a supporting affidavit, but that is not necessarily fatal to the point sought to be made on behalf of the applicant because it is largely a legal point arising out of facts which are deposed to in at least broad terms.

17. The third objection began as the misconceived hyper-technical complaint that amending the statement of grounds is separate to whether leave should be granted on the grounds as so amended. However, that misunderstands the process. Allowing an amendment after the grant of leave amounts to giving leave to make that point; otherwise it would have no purpose whatsoever. There is no further stage, having allowed an amendment,

of then pointlessly giving leave to pursue that amendment. Arguability is built in as part of the test for an amendment, as set out by the Court of Appeal in *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 [2018] 2 I.L.R.M. 56.

18. Ms. Butler then moved on to argue that the arguability test had not been satisfied in respect of the amendments, but arguability is not an enormously high test, all things considered.

19. The criteria endorsed by the Court of Appeal in *B.W.,* namely arguability, lack of irremediable prejudice, and explanation (the explanation being oversight, as in *Keegan v. Garda Siochána Ombudsman Commission* [2012] IESC 29 [2012] 2 I.R. 570) were satisfied in this case, so I gave liberty to the applicants to make the amendment sought.

Whether the application should be struck out for failure to comply with High Court Practice Direction HC81

20. Ms. Butler applied to strike out the proceedings on the basis of failure to comply with practice direction HC81, the non-compliance being the failure of the second-named applicant to set out his immigration history and his failure to attend court in person. The practice direction was in its early stages when the leave application was made, and in granting leave I allowed a certain latitude to the applicants. In those circumstances it does not seem right to revisit that, especially when no particular objection was raised by the respondent in advance of the oral hearing. The current procedure is that if the practice direction is not being complied with then the leave application is adjourned at the call-over to be heard on notice to the respondents. If the situation here occurred now I would have formally required the leave application to be on notice, and indeed at the time I did require the injunction application to be on notice. The letter to the State serving the papers dated 22nd January, 2019 expressly puts the respondents on notice of the injunction application. But either way, if the State had a problem they should have raised it at an earlier stage than on the day of the hearing. It is also worth mentioning that the second-named applicant has now in fact taken some steps to disclose his immigration history, although having said that there probably is still something to Ms. Butler's complaint that the second-named applicant has been "*high-handed*" towards the court.

21. As regards the second-named applicant's failure to attend court on 31st July, 2019, the applicant's presence at the hearing is meant to be an instrument to facilitate the respondents if they wish to challenge the affidavit of verification. The respondents did not put the applicants on notice of their wish for the second-named applicant to attend; and even if he had been here on the 31st July, 2019, the respondents have not asserted that they wanted to cross-examine him. So there did not appear to be much basis to strike out the proceedings simply because he did not attend. There has got to be some onus on the State to demonstrate that some injustice is thereby occasioned to them. It also may be relevant that the applicants' solicitor only told the second-named applicant of the hearing date at a fairly late stage, and indeed that the first-named applicant then did attend at the resumed hearing on 4th September, 2019. On the basis of the foregoing, it does not appear to be appropriate to strike out the proceedings *in limine*.

Claim for injunction or declaration regarding breach of rights

22. The first claim arises in connection with reliefs 2, 8 and 9. The grant of an injunction depends on showing a breach or a prospective breach of rights in some way. As regards the declaration of breach of rights, Mr. Conlon concedes that that is essentially the same as the disproportionality argument; and all things considered, the complaint under this heading is best considered at a later stage in the judgment under the heading of disproportionality.

Claim regarding alleged duty to give an undertaking or to give reasons for not giving an undertaking

23. The second claim relates to the request for an undertaking, and arises in connection with reliefs 1 and 5. The fundamental misconception of the pleadings in this regard is that, save perhaps in exceptional circumstances, no potential litigant is *obliged* to give an undertaking. Failure to do so may be relevant to costs but it is not a legal obligation, leaving aside what may be the inevitable spectre of truly exceptional circumstances, a spectre that is hard to exorcise from any given area of law. The suggestion that there is a legal obligation to give an undertaking is entirely novel; and in the absence of such an obligation there cannot be an obligation to consider a request for an undertaking in any particular manner or to give reasons for not providing an undertaking. To hold otherwise would be to create a free-standing system for leave to remain independently of the statutory process. The mere fact that an undertaking has been refused does not breach any rights of the applicants in and of itself. Mr. Conlon submitted that refusal deprived the applicant of a remedy, but that is not so. The applicants can seek any appropriate remedies from the court, and indeed are doing so.

Claim regarding requirement to consider all relevant matters when considering revocation or deciding on an undertaking

24. The claim regarding the duty to consider all relevant matters arises under reliefs 3 and 4. As regards the undertaking, as I have noted, absent exceptional circumstances, a litigant's decision or prospective litigant's decision to give or not to give an undertaking is itself a litigation decision and thus is not justiciable, so there cannot be a legally enforceable obligation to consider or not consider any particular matter.

25. As regards the question of revocation of the deportation order, Ms. Butler expressly accepts that the Minister has to consider all relevant prospective matters insofar as they relate to prospective constitutional rights. Therefore that aspect is not in dispute and does not require my involvement. However, her submission did not extend to accepting that the Minister had to consider prospective rights under the ECHR or EU law, so that by contrast *is* an issue in dispute. But not all aspects of that dispute are actually raised on the pleadings.

26. As regards the ECHR, while submissions were made in relation to it, it is not actually pleaded, so it would not be appropriate for me to make any findings in relation to that element of Mr. Conlon's argument. Nonetheless, it is probably worth mentioning that, in a combative sequel to a combative submission, Ms. Butler suggested that I had misrepresented her submission when I gave the initial *ex tempore* ruling in this case. She characterised me as having said that the Minister was not going to consider the

ECHR. However that was incorrect. I did not say that Ms. Butler had stated that the Minister is not going to consider the ECHR or indeed is not going to consider anything specifically. The issue of the ECHR arose in the context of what the Minister is constitutionally and legally *obliged* to consider, and my understanding of her argument was that it was accepted that the Minister was constitutionally and legally obliged to consider the prospective constitutional rights of the applicants, but that was as far as it went. That does not of course preclude the Minister from voluntarily deciding to consider other matters, such as prospective ECHR rights and so forth, but the question was whether there was an obligation to do so. Ms. Butler accompanied this mistaken complaint with a vigorous demand for the DAR of the full two days of the hearing, which I perhaps mistakenly granted, although I would respectfully and deferentially encourage whatever appellate court she avails of to read the entire transcript rather than whatever fragments of it are selected by the State. I also emphasised to Ms. Butler in making the DAR available that the present written version of the judgment would be the definitive one. Otherwise *ex tempore* rulings would be severely if not fatally disincentivised if they could not be amended or clarified in a subsequent written version (as the law clearly allows – see *Walsh v. Walsh (No. 1)* [2017] IEHC 181 [2017] 2 JIC 0207 (Unreported, High Court, 2nd February, 2017) at paras. 2 to 16 and the large volume of authorities and material there cited) simply because some party, for its own tactical reasons, demands the DAR on the spot. Certainly in the context of criminal appeals there has been a practice that the transcript would only be released after filing of the notice of appeal, to avoid "trawling" the transcript for appeal points, and on reflection I think I may have been too accommodating in agreeing to allow access to the DAR of the entire hearing before any appeal by the respondents was actually launched. Let an appealing party pin its colours to the mast first would seem to be by far the better practice. No doubt any appellate court can give due consideration to the sequence of events involved in the event that some sort of querulous micro-critique of the hearing is launched in another forum.

27. Turning then to the one matter under this heading that is both in dispute and actually raised on the pleadings, namely whether the Minister is required to consider prospective rights under EU law in the context of an application to revoke a deportation order, Ms. Butler submits there is no EU authority for the proposition that there are any prospective rights of the unborn child. But that is missing the point. The case is not about whether there is any prospective right of the unborn child under EU law, and indeed insofar as the unborn child is not a party to the proceedings, the case is not about the rights of the unborn child at all.

28. The case is really about Irish administrative law, in particular the obligation to take into account all relevant matters and not to act in a disproportionate way. Those are not, in this context, EU law principles; they are principles of Irish law. The application of those principles is not dependent on whether EU law recognises any prospective rights for the unborn child. That question is simply irrelevant. There is nothing to refer to the CJEU, even if I had been asked to do so, which I wasn't. The clear logic of the order of the Supreme Court *in I.R.M. v. Minister for Justice and Equality* [2018] IESC 14 [2018] 1 I.R. 417 is that the prospective position generally of the first-named applicant that arises after

the birth of her child should be considered by the Minister in the context of an application to revoke the deportation order that is made before such birth. That includes any prospective entitlement to assert rights under EU law (or, for what it's worth, otherwise).

29. Ms. Butler's other proposed answer to the case is that the first-named applicant does not have EU law rights because she is a non-EU citizen. Maybe so, but she does have a prospective legal position which is derivative on the rights of a person who was at the time of the revocation application shortly to be born. It is *that* prospective legal position that the Minister must consider. The short answer to Ms. Butler's complaint that the first-named applicant has no substantive rights that are engaged by the giving effect to of an unchallenged deportation order is that the first-named applicant has a right of fairness of procedure in administrative law, which involves the right to have relevant considerations, including her prospective position, taken into account.

30. The complete answer to Ms. Butler's further complaint that the court is being asked to presume that the Minister will decide the application unlawfully is that Ms. Butler has firmly set out her position that the Minister is *not* obliged to consider the prospective position of the first-named applicant under EU law in general or Case C-34/09 *Zambrano* in particular. In that context, to grant a declaration in this regard *does* serve a function and *does* address an issue that is actually in dispute between the parties and is properly raised on the pleadings, and it therefore seems appropriate and necessary as well as just and convenient to do so. That is not presuming an illegality, it is giving the only possible helpful and sensible response to the Minister's very clear and definite statement of his understanding of the limits of his legal obligations. Apart from being an abdication of the judicial function, it would misleadingly endorse the correctness of that definite statement if I were to refuse to clarify the position.

Claim that deportation would be substantively unlawful because it is too close to the due date

31. The applicants submit that deportation now would be too close to the due date and would be contrary to human dignity. This arises under reliefs 7 and 8.

32. While clearly the State was not particularly enthused about deporting the first-named applicant in close proximity to the birth, and while I had the distinct impression that that was not in fact going to happen, for me to declare the intention to deport her to be unlawful would require some positive evidence regarding the risk to her dignity or her medical condition in terms of the particular applicant and her particular medical condition. There was in this case no such evidence. It feels unduly legislative to say that an applicant cannot be deported for a particular period, specified by a judge, before or after her due date. One hoped, naturally, that all appropriate humane approaches would be taken, but if an applicant wishes to assert a legal right involving a claim to a mandatory order as a consequence, some sort of personalised medical evidence is a minimum requirement. That was lacking in the present case.

Claim that it would be disproportionate to deport the first-named applicant prior to revocation because she would have to be brought back shortly thereafter

33. Under the heading of disproportionality, an argument was made in relation to the potential breach of the rights of the unborn child. As the unborn child is not a party to the proceedings it is not open to the applicants to assert rights on behalf of that child. The Supreme Court in *I.R.M. v. Minister for Justice and Equality* decided that the unborn child has no inherent rights under the Constitution, so it would be an understatement to say that any argument predicated on constitutional (as opposed to legal) rights is off to an inauspicious start. At the same time, I made the point in the trial level ruling in that case that statute and common law have for centuries across the common law world envisaged litigation by a child *en ventre sa mère* in certain circumstances, and I do not read that particular aspect of my judgment in *I.R.M.* as having been fundamentally differed from in the Supreme Court, where the focus was on the absence of any wider *constitutional* rights for the unborn child. The applicants did not seek to have the unborn child included as an applicant at the leave stage, and nor did they pursue their application that the unborn child should be added at a later stage, so therefore no such alleged legal rights can be argued for. Thus the focus in the present proceedings has to be on the rights of the mother.

34. In that regard, an argument is made drawing on *B.S. (India) v. Minister for Justice and Equality* [2019] IEHC 367 [2019] 5 JIC 1011 (Unreported, High Court, 10th May, 2019) to the effect that execution of the deportation order prior to a determination on the application for revocation would be unlawful in that it would be disproportionate. On the material before the court in the very fact-specific circumstances of the present case, the chances of the Minister being required to readmit the first-named applicant to the State, if deported before the birth of the child, seemed relatively high because the child would have a right to come back as an Irish citizen. That would be likely to require the first-named applicant's readmission to the State under the *Zambrano* doctrine.

35. On that basis it appears appropriate to restrain the deportation of the first-named applicant unless and until that determination in the prospective *Zambrano* application is made, conditional on a *Zambrano* application being made promptly. Having heard counsel I allowed one month from the birth of the child for the first-named applicant's solicitors to make that application.

36. Finally, for the avoidance of doubt given the sheer level of misunderstanding that seems to break out whenever the term "*unborn"* is mentioned in litigation, it is unfortunately necessary to repeat that this case is *not* about the rights of the unborn child. It decides only in relation to the rights of the mother to fairness of procedure in terms of two issues; firstly, the right to have consideration given to all relevant matters and secondly, the right to a decision that does not breach the principle of proportionality.

Order

37. Accordingly, the order made on 4th September, 2019 was:

    (i). a declaration that, in considering any application for revocation of the deportation order, the Minister is obliged to consider *inter alia* the prospective EU law position of the first-named applicant, and;

(ii). an order restraining the enforcement of the deportation order against the first-named applicant until the determination of any application under the CJEU judgment in Case C-34/09 *Zambrano* that is made within one month of the birth of her child.