Judgments Of the Supreme Court

Judgment

Title: M (Immigration - Rights of Unborn) -v- Minister for Justice and Equality & ors

Neutral Citation: [2018] IESC 14

Supreme Court Record Number: 61/17

High Court Record Number: 2015 436 JR

Date of Delivery: 07/03/2018

Court: Supreme Court

Composition of Court: Clarke C.J., O'Donnell Donal J., McKechnie J., MacMenamin J., Dunne J., O'Malley Iseult J., Finlay Geoghegan J.

Judgment by: The Court

Status: Approved

Result: Appeal dismissed

Judgments by	Link to Judgment	Concurring
The Court	Link	O'Donnell Donal J., McKechnie J., MacMenamin J., Dunne J., O'Malley Iseult J., Finlay Geoghegan J.

Statement

THE SUPREME COURT

Record No. 2017 No. 61

Clarke C. J.
O'Donnell J.
McKechnie J.
MacMenamin J.
Dunne J.
O'Malley J.
Finlay Geoghegan J.

Between/

I.R.M, S.J.R. and S.O.M. (A minor suing by her Mother and Next Friend S.J.R.)

Applicants/Respondents

and

The Minister for Justice and Equality, Ireland and the Attorney General
Respondents/Appellants

Judgment of the Court delivered by the Chief Justice on the 7th March, 2018

1. Introduction

1.1 The issues with which this judgment is concerned have evolved very significantly since this case started. The legal context in which these proceedings were commenced arose from a deportation order made against the first named applicant/respondent ("Mr. M.") in 2008. In 2015, an application was made to the first named respondent/appellant ("the Minister") seeking to revoke that deportation order. The basis on which it was asserted that there was a sufficient change in circumstances to warrant the Minister taking a different view on deportation stemmed from the relationship between Mr. M. and the second named applicant/respondent ("Ms. R.") and in particular the fact that she and Mr. M. were due to have a child. The child concerned has since been born and is the third named applicant/respondent ("the third respondent"). The applicants/respondents will for convenience collectively be referred to as the respondents.

1.2 The Minister in fact made no decision regarding the application to revoke. In the absence of an undertaking on the part of the Minister not to deport Mr. M. pending the outcome of the revocation application, Mr. M. sought an injunction preventing his deportation, which injunction was granted by the High Court (Mac Eochaidh J.) (*I.R.M. and anor v. Minister for Justice and Equality and ors (No. 1*) [2015] IEHC 873). A contemporaneous application for leave to apply for judicial review was adjourned to be considered at a later date. It is the subsequent decision of the High Court, and the declarations made after a so-called "telescoped" hearing, which is the subject of this appeal. The case is, therefore, an immigration case. However, having regard to the approach of the trial judge, wider issues concerning the constitutional status of the unborn have come into particular focus. The High Court (Humphreys J.) (*I.R.M. and ors v. Minister for Justice and Equality and ors (No. 2*) [2016] IEHC 478) importantly made a declaration that the Minister was obliged to consider, as part of the application to revoke, the prospective position of the third respondent. An appeal was brought to the Court of Appeal raising a number of grounds. However, placing reliance on s. 9 of the Court of Appeal Act 2014, the Minister and the other respondents/appellants (collectively "the State") sought leave to bring a leapfrog appeal to this Court in respect of some of the broader issues which had been the subject of the judgment of Humphreys J. in the High Court. It was said that those issues were of particular importance and urgency. Leave was granted on a basis which will shortly be described which involved some but not all of the grounds of appeal which were put before the Court of Appeal.

1.3 However, in the course of case management of this appeal, it was indicated on behalf of the State that it was not intended to pursue any grounds of appeal other than those in respect of which leave to appeal had been granted. Thus, the issues which fall for determination by this Court are confined to the issues in respect of which this Court granted leave. In that context, it is appropriate to set out a very brief account of the proceedings and the important questions which they raise.

2. The Proceedings

2.1 The facts and the procedural history together with the judgment of the High Court will be set out and analysed in more detail later in this judgment. However,

in simple terms this case involves a contention on the part of Mr. M. concerning the factors or considerations which the Minister was required to take into account in deciding on the application which he had made seeking the revocation of the deportation order which had previously been made against him.

2.2 In the course of the proceedings before the High Court, a wide range of issues relating to the constitutional status of the third named respondent came into sharp focus. She was unborn at the time of the application which Mr. M. made to revoke the relevant deportation order and at the time of the commencement of the proceedings. She was later joined as a party when born. The trial judge made a range of significant findings as to the constitutional status of the unborn child.

2.3 It will be necessary to address in greater detail the issues which have thereby arisen for determination by this Court on this appeal. However in summary form they are the following:-

> (i) Whether the Minister was required, as a matter of law, to have regard to the position of the third respondent while unborn as a factor to be taken into account in the deportation revocation application under consideration;
>
> (ii) whether, in addition, the undoubted constitutional rights which the third respondent would enjoy as an Irish born citizen child when born were also matters which required to be taken into account;
>
> (iii) whether, as the trial judge in effect determined, the unborn enjoy a wide range of constitutional and other rights independent of the right to life guaranteed by Article 40.3.3 of the Constitution as inserted by the Eighth Amendment;
>
> (iv) whether, as again the trial judge determined, the term "any children" to be found in Article 42A of the Constitution includes the unborn; and
>
> (v) whether it is necessary, as found by the trial judge, to reassess the constitutional rights of families not based on marriage.

2.4 While many of these matters were dealt with in a relatively brief way in the judgment of the trial judge, they do undoubtedly raise issues of very particular importance which have the potential to affect rights and obligations going well beyond the scope of these proceedings and, indeed, having potential impact well beyond the scope of immigration law. It is for that reason necessary to consider the findings of the High Court in a careful, detailed but robust manner. This is both for the purposes of examining whether it is necessary for this Court to reach its own conclusions on some or all of those issues in order to determine these proceedings, but also, where it is so necessary, to determine the proper interpretation of the constitutional and other rights relied on and their implications for the proper resolution of this case.

2.5 This judgment is a judgment of the Court. Each of the members of the Court who sat on this appeal has contributed to the content of this judgment.

2.6 It is next necessary to turn to the determination by reference to which leave to appeal to this Court was granted.

3. The Leave to Appeal

3.1 As noted above, the State applied to this Court for leapfrog leave. In its determination (*I.R.M. and S.J.R. and S.O.M. v. Minister for Justice and Equality & anor* [2017] IESCDET 147), this Court noted the unusual procedural history of this case. Not least, the Court noted that the case was in fact moot even when it was before the High Court. The respondents sought to resist the application for leave to appeal on grounds of mootness. However, this Court stated in that regard that:-

> "… it is plain that the case does involve matters of general public importance, and therefore meets the general threshold for appeal to this Court. Furthermore, the issue of law is one which is unlikely to appear significantly different after a determination of the Court of Appeal. There is also clear advantage in seeking to address those issues sooner rather than later, given the systemic importance of the matters debated, not just in the field of immigration law, but more widely. While there was clear mootness in the case at the level of the High Court, the fact that the case proceeded, now means that the law is as stated in the High Court, and it appears inappropriate to now consider refusing leave to appeal to this Court on grounds of mootness, which was explicitly addressed in the High Court, and where the case proceeded effectively by agreement."

3.2 The grounds on which the State sought leave to appeal to this Court might be divided into, first, broad substantive issues, and second, those grounds relating to alleged errors on the part of the trial judge in relation to matters of procedure.

3.3 The Court concluded that the procedural grounds raised did not meet the constitutional threshold for leave to appeal, and that, while in other circumstances it might be deemed necessary to grant leave in relation to such matters in the interests of justice, in the context of this unusual application the Court did not want to risk the possibility that the consideration of such matters could lead to the issues of general public importance not being addressed. Therefore, the Court concluded that leave to appeal should be granted in relation only to the following grounds:-

> "(a)The learned Trial Judge erred in law and in fact in his determination of the matters that the Appellant Minister is obliged to take into account when considering representations involving an unborn made under s. 3 (11) of the Immigration Act 1999 (as amended) seeking to revoke a deportation order in force against a non-national prospective father of a potential Irish citizen child unborn at the date of such consideration.
>
> (b) Without prejudice to the forgoing paragraph, the learned Trial Judge erred in finding that when the Appellant Minister is presented with an application based on the prospective parentage of an Irish child who is unborn at the date of the making of the application, the Appellant Minister must address the application on the basis that appropriate consideration should be given to rights, or interests, if same are raised in the application, which that child will acquire on birth and will probably enjoy into the future in the event of being born, insofar as such prospective rights are relevant to the deportation issue.
>
> (c) The learned Trial Judge erred in law and in fact in failing to take into account and/or erroneously considering/applying the express time period under consideration by the Court, being 21 May 2015 to 21 August 2015. The Second Named Applicant's baby, subsequently joined to the proceedings as the Third Named Applicant, was born on 22 August 2015. It was expressly agreed for the purposes of further amendment of the Statement of Grounds that the period under consideration by the Court ceased on the day before the Third Named Applicant was born.
>
> (d) The learned Trial Judge erred in law and in fact in his consideration of the justiciable rights of the unborn under the Constitution of Ireland and in finding that an unborn enjoys significant statutory, common law and constitutional rights which are effective, rather than prospective and/or that such rights are justiciable before birth and/or that such rights extend beyond rights deriving under Art 40.3.3.

(e) The Learned Trial Judge erred in law in his application and interpretation of Article 42A of the Constitution and in particular, without prejudice to the generality of the foregoing, its application to the unborn.

(f) Without prejudice to the forgoing paragraph, the Learned Judge erred in law in finding that the unborn is a child for the purposes of Art 42A of the Constitution, and in finding that the meaning of "all children" in that Article extends the protection of the Article to children before and after birth.

(g) The Learned Trial Judge erred in law in finding that Art 40.3.3 of the Constitution does not state the legal position of the unborn on an exclusive basis and in finding that the expression "unborn" found in that Article, must be interpreted as meaning and read as a reference to a child so that for the purposes of Art 40.3.3 an unborn equates to a child.

(h) The learned Trial Judge erred in law and in fact in holding that the 28th, 31st and 34th amendment to the constitution together with societal changes, warrant recognition that members of non-marital unions and non marital parents of both sexes enjoy inherent constitutional rights in relation to their children, and to each other, on a wider basis than previously recognised under the constitution."

3.4 As already noted, all of the other grounds which were before the Court of Appeal have been abandoned. It follows that it is only the issues thus identified which need to be considered by this Court. As will be seen, those questions are largely ones of principle deriving from the Constitution and are not, to any great extent, dependent on the facts of this case. However, by way of background, it is appropriate to set out a brief account of the relevant facts.

4. The Facts

4.1 Mr. M. is a Nigerian national who arrived in the State in December 2007. He applied for asylum, which application was refused. He appealed this decision to the Refugee Appeals Tribunal. On the 30th June 2008, he was notified that his appeal had been refused. He further applied for leave to remain on the 9th September 2008 and for subsidiary protection on the 24th November 2008. Both of these applications were also refused.

4.2 On the 30th October 2008, a deportation order was made against Mr. M. This order has not been revoked. Mr. M. remained in the State and, it would appear, worked unlawfully.

4.3 On the 12th August 2009, Mr. M. married a Czech national. He subsequently applied for residency in the State on the basis of his marriage to an EU national. This application was rejected on the 4th November 2010 on the basis of what was found to be a lack of necessary evidence.

4.4 Mr. M. entered into a relationship with a now-naturalised Congolese national in 2014. This relationship resulted in the birth of a child in Ireland on the 10th July 2015. Mr. M. represented himself to the Department of Social Protection at that time as living with the person concerned.

4.5 From September 2014, Mr. M. began a relationship with Ms. R. who is an Irish national. They are not married. As already noted, the third respondent is the child of Mr. M. and Ms. R., and was born on the 22nd August 2015.

4.6 Earlier, on the 21st May 2015, Mr. M. made an application under s. 3(11) of the Immigration Act 1999 ("Section 3(11)") seeking the revocation of the deportation order against him.

4.7 Following the birth of the third respondent in August 2015, Mr. M. applied to the Minister on the 17th December 2015 for residency, on the basis of parentage of an Irish citizen child. Residency was granted on that basis on the 10th August

2017. The application for residency superseded the application under Section 3(11), which was withdrawn. It is on that basis that it was accepted that these proceedings had become moot by the time of the trial in the High Court.

4.8 This case came before the High Court in the context of an application for leave to seek judicial review coupled with an application for an injunction restraining Mr. M's deportation. On the 1st August 2015, Mac Eochaidh J. delivered an ex tempore judgment granting an interlocutory injunction restraining deportation until further order of the Court. The application for leave was adjourned to be considered at a later date and was subsequently considered by the Humphreys J. As also already noted, the third respondent was then born on the 22nd August 2015 and later joined to these proceedings. No attempt had been made to join the third respondent prior to birth, although Mac Eochaidh J. did note in his judgment that he would have considered such an application had it been deemed necessary.

4.9 The starting point for a consideration of the issues which are before this Court requires an analysis of the judgment of the High Court on the substantive issues.

5. The High Court Decision

5.1 The High Court (Humphreys J.) delivered its judgment on the 29th July 2016. In his decision, the trial judge noted that the case had seemed to be an appropriate instance for the Court to exercise its discretion to telescope the application for leave with the substantive hearing and the parties ultimately agreed to this course of action. Therefore, Humphreys J. made an order under the Court's jurisdiction, given by O. 84, r. 24(2) of the Rules of the Superior Courts, to the effect that the application for leave be treated as the hearing of the action.

5.2 Humphreys J. also noted in his judgment that any question concerning the legal position of the unborn was strictly speaking moot by the time it fell for the High Court to reach a decision because the third respondent had been born. However, he stated that the parties appeared willing to treat the proceedings as a test case in relation to the issues. Furthermore, it was noted that there are necessary temporal limitations regarding the rights of the unborn. In this context, Humphreys J. concluded as follows:-

> "A court can proceed to determine an issue that is strictly moot if the interests of justice so require. In this case there are two factors so requiring; firstly the particular suitability of issues arising from pregnancy as a basis to depart from the normal mootness doctrine, and secondly the consent of the parties."

5.3 The trial judge then identified the issues which he considered arose from the proceedings and the pleadings of the parties in the following terms:-

> "(i) [W]hether the first named applicant is entitled to notice of the date and time of his intended deportation (a point which is not moot in any event);
>
> (ii) whether it would have been unlawful for the Minister to deport the first named applicant without first deciding on the s. 3(11) application; and
>
> (iii) whether, when the Minister came to consider the s. 3(11) application prior to the birth of the third named applicant, she could limit herself to a consideration of the family rights of the applicants by reference to the right to life of the unborn only or whether she was obliged to consider the substantive *prospective* family rights as between all of the applicants that would arise on the birth of the third named applicant."

5.4 Point (i) is not relevant to the issues before this Court but it should be noted that it was rejected by the High Court.

5.5 Likewise point (ii) is not relevant to the issues before this Court as Humphreys J. held that it was clear from the relevant authorities that such an application does

not have the effect of suspending the deportation order concerned and that therefore, "It follows irresistibly from that conclusion that the Minister is not obliged as a matter of law to determine a s. 3(11) application prior to effecting deportation."

5.6 Humphreys J. then turned to issue (iii). In addressing this issue, the trial judge set out the positions adopted by the parties, being that the Minister considered that, where an individual was the parent of an unborn, the only rights of that unborn that should be considered was the right to be born. On the other hand, the respondents contended that the Minister had an obligation to consider a broader range of rights of an unborn potential Irish citizen, including future rights, in the context of a deportation order.

5.7 Humphreys J.'s approach to addressing the question of the matters which the Minister must take into account when considering a Section 3(11) application was to first consider the broader question of what must be taken into account in any such application before turning to the application of that test in the context of the prospective birth of an applicant's child. Humphreys J. then undertook a review of the authorities in this area at paras. 45 to 49 of his judgment and concluded as follows at paragraph 50:-

> "In my view it follows from the caselaw I have referred to that the matters which the Minister must consider in the context of a s. 3(11) application are the foregoing:
>
> (i) any representations by the applicant; and
>
> (ii) any change of circumstances since the original decision which engages a legal provision which would have the effect of rendering the deportation unlawful by reason of an actual or prospective breach of rights. Such unlawfulness could arise under one of the following headings:-
>
> (a) a change in the legal status of the person so as to deprive the Minister of jurisdiction to effect deportation (for example, the acquisition of EU citizenship or other EU rights);
>
> (b) an actual or prospective threat to the life of freedom of the person, either on Convention grounds under s. 5 of the Refugee Act 1996 or in a manner that would infringe arts. 2 or 5 of the ECHR;
>
> (c) an actual or prospective risk of torture or inhuman or degrading treatment under to s. 4 of the Criminal Justice (United Nations Convention Against Torture) Act 2000 and arts. 2 and 3 of the ECHR;
>
> (d) any other actual or prospective breach of the rights (whether legal, constitutional, EU or ECHR) of the applicant or another person that would arise if the deportation was effected."

5.8 The trial judge went on to note that the prohibition on *refoulement* is forward looking under the relevant legislative provisions and, therefore, that test considers prospective risks. On that basis he considered that there is no reason why such a forward looking approach to rights should not be applied to the prospective position of an unborn.

5.9 Humphreys J. then considered whether it would be a breach of the rights of the respondents to deport a prospective parent so that the mother would not have her partner present for the birth. He stated:-

> "In my view there is no basis to elevate the desirability of having one's partner present for the birth into a constitutional right that can be asserted in the deportation context."

5.10 The next issue which the trial judge considered was phrased as follows:

> "Is the Minister obliged to consider the prospective family rights of the parties including the prospective rights of a child who is unborn at the time of the making of a s. 3(11) application?"

It is, in substance, the findings of the trial judge in relation to this question which lie at the heart of the issues which arise on this appeal.

5.11 Humphreys J. began his consideration of this question by noting that the Minister's position, being that the only relevant right of the unborn to be considered was the right to life, appeared to derive from Article 40.3.3 of the Constitution. The trial judge stated that this constitutional provision was adopted following a number of what he considered to be judicial decisions recognising that certain rights of the unborn are protected by Article 40.3 (for example, *G. v. An Bord Uchtála* [1980] I.R. 32). He rejected the contention that the introduction of Article 40.3.3 was intended to sweep away these preceding decisions and to represent the entirety of the rights of the unborn. In this regard, the trial judge differed from Cooke J.'s suggestion in *Ugbelase v. Minister for Justice, Equality and Law Reform* [2010] 4 I.R. 233 that Article 40.3.3 represented a statement of the rights of the unborn "on an exclusive basis" and expressed the view that the Article itself recognised other unenumerated rights such as the right to travel in the case of the mother.

5.12 Humphreys J. continued by stating:

> "In addition to these rights, other significant rights of the unborn child are recognised, acknowledged or created by common law or statute, in turn reflecting inherent natural and constitutional rights of the unborn which are implied by the constitutional order."

5.13 At paras. 58 to 74 of his judgment, the trial judge considered in detail the various contexts in which such rights might be said to be recognised including succession to property and dealing with property on behalf of the unborn (paras. 60 to 62), tortious liability for injuries which occur while the unborn is in the womb (paras. 64 to 67) and the right to litigate on behalf of the unborn (paragraphs 71 to 74).

5.14 Humphreys J. then referred to the judgment of Irvine J. in *O.E. v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 760, stating:-

> "It is manifest from the comprehensive and compelling analysis carried out by Irvine J. that the submission by the State that the Minister is only required to consider the right to life of the unborn, and no other rights or potential rights, is entirely without merit for a series of reasons, as identified by Irvine J., which include the following:-
>
> (i) Such an approach is arbitrary and would make the substance of rights dependent on the happenstance of the date of birth;
>
> (ii) It is clearly established in case law that the unborn child enjoyed significant rights under the Constitution even prior to the adoption of Article 40.3.3°;
>
> (iii)The interpretation offered by the State would, as Irvine J. points out, at p. 777: "place the rights of the unborn child, from a constitutional perspective, at a much lower level than the rights afforded to the unborn child at common law"."

5.15 The trial judge further referred to the decision of this Court in *East Donegal Cooperative Livestock Mart Limited v. Attorney General* [1970] I.R. 317 and stated that this case acknowledged that prospective threats to rights need to be guarded against. The trial judge concluded on that point as follows:-

> "It is irrational, and therefore unlawful, for the Minister to ignore the likely potential situation of an unborn child if to do so would be to fail to give consideration to that child's likely rights."

5.16 The trial judge subsequently went on to consider whether the term "unborn" could be taken to mean "unborn child" in the particular context of Article 42A of the Constitution. In this regard, he stated:-

> "Since Irvine J's decision in *O.E.*, Article 42A of the Constitution on the rights of the child has been adopted. Section 1 of the Article provides that: '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' (emphasis added). The reference to 'all' children is striking and grammatically unnecessary, and must therefore have very significant substantive content and intention. As well as smacking of non-discrimination, on grounds such as the marital status of parents, it must, in my view, be given a wide interpretation and should include the child before birth."

5.17 Humphreys J. suggested that the term "unborn child" was part of statute law on the date of the adoption of Article 42A and that therefore the use of the phrase "all children" in that constitutional provision would, in his view, support the conclusion that the term "child" was intended to include an unborn child.

5.18 Humphreys J. did note the possibility that it was not intended that Article 42A would have such an effect on deportation proceedings. Furthermore, he acknowledged the fact that many rights guaranteed by Article 42A would not be capable of practical exercise by the unborn. However, he rejected an argument, suggesting that "child" did not include an unborn child on the basis of non-exercisability of rights, as facetious and as "a simplistic and almost sneering basis to diminish or dismiss the status of the unborn child."

5.19 The trial judge then turned to the issue of whether it could be said that Article 40.3.3 represented an exhaustive statement of the rights of the unborn. In this regard, he rejected the conclusions of Cooke J. in *Ugbelase* to the effect that:-

> "…the only right of the unborn child as the Constitution now stands which attracts the entitlement to protection and vindication is that enshrined by the amendments in Article 40.3.3 namely, the right to life or, in other words, the right to be born and, possibly, (and this is a matter for future decision) allied rights such as the right to bodily integrity which are inherent in and inseparable from the right to life itself".

5.20 The trial judge stated that this could only be based on "an extremely literal reading of Article 40.3.3 and [a] sheer assertion that it is an exhaustive statement of the entirety of the rights of the unborn."

5.21 Humphreys J. further referred to the decision of the High Court (Hogan J.) in *X.A. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 397, stating that Hogan J. largely followed the observations of Cooke J. in Ugbelase. In relation to Hogan J.'s comment in X.A. that Article 40.3.3 of the Constitution was not intended to have an effect in the context of immigration, Humphreys J. said this was a "straw man". He continued:-

> "The issue is whether in considering a deportation decision, the Minister should consider the prospective situation which is likely to unfold, and particularly such rights arising from a child's status as a citizen as are likely to exist, rather than the state of affairs as it exists as a snapshot on the date on which the Minister's decision is made in isolation from matters which are imminently prospective as a matter of likelihood. The proposition that Article 40.3.3° was not intended to affect deportation matters is just simply not an answer to this question. The need to consider the imminently probably state of

> affairs, whatever that might be likely to be, would exist even if Article 40.3.3° had never been enacted, or if it were hypothetically repealed or reworded."

5.22 Humphreys J. preferred to follow the approach of Irvine J. in O.E.. He continued at paras. 90 and 92 of his judgment:-

> "The consequence of that approach to my mind is that when the Minister is presented with an application based on the prospective parentage of an Irish child who is unborn at the date of the making of the application, the Minister must address the application on the basis that appropriate consideration should be given to the rights which that child will probably enjoy into the future in the event of being born, insofar as such prospective rights are relevant to the deportation issue.
>
> …
>
> The upshot of the foregoing is that the prospective legal rights and (where raised in submissions) interests that a child will acquire on birth are matters that the Minister must consider when an application is made under s. 3(11) by reference an unborn child. However she is not under any obligation to automatically allow such an application."

5.23 Humphreys J. finally considered the nature of any constitutional family rights which might exist in relation to non-marital parents and their children, in the context of determining what matters the Minister may take into account in a Section 3(11) application. In this regard, the trial judge referred to the statements of McKechnie J. in *G.T. v. K.A.O*. [2008] 3 I.R. 567, to the effect that greater recognition might be given to a father in an established cohabiting non-marital family. Humphreys J. further noted recent changes in the constitutional framework since the decision in G.T., starting with the Twenty Eighth Amendment and its requirement of commitment to membership of the European Union involving recognition of the wider family rights contained in the EU Charter of Fundamental Rights. Reference was also made to the Thirty First Amendment, recognising the natural rights of all children. That amendment, Humphreys J. stated, "… must have particular reference to the enjoyment of those rights without regard to the marital status of their parents." Finally, Humphreys J. cited the Thirty Fourth Amendment and its extension of the availability of marriage to same-sex relationships. He concluded:-

> "Any one of these developments, and certainly all of them taken together, as well as the fundamental shifts in society since the adoption of the Constitution, in my respectful view warrant a recognition that members of a non-marital relationship, and non-marital parents of both sexes in particular, enjoy acknowledgement of inherent constitutional rights in relation to their children and each other on a wider basis than has been recognised thus far."

5.24 Consequently, Humphreys J. made the following orders:

> "(i) that leave be granted in accordance with the latest amended statement of grounds;
>
> (ii) that there be a declaration that the Minister, in considering an application under s. 3(11) of the Immigration Act 1999, is required to consider the current and prospective situation of the applicant concerned insofar as relevant to that application, including the prospective position, likely to arise on birth, of any child of the applicant unborn at the time of the application;
>
> (iii) that the remaining reliefs sought be refused; and
>
> (iv) that the respondents' undertaking not to deport the first named applicant continue until withdrawn in accordance with its terms, and

that there be liberty to apply in the event that the respondents seeks to so withdraw it."

5.25 As can be seen at least certain of the findings of the High Court are potentially far reaching in their effect. It is those central findings which form the principal focus of the grounds on which leave to appeal was granted.

5.26 Under a range of headings the State argued that the approach of the trial judge was incorrect, first, by virtue of his identification of considerations or factors which had, as a matter of immigration law, to be taken into account by the Minister in considering an application to revoke under Section 3(11). In addition, the State argued that the analysis of the trial judge erred in holding that constitutional rights attached either to the unborn generally, to the unborn as potentially a child within the meaning of Article 42A of the Constitution and concerning non-marital family rights under the Constitution and in particular the potential rights of the third respondent.

5.27 It is in that context that it is appropriate to seek to identify the issues or groups of issues with which this Court was concerned on this appeal and to which this judgment must be directed. Those issues derive from the grounds on which leave to appeal was granted, but also involve the refinement of those grounds to be found both in the written submissions filed by the parties and to the evolution of the debate during the oral hearing.

6. The Issues

6.1 Having regard to the manner in which the issues were developed at the oral hearing it seems to the Court that the following issues or groups of issues potentially arise for decision. The Court has referred to issues "potentially" arising for, at least in some respects, there may be a question as to whether it is either necessary or appropriate for the Court to resolve those issues for the purposes of giving judgment in this case. Where that consideration applies it is proposed to identify it when referring to the issue in question.

6.2 While it might be possible to characterise the issues in a number of different ways and while there could, indeed, be questions as to the appropriate order in which those issues need to be addressed, it seems to the Court that the following represents the most convenient description of the questions to be considered on this appeal.

6.3 First, there is the question of whether the fact of the impending birth of the third respondent was a factor or consideration which was required to be taken into account by the Minister in the context of the application by Mr. M. to revoke the relevant deportation order under the provisions of Section 3(11). In that context, it became clear at the oral hearing that the Minister did not dispute the contention that one of the circumstances to which the Minister was required to have regard was the fact that Mr. M. was, at the time of the relevant application under Section 3(11), likely to become a father of a child who was likely to be born in Ireland.

6.4 There was some dispute as to whether the position thus characterised on behalf of the Minister at the oral hearing amounted to a departure from the position which the Minister had previously adopted. However, it is not necessary for the purposes of this judgment to reach a conclusion on that dispute. It is certainly now clear that the Minister does accept that the fact that Mr. M. was due to become a father of a child likely to be born in Ireland was a circumstance to which regard was required to be had.

6.5 However, that being said, there was potentially a second question under this heading being as to whether the Minister was required, as a separate matter, to have some regard to the position of the then as yet to be born third respondent. Essentially, the Minister's case in that regard was that the third respondent did not have legal or constitutional personality until birth and that it followed that the Minister did not have any obligation to pay separate regard to the position of the third respondent.

6.6 The second issue, which in many ways came to be closely aligned with the first, was as to whether the Minister was required to have regard to the fact that the third respondent, if and when born, would be an Irish citizen child who would enjoy all of the rights guaranteed to such a child under the Irish Constitution. The Minister, of course, agreed that the premise to that issue was factually correct in that it was accepted that, once born, the third respondent would be an Irish citizen and would enjoy the rights in question. However, the Minister again argued that the third respondent, not yet having been born at the time when the relevant application to the Minister was made, did not have a constitutional personality so that, it was said, the third respondent did not enjoy any constitutional rights at that time other than the right to life guaranteed by Article 40.3.3. On that basis it was said that the third respondent could not be said to enjoy any constitutional rights which the Minister was required to take into account notwithstanding the fact that it was acknowledged that, if and when born, the third respondent would enjoy significant constitutional rights.

6.7 In many ways, in the manner in which the debate developed at the oral hearing, the principal argument put forward on behalf of the Minister in respect of issues (i) and (ii) had many similarities. It was said that the third respondent did not, until born, have any legal or constitutional personality. On that basis it was argued, in respect of issue (i), that the Minister could not be required to have separate regard to the position of the third respondent and, with even greater strength, that the Minister could not be required, under issue (ii), to have regard to the fact that the third respondent would, if and when born, enjoy significant rights as an Irish citizen child.

6.8 In one sense if the respondents were to succeed on either issue (i) or issue (ii) there might be a question as to whether it was necessary to consider any further issues. If, contrary to the submissions of the Minister, it was legally required that consideration be given to the separate position of the third respondent either as a circumstance which was, as a matter of general law, required to be taken into account or because the constitutional rights which the third respondent would enjoy if and when born were themselves a matter which required to be taken into account, then the Minister would clearly have adopted a wrong position and the respondents would clearly be entitled to an appropriate form of declaration at least similar to that granted by the High Court.

6.9 However, it must be recalled that these proceedings were moot even at the time when they were before the High Court. It was for that reason that the High Court made a declaration as to the legal position rather than quashing any decision of the Minister, for there was, of course, no decision to quash. Equally, there will not now be any decision taken by the Minister on the application of Mr. M. under Section 3(11). However, part of the reason why it was considered appropriate to go ahead with these proceedings notwithstanding the fact that they were moot was that it will almost inevitably be the case that questions concerning the extent to which the Minister may or may not have to take into account the circumstances of an as yet unborn child of a potential deportee will become moot before being finally determined by a Court by virtue of the birth of the child concerned. It follows that it is almost inevitable that the only way in which such legal questions can be finally resolved is by the determination of a moot appeal. It follows in turn that the purpose of these proceedings after they became moot was clearly designed to determine the matters which the Minister was required by law to take into account in considering an application under Section 3(11) involving the potential birth of a child to the potential deportee. In addition, it is clear that, in that context, questions concerning at least the broad approach to the weight to be attached to any factors to which the Minister is required to have regard are equally important.

6.10 Even if the courts were concerned with a straightforward case where the Minister had made a decision, which was under challenge, to decline to revoke a deportation order, a decision by the court that the Minister had failed to take into account a factor or matter which the law required would lead to the decision of the Minister being quashed and the matter being remitted to the Minister. However, in

such circumstances it would be more than appropriate for the court to determine any questions within the court's competence (as opposed to questions which are for the Minister) which would arise in the circumstances of the case when the matter returned to the Minister for re-consideration. Clearly, the question of whether constitutional rights are engaged is a matter which would come into sharp focus in such circumstances. If a matter were to be remitted to the Minister without a determination by the court as to whether any of the factors identified had constitutional status then the Minister would be left with insufficient guidance from the court as to the proper approach to be adopted when the matter came back before the Minister for further consideration. It is important to emphasise that, in such circumstances, the court is not determining what the ultimate decision of the Minister must be (for that is a decision which is within the jurisdiction of the Minister) but rather the court is determining a relevant matter of law which will require to be taken into account by the Minister on the matter being remitted. The relevant matter of law would be as to whether constitutional status attaches to any of the considerations which the Minister must take into account and, possibly, the nature of any such constitutional rights. In those circumstances it seems to the Court that it is necessary to determine whether any of the constitutional issues asserted on behalf of the respondents, and as found by the trial judge, are established. Those are questions of law which would require to be properly taken into account by the Minister in the event that this issue had to be reconsidered.

6.11 However, before going on to consider the specific constitutional questions which arise, it is important, as a separate matter, to briefly address certain aspects of both statutory and common law concerning the unborn not least because considerable reliance was placed by the trial judge on those matters in coming to his conclusion that the unborn enjoyed significant constitutional rights beyond the right to life guaranteed by Article 40.3.3 of the Constitution.

6.12 Thereafter, the third set of issues which arises is as to whether the third respondent had, prior to birth, any constitutional entitlements or rights which extend beyond the express terms of Article 40.3.3. Within that question it may be necessary to address the issue explored at some length at the oral hearing as to whether, prior to the adoption of the Eighth Amendment, the unborn had any constitutional rights. In addition, there is the question of whether, as the Minister argues, any such rights which may have pre-dated the Eighth Amendment were, in effect, codified by and subsumed into the Eighth Amendment so that, it is said, no continuing rights exist in the unborn beyond those which find express recognition in Article 40.3.3. It will also be necessary, for the purposes of determining the questions which arise under this heading, to address at least some issues which arise in relation to the proper approach to the interpretation of the Constitution in areas such as this. In particular. the identification of the potential source of constitutional rights which might attach to an unborn outside the scope of Article 40.3.3 needs to be considered.

6.13 Fourth, there is the question of whether an unborn is a child for the purposes of Article 42A of the Constitution. The trial judge so held. Clearly, if the trial judge was correct in that regard then, in a sense, all of the other earlier issues which have been identified would potentially become irrelevant for the very high level of constitutional protection which is conferred by Article 42A would require a very high level of regard to be paid by the Minister to the position of the third respondent prior to birth.

6.14 Fifth, and finally, it may be necessary for the Court to address the finding of the trial judge that, in the light of modern conditions and in the light of the various amendments to the Constitution on which he placed reliance, the meaning of the term "family" as used in the Constitution or the constitutional rights which attach to a non-marital family needs reconsideration. However, under that heading, an important preliminary question arises as to whether, and if so to what extent, it either was necessary or appropriate for the trial judge to go into those issues at all. It follows that similar questions need to be addressed by this Court.

7. The Submissions of the Parties

7.1 Having identified the issues or groups of issues arising, it is proposed to set out the position of the parties in respect of those issues utilising the clarification set out above. This was not necessarily the way in which the parties themselves approached those issues both in the written and in the oral submissions.

(a) The Factors to be Taken into Account

7.2 The first and second issues identified above concern the factors which the Minister was required to take into account in relation to the revocation application of Mr. M., having regard to the impending birth of the third respondent at the time the application was made. The first issue relates to the position of the third respondent as potentially an independent factor required to be taken into account by the Minister given the likelihood that the third respondent would be born in Ireland as a child of Mr. M. in circumstances where it was the deportation of Mr. M. which was under consideration. The second issue relates to the question of whether, in addition, the constitutional rights which the third respondent would enjoy as an Irish citizen once born must also be taken into account. This second issues has possible additional importance to the respondents for it has at least a constitutional character.

7.3 The State submitted that the trial judge correctly identified all of the factors which the Minister must take into account in any revocation application, by reference to *Sivsivadze v. The Minister for Justice* [2016] 2 I.R. 430 and *P.O. and F.O. v. The Minister for Justice* [2015] 3 I.R. 164. As noted above, the Minister did not dispute that one of the circumstances to which the Minister was required to have regard was the fact that Mr. M., at the time of making the Section 3(11) application, was likely to become a father of a child born in Ireland.

7.4 However, the State continued to maintain that the Minister was not required to give separate consideration to the position of the third respondent (who was at the relevant time, of course, unborn) on the basis that unborn children do not enjoy legal personality and that their position does not, therefore, require to be taken into account as a standalone matter. On the other hand, the respondents maintained that the unborn had a sufficient legal existence to justify its interest being separately considered. In addition it was said that it was not logical for the Minister to accept that the fact that Mr. M. was likely to become a father of a child born in Ireland had to be taken into account but, at the same time, assert that the position of that child could be ignored.

7.5 However, in relation to the second issue, which concerns whether the Minister was required also to have regard to the fact that when born the third respondent would be an Irish citizen child enjoying the rights that entails, the State submitted that until born the unborn has no constitutional personality. As such, while acknowledging the necessary fact that if and when born the third respondent would enjoy certain constitutional rights, the State disputed the High Court's finding that the Minister was required to take such future rights into account in the context of Mr. M.'s revocation application. The State disputed the argument that it was necessary to take into account any prospective rights of the unborn and submitted that to do so would, in effect, amount to the same thing as recognising that rights were enjoyed by the unborn before birth.

7.6 In relation to the test which the Minister is required to apply in a consideration of the immigration status of a foreign parent of a born Irish citizen child, the State placed reliance on the criteria established in the case law of this Court which, it was said, relates to the current, practical circumstances of the child and its integration into Irish society (citing Oguekwe). The State submitted that a future analysis in this context is not required and, indeed, that such an analysis would be problematic given that the nature of the unborn is such that it would be incapable of having social or factual integration in Irish society.

7.7 In the first place the respondents disagreed with the State's characterisation of this issue. It was said that the State wrongly suggested that Humphreys J. had determined that the rights of the unborn fall to be considered in the context of a revocation application as if that unborn was an Irish citizen child or that the

position of the unborn must be equated with that of a born child for the purposes of Article 40.3. The respondents submitted that this mischaracterised the findings of the High Court. The respondents submitted that the key finding of the High Court is to be found at paras. 90-92 of the High Court judgment and is to the effect that the rights which the unborn child of an applicant will enjoy on birth are simply matters that the Minister must consider in the context of a revocation application without those rights being necessarily equated with those of a born child.

7.8 The respondents also noted the jurisprudence of this Court and the lower courts in relation to the rights of children and parents in immigration/deportation matters and the obligations of the Minister and the State in this regard. They noted that an Irish citizen child has personal and constitutional rights in this context. They further submitted that these rights are not unilateral and indeed in some instances rely in substance on the parents of the child concerned for their practical exercise and operation. The respondents questioned the validity of what is said to be the position of the State, being that none of the constitutional rights and protections afforded to Irish citizen children in this context apply either immediately or prospectively to the unborn.

7.9 The respondents submitted that the relevant rights of the third respondent were those identified in *Oguekwe*, including the right to protection of the family. The respondents argued that there was no logical reason to attribute significant constitutional weight to the presence of an Irish citizen child in the immigration context while also asserting that an unborn child, who on birth will be an Irish citizen, is what would amount to nothing more than a "constitutional cipher". They argued that the inability to exercise certain rights is not a sound basis for justifying this distinction.

7.10 With regard to the marital status of the parents of the unborn in this context, and its relation to the right to protection of the family identified in *Oguekwe*, the respondents relied on the decision of Irvine J. in *O.E*. to support the contention that an unborn, who when born will be an Irish citizen child, but whose parents are unmarried, is nonetheless entitled to expect that once born they will enjoy the care, society and support of his or her parents. The respondents further submitted that, in any event, this issue is put beyond doubt by the terms of Article 42A which applies to all children regardless of the marital status of their parents.

7.11 Ultimately, the respondents submitted that the key issue on this appeal is as to whether the constitutional rights of the unborn warrant any consideration at all, rather than a fine calibration of the consideration required. This is said to be so because of the position of the State to the effect that a decision such as that under consideration in these proceedings is argued not to involve a requirement to consider or attach any weight at all to the position of the unborn. For that reason the respondents suggested that this issue does not properly arise on this appeal.

(b) The Common Law and Statutory Position of the Unborn

7.12 As already noted the trial judge attributed significant importance in his analysis to certain provisions concerning the unborn to be found both in the common law and in statute. In their submissions, the State approached these matters by considering the various contexts in which Humphreys J. stated that it is possible to identify relevant rights relating to the unborn. Broadly speaking, the State argued that any entitlements that the unborn might have in law exist only as limited exceptions to what is said to be the established principle that an unborn does not have legal personality. Furthermore, it was argued that the examples relied on by Humphreys J., in support of the suggestion that the unborn had a broad range of rights were legal fictions or necessary corollaries thereof. The State further argued that, where the unborn is afforded a legal entitlement in the established case law, it is always contingent on the birth of the unborn. Therefore, the State's essential argument in this context was that the examples relied on by the trial judge do not justify the conclusion that the unborn enjoys a broader range of rights than suggested by the State. Furthermore, it was argued that it is

inappropriate to identify constitutional rights by inference from statutory provisions and common law principles.

7.13 The respondents, while acknowledging that the High Court judgment considers the above issues at length, suggested that the detail of the questions addressed are not central to the determination of the issues involved in the appeal. The significance of the above issues, the respondents submitted, is the recognition that the unborn can be and is a repository of rights so that the question of whether such rights may be vindicated *in utero* or only on birth does not, it is said, determine the issues in the appeal. This is so, the respondents contended, because the State's case is that the Minister is not required to give any recognition to the position of the unborn, whether on the basis of the status as unborn or the status as a prospective born child.

(c) The Constitutional Position of the Unborn

7.14 Under this issue it is necessary to consider the submissions of the parties in relation to the constitutional position of the third respondent prior to birth and whether the constitutional protection of the unborn extends beyond the express provisions of Article 40.3.3. As noted above, the related question of the constitutional position of the unborn prior to the adoption of the Eighth Amendment may also arise under this heading but only as part of the analysis required to be carried out on the question of whether the unborn have constitutional rights beyond those guaranteed by Article 40.3.3.

7.15 The State submitted that it does not follow from the recognition of the right to life as an express right of the unborn under Article 40.3.3 that other constitutionally protected personal rights must also inhere in the unborn. In that context the State noted the jurisprudence in this regard relied on by the trial judge to support the argument that, prior to the Eight Amendment, the "rights of the unborn were in any event protected by Article 40.3". The principal decisions referred to are *McGee v. Attorney General* [1974] I.R. 284; *G. v. An Bord Uachtála*; *Norris v. Attorney General* [1984] I.R. 36; and *Finn v. Attorney General* [1983] 1 I.R. 154. The State submitted that these decisions cannot be relied on to reach the conclusion that Article 40.3 protected the rights of the unborn prior to the Eighth Amendment. It is said that none of these cases directly concerned the right to life of the unborn so that any comments in that context in those decisions are *obiter*. It should be noted that during oral submissions the State declined to take a definitive stance regarding the constitutional rights of the unborn, or lack thereof, prior to the Eighth Amendment, and stated merely that there was no definitive judicial decision in this regard. In that context it was said that the adoption of the Eighth Amendment meant that it was not necessary to take a stance on this issue.

7.16 In relation to judicial pronouncements in this area following the Eighth Amendment, the State suggested that the early cases dealing with this provision tend to see it as recognising a pre-existing right rather than creating a new right. However, it was further submitted that the later cases tend to focus on the purpose of the Eighth Amendment. In this regard, the State pointed to the decisions of this Court in *Attorney General v. X* [1992] 1 I.R. 1 and in *Roche v. Roche* [2010] 2 I.R. 321 and particular reliance was placed on statements in those cases to the effect that the purpose of introducing the Eighth Amendment was to prevent the introduction or legalisation of abortion. The State acknowledged that in *Roche*, Murray C.J. took a different view regarding the intention behind the Eight Amendment. The State noted however that, in *Roche*, Murray C.J. was alone among his colleagues in expressing such a view.

7.17 Ultimately, the State submitted that, even if there were indeed rights inhering in the unborn prior to the Eighth Amendment, the effect of that Amendment was to set out on an exclusive basis the extent of the constitutional protection of the unborn. In this regard, the State submitted that the approach of Cooke J. in *Ugbelase* is to be preferred to that of Irvine J. in *O.E.*

7.18 The respondents for their part submitted that the jurisprudence prior to the adoption of the Eighth Amendment clearly recognises that the unborn has

constitutional personality and visibility. However, it should be noted that the respondents conceded that the trial judge erred in suggesting that there was any definitive decision in this context prior to the Eighth Amendment. They did, however, submit that there is no basis to suggest that the unborn is excluded from the protection of Article 40.3. They also submitted that, while the exact source of the protection of the right to life of the unborn within Article 40.3 prior to the Eighth Amendment might be open to debate, there was no basis for suggesting that the right to life is or was the sole right protected in relation to the unborn. This was said to be so on the basis that there is no apparent limitation in Article 40.3 to that effect.

7.19 Furthermore, the respondents submitted that it is incorrect to suggest that the Eighth Amendment was intended to represent an exclusive statement of the rights of the unborn. They disputed the argument that, if the unborn enjoyed constitutional rights prior to the adoption of Eighth Amendment, the People could have unwittingly restricted the rights of the unborn by adopting that Amendment. They argued that no one would have understood this to be the effect of the Eighth Amendment. In this regard, they submitted that the High Court was correct in declining to follow the decision of Cooke J. in Ugbelase. They submitted that the wording of Article 40.3.3 does not support the conclusion that it is intended to be an exclusive expression of the rights of the unborn. Furthermore, the respondents submitted that Cooke J.'s invocation of the *maxim generalibus specialia derogant* in *Ugbelase* is not appropriate in the context of constitutional interpretation.

(d) Article 42A

7.20 As noted above, a related issue in the context of the extent of the constitutionally protected rights of the unborn arises from the High Court's interpretation of Article 42A of the Constitution to the effect that the phrase "all children" within that Article should be taken to include the unborn.

7.21 The State submitted that Humphreys J. erred in his interpretation of this Article. The State submitted that the wording of the provision is clear and unambiguous and does not contemplate the inclusion of the unborn in the meaning of "all children". In arguing that the trial judge did not engage in linguistic or textual analysis or consider the intention behind the introduction of Articles 42A and the Eighth Amendment, the State submitted that the trial judge inappropriately reasoned backwards from the fact that the term "unborn child" was found in statutory provisions prior to the introduction of Article 42A. With regard to the use of the phrase "all children" in Article 42A, the State suggested that the intention behind the inclusion of this phrase in that formulation was to resolve uncertainty regarding the nature of constitutional rights held by marital and non-marital children. The State ultimately submitted that a linguistic analysis of the wording of Article 42A and 40.3.3 and a consideration of the purpose behind these Articles lead to the conclusion that Humphreys J. erred in this regard.

7.22 The respondents contended that it may not be necessary for this Court to address this issue for, it was said, if this Court is satisfied that the effect of the other provisions of the Constitution relied on is such as to confer constitutional recognition and protection to the unborn, then the precise scope of Article 42A is not determinative of this appeal. The respondents submitted that the fundamental reasoning of the High Court is that the prospective constitutional rights of the unborn must be considered in the context of immigration and deportation and, if this is accepted, then it follows that Article 42A is engaged. Nevertheless, the respondents submitted that the High Court was correct in its interpretation of Article 42A. They submitted that the trial judge's finding is consistent with the literal interpretation of that Article. The respondents further submitted that a purposive interpretation of Article 42A also points towards the inclusion of the unborn within the meaning of "all children". The respondents submitted that the State's argument concerning the intention behind the introduction of Article 42A amounts to nothing more than assertions without a substantive basis to support them and disputed the argument that constitutional rights under Article 42A do not apply to the unborn because some of the rights guaranteed by that article may not be capable of exercise by the unborn. Finally, they also disputed the State's

submission that a harmonious interpretation of the phrase "all children" requires the exclusion of the unborn so as to avoid conflicts of rights. The respondents argued that no such conflict in fact arises.

(e) Non Marital Parents and "The Family"

7.23 This issue concerns the position of non-marital parents and the family under the Constitution.

7.24 The State submitted that the comments of Humphreys J., to the effect that there has been a shift in attitudes in Irish society, is merely a hypothesis and furthermore suggested that the trial judge did not identify the scope of any relevant rights asserted. The State submitted that the High Court thus erred in its conclusions in this regard.

7.25 The respondents argued that the issues addressed by the State in this context do not properly arise for consideration on this appeal. They submitted that the rights of the non-marital family in relation to their children are equivalent to the rights of the marital family and that this does not appear to be in dispute. They submitted that the State appears to accept that this is the effect of Article 42A. They noted that there may be some circumstances where there is a difference between the position of the father in an Article 41 family based on marriage compared with other non-marital family situations. However, the respondents submitted that this issue does not properly arise in this appeal.

7.26 Having identified the position of the parties it is next appropriate to turn to consideration of the issues raised. In that context it is proposed to consider issues (i) and (ii) together. The issues which arise under both of those headings concern the factors or circumstances which the Minister is required, by law, to take into account when considering a Section 3(11) application in circumstances such as arise in this case. However, those issues do not involve the more difficult and complex question of whether the unborn enjoys any current rights under the Constitution which go beyond the right to life expressly acknowledged in Article 40.3.3. It is proposed therefore, to turn to issues (i) and (ii).

8. Must the Minister Consider the Position of the Unborn?

8.1 The Court has already sought to identify the way in which this question arises. As already noted, the Minister accepts that the potential birth of a child of Mr. M. forms part of the circumstances of that respondent to which the Minister is required to have regard. However, the Minister stops short of accepting that any separate regard is required to be had to the position of that unborn in and of itself as opposed to as part of the circumstances applicable to the father. It is said that the position of the unborn in such circumstances is not a factor which, as a matter of general law, the Minister is required to take into account. Still less, it is said, is the Minister required to have regard to the fact that the third respondent would enjoy significant constitutional rights as an Irish citizen once born.

8.2 On one view, the distinction which the Minister makes between the matter which it is accepted the Minister must consider, being the fact that Mr. M. was about to become a father of the third respondent, and the additional matters which the respondents argue the Minister was required to consider, being the separate position of the third respondent and furthermore the fact that the third respondent would enjoy significant constitutional rights at least when born, may not appear to be very great. The underlying facts are the same. The Minister has to consider the "situation", to use a neutral term, which pertained at the time of the application to revoke, being that the birth of the then unborn third respondent was due within approximately three months. The birth was due within one month of when proceedings were commenced at which stage no decision had been made by the Minister.

8.3 However, the Minister argued that the nature of the consideration which he is required to carry out has the potential to have a significant impact on the result of any proper consideration given. On that basis it is said that a requirement to give separate and independent consideration to the position of the unborn will potentially affect the overall assessment (even though all sides accept that such

additional consideration would not necessarily be decisive). Still more, the Minister argued, the overall assessment would inevitably be significantly impacted by a requirement to take into account the constitutional rights which the unborn would enjoy in the future because those constitutional rights would be required to be given particular weight in any overall assessment.

8.4 In that latter context it is important to note that counsel on behalf of the respondents did acknowledge that the weight to be attached even to those constitutional rights which the respondents assert should be considered would not necessarily be identical to the weight which would be required to be attached to the situation of a born child. However, there can be little doubt but that the Minister is at least correct in asserting that a material weight would have to be attached thereto in any analysis where he was required to give independent consideration to the position of the unborn and even more so if he was required to give consideration to the constitutional rights which that unborn would enjoy if and when born.

8.5 On that basis the question is one of some importance, because it touches on the way in which the Minister is required, as a matter of law, to have regard to the fact that the applicant for a revocation of a deportation order under Section 3(11) is expected soon to be a father of an Irish citizen child and, thus, has at least the potential to impact on the ultimate result of such an application in some cases.

8.6 It is also important to identify that the issues which arise in respect of these questions are separate and distinct from the question which will be addressed shortly concerning whether the unborn enjoy constitutional rights outside the scope of Article 40.3.3. If the unborn actually have rights *qua* unborn then it would be very difficult to see how those rights would not have to be taken into account as a separate matter in any assessment which might lead to an impairment of those rights even if that assessment related to a third party in the sense of the potential deportation of the father of the unborn concerned. But the argument under issues (i) and (ii) does not go so far as to assert that the unborn actually has current constitutional rights separate from Article 40.3.3. The argument simply goes to the question of whether, as a matter of immigration law, the position of the unborn likely to be born in Ireland, and, potentially, under the second issue, the rights which the unborn is likely to enjoy as an Irish citizen child when born, are factors which require to be taken into account and given appropriate weight in the Minister's assessment of an application to revoke a deportation order under Section 3(11).

8.7 These questions arise under very traditional judicial review principles which assert that the lawfulness of any decision involving rights and obligations requires the relevant decision maker to take into account all matters which the law mandates but also requires that decision maker to exclude from consideration any matters which the law regards as irrelevant. Finlay C.J. formulated the principle as follows in *P. & F. Sharpe Ltd v. Dublin City and County Manager* [1989] I.R. 701:-

> "… the decision-making authority must have regard to all relevant and legitimate factors which are before it and must disregard any irrelevant or illegitimate factor which might be advanced."

8.8 If either or both of the matters under consideration here are required to be taken into account as a matter of law, then it follows that any decision taken by the Minister which does not take them into account will not be in accordance with law and would be open to being quashed on that basis. But it does not necessarily follow that, in order for it to be the case that such matters are required as a matter of law to be taken into account, the relevant unborn requires to have a current and enforceable constitutional right. There are very many cases indeed where a decision maker is required, as a matter of law, to have regard to certain factors where no legal right let alone a constitutional right is involved. Rather, it is simply that the law requires the factor concerned to be taken into account.

8.9 A starting point must be the acceptance by the Minister that it is necessary, as a matter of law, to have regard, as a relevant circumstance appertaining to Mr.

M., that he is likely to become the father of a child born in Ireland. It is difficult to see how it does not necessarily follow from that acceptance that one of the circumstances to which the Minister is required to have regard must involve a consideration by the Minister of the position of that child. There seems little logic in attempting to draw what is, in reality, a wholly artificial distinction between having regard to the fact that Mr. M. was likely, at the time of the application to revoke the deportation order concerned, to be about to be the father of a child born in Ireland but not also to have regard to the position of that child. The two questions are so inextricably linked that it just does not make sense to suggest that it is possible to have regard to one without also having regard to the other.

8.10 But there is equally little logic in stating that it is necessary for the Minister to have regard to the position of the potential father, and thus the position of the potential child, without also accepting that regard must be had to the most important fact that, in the circumstances of this case, the child concerned, once born, will become an Irish citizen with the significant rights under the Irish Constitution which attach to that status.

8.11 In the same context it is also important to recall that the assessment which it is frequently necessary to carry out in the context of deportation (whether the relevant decision is one to make a deportation order in the first place or whether, as here, the decision concerns a potential revocation of a deportation order already in place) involves the assessment of future events. Much of immigration law is concerned with assessing the risks or likely consequences of a person being returned to another jurisdiction. The matters that a decision-maker is required to address in reality concern matters that will or may happen in the future in the event of return. While it may, theoretically, be possible to speak of a current risk of a future event such an analysis is unduly technical. In substance, the decision maker is considering the potential consequences of a current decision to deport (or not to revoke an existing deportation order) by necessary reference to events or circumstances which will or may occur or pertain in the future. Why then should the decision-maker exclude from their proper consideration, in an application such as that which is at issue in these proceedings, the future but important circumstance that it is likely that there will be a child of a potential deportee born in Ireland and, in the particular circumstances of this case, as an Irish-born citizen.

8.12 It is appreciated that this analysis leads to a somewhat different finding to that which was determined by Cooke J. in *Ugbelase*. However, it would appear that the only circumstance on which Cooke J. was invited to rule in that case was the assertion that an unborn enjoyed an existing constitutional right which required to be taken into account. The conclusion reached by Cooke J., to the effect that all of the constitutional rights attaching to the unborn are now to be found within the parameters of Article 40.3.3 of the Constitution, is a matter to which it will be necessary to turn in due course under the third issue. However, for the purposes of the argument under this heading it is important to emphasise that Cooke J. was not asked to consider whether it was necessary for the Minister to have regard to the position of a potential child likely to be born in Ireland or to the constitutional rights which would undoubtedly attach to such a child when born in circumstances where, as here, the child concerned would, on birth, be an Irish citizen.

8.13 While the conclusions reached in this section of this judgment necessarily point to a different answer to that given by Cooke J. in *Ugbelase*, the reasoning leading to those conclusions stems from an argument which was not made before him.

8.14 The Court understands the reasons why the Minister might not wish to be required to have regard to the position of the unborn and, in particular, to the rights which the unborn would enjoy when born. However, it is difficult to see that there is any real justification for the assertion that the Minister is required to have regard to the fact that Mr. M. is likely to become the father of the unborn

concerned as a relevant circumstance but not have regard, simply as a factor to be taken into account, to the position of that unborn itself.

8.15 To hold that the position of the unborn has to be considered is not to say that the unborn, prior to birth, actually has currently enforceable rights to the care and company of her father. Likewise to say that the fact that the unborn, if and when born, will enjoy significant constitutional rights, is a factor to be taken into account, does not mean that the unborn necessarily has independently enforceable constitutional rights of the type contended for, being to the care and company of her father, as of the time in question. It is simply to state that both of these matters are factors which the lawful exercise of the discretion conferred on the Minister by Section 3(11) require to be taken into account.

8.16 It follows, therefore, that the debate about whether, and if so to what extent, it can be said that the unborn has a sufficient legal status to assert rights on its own behalf (or, in practical terms, to have those rights asserted on its behalf by an appropriate person) does not really affect this question. Whether or not the unborn could commence proceedings asserting its rights does not, in and of itself, determine whether the Minister is required to give appropriate consideration to the position of the unborn together with its future probable birth in Ireland, its likely status as an Irish citizen child and the constitutional rights it will then enjoy. The latter is a matter of the proper interpretation of immigration law and is not necessarily dependent on the question of whether those rights can be asserted directly.

8.17 The Court concludes, therefore, that, in assessing the position of the unborn in a case such as this, the Minister is obliged to take into account the fact that the unborn, if born, will enjoy significant constitutional rights when born.

8.18 It is, of course, the case that the reason why it was considered necessary to address these issues stems from the fact that they have the potential to affect the weight to be attached to the likely birth of an Irish citizen child to which the applicant for revocation is a father. Were it not for those questions of weight (which would have theoretically arisen had this matter been capable, in practical terms, of being remitted back to the Minister) then the issues would have been moot in circumstances where it would not have been appropriate for this Court (or indeed the High Court) to have addressed them. It follows that some weight might have to be attached to the position of the unborn and, indeed, additional weight might well have to be applied to the consideration of the undoubtedly significant constitutional rights which the unborn would enjoy on being born.

8.19 However, it is important to emphasise that the analysis which the Minister would be required, as a matter of law, to carry out in giving proper consideration to those two matters is not necessarily the same as the consideration which the Minister would be required to carry out in respect of the potential deportation of the father of a born Irish citizen child. Those later considerations are to be found in the judgment of Denham J. speaking for this Court in *Oguekwe v. Minister for Justice, Equality and Law Reform* (2008) IESC 25.

8.20 *Oguekwe* concerned a deportation order made in respect of a Nigerian father whose Nigerian wife had been granted residency under the Irish Born Child 05 scheme on the basis of her Irish born child who was, in accordance with then law, an Irish citizen. Denham J. at p. 822 set out a non-exhaustive list of matters relevant for consideration by the Minister when making a decision as to deportation under s. 3 of the 1999 Act of a parent of an Irish born citizen child. Those matters are specified in a context where the applicants concerned were a family within the meaning of Article 41. The list of considerations includes not only rights of the applicants but also the State's interests and further specifies permissible approaches by the Minister to balancing the individual and family rights concerned with the State's interest in the common good. As submitted on behalf of the respondents, the framework articulated in Oguekwe is a flexible one capable of accommodating the circumstances and facts of the particular application and persons concerned. The list commences with the statement:-

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

8.21 Specifically, in relation to the Irish citizen child Denham J. included as relevant matters:-

> "5. The Minister should consider the potential interference with rights of the applicants. This will include consideration of the nature and history of the family unit.
>
> 6. The Minister should consider expressly the Constitutional rights, including the personal rights, of the Irish born child. These rights include the right of the Irish born child to:-
>
> (a) reside in the State,
>
> (b) be reared and educated with due regard to his welfare,
>
> (c) the society, care and company of his parents, and
>
> (d) protection of the family, pursuant to Article 41.

The Minister should deal expressly with the rights of the child in any decision. Specific reference to the position of an Irish born child of a foreign national parent is required in decisions and documents relating to any decision to deport such foreign national parent."

8.22 As already stated, the third respondent when born, unlike the child in *Oguekwe*, did not become a member of a family of the type expressly envisaged by Article 41 of the Constitution. The question of the views of the trial judge on the definition of "family" for constitutional purposes and allied matters will be considered later in this judgment. However, it is accepted that, if a decision had been taken by the Minister on the revocation application whilst the third respondent was unborn, it was foreseeable that when born as a citizen she would have the rights identified at (a), (b) and (c) above. However, as Denham J. made clear, such constitutional (or any Convention) rights are not absolute or necessarily determinative. The State's interests also require consideration and, as she stated, "the Minister should weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision" and "The Minister should be satisfied that there is a substantial reason for deporting a foreign national parent, that the deportation is not disproportionate to the ends sought to be achieved, and that the order of deportation is a necessary measure for the purpose of achieving the common good."

8.23 The potential interference with one or other of the constitutional rights to reside in Ireland and to the care and company of parents by deportation of a father is obvious. However, the impact of that interference for the citizen child will depend on many factors including age, existing or future probable relationship and contact with the father, possibly the relationship with, and circumstances of, the mother and many more. The impact on a ten year old child who has lived in Ireland in the care of both parents for many years may be significantly different to that of a one month old child where the facts are such that it appears probable that, even if the father remained in Ireland, the child would not live with him. The assessment of the impact on the constitutional rights of, say, a two month old child by the deportation of his father may not differ greatly from that of an unborn child due to be born in two months time, but both might greatly differ from that of the ten year old in the circumstances already described or, indeed, an unborn in the very early stages of gestation. The interests of the State in any given application may differ significantly and possibly depend, amongst other things, on the immigration or other relevant history of the potential deportee or applicant for revocation. The weight to be attached to those factors and the potential

proportionality of any decision by the Minister to refuse revocation of a deportation order are not matters for this judgment.

8.24 It suffices to say that the Court considers that, whilst the Minister must consider the constitutional rights when born of an unborn either on an application for revocation or a proposal to deport, the weight to be attached to the potential interference with such rights will depend on all the facts and circumstances of the applicant and unborn concerned and is a matter for the Minister, as is the balance to be struck with the interests of the State in reaching a proportionate decision in accordance with the principles set out by this Court in *Oguekwe*.

8.25 For the reasons already addressed it is now necessary to consider whether the unborn enjoys current constitutional rights which require to be taken into account in an immigration case such as this. As already noted, the trial judge held that the unborn did enjoy such rights and the State argues that the trial judge was incorrect in that regard. The Court has already set out the reasons why it feels that it is necessary to address this question notwithstanding the findings already made in relation to issues (i) and (ii). It will be necessary, therefore, shortly to discuss the important constitutional issues raised under issue (iii). However, having regard to the fact that the trial judge placed reliance on certain provisions of statute law concerning the unborn and also on certain common law provisions affecting the unborn, it is appropriate first to consider those questions both for the purposes of determining whether the trial judge's conclusion in those regards was necessarily correct but also for the purposes of considering whether any such conclusions as are or might be correct could have any proper bearing on the constitutional issues to which it will be necessary shortly to turn.

9. Statute and Common Law Concerning the Unborn

(a) The Common Law

9.1 One of the reasons given by Humphreys J. for disagreeing with the analysis in *Ugbelase* was that he saw as "completely incorrect" the statement by Cooke J. that the common law did not operate to enable justiciable rights to be asserted by or on behalf of the unborn child prior to birth. A number of judgments and statutes are referred to by the trial judge as supporting a contrary view to the effect that "significant" rights of the unborn child were "recognised, acknowledged or created" by common law or statute. The summary of principles identified by the trial judge in this case includes (at paragraph 101 (vi)) the following proposition:

> "The unborn child enjoys significant rights and legal position at common law, by statute and under the Constitution, going well beyond the right to life alone. Many of these rights are actually effective rather than merely prospective."

9.2 The purpose of this section is to examine the common law judgments and the statutes referred to in order to ascertain the extent to which they can be said to support this conclusion. It is not intended to suggest that this Court is thereby ruling that, in particular, any or all of the common law judgments from other jurisdictions represent either the law or the appropriate approach in this jurisdiction.

9.3 At para. 65 of the High Court judgment in this case there is a reference to *Burton v. Islington Health Authority* [1992] EWCA Civ 2, where Dillon L.J. noted that in certain contexts English courts had adopted as part of English law the maxim of the civil law that an unborn child is deemed to be born whenever its interests so require. The authority for this is attributed to Lord Westbury in *Blasson v. Blasson* 2 De G.J. & S. 665, quoting from Justinian's Digest to the effect that an unborn child is taken care of, just as much as if it were in existence, in any case in which the child's own advantage comes into question although no other person could derive any benefit through the child before its birth.

9.4 *Blasson v. Blasson* was discussed by the House of Lords in *Villar v. Gilbey* [1907] A.C. 139. That case concerned a ruling by the Court of Appeal of England and Wales that there was a general rule for the construction of wills obliging a

court to hold that, where a testator referred to children "born" in his lifetime, a child who was *en ventre sa mère* (that is, in the womb of the mother) before the testator's death but was not born until after the death was to be deemed to have been born in the testator's lifetime. The House of Lords rejected the proposition that this was a fixed rule, holding that it applied only where it was of benefit to the child. On the facts of the case, it was not in the interests of the child in question since it would have resulted in him taking a lesser estate. Where it did apply, the principle was justified on the ground that such children came within the motive and reason for the gift and should therefore be included, although it compelled the court "to do violence to the English language" (Lord Loreburn L.C.). Lord Atkinson quoted the following paragraph from *Blasson v. Blasson* as encapsulating the rule:

> "That the fiction or indulgence of the law which treats the unborn child as actually born applies only for the purpose of enabling the unborn child to take a benefit which if born it would be entitled to, and it is limited to cases where 'de commodis ipsius partus quaeritur'."

9.5 In *Elliot v. Joicey* [1935] A.C. 209, the House of Lords also considered the case of a child born after the death of his father. The question was whether the child was to be considered as issue "surviving" the father, in circumstances where he would not take any direct benefit thereby. The judgments stress the artificiality involved in deeming a child to have been born when it was not. At p. 233 Lord Russell of Killowen summed up *Villar v. Gilbey* in saying:

> "First, words referring to children or issue 'born' before, or 'living' at, or (as I think we must add) 'surviving', a particular point of time or event, will not in their **ordinary or natural meaning** include a child en ventre sa mère at the relevant date. Secondly, the **ordinary or natural meaning** of the words may be departed from … if, but only if, that **fictional construction** will secure to the child a benefit to which it would have been entitled if it had been actually born at the relevant date. Thirdly, the only reason and the only justification for applying such a **fictional construction** is that where a person makes a gift to a class of children or issue described as 'born' before or 'living' at or 'surviving' a particular point of time or event, a child en ventre sa mère must necessarily be within the reason and motive of the gift. Fourthly, that being the only reason and the only justification for applying the **fictional construction**, it follows that, if the person who uses the words under consideration confers no gift on the child or issue described as above mentioned, but confers the gift on someone else, it is impossible (except in the light of subsequent events) to affirm either that the fictional construction will secure to the child en ventre sa mère a benefit to which if born it would be entitled, or that the child en ventre sa mère must necessarily be within the reason and motive of the gift made. In these circumstances the words used must bear their ordinary or natural meaning."
>
> (Emphases added.)

9.6 It was emphasised in the speech of Lord Macmillan in the same case that the legal fiction in question was intended to alleviate the logic of the law ("which is naturally disposed to insist that at any given moment of time a child must be either born or not born, living or not living") in the interests of the posthumous child. The civil law had surmounted the problem by inventing the fiction that, in all matters affecting its interests, the unborn child *in utero* should be deemed to be already born. English and Scots law had adopted that fiction to the extent only of enabling the child to take a benefit to which, if born, it would be entitled. It could not be invoked in the interests of a third party. Thus, if a third party's claim depended on the child having been born within a particular time, the right would not accrue unless the child was actually born within that time.

9.7 It is clear from these authorities that the common law courts, in adopting this particular principle from the civil law, did so only to a limited extent and in full

consciousness that as far as the common law was concerned, they were adopting a legal fiction that was to be deployed only in limited circumstances.

9.8 In *Burton v. Islington Health Authority*, the Court of Appeal of England and Wales was dealing with two appeals in respect of children born with disabilities as a result of pre-natal medical negligence. In each case the health authority had argued that the injury occurred while the child was still *en ventre sa mère*. In those circumstances the child was not considered a person in the eyes of English law and was thus not entitled to any of the remedies or the protection of the common law.

9.9 Giving the leading judgment, Dillon L.J. referred to the general proposition, not in any way doubted in the appeals, that a foetus (as it was termed in the judgment) enjoyed no independent legal personality. It could not, before birth, sue or be made a ward of court. He said that he would have been prepared to apply the civil law maxim in question to the appeals, but that it was unnecessary to do so in view of the development of the common law in other jurisdictions. In particular he cited *Montreal Tramways v. Leveille* [1933] 4 D.L.R. 337, *Watt v. Rama* [1972] V.R. 353, and *Duval v. Seguin* (1972) 26 D.L.R. (3d) 418, as supporting a conclusion that a child who suffered pre-natal injuries occurring during the mother's pregnancy had a cause of action at birth. It is worth stressing that the approach taken by the Court of Appeal was that the cause of action could only arise from that point, since the tort of negligence was complete only when the negligent act caused damage to a person.

9.10 *Attorney General's Reference* (No. 3 of 1994) [1997] 3 All E.R. 936 is cited by Humphreys J. for the proposition that the unborn child may be the subject of an unlawful act. The issue in that case was whether either a murder or manslaughter charge could lie in respect of a prematurely-born child who died at the age of about three months. For the purposes of the reference it was assumed that her death was the result of the effects of a "grossly" premature birth that came about because of an assault on the mother and therefore that the death was the result of that assault.

9.11 The House of Lords unanimously held that what it termed the foetus was neither a distinct person separate from its mother nor merely an adjunct of its mother but a unique organism.

9.12 It was considered to have been "established beyond doubt for the criminal law, as for the civil law [citing here *Burton v. Islington Health Authority*], that the child *en ventre sa mère* does not have a distinct human personality whose extinguishment gives rise to any penalties or liabilities at common law". Violence to the foetus which caused its death in utero was therefore not murder. Lord Mustill described as the foundation authority for this rule the definition of murder by Sir Edward Coke as the killing of "a reasonable creature, in rerum natura" (Co. Inst., Pt. lll, ch.7, p. 50). Since the foetus was not a human person, the doctrine of "transferred malice" could not be applied and, as the accused lacked the necessary *mens rea* in respect of causing death or grievous bodily harm to the child should it be born alive, he could not be guilty of murder.

9.13 It is true that the Court took a different view in relation to possible liability for manslaughter by an unlawful and dangerous act. That was because of the different mental element required for that offence which did not necessarily involve intention directed towards a person. Although the child was not alive at the time of the assault, once born she might carry with her the effects of things done to her before birth. Her subsequent death completed the *actus reus* once the question of causation was satisfied.

9.14 It is clear that none of these cases are authority for the suggestion by the trial judge that the common law "recognised, acknowledged or created" rights in the unborn child. On the contrary, the common law held firmly to the principle that the unborn child had no legal personality. The succession law cases are expressly based on a maxim considered by the common law to be a legal fiction that should be applied only in particular circumstances. The limitations on its use

demonstrate that it was not intended to reflect a broader approach to the legal existence or status of the unborn. The position in respect of crimes of violence and the tort of negligence is not, in truth, an exception to the common law either, since in all cases the crucial requirement was that the child be born alive. If that came to pass, and the child had been injured as a result of the actions of a wrongdoer while it was still in its mother's womb, then legal consequences arising from the relevant common law rules could be visited on the person responsible but not otherwise.

(b) Statute Law

9.15 The consideration by the High Court judge of various statutory provisions relating to the unborn commences with s. 3(2) of the Succession Act 1965 which provides:

> "Descendants and relatives of a deceased person begotten before his death but born alive thereafter shall, for the purposes of this Act, be regarded as having been born in the lifetime of the deceased and as having survived him."

This provision was seen by the trial judge as a statutory expression of the common law principle of the entitlement of the unborn to succeed to property while "*en ventre sa mère*".

9.16 The trial judge further noted the statutory recognition of a power to deal with property on behalf of the unborn in particular contexts, citing, amongst other provisions, s. 75 of the Public Works (Ireland) Act 1831, which states in relevant part:

> "After any lands, tenements, or hereditaments shall have been set out and ascertained for making any road or bridge hereby authorized to be made or erected, or any of the approaches thereto, it shall be lawful for all bodies politic, corporate, and collegiate, corporations aggregate or sole, tenants in tail or for life, or for any other partial or qualified estates or interests, husbands, guardians, trustees, and feoffees in trust for charitable or other purposes, committees, executors, and administrators, and all trustees and persons whomsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of the person or persons entitled in reversion, remainder, or expectancy after them, if incapacitated, and for and on behalf of their cestuique trusts, whether infants, issue unborn, . . . to contract for, sell, and convey the same, and every part thereof, unto the said commissioners for the execution of this Act."

9.17 Humphreys J. further cited s. 58 of the Civil Liability Act 1961, which is entitled "Wrongs to Unborn Child". It provides as follows:

> "For the avoidance of doubt it is hereby declared that the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive."

Some reference is also made in the High Court judgment to the provisions of the Civil Registration Act 2004 ("the 2004 Act") regarding stillbirths. Section 2 of the 2004 Act provides:

> "'stillborn child' means a child who, at birth, weighs not less than 500 grammes or has a gestational age of not less than 24 weeks and shows no sign of life and 'stillbirth' shall be construed accordingly."

9.18 Section 28 of the 2004 Act provides for the registration of stillbirths. It provides as follows:

> "(1) Subject to the provisions of this Part, when a child is stillborn –

> (a) the parents or, if one of the parents is dead, the surviving parent of the child, or
>
> (b) if both of the parents are dead, a relative of either parent,
>
> may, not later than 12 months from the date of the stillbirth -
>
> > (i) attend before any registrar,
> >
> > (ii) give to the registrar, to the best of his or her knowledge and belief, the required particulars of the stillbirth and, if it has been obtained, the certificate referred to in subsection (3),
> >
> > (iii) after the registrar has entered the required particulars in relation to the stillbirth in the register, sign the register in the presence of the registrar."

9.19 Section 29 of the 2004 Act makes provisions for the registration of stillbirths that occurred before the 31st December 1994. Section 30 of the 2004 Act provides for a duty to notify the Ard-Chláraitheoir of birth and stillbirths.

9.20 Humphreys J. in his judgment also referred to s. 19(3) of the Registration of Title Act 1964 in the context of a statutory right for the unborn to litigate. That section provides as follows:-

> "In any proceeding under this section the court shall, if so requested by the Registrar, and may in any case, if necessary, appoint a guardian or other person to represent any infant, person of unsound mind, person absent from the State, unborn person or person as to whom it is not known whether he is alive or dead; and, if satisfied that the interests of any person so represented are sufficiently protected by the representation, may make an order declaring that he shall be conclusively bound by the decision of the court and thereupon he shall, subject to the right under this Act to appeal on special leave, be bound accordingly, as if he were a party."

9.21 The trial judge noted that, at the time of the adoption of Article 42A of the Constitution, there were what he described as numerous references to "the unborn child" in EU and national instruments. He cited *inter alia* the Safety, Health and Welfare at Work (General Application) Regulations 2007 (S.I. No. 299 of 2007), ("the 2007 Regulations") which, for example, provides at Regulation 145 that:-

> "An employer shall not employ a child or young person at work where a risk assessment reveals that the work -
>
> > (a) …
> >
> > (b) involves harmful exposure to agents which are toxic, carcinogenic, cause heritable genetic damage, or harm to the unborn child or which in any other way chronically affects human health… "

(c) Conclusions on Relevant Common and Statute Law

9.22 Again, it should be stressed that this examination does not in itself lead to any particular view of the issues dealt with in the case law. The point to be made here is that the authorities cited in the High Court judgment do not in fact support the trial judge's conclusion insofar as that entailed finding a recognition by the common law of a legal personality or rights in an unborn child.

9.23 The statute law does not support this view either. The purpose of the various legislative provisions set out above is to make it clear that those provisions expressly provide for the unborn child. In the absence of such language being used, the relevant statutory provisions would have no applicability to unborn children. So, for example, the provisions of the 2007 Regulations would have no application to unborn children absent the express words referring to the unborn child to be found therein.

9.24 Having reached those conclusions it is now appropriate to discuss the important questions which arise in relation to the potential rights of the unborn in the context of an immigration case such as this. In so doing it is, of course, important to emphasise that the unborn enjoys an undoubted right to life under Article 40.3.3 of the Constitution. However, there was no suggestion that there was any risk to the right to life of the unborn in this case. It follows that the precise question which this Court has to address concerns the issue of whether the unborn has any other rights guaranteed by the Constitution. It is only necessary to consider the constitutional status of any potential right to life of the unborn which might exist independent of Article 40.3.3 as a means to determining whether it followed that the unborn must enjoy other rights, beyond the right to life, which might be relevant in the context of the assessment which the Minister would be required to carry out in a case such as this.

10. The Constitutional Position of the Unborn

(a) Introduction

10.1 The next issue to be considered is whether, as held by the trial judge, the third respondent before birth, and at the time the Minister was considering the application under Section 3(11) for revocation of the deportation order in respect of Mr. M., her father, had an *existing* constitutional right which the Minister was required to consider when making her decision. Did the Minister have to consider not only that on birth the third respondent would have a constitutionally protected right to the care and company of her father, but that the third respondent actually had that right before birth? It may appear that little of practical consequence could follow from the resolution of this issue once it is accepted that the Minister must consider the prospective rights of the child and take account of the separation that deportation may entail, but this issue was hotly debated and has important consequences for the law more generally.

10.2 The respondents argue that, without reference to Article 40.3.3, and indeed prior to the passing into law of the Eighth Amendment inserting the first paragraph of that provision into the Constitution, the Courts had recognised that an unborn child had a right to life recognised and protected by the Constitution. It was argued that it followed logically that the unborn child must also have any other relevant right. The final step in this argument is that, on this approach, the passage of the Eighth Amendment only formalised in explicit terms the right to life of the unborn already protected by the Constitution, and made express provision for the equal right to life of the mother, but that could not be understood as limiting the constitutionally protected rights of the unborn to the right to life expressed in Article 40.3.3. It followed, therefore, it was argued that the third respondent, as an unborn child at the time of the Minister's decision, had constitutional rights which the Minister was obliged to consider.

10.3 An important element of the respondents' argument that the unborn child had a constitutionally protected right to the care and company of her father was the contention that, prior to 1983, the Courts made important observations to the effect that an unborn child had a constitutionally protected right to life. It followed, it was argued, that the unborn child was recognised as being a rights holder under the Constitution, and it must follow that there could be no basis for limiting the rights so held to a right to life. That was the most important, but not the only, right the unborn child had. Accordingly, much attention was paid to observations made in different cases prior to and subsequent to the enactment of the Eighth Amendment on the constitutional position of the unborn prior to the passage of the Eighth Amendment. However, the State parties on this appeal did not offer

any submission on that issue maintaining only that it had not been *decided* prior to 1983 that the unborn had a constitutional right to life. This position is correct so far as it goes, which is not very far. It is difficult to understand how the merits of the issue which the respondents raised (and which the State parties considered raised issues of general public importance which furthermore merited both direct appeal to this Court and an expedited hearing of this appeal) can be addressed without at least considering the import of the judicial observations relied on by the respondents. The position taken is regrettable therefore not least because it deprived the Court of the precise focus that sharply honed opposing arguments can provide.

10.4 The respondents' argument in this regard was accepted by the High Court and is succinctly set out at paras. 55 and 56 of the judgment of the trial judge as follows:-

> *"55. The Minister's position that the only relevant right of the unborn to be considered was the right to life appeared to derive primarily from Article 40.3.3º which of course provides for the protection of the right to life of the unborn and obliges the State to protect that right, as far as practicable.*
>
> *56. That subsection was enacted in the wake of a number of judicial decisions to the effect that the rights of the unborn were in any event protected by Article 40.3: G. v. An Bord Uchtála [1980] I.R. 32 per Walsh J. (Henchy and Kenny JJ. concurring) at p. 69; McGee v. Attorney General and the Revenue Commissioners [1974] I.R. 284 per Walsh J. (Budd, Henchy and Griffin JJ. concurring) at p. 312; Finn v. Attorney General and the Minister for the Environment [1983] I.R. 154 per Barrington J. (High Court) at p. 160. The Minister's position, which I do not accept, is that Article 40.3.3° was intended to sweep away all such decisions and to embody in one subsection the totality of the rights of the unborn. Even a statute would not be read this way, and in any event the Constitution should not be read as if it were statutory law."*

10.5 The respondents also point to the judgment of Irvine J. in *O.E.*, which was relied on by Humphreys J. in the decision which is the subject of this appeal. At para. 50 of her judgment in that case, having recorded that the State parties had pleaded that the fact that the applicant concerned was unborn as of the date of the decision meant that the applicant did not enjoy any constitutional rights other than those specified in Article 40.3.3, Irvine J. recorded the position taken by the State parties on the appeal as follows:-

> "Whilst this formal plea was delivered on behalf of the respondent, this argument was not purposefully pursued in the course of the hearing. The respondent did not ask the court to consider the constitutional rights of the unborn child in this case, having regard to its impending birth, as being any different from the rights which he would have enjoyed had he been born at the time the respondent was asked to exercise his power under s. 3(11) of the Act of 1999."

10.6 Having recorded this concession Irvine J. then referred to a well known passage in the judgment of Walsh J. in *G. v. An Bord Uchtála*, which will be set out later in this judgment. She then continued:-

> *"[52] I cannot accept that the only constitutional rights enjoyed by the applicant at the time the respondent was making his decision under s. 3(11) of the Immigration Act 1999 was the right to be born by virtue of Article 40.3.3 of the Constitution, which right the courts had already concluded existed prior to this amendment to the Constitution in October, 1983, which rights were described by Walsh J. in G. v. An Bord Uchtála and*

also by Barrington J. in Finn v. The Attorney General [1983] I.R. 154.

[53] In the aforementioned circumstances, it seems only appropriate that counsel for the respondent, as she did, dealt with the present proceedings on the basis that the constitutional rights enjoyed by the applicant at the time of the respondent's decision, particularly having regard to his impending birth, were the same as those he would have enjoyed had he been born at that time. To have argued successfully otherwise would have placed the applicant in a position where the happen chance of a premature delivery would have afforded him rights which the respondent would have had to consider at the time he made his decision but in the event of his having been born on his expected delivery date, he would have enjoyed no rights which required the respondent's consideration. It seems to me that little would be achieved by enshrining the right of the unborn to be born if such a right did not ensure that when ultimately born that infant would enjoy the constitutional rights and protections so carefully enshrined in the Constitution for the benefit of Irish citizen children.

…

[55] In these circumstances, I find no difficulty in concluding that the applicant, although not born at the time of the respondent's decision under s. 3(11) of the Act of 1999, should have been treated by him as enjoying precisely the same rights as he would have enjoyed had he been born prior to the making of the decision."

It should be said that counsel for the respondents in this case did not go so far as to suggest that the pre 1983 *dicta* constituted decisions. With that qualification however he relied heavily on these two passages.

10.7 The State parties for their part rely on the judgment of Cooke J. in *Ugbelase*, which declined to follow the decision of Irvine J. and considered that the observations relied on by Irvine J. in O.E. and which were to be relied on by Humphreys J., were *obiter* (para. 59) and that there had been no binding decision of the Courts that an unborn child had a right to life or indeed any other right prior to birth and prior to the passage into law of the Eighth Amendment. Cooke J. carefully analysed the decisions and concluded:-

"[74] In the court's judgment accordingly the only right of the unborn child as the Constitution now stands which attracts the entitlement to protection and vindication is that enshrined by the amendments in Article 40.3.3, namely, the right to life or, in other words, the right to be born and possibly, and this is a matter for future decision, allied rights such as the right to bodily integrity which are inherent in and inseparable from the right to life itself. The deportation of a non-national parent cannot in the court's judgment be said to be in any sense an interference with that right.

[75] It follows that the respondent was under no obligation to consider for the purpose of the contested decision, the possible implications of the impact of the decision on the alleged rights ..."

10.8 It is apparent that much of the difference between the parties, and indeed the judgments at the level of the High Court, flow from differing analyses of the case law to which it is necessary now to turn.

(b) The Case Law Relied On

10.9 The first reference to this issue can be found in the landmark case of McGee. In the course of holding that Article 41 of the Constitution created a right of marital privacy which was infringed by s.17 of the Criminal Law Amendment Act 1935, making illegal the importation of contraceptives into Ireland, Walsh J. made the following observations:-

> "What may be permissible to the husband and wife is not necessarily permissible to the State. For example, the husband and wife may mutually agree to practise either total or partial abstinence in their sexual relations. If the State were to attempt to intervene to compel such abstinence, it would be an intolerable and unjustifiable intrusion into the privacy of the matrimonial bedroom. On the other hand, **any action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question.**
>
> The sexual life of a husband and wife is of necessity and by its nature an area of particular privacy. If the husband and wife decide to limit their family or to avoid having children by use of contraceptives, it is a matter peculiarly within the joint decision of the husband and wife and one into which the State cannot intrude unless its intrusion can be justified by the exigencies of the common good." (emphasis added)

10.10 The decision in *McGee*, and in particular the reliance in some of the judgments on the decision in *Griswold v. Connecticut* (1965) 381 U.S. 479 and in any event the close and obvious comparison between the two cases, gave rise to a debate as to the extent to which the reasoning in *McGee* might lead to a decision that a right to privacy could extend to a decision to have an abortion. This was, of course, what had been decided by the US Supreme Court earlier the same year in *Roe v. Wade* (1973) 410 U.S. 113. (See by way of example , O'Reilly *Marital Privacy and Family Law* Studies, Spring 1977 p. 8, and Binchy, *Marital Privacy and Family Law: A Reply to Mr O'Reilly*, Studies, Winter 1977, p. 330.) It is accepted that this exchange was reflective of a debate which was part of the background to the passage of the Eighth Amendment. The judgment of Hardiman J. in *Roche* explains this aspect of the background to the passage of the Eighth Amendment:

> "It is not necessary here to set out in any detail the reasons why those who promoted the Amendment thought it necessary to take active steps to prevent the legalisation of abortion whether by legislation or by judicial decision. It related, in some degree, to the perception of the proponents of the Eighth Amendment to the Constitution which became Article 40.3.3 of the possibly baneful effects of such cases as McGee v. The Attorney General [1974] 1 I.R. 284, Griswold v. Connecticut (1965) 381 U.S. 479 and, most of all, Roe v. Wade (1973) 410 U.S. 113. These cases led certain proponents of a constitutional amendment in Ireland to embark upon a sometimes very learned analysis of them and to conclude that the emphasis, not least in the Irish case of McGee v. Attorney General, on the authority of the family and the rights of its members to privacy, might contain the seeds of the judicial development of a right, however limited, to abortion."

10.11 That debate was ongoing at the time of the decision in the next case on which reliance is most centrally placed in this argument. In *G. v. An Bord Uchtála*, which was decided in 1978 although reported at [1980] I.R. 32, Walsh J. addressed this question in a slightly broader way. Again, it is relevant to set out the full text of the relevant passage from the judgment. At p. 69 of the reports he said:

> "In my judgment in [McGee], I referred (at p. 310) to Articles 41, 42 and 43 of the Constitution and expressed the view, which I still hold,

> that these Articles 'acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority. . .' Later, at p. 317 of the report, I stated:- "The natural or human rights to which I have referred earlier in this judgment are part of what is generally called the natural law."
>
> Not only has the child born out of lawful wedlock the natural right to have its welfare and health guarded no less well than that of a child born in lawful wedlock, but a fortiori it has the right to life itself and the right to be guarded against all threats directed to its existence whether **before** or after birth. The child's natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and to follow his or her conscience. **The right to life necessarily implies the right to be born**, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation. It lies not in the power of the parent who has the primary natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child **or to terminate its existence. The child's natural right to life** and all that flows from that right are independent of any right of the parent as such. I wish here to repeat what I said in McGee's Case at p. 312 of the report:- '. . . any action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question.' In these respects the child born out of lawful wedlock is in precisely the same position as the child born in lawful wedlock." (*emphasis added*)

It is apparent that here Walsh J. treats an unborn child as the same as a child who has been born and as having "natural" rights protected by the Constitution.

10.12 The next step in this regard is *Norris*, which although reported at [1984] I.R. 36, was decided by this Court on the 22nd April 1983, and before the passage of the Eighth Amendment into law. In his dissenting judgment in that case McCarthy J. addressed what he described as the "present public debate concerning the criminal law and arising from the statute of 1861 in regard to abortion – the killing of an unborn child". Citing the extracts already referred to in both McGee and *G. v. An Bord Uchtála*, McCarthy J. observed:

> "It is not an issue that arises in this case, but it may be claimed that the right of privacy of a pregnant woman would extend to a right in her to terminate a pregnancy, an act which would involve depriving the unborn child of the most fundamental right of all—the right to life itself. I recognize that there has been no argument in this case relevant to such an issue, but nothing in this judgment, express or in any way implied, is to be taken as supporting a view that the provisions of s. 58 of the Act of 1861 (making it a criminal offence to procure an abortion) are in any way inconsistent with the Constitution."

Referring to the two judicial references to this question already cited, McCarthy J. continued:

> "For myself I am content to say that the provisions of the preamble, which I have quoted earlier in this judgment, would appear to lean heavily against any view other than that the right to life of the unborn child is a sacred trust to which all the organs of government must lend their support."

10.13 Later that year, in July 1983, the High Court was asked at short notice to grant an injunction restraining the submission of the proposal contained in the Eighth Amendment to the Constitution Bill 1982 to the electorate for their decision in a referendum. Part of the plaintiff's claim was for a declaration that the terms of the proposal were repugnant to the Constitution because of the protection to the right of life of the unborn which it was alleged was already contained therein. In *Finn*, Barrington J. considered the observations in *McGee, G. v. An Bord Uchtála* and *Norris* set out above, and continued:-

> "A difficulty for this line of interpretation may arise from the fact that in many places the Constitution of Ireland, 1937, refers to the rights of the "citizen" rather than to the rights of the person. For instance Article 40, s. 3, of the Constitution refers to the personal rights of the citizen, and places on the State the duty of protecting the life of 'every citizen'. On the other hand, it is arguable that the term 'citizen' is used in different senses in different parts of the Constitution. … On the other hand, Articles 40 to 44 (inclusive) are in a section of the Constitution which is headed 'Fundamental Rights.' Article 40 is headed 'Personal Rights'. It is arguable that these rights derive not from a man's citizenship but from his nature as a human being. The State does not create these rights, it recognises them, and promises to protect them.
>
> The French Declaration of Rights, 1789, is entitled "Declaration of the Rights of Man and the Citizen". Sometimes the citizen is referred to in the body of the text, but article 1 opens with the statement:- 'Men are born and remain free and equal . . .' A similar switching of gear can be discovered in Articles 40 to 44 of the Constitution. Articles 41, 42 and 43 recognise that man has certain rights which are antecedent and superior to positive law. By doing so, the Constitution accepts that these rights derive not from the law but from the nature of man and of society, and guarantees to protect them accordingly. If man has any natural rights, the right to life must be among them.
>
> The fact that the wording of Article 40, s. 3, commits the State to protect and vindicate the life of 'every citizen' does not justify the inference that it relieves the State of the obligation to defend and vindicate the lives of persons who are not citizens. This is because the whole scheme of moral and political values which are clearly accepted by the Constitution indicates otherwise. In McGee v. The Attorney General Mr. Justice Walsh stated the matter as follows at p. 310 of the report:- 'Articles 40, 41, 42 and 44 of the Constitution all fall within that section of the Constitution which is titled 'Fundamental Rights'. Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection'. In The State (Nicolaou) v. An Bord Uchtála the Supreme Court expressly left open the question of whether a foreigner could invoke the Constitution to attack the validity of an Act of the Oireachtas; that question does not arise in the present case.
>
> On the basis of the authorities opened to me by Mr. Mackey, and in the light of the above reasoning, I would have no hesitation in holding that the unborn child has a right to life and that it is protected by the Constitution." (*emphasis added*)

An appeal to this Court was dismissed.

10.14 On the 7th September 1983, the People adopted the Eighth Amendment to the Constitution, acknowledging the right to life of the unborn with due regard to the equal right to life of the mother. The case law after that date must accordingly be viewed in that light. In *the Attorney General (SPUC) v. Open Door Counselling*

Limited and Dublin Wellwoman Centre Limited [1988] I.R. 593 ("*Open Door*"), a case decided after the passage of the Eighth Amendment, Hamilton P. in the High Court said at p. 597 of the report:-

> "The right to life of the unborn has always been recognised by Irish law."

10.15 Referring to the position prior to the enactment of the Eighth Amendment he quoted the judgment of Walsh J. in G. v. An Bord Uchtála and continued:

> "These passages clearly acknowledge:-
>
> *(1) the right to life of the unborn;*
>
> *(2) that that right springs primarily from the natural right of every individual to life;*
>
> *(3) the right includes the right to have that right preserved and defended and to be guarded against all threats to its existence before or after birth;*
>
> *(4) that it lies not in the power of a parent to terminate its existence, and*
>
> *(5) any action on the part of any person endangering human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question."*

10.16 Quoting the provisions of the Eighth Amendment which provides that "the State acknowledges the right to life of the unborn" Hamilton P. continued:

> "The right to life of the unborn therein referred to is not created by law or by the Constitution; the aforementioned Article merely confirms or acknowledges its existence and gives it protection."

10.17 Quoting again the relevant passage from the judgment of Walsh J. in *McGee*, Hamilton P. continued:

> "The rights referred to in Article 40, s. 3, sub-s. 3 are in the same category and are part of what is generally called the natural law."

10.18 Turning to the passage in the judgment of McCarthy J. in *Norris*, Hamilton P. concluded in this respect that "consequently the judicial organ of government is obliged to lend its support to the enforcement of the right to life of the unborn, to defend and vindicate that right, and if there is a threat to that right from whatever source, to protect that right from such threat, if its support is sought". The case was appealed to the Supreme Court and the decision upheld, without however any comment on, or repetition of, those passages.

10.19 The Eighth Amendment was approved by the People on the 7th September 1983. Subsequently, as is well known, this Court decided *Attorney General v. X*. Thereafter, in November 1993 the Thirteenth and Fourteenth Amendments were adopted, which were known as the Travel and Information Amendments, and to which it will be necessary to refer in more detail later in this judgment. In this regard, the Supreme Court in 1995 was obliged to consider the provisions of the Information (Termination of Pregnancies) Bill 1995 introduced to give effect to the provisions of the Thirteenth and Fourteenth Amendments to the Constitution. In *Information (Termination of Pregnancies) Bill* 1995 [1995] 1 I.R. 1, 27, the Court set out the "Position prior to the passage of the Fourteenth Amendment", and stated:

> "The determination of the issue as to whether or not the Bill or any provision thereof is repugnant to the Constitution or any provisions thereof, of necessity involves an examination of the relevant provision to the Constitution. Prior to the passage of the Eighth Amendment to

> the Constitution, the right to life of the unborn was not one of the personal rights acknowledged specifically by the Constitution. However the right to life of the unborn had been referred to and acknowledged by Walsh J. in the course of his judgment in G. v. An Bord Uchtála. …"

10.20 The judgment of the Court then set out the passages from *McGee*, *G. v. An Bord Uchtála* and *Norris*, which have already been quoted above, and at p. 28, stated:-

> "The right to life of the unborn was clearly recognised by the courts as one of the unenumerated personal rights which the State guaranteed in its laws to respect, and, as far as practicable, by its laws to defend and vindicate."

10.21 To this list of judicial observations suggesting that the right to life of the unborn was protected by the Constitution prior to the introduction of the provisions of Art 40.3.3, may be added the dissenting judgment of Hederman J. in *The Attorney General v. X.*, in which, referring to *McGee*, he said:

> "The application of the provision [Article 40 subsection 3], and the nature of the form of application adopted by the State to honour its guarantees must necessarily depend on the particular circumstances of every case in which it is sought to invoke the Article in question. It would be a mistake to think that 40, s. 3, sub-s. 2 or the Eighth Amendment refer only to the creation or destruction of life. It appears to me that they can also be invoked to deal with other situations, and might be invoked by the mother of an unborn child or others to protect it from injury or adverse environmental conditions, the use of various toxins in the air and other health or life threatening situations. It is a protection which all lives may invoke or have invoked on their behalf. **Article 40, s. 3, sub-s. 2 as invoked in the McGee case could have been equally invoked at the time for the protection of an unborn life, as if, for example, Mrs. McGee had been pregnant and was in some way being deprived of some procedure or other treatment or medicines, the absence of which would threaten the life of the child she was carrying**. The Eighth Amendment to the Constitution was quite clearly designed to prevent any dispute or confusion as to whether or not unborn life could have availed of Article 40 as it stood before the Eighth Amendment. The Eighth Amendment made it clear, if clarity were needed, that the unborn life was also life within the guarantee of protection. It went further, and expressly spelled out a guarantee of protection of the life of the mother of the unborn life, by guaranteeing her life equality – equality of protection, to dispel any confusion that there might have been thought to exist to the effect that the life of the infant in the womb must be saved even if it meant certain death for the mother." (*emphasis added*)

10.22 These then appear to be the judicial observations, made both prior and subsequent to the passage of the Eighth Amendment, which are relied on by the respondents to establish that an unborn child had actual rights protected by the Constitution not limited to the right to life guaranteed by Article 40.3.3 (and not merely the expectation of such rights on birth). It is somewhat frustrating that the Court must engage in the exercise of considering what may have been the position previously in relation to the existence of one unspecified right in order to throw light on the possible present existence of another, but that is a consequence of the arguments made in this complex area.

10.23 These observations, to use a neutral term for the moment, constitute the first building block in the argument the respondents seek to construct to lead to the conclusion asserted in this case, that the unborn child had an existing constitutional right to the care and company of its father which a Minister considering deportation was obliged to take into account. It is accordingly

important to look closely at what was, and was not, said and decided in these cases.

10.24 This case is undoubtedly important in its immediate legal context, and indeed more broadly. But it also raises important issues related to the function of the court when considering novel issues of law particularly in the field of constitutional interpretation. The first of those issues relates to what a court decides and how it decides it. If it is correct to say that a decision of the court can make law – and it can be said it does so not least because a decision of a Superior Court binds everyone in a similar position unless and until altered by legislation, the decision of the People in referendum, or subsequent judicial decision – then it is equally important to recognise that courts make law in a way which is significantly different from the manner in which legislation is made by the Oireachtas. Courts may only decide cases brought before them by parties. The parties must themselves have a legitimate interest, grounded in the facts, in the resolution of their dispute. A court cannot itself initiate a legal issue, still less issue of its own accord a generally binding statement of law. Furthermore, a court may only decide (in the sense of giving a binding determination) those legal issues which are *necessary* and *essential* to resolve the legal dispute between the parties. While courts may and do say other things in the course of a judgment which may be of benefit both in the development of the law and in the assistance of the resolution of future disputes, it is only that portion of the judgment that contains what is considered to be essential and necessary for the actual decision in the case which can be said to be binding on subsequent courts. Furthermore, it is for later courts to determine what portion of the judgment meets that test. Finally, but not least importantly, when a court comes to decide even those legal issues which are necessary and essential for determination in order to decide the case, it must do so according to law, rather than any view, however wise, well informed, and astute, as to what is desirable.

10.25 The fact that it is only the central reasoning leading to the particular decision (in Latin the *ratio decidendi*) which forms a binding part of the court's decision having effect beyond the individual case is of course, a familiar part of the principle of *stare decisis* which itself is an essential part of the common law system of law. The fact that a *ratio* is binding provides the element of certainty and predictability: the limitation of the binding nature of a decision to the *ratio* provides some necessary flexibility. But in addition to that, the limited nature of the *ratio decidendi* can be seen itself as an important component of the judicial function more generally, derived from the separation of powers. Law may in some sense be made by judicial decision, but even in the most important case raising issues of obvious national consequence, which may inevitably be the subject of active public and political debate, law made by courts is always made indirectly, and only because it is a necessary and indeed essential consequence of the performance of the judicial function of resolving the particular dispute. The intense focus of adversarial argument on such core issues provides in addition the best assurance that the decision made can properly bind citizens and others whose legal situation may be identical, but who have not been party to the proceedings, and had no right or entitlement to participate or make representations in relation to it. This analysis of the importance of the *ratio decidendi* is not to depreciate the value of considered ancillary observations made in the course of a judgment, (and again in Latin *obiter dicta*). In many cases these statements have been accepted subsequently as anticipating developments in the law and expressing principles of value. However, it is essential to appreciate the distinction between the two.

10.26 Taking this approach, it will be apparent that the observations relied on are significantly overstated by the judgment appealed against at para. 56 (and set out above) when it is suggested that in particular prior to the coming into force of the Eighth Amendment, in both *McGee* and *G. v. An Bord Uchtála*, this Court had made "decisions" and indeed in suggesting that those decisions had been concurred in by the other judges hearing and deciding the same case. Indeed, it will become apparent that the relevant observations are in the clearest way obiter dicta which moreover did not attract the agreement of the other members of the courts hearing the cases. This of course does not mean that they can be

disregarded. The Court's task however becomes then a consideration as to whether the observations, detached as they are from the core focus of the case in which they are made, are nevertheless correct and can properly be applied when an issue is properly raised which it is necessary to decide in order to resolve the dispute between the parties. It is necessary therefore to look particularly closely at the cases in which these observations were made.

10.27 *McGee* was a case concerned with the question of whether there existed a right of (marital) privacy, which was infringed by s. 17 of the Criminal Law Amendment Act 1935. The issue of a right to life was not debated or argued. Given the recent US precedent it was perhaps not surprising that Walsh J. took the opportunity to make it clear that he considered that any right of marital privacy could not extend to protect a decision to have an abortion. In that sense the observations were negative, establishing the limits to the right of marital privacy, rather than a positive assertion of a fully developed concept: what was stated was that neither parents nor the State had a right to terminate a life.

10.28 Furthermore, these observations made by Walsh J. cannot be said to have been agreed to by any of the other members of the majority in that case. He decided the case by reference to the Article 41 rights of the family, without any reliance on *Griswold*, as was said expressly at p. 319 of the report. This appears a quite deliberate attempt to distance the judgment from that authority and moreover locate any right to marital privacy in Article 41, which might limit the expansion of any right to privacy beyond a married couple. The members of the majority, Henchy, Griffin and Budd JJ., identified a guaranteed personal right to privacy under Article 40.3, and did rely on the reasoning in *Griswold*. In terms of constitutional analysis these are very significant differences of approach. For this and other reasons, the broad statements made as to the existence of natural rights protected by natural law contained in the judgment of Walsh J., and which were relied on in later observations, cannot be said to have been concurred in or agreed to by any of the other judges in the majority. Indeed the very distinct route adopted by the majority can be seen as a marked difference from the approach taken by Walsh J.

10.29 *G. v. An Bord Uchtála* concerned an application to dispense with the consent of a natural mother to the adoption of her child. Since adoption had been regulated by statute in Ireland, two consents of the natural mother were necessary before an adoption could be made, an initial consent to placement for adoption and a later consent to adoption. Under the original Adoption Act of 1952, the consent of a natural mother to an adoption could be dispensed with by the Adoption Board in limited circumstances: if the person was incapable of giving consent by reason of mental infirmity or could not be found. Under the relatively recently enacted provisions of s. 3 of the Adoption Act 1974, however, the High Court was empowered to dispense with the consent of a natural mother if satisfied it was in the best interests of the child to do so. In this case, a natural mother had consented to placement for adoption in January 1978, and the child was placed with prospective adoptive parents on the 22nd of January of that year. However, the mother wrote to the Adoption Society on the 11th of February to seek the return of her child and to withdraw her consent to placement. When she commenced proceedings for the return of the child, the prospective adoptive parents sought an order pursuant to s. 3 of the 1974 Act. It is important that the adoption order had not been made, and could not have been made, without either the consent of the mother or with her consent being dispensed with pursuant to section 3. The prospective adoptive parents had no legal status in relation to the child at that point. They argued however that the best interests of the child lay in dispensing with the mother's consent.

10.30 It seems relatively clear on the facts, at least viewed from today's vantage point, that the proper order was to return the child to the natural mother and her family, all of whom impressed the High Court judge. There was no suggestion that the child would not be well cared for and reared appropriately. It is arguable that the issue was not whether the child was better placed with the prospective adoptive parents, but rather whether or not the child's best interests were served

by the consent of its natural mother being dispensed with so that the child could be adopted by anyone. So framed, the focus of the provision, like its predecessor, was on the conduct of the natural mother. So viewed, the balance is reasonably clear. However, the courts approached the matter on the basis that it was argued that a decision had to be made between the natural mother and the prospective adoptive family. In seeking to address that balance, and the possibility that the interests of the child might be found to lie with the prospective adoptive parents who were a married couple with one child and could offer more by way of material support, the natural mother sought to assert constitutional rights as tipping the balance in her favour. This led the Court to a consideration of the rights of mothers and children, and whether any such rights were constitutional in origin, "natural rights" protected by the constitution or statutory rights.

10.31 The outcome of the case was anything but clear cut. This Court by a majority (Walsh, Henchy, and Kenny JJ.) held that the High Court judge had correctly refused to dispense with the consent of the natural mother and that the child should therefore be returned. The dissenting judges (O'Higgins C.J. and Parke J.) would have remitted the matter to the High Court judge to expressly decide where the best interest of the child lay. On the broader constitutional issues which were raised, there was a different division of views. Of the majority, two judges (Henchy and Kenny JJ.) held that a natural mother had a statutory right to custody, but that a child had a constitutional right to have its welfare safeguarded. Three other members of the court, (Walsh J., and the minority members O'Higgins C.J. and Parke J.) expressed the view that a natural mother had a natural right to custody protected by the Constitution.

10.32 This recital of the facts makes it clear that there was no question of a right to life of an unborn child being in any way an issue in *G. v. An Bord Uchtála*. Indeed the judgment of Walsh J. explored a number of issues which seemed extraneous to the central and complex issue in the case. These involved the question whether the Adoption Board was exercising a judicial function, whether the original consent to the placement for adoption was invalid, and whether children, including in this respect children not yet born, had natural rights protected by the Constitution . Therefore, it is significant that the other members of the court were at pains to distance themselves from some or all of the observations made. See for example O'Higgins C.J. at p. 60, Kenny J. at pp. 98 and 99, Parke J. at p. 101, and most clearly Henchy J. at p. 83 where the following is said:

> "The case has been argued within the framework of the terms of reference imposed by that issue, [whether the consent of the natural mother should be dispensed with pursuant to s. 3 of the Adoption Act 1974] so I shall confine this judgment accordingly. In so far as opinions or observations on wider and unargued topics emanate from this case, I do not wish my silence on those obiter dicta to be taken as concurrence."

10.33 This emphasises an important point. The judgment in the High Court in this case suggests that the relevant *dicta* on which such reliance is placed must be taken as representing the concluded view of the courts. However, that may be to fail to take account of, and arguably misconstrue, the silence of the other members of the courts involved. In the present context, the fact that other members of the Court hearing the case did not agree to the observations is arguably as, if not more, eloquent than the observations themselves.

10.34 The analysis of the judgment of Walsh J. in the passage relied on from *G. v. An Bord Uchtála* treats the critical issue of the constitutional position of the unborn child as part of its treatment of the rights of a born child. As a result, reference is made to rights ("to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and to follow his or her conscience … the right to maintain that life at a proper human standard in matters of food, clothing and habitation") which are plainly inapplicable to an unborn child. While a member of the majority for the disposition of the case, the judgment of Walsh J., even

though the observations of a distinguished judge, cannot therefore be treated as expressing the views of the Court. In particular, the observations on the right to life of the unborn are not merely *obiter* but perhaps far removed from a finding on a central issue argued by both parties and which it is necessary to decide to resolve a case.

10.35 It might be said that *Finn* goes somewhat further in that Barrington J. there made what was described as a "finding" that the unborn child had a right to life protected by the Constitution. But, once again, that case deserves closer scrutiny. First, it is apparent that the issue was not argued between the parties. At p. 160 of the judgment it is recorded that counsel for the State:-

> "[Did] not dispute Mr Mackey's submission that the Constitution protected the right to life of the unborn child; neither does he submit that the Constitution does protect the life of the unborn child. He joins issue with Mr Mackey at a later stage of Mr Mackey's argument."

10.36 The point on which counsel for the State in *Finn* took issue was in many ways an even more fundamental one. It was that, absent a breach of the constitutional procedure for the calling of a referendum, it was no function of the courts to engage with the merits of a proposal to amend the Constitution, something which was instead consigned exclusively to the People. This follows in a most fundamental way from the separation of powers, and the derivation of power under the Constitution. The High Court accepted that argument, and six days later this Court in a short 12 line judgment emphatically agreed but observing also "as these proceedings cannot be maintained the Court should not find it necessary to consider the matters dealt with in the judgment of Mr Justice Barrington". Again there is a marked distancing from the observations now relied on. Finally, the observations made by McCarthy J. in *Norris* are very general in their terms and furthermore expressly acknowledge both that the issue was not argued and that it did not properly arise in that case.

10.37 The observations made in these four cases prior to the Eighth Amendment are the cornerstone of the respondents' argument that, prior to 1983, the Constitution protected the right to life of the unborn and therefore protected other rights so that consequently such other rights are still protected by the Constitution notwithstanding the passage of the Eighth Amendment. The subsequent statements of Hamilton P. in *Open Door* and, as Chief Justice speaking for the Court, in *Information (Termination of Pregnancies) Bill* 1995, repeated these dicta but do not add to them other than by repetition. Insofar as these latter cases may have suggested that decisions had been made in the pre 1983 cases, that would not appear to be justified having regard to the analysis set out above.

10.38 Pausing there, it is plain that the observations in the pre Eighth Amendment cases relied on cannot be properly described as "decisions" of the courts, nor can the individual observations be said to have been "concurred" in by the other members of the courts which heard and decided the cases. Nor can it be said that by 1983 the courts had "already concluded" that a right to life of the unborn existed and was guaranteed by the Constitution. On the contrary, when analysed, these observations, although made by judges whose views are entitled to the greatest respect, were observations made in the course of cases in which the matters discussed were a considerable remove from the issue to be determined by the court.

10.39 The question remains however as to whether those observations are correct and must lead to a conclusion that, now, an unborn has rights under the Constitution other than the right to life guaranteed by Article 40.3.3. That depends on an analysis of the reasoning in the judgments rather than the fact that the observations were made. One difficulty is that regard is that the *dicta* do not identify clearly a source for the right or rights. Two different routes may be detected in the *dicta*. First is the analysis suggested tentatively by Barrington J. in *Finn* which would suggest that the issue is one of interpretation of the Constitutional text, and that an unborn child is to be treated as a person entitled to assert the right to life which is expressly guaranteed by Article 40.3.2. The

second route appears to be implicit in the approach of Walsh J. in *McGee* which suggests the existence of a "natural right", not expressed in the Constitution, but which the Constitution is bound to respect and vindicate.

10.40 The route suggested by Barrington J., if correct, might lead to a conclusion that the unborn must be entitled to exercise the other rights protected by Article 40.3.2 and thus would strongly support the respondents' argument here. However, the first difficulty with that approach is the textual problem identified by Barrington J. in *Finn*, being that Article 40.3.2 refers to the personal rights of "citizens" which is an expression which is not apt to cover persons not yet born. There have been, as Barrington J. anticipated, a number of cases in which courts have been prepared to hold that Article 40.1 may mean that non citizens may be entitled to the same or equal protection under the Constitution as citizens enjoy where it can be said that as human persons they are in the same situation. (See for example most recently *N.H.V. v. The Minister for Justice* [2017] IESC 82). However, that does not advance the issue much here since there are clear differences between born persons and those not yet born, most obviously in relation to their capacity to exercise rights. But approached from a purely textual perspective, there is a further difficulty.

10.41 Whether the subject of Article 40.3.2, in modern language the rights holder, is viewed as a "citizen" or more expansively as a "person", the rights guaranteed by that Article, namely the personal rights of the citizen, taken collectively seem to envisage a person who is born. Thus, for example, Article 2 of the Constitution now provides that it is the "*birthright* of every citizen *born* on the Island of Ireland to be a member of the Irish Nation". Birth is therefore seen not as irrelevant but central to status and, thereafter, rights. The personal rights referred to in Article 40.3 are not merely those which happen to be enumerated in Article 40.3.2 such as life, person, good name and property, but they are also all the personal rights protected by Article 40 itself: equality before the law, liberty, inviolability of the dwelling home, freedom of speech, freedom of assembly, and freedom of association, as well as those rights found to be implicit in the constitutional guarantee although not expressly enumerated such as bodily integrity, the right to marry, to procreate, to travel within the State and outside the State, to seek work, to communicate, the right to litigate claims, the right to privacy, and, more broadly perhaps, a right to autonomy. Other rights have been suggested.

10.42 In no case have the rights either explicitly or implicitly been qualified by reference to the necessarily different position of the unborn. But taken collectively these are not rights capable of being conceived of as being readily exercisable by the unborn who not only lacks the autonomy implicit in such rights but is wholly dependent on its mother. If it was the intention of the Constitution however that only such rights were to be conferred on the unborn child before birth as were capable of being exercised by it or on its behalf, *and* moreover only to the extent capable of being exercised by it or on its behalf, it might at a minimum have been expected that this would have been identified and said explicitly. The textual analysis which would suggest that an unborn child is for the purposes of Article 40.3.2 a person and thereby a citizen, therefore tends to prove too much.

10.43 The other route, which it is suggested leads to the identification of a pre-existing right to life itself implying that the unborn possesses further rights such as that suggested here, is not dependent on the text. It is suggested, although not elaborated on, in the passage of Walsh J. in *G. v. An Bord Uchtála* quoting an earlier passage in his judgment in *McGee*. That approach is that a right to life can be deduced not from the constitutional text, but rather is a "natural right" protected by the Constitution. This language of course echoes the language of Articles 41, 42, and 43, where the State "recognises" the Family as the natural and primary fundamental unit group in society and as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law, acknowledges "that the Family is the primary and natural educator of the child", and "acknowledges" that man has a natural right antecedent to positive law to private ownership of external goods. Similar language was used in the original Article 42.5 and is now employed in the new Article 42A in which the State

recognises and affirms the natural and imprescriptible rights of all children. This approach might also point to the express terms of Article 40.3.3 in which the State "acknowledges" the right to life of the unborn and guarantees by its laws to defend and vindicate that right.

10.44 This approach explicitly invokes natural law. As Walsh J. said in McGee and repeated in *G. v. An Bord Uchtála*, Articles 41, 42, and 43 of the Constitution "acknowledge that natural rights, or human rights, are not created by law but that the Constitutional confirms their existence and gives them protection. The individual has natural and human rights over which the State has not authority …". Later at p. 317 of the report he stated:

> "The natural or human rights to which I have referred earlier in this judgment are part of what is generally called the natural law."

10.45 This approach avoids the difficulties of textual interpretation by asserting a right outside the text but which the Constitution exists to protect, but does so at the cost of raising other significant difficulties which are not resolved in the relatively sparse *dicta* relied on.

10.46 There is moreover little agreement on the precepts of natural law that might be understood to touch on the particular issue that arises in this case; the question of an asserted right to care and company of a father. As the outcome of McGee itself illustrates it is possible to invoke natural law to support diametrically opposed conclusions. It is not necessary to discuss these issues at length, however, in the light of the decision of this Court in *Information (Termination of Pregnancies) Bill* 1995. In that case counsel assigned by the Court to argue on behalf of the unborn contended in very clear terms, relying on this passage in *McGee*, that the Bill was invalid because it was asserted to be contrary to natural law which was itself stated to be the bedrock of the Constitution and the ultimate governor of all the laws of men. It was argued that "for so long as the present Constitution remains in force, nothing in it, or in any laws passed by the Oireachtas, or any interpretation thereof by the judiciary can run counter to the natural law". These contentions were expressly rejected by the Court at p. 38 of the report where the following is stated:

> "The Court does not accept this argument. By virtue of the provisions of Article 5 of the Constitution, Ireland is a sovereign, independent, democratic state."

At p. 45 the Court continued:

> "The courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State to which the organs of the State were subject and at no stage recognised the provisions of the natural law as superior to the Constitution"

10.47 It is not necessary to discuss these interesting philosophical issues further in this case. It was not argued that the decision in the Article 26 reference was wrong, or that these statements are in any way questionable. It is therefore of some importance that the philosophical approach which underpins the *dicta* in *McGee* and *G. v. An Bord Uchtála* (which in fairness was not fully explored in those cases, presumably because the issue was not central to the resolution of the cases), is one which in any event has been clearly disavowed by this Court.

10.48 It is certainly the case that the *dicta* recited here can be deployed in support of the respondents' arguments that, prior to 1983 and the passage of the Eighth Amendment, the Constitution already protected a right to life of the unborn and, therefore, was suggestive of the existence of other rights which were also protected. But quite apart from the difficulties with that approach it must necessarily be acknowledged that there existed powerful contrary contentions leading to different conclusions. One is that the Constitution is an instrument adopted by the People from whom all powers in the Constitution derive (Article 6). In the words of the preamble "We, the people of Éire … do hereby adopt, enact,

and give to ourselves the Constitution". That document, and all subsequent additions to it, are matters which the People choose as the fundamental law. The Constitution can, and should, be interpreted to mean what it says, and perhaps as importantly does not say. It is not inconceivable therefore, to put it at its lowest, that in 1937 the Constitution did not address the position of the unborn child. After all the 1967 Abortion Act in England and Wales and the decision in *Roe v. Wade* lay far in the future. As Hardiman J. put in *Roche*:

> "The felt need for what became Article 40.3.3 was suggested to its proponents by legal and medical developments in the 1970s. It is a grave anachronism to seek for reference to such things 40 years earlier."

10.49 On this approach, the enactment of the Eighth Amendment was not an exercise in suplusage but was necessary in the views of those who approved it to address this changed position and make an express provision for the protection of the life of the unborn on terms debated by the People and ultimately adopted by a majority of them. On this approach Article 40.3.3 was a complete account of the right the People considered should be attributed to the unborn, and furthermore established the balance which the People desired in relation to the equal right to life of the mother.

10.50 Another is that the Constitution did, as the *dicta* suggested, protect a right to life of the unborn alone. There is moreover a logic to interpreting the constitutionally protected rights of the unborn as limited to such a right. One view of the importance of the right to life is arguably that it is fundamental to permitting the unborn child to reach the point of birth, which in the apt words of counsel for the respondent is a "gateway" to the commencement of the enjoyment of all rights guaranteed to persons who are born and who begin to live autonomous lives capable of involving the exercise of other rights protected and guaranteed by the Constitution.

10.51 Perhaps the most plausible interpretation of the constitutional position prior to the passage of the Eighth Amendment was that there was uncertainty. At least four positions were capable of being canvassed: that the unborn had a right to life and a range of other rights guaranteed by the pre 1983 Constitution; that the unborn had a right to life guaranteed by the Constitution forming a gateway to rights which were acquired on birth; that the Constitution did not contain or protect any right of the unborn; and fourth that the Constitution protected a right to privacy which permitted termination of a pregnancy. In the face of this range of possible views as to the legal position the purpose of the Eighth Amendment was to remove uncertainty. Thus, in *Attorney General v. X.*, Hederman J. said:

> "The Eighth Amendment to the Constitution was quite clearly designed to prevent any dispute or confusion as to whether or not unborn life could have availed of Article 40 as it stood before the Eighth Amendment. The Eighth Amendment made it clear, if clarity were needed, that the unborn life was also life within the guarantee of protection".

10.52 In the same case O'Flaherty J., at p. 86, recited the passage from *G. v. An Bord Uchtála* and said:

> "The fact is that this right to life is now, by reason of the Eighth Amendment of the Constitution, in express words enshrined in the document".

10.53 If this is correct, the uncertainty could only have been resolved if the Constitution as amended expressed the entire position in relation to the unborn. If for example it remained arguable that there were other sources of rights for the unborn beyond Article 40.3.3 then significant uncertainty would remain. If it could be contended for example that Articles 40.3.1 and 40.3.2 also protected the right to life of the unborn, then it might be argued that the right thus protected was different to and either more or less qualified than the right guaranteed in Article

40.3.3. If, therefore, an objective of the Eighth Amendment was to remove uncertainty, that could only be achieved if the Amendment is regarded as encapsulating and expressing definitively the constitutional position of the unborn. It is also noteworthy that the subsequent litigation such as *Open Door*, *Attorney General v. X.* and *Information (Termination of Pregnancies) Bill* 1995, all focussed exclusively on the terms of Article 40.3.3.

10.54 It is however not necessary, and arguably not possible, to resolve the question of the interpretation of the Constitution prior to the enactment of the Eighth Amendment. In this respect there is some merit in the State's submission that the issue was not decided. The function of the courts is to interpret the Constitution as it now stands. The People enacted and gave to themselves the Constitution when first adopted, and continue to do so on each occasion on which they approve an amendment to the Constitution. Some amendments are technical but others are more substantial and have consequential effects on the interpretation given to the Constitution more generally. A simple example is that the concept and understanding of the Family in Article 41 is necessarily affected by the passage of the Fifteenth Amendment to the Constitution removing the absolute ban on divorce and permitting the dissolution of marriage in certain circumstances. Similarly, the concept of Family must also be affected by the passage of the Thirty Fourth Amendment, known as the Marriage Equality Referendum. Furthermore, the passage of an amendment to the Constitution can also fix the interpretation of the Constitution: an interpretation of the Constitution which was possible prior to adoption of an amendment may no longer be possible because the terms of an amendment show a clear understanding of the interpretation to be given to the Constitution, even if at some abstract level that interpretation was contestable or even wrong. For this reason it is necessary to consider the Constitution as it now is in particular with the Eighth, Thirteenth and Fourteenth Amendments.

10.55 Here most attention has been addressed to the first paragraph of Article 40.3.3 which as is well known was introduced by the passage of the Eighth Amendment. However, that subparagraph was added to by the provisions of the Thirteenth and Fourteenth Amendments known popularly, and accurately, as the Travel and Information Amendments. Those paragraphs provide:

> "This subsection shall not limit freedom to travel between the State and another state.
>
> This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

10.56 The object of these amendments is well known, but was also discussed in the decision in *Information (Termination of Pregnancies) Bill* 1995, which considered the constitutionality of the legislation introduced in pursuance of the provisions of the third sub article of Article 40.3.3, that is the laying down of conditions by law for the provision of information. Both sub articles were adopted to deal with decisions and *dicta* of this Court in *Open Door* in which it had been held that the provision of information in this jurisdiction in relation to the availability of abortions abroad was prohibited by the terms of the Eighth Amendment, and also observations made in *Attorney General v. X*. where a number of members of the Court had expressed the view that the unenumerated right to travel did not permit travel for the purposes of obtaining a termination of pregnancy, and any such travel could accordingly be restrained by injunction. It is not necessary here to consider whether either the adoption of the Thirteenth or Fourteenth Amendments is to be interpreted as a conclusion that the majority of the People did not approve of the interpretation which had been given to the Eighth Amendment in these cases or rather simply did not wish such interpretations to be capable of being adopted in the future. It is certainly clear however that the object of both amendments was to prevent restrictions on travel or the provision of information or travel, and in particular to preclude any

interpretation of the Constitution which could lead to the grant of any order restraining the provision of such information or undertaking of such travel.

10.57 Given this clear objective, the terms of the two amendments are particularly revealing in the present context. It is stated in each case merely that "**this subsection** shall not limit" travel or the provision of information as the case may be. It is clear therefore that the constitutional text considered that the only relevant possible restraint on the provision of information in relation to termination of pregnancy or travel for such purpose was to be found in the terms of Article 40.3.3 and in particular the subsection introduced by the Eighth Amendment. This interpretation of the Constitution adopted by the People is inconsistent with the possibility of the existence of any constitutionally protected pre-existing right whether to life generally, or to any other possible natural rights of the unborn. If such rights were considered to exist prior to 1983 (and 1992) then in theory they could have been invoked and asserted to prevent the provision of information in relation to, or travel for the purposes of, termination. The conclusion must be that the only relevant right of the unborn in contemplation at the time of the Thirteenth and Fourteenth Amendments was that contained in Article 40.3.3 and accordingly it was only necessary to qualify that right to ensure freedom to travel or receive information. Even if, therefore, at some abstract level it was possible to argue that the Constitution may have been interpreted more broadly, the terms of the Thirteenth and Fourteenth Amendments make it clear that the Constitution must now be understood as guaranteeing the rights of the unborn in terms of Article 40.3.3 and not otherwise.

10.58 Similarly, the very fact that on birth rights are acquired and that, as this Court has held, the prospective acquisition of such rights must be in the contemplation of decision makers dealing with a pregnant woman and her partner, is also consistent with this interpretation. On this view, it is precisely because the right to life is a gateway to those other rights that it is necessary to protect that right and with it the opportunity of enjoying those other constitutional rights in the future. On this approach, birth is indeed a defining event, arguably *the* defining event, since it commences the process of acquisition and enjoyment of such rights. It would not be possible to seek to restrain travel for the purposes of termination of a pregnancy on the grounds that that would necessarily terminate the rights that the foetus would acquire: instead the Constitution must be understood as providing that other than the right to life of the unborn, such rights are contingent on birth.

10.59 Counsel for the respondents sought to counter this argument by suggesting that, on a harmonious interpretation of the Constitution, the greater includes the lesser. If, as he put it, after the passage of the Thirteenth and Fourteenth Amendments, the right to life of the unborn established by the Eighth Amendment could not be employed to restrain travel or the provision and receipt of information then a harmonious approach to the interpretation of the Constitution could not permit other and lesser rights to have that effect. It is however implausible that, in the specific context in which the Thirteenth and Fourteenth Amendments were adopted, which were plainly focused on difficulties caused by the interpretation given to the constitutional text, the amendments would not have addressed such other rights if it was considered that the unborn had or might have them.

10.60 This interpretation is also supported by the decision of this Court in Roche. In that case, as is well known, the plaintiff commenced proceedings seeking orders in respect of frozen embryos, permitting their use without the consent of the respondent, her husband from whom she was legally separated. In support of that contention she argued that such orders were necessary to vindicate the right to life of the relevant embryos pursuant to Article 40.3.3 of the Constitution. The claim failed in the High Court and in this Court. A majority of this Court concluded that, from a textual analysis of both the Irish and English texts, and also from a consideration of the circumstances in which the Eighth Amendment was adopted, the Court was entitled to conclude that the purpose of Article 40.3.3 was to protect the legal position created in Ireland by s. 58 of the Offences Against the

Person Act1861 and therefore the unborn in the Article referred to a child in the womb and protection of an embryo only arose after implantation. Such an approach is only consistent with an understanding that the rights of the unborn are to be found in the provisions of Article 40.3.3.

10.61 In his judgment in that case Hardiman J. addressed the very issue which arose and was debated in this case. At p. 381 of the report, under the heading "Article 40.3.1", he said the following:

> "I do not consider that the plaintiff can rely, in the alternative, on Article 40.3.1. I remain to be convinced that this provision, with its express reference to the rights of "citizens" and to such specific rights as "good name" and "property rights", extends or was ever intended to extend to a fertilised but unimplanted ovum.
>
> Be that as it may, if the earlier provision (i.e. Article 40.3.1) did extend to a fertilised ovum, and to a foetus, that fact would appear to make Article 40.3.3 redundant. Without necessarily relying on canons of construction such as inclusio unius exclusio alterius, I would point out that, apart from the redundancy of the Article 40.3.3 that would follow from the plaintiffs contention, Article 40.3.1 contains no express reference at all to the right to life of the mother. This seems a remarkable omission (for the reasons given by Hederman J. and quoted above), as if the earlier sub-Article applied to a fertilised ovum so as to confer a right to implantation in the mother's uterus, there would be no explicit protection of the position of the mother. But the mother, who is a life in being, and a citizen, is undoubtedly herself within the protection of Article 40.3.1. The failure explicitly to acknowledge her position in that sub-Article strongly suggests to me that, for the reasons set out below, the position of the fertilised embryo is not within the meaning or the intent of Article 40.3.1"

10.62 Accordingly, this Court concludes that the decision of Cooke J. in *Ugbelase* is correct, in so much as it holds that the only right of the unborn child as the Constitution now stands which attracts the entitlement to protection and vindication is that enshrined by the amendments in Article 40.3.3 namely the right to life, or in other words, the right to be born, and the deportation of a non-national father cannot be said in any sense to be in interference with that right. Accordingly the Minister was not wrong to refuse to consider the possibility of other existing rights of the unborn affected by the deportation decision. However, for the reasons already set out, the Court is satisfied that the Minister was obliged to take account of the rights of any unborn child which would accrue on birth.

10.63 The conclusion set out above does not mean that, as counsel for the respondents sought to suggest, the unborn child is either constitutionally or legally "invisible". The terms of Article 40.3.3, the fact that this Court has held that the Minister must take account of rights which will be acquired on birth, and the provisions of common law and statute already referred to in the judgments of this Court and the court below, all recognise and protect the interests of an unborn child. Furthermore, the State is entitled to take account of the respect which is due to human life as a factor which may be taken into account as an aspect of the common good in legislating. Looked at from a practical rather than theoretical perspective, it must also be recognised that, until very recently, it had not been suggested that the unborn had any rights other than the right to life, and what has been asserted here is essentially a negative right not to be separated from a father (albeit a right mediated through the mother) which has been asserted in an attempt to prevent deportation or surrender of a father. Given the finding of this Court that even in that situation the decision maker has to take into account the future rights an unborn child will acquire on birth, it is difficult to see that any practical advantage to the respondents here, or persons similarly situated, would accrue if it had been held on this aspect of the appeal that the Constitution did protect other unspecified rights of the unborn outside Article 40.3.3.

10.64 It is next necessary to consider whether the constitutional position of the unborn can be said to have been altered by the insertion by Article 42A into the Constitution by the Thirty-First Amendment.

11. Article 42A

(a) Introduction

11.1 The Court in an earlier part of this judgment has set out the findings of the trial judge in respect of Article 42A. As will be recalled, the trial judge concluded that the reference to "all children" found in Article 42A.1° should be given a wide interpretation and "should include the child before birth". Nevertheless, the trial judge acknowledged that Article 42A was not intended to have a significant, or perhaps any, effect on deportation proceedings. He also acknowledged that the rights of the unborn could not be, and should not be, equated with those of the born child in every respect given that many such rights are not capable of being exercised by the unborn. It may be observed at this point that no attempt was made by the trial judge to identify the rights said to repose in the unborn. In this Court, counsel for the respondents did suggest, in the context of Article 40.3, that the unborn had a right to the care and company of his/her parents.

11.2 The trial judge was persuaded in coming to his interpretation of the words "all children" by virtue of his finding that the phrase "unborn child" was part of the statute law prior to the enactment of Article 42A. As such, he considered that the unborn enjoys significant rights recognised, acknowledged or created by common law or statute. Reference has already been made previously in this judgment to the common law and to the statutory provisions relied on by the trial judge in relation to specific provisions of the law concerning unborn children. It is unnecessary to set out the detailed provisions of statute law again but it is important to bear in mind that the statute law relied on was, for the trial judge, an important factor in coming to the conclusion that the phrase "all children" included the child before birth.

11.3 The question therefore arises as to whether the words "all children" in Article 42A are capable of such broad interpretation by reference to existing statute law on the date of the adoption of Article 42A or otherwise.

(b) Principles of Constitutional Interpretation

11.4 In addition to the principles of constitutional interpretation already discussed concerning the identification of constitutional rights, it is in this context also useful to have regard to the judgment of this Court in *Curtin v. Dáil Éireann* [2006] 2 I.R. 556 where the following was stated by Murray C.J. at paragraph 73:-

> "This court has, in a number of its decisions, referred to criteria governing the correct approach to the interpretation of the Constitution. As is to be expected, different interpretative elements are emphasised in individual judgments according to the particular context in which questions arise and the particular types of interpretative problem. . . . A correct balance has to be struck between the effect to be given to the literal meaning of particular words and the need to have regard to the terms of the Constitution as a whole."

11.5 In *Curtin*, Murray C.J. quoted from the judgment of O'Higgins C.J. in *The People v. O'Shea* [1982] I.R. 384 at p. 397 where it was stated:

> "The Constitution, as the fundamental law of the State, must be accepted, interpreted and construed according to the words which are used; and these words, where the meaning is plain and unambiguous, must be given their literal meaning. Of course, the Constitution must be looked at as a whole and not merely in parts and, where doubt or ambiguity exists, regard may be had to other provisions of the Constitution and to the situation which obtained and the laws which were in force when it was enacted. Plain words must, however, be given their plain meaning unless qualified or restricted by the

> Constitution itself. The Constitution brought into existence a new State, subject to its own particular and unique basic law, but absorbing into its jurisprudence such laws as were then in force to the extent to which these conformed with that basic law."

11.6 Murray C.J. then went on to state, at page 610:

> "The result can be expressed as follows. Where words are found to be plain and unambiguous, the courts must apply them in their literal sense. Where the text is silent or the meaning of words is not totally plain, resort may be had to principles, such as the obligation to respect personal rights, derived from other parts of the Constitution. The historical context of particular language may, in certain cases, be helpful, as explained by O'Higgins C.J. in the passage quoted above. Geoghegan J., when considering the meaning of the term 'primary education' in Article 42.4 of the Constitution in his judgment in Sinnott v. Minister for Education [2001] 2 I.R. 545, said at p. 718 that it was 'important in interpreting any provision of the Constitution to consider what it was intended to mean as of the date that the people approved it'. Hardiman J., at p. 688, thought that it was 'beyond dispute that the concept of primary education as something which might extend throughout life was entirely outside the contemplation of the framers of the Constitution'."

11.7 Murray C. J. added that:

> "This is not to say that taking into account the historical context of certain provisions of the Constitution excludes its interpretation in the context of contemporary circumstances."

11.8 Thus, relying on the principles referred to above from the decision of this Court in *Curtin*, the State submits that the words used in Article 42A are clear and unambiguous and do not contemplate the inclusion of unborns in the meaning of "all children" for the purposes of that Article.

(c) The Eighth Amendment

11.9 Having regard to the principles of constitutional interpretation outlined above, it is appropriate to have regard to the context in which Article 42A came to be inserted into the Constitution. Before considering the provisions of Article 42A, however, it is worth recalling that the Eighth Amendment to the Constitution, which inserted Article 40.3.3, was intended, amongst other things, to copper-fasten the legislative prohibition on abortion in this jurisdiction provided by ss. 58 and 59 of the Offences Against the Person Act 1861. (See the discussion in the Irish Constitution, J M Kelly, 4th Ed., Hogan and Whyte commencing at paragraph 7.3.247). As already discussed, a number of later and further amendments were made to Article 40.3.3. These guaranteed freedom to travel between the State and another state and freedom to obtain or make available in the State information relating to services lawfully available elsewhere.

11.10 The word unborn was discussed by this Court in *Roche*. It is perhaps surprising that this authority was not considered by the trial judge. Hardiman J., in the course of his judgment in Roche at page 377, referred to the unusual nature of the phrase "the unborn". He stated:

> "The phrase 'the unborn' represents an unusual usage in English and it may be that the primary or Irish version clarifies it. Professor Ó Cearúil observes at p. 549 . . .: 'Beo' is translated principally as 'living being' with the secondary sense of 'life'… It appears from the same discussion, at p. 549, that 'gan bhreith' means 'without birth'. . . . Thus the phrase 'na mbeo gan breith' translates easily enough as 'the living without birth'. This is an unusual phrase, either in English or in Irish and indeed Professor Ó Cearúil comments, for reasons too technical to go into here but fully expounded in his text, that one would expect further explanatory material and not the sudden finality

> of 'gan breith' which one actually finds. That, indeed, is the sense which in my view an English speaker has in reading the phrase 'the unborn': one is inclined, however briefly, to wonder 'the unborn what?' But there is no further elucidation, in the language itself, though some may be gleaned from the context . . .”

11.11 Geoghegan J. in the same case also considered the meaning of the word “unborn” as used in Article 40.3.3° of the Constitution. He said:

> “I would also attach some significance to the expression 'the unborn'. It has been said that this expression was unusual in its nakedness. I do not think that that is altogether correct but its meaning and context may be somewhat unusual. The expression 'the unborn' is not by any means unique but normally, far from meaning an actual baby or foetus, it would tend to mean what I might describe as 'the as yet unborn' or in other words future existences. The expression in this sense finds its way into two quotations in the Oxford Book of Quotations. I do not believe that the expression 'the unborn' would ever be used to describe a stand alone embryo whether fertilised or unfertilised or whether frozen or unfrozen. It has ultimately been accepted on all sides in this appeal that the case does not involve any determination of when life begins. Furthermore, the experts on both sides were in agreement that there is no scientific proof of when life begins. The in vitro fertilization treatment itself highlights the complexity of the succession of steps in the process leading up to a successful birth. It seems clear on the evidence before the court that pregnancy in any meaningful sense commences with implantation. I think I am entitled to take judicial notice of the fact that the referendum that led to the insertion of this provision in the Constitution was generally known as 'the abortion referendum'.”

11.12 Geoghegan J. went on to refer to constitutional interpretation. He observed:

> “Judges, however, are ordinary citizens and do participate in referenda. It would seem to me to be highly artificial if a judge could not also take judicial notice of and, to some extent at least, use as an aid to interpretation, the ordinary common understanding of what in context was involved in the referendum. Nobody could dispute that the primary purpose of the referendum was to prevent decriminalisation of abortion without the approval of the people as a whole.”

11.13 Whilst the judgment in that case considered the meaning of the word “unborn” in the context of frozen embryos and the difficult question as to what should happen to frozen embryos not yet implanted, the case is of relevance both in the interpretation of the word “unborn” and the approach that should be taken by a court in placing a constitutional amendment in its context as of the time when enacted. That leads to a consideration of the circumstances in which Article 42A was enacted.

(d) The Thirty-First Amendment

11.14 Article 42A was inserted into the Constitution following a referendum in 2012. (For reasons which are not necessary to consider here, the provisions enacted by the People in 2012 did not formally become part of the Constitution until 2015).

11.15 The provisions added to the Constitution by Article 42A have been set out above. They provided in the first instance for explicit recognition by the State of the natural and imprescriptible rights of all children. Changes were made to the existing provisions in relation to State intervention in exceptional cases where parents failed in their duty towards their children. In addition, it was provided that the State had to legislate for the adoption of any child where the parents had failed, for a period of time to be prescribed by law, in their duty towards the child and where adoption was in the best interests of the child. Provision was required

to be made by law for the adoption of any child. Next, the State was obliged to provide by law that, in proceedings brought by the State for the purpose of protecting the safety and welfare of children or concerning the adoption, guardianship or custody of or access to any child, the best interests of the child should be the paramount consideration. Finally, the State was required to pass laws obliging the courts where practicable to ascertain and take into account the views of a child in relation to such proceedings as were provided for or referred to in Article 42A.

11.16 A number of important points are immediately apparent from a consideration of the terms and provisions of Article 42A. First of all, there is no distinction made between the children of married parents or unmarried parents. Second, in exceptional cases, where the parents have failed in their duty towards their children, the State is obliged to "endeavour to supply the place of the parents" with due regard for the rights of the children. Third, in cases where the parents have so failed, and again, regardless of the marital status of the parents, provision has to be made by law for the adoption of any such child where the best interests of the child so require. Provision is also made for the voluntary placement of a child for adoption. Finally, reference is made to the requirement to take into consideration the voice of the child.

11.17 It will, therefore, be readily apparent from the provisions of Article 42A.2, Article 42A.3 and Article 42A.4 that the reference to a child or children in those sub-Articles can only be a reference to a child or children born alive. Any other interpretation of those provisions would be illogical and meaningless. Quite clearly an unborn child cannot be placed for adoption. Equally, the requirement to ascertain the views of a child can only be of relevance to a living child. How then does one interpret the phrase "all children" as used in Article 42A.1°? The Irish language version of Article 42A uses the word "leanbh" for child. The phrase "leanaí uile" is used for "all children". This, as was pointed out in the submissions on behalf of the State, contrasts with the terms used in Article 40.3.3 of the Constitution in respect of the meaning of "unborn". There has already been reference to the judgment of Hardiman J. in Roche in which he discussed the phrase "the unborn" by reference to the Irish language version of that word. Murray C.J., in the course of his judgment in the same case, referred to the Irish reference to the unborn, ". . . ceart na mbeo gan breith chun a mbeatha"; a phrase which as he said "can be fairly interpreted as meaning the right of life not yet born to live, or to its life." It is clear, therefore, that there is a significant contrast between the terms used in Article 40.3.3 and Article 42A.

(e) Does "all children" in Art 42A encompass "the unborn"?

11.18 It is undoubtedly the case that the phrase "the unborn" is unusual as has been pointed out previously. As Hardiman J. memorably said "the unborn what?" Clearly, as Geoghegan J. said, it would appear to mean "the as yet unborn" or is a reference to "future existences". It is difficult to disagree with that view. The phrase the "unborn", as used in Article 40.3.3, gave constitutional protection to the right to life to the unborn, which right was not otherwise expressly to be found elsewhere in the Constitution.

11.19 Is it then possible, having regard to the purpose of the amendment which inserted Article 42A into the Constitution, to view the expression "all children" as encompassing the unborn? Prior to the introduction of Article 42A, certain difficulties in relation to the position of children in the marital family had emerged in a number of decisions of the courts. (See for example *J.H. (An Infant)* [1985] I.R. 375 and also *N. v. HSE* [2006] 4 I.R. 374.)

11.20 In *N.*, for example, it was held by this Court that, in the case of married parents, the effect of Article 42 of the Constitution as it then stood was that there was a constitutional presumption that it was in the best interests of the child to be with its natural parents, within a family founded on marriage, unless there were very exceptional circumstances leading to a contrary conclusion. It was also held that, once the parents of a non-marital child married, the parents became a constitutional family and accordingly no adoption as had been contemplated in

that case was then possible. Such cases informed the background in which the provisions of Article 42A came to be enacted. The context in which Article 42A came to be inserted into the Constitution makes it clear that it had nothing to do with the rights of the unborn, but had everything to do with the rights of children and in particular the removal of a difference in treatment between marital and non marital children.

11.21 That being so, it is not possible to support the trial judge's interpretation of Article 42A.1, and the phrase "all children" used therein, without excising Article 42A.1 from the remainder of Article 42A. If one carries out that exercise, is it possible to look at Article 42A.1 as creating a standalone provision conferring rights on children? How could such an exercise be regarded as an harmonious interpretation of the Constitution? Given that Article 40.3.3 of the Constitution specifically deals with the right to life of the unborn and Article 42A deals with the rights of children, it is not possible to accept the view expressed on behalf of the respondents that either a literal or purposive interpretation of Article 42A requires that it should be interpreted as including unborn children. Given in particular the nature of the rights sought to be protected by each of those two Articles of the Constitution, it is difficult to see how it could be said that the same rights attach to each category. Article 42A is a composite provision recognising the rights of children, making it clear that its provisions apply to all children regardless of the marital status of the parents, providing that the children's best interests will be the paramount consideration and providing for the voice of the child to be ascertained in proceedings concerning them. Thus, in considering the use of the phrase "all children" as used in Art 42A.1, it is simply not possible to interpret that phrase as encompassing the unborn. They are separately dealt with in Article 40.3.3 of the Constitution.

11.22 In coming to this conclusion, it is also be helpful to consider Article 42.5, the constitutional predecessor to Article 42A.1, which was deleted from the Constitution on the coming into force of the Thirty First Amendment. It provided as follows:

> "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child"

11.23 It is of some importance to note that it was never suggested in any judgment prior to its deletion from the Constitution that Article 42.5, in referring to children, was understood to include the unborn. Cases in which Article 42.5 was considered concerned issues such as custody of children, (*Re O'Brien* [1954] I.R. 1), adoption (*Re Article 26 and the Adoption (No. 2) Bill 1987*, [1989] I.R. 656, 663) and many guardianship cases.

11.24 It will be recalled that the trial judge, in coming to his view on this question, made reference to the fact that the term "unborn child" was part of the statute law of the State when Article 42A was adopted. Far from this fact supporting his view, the contrary is the case. The purpose of the various legislative measures set out earlier is to make express provision for the unborn child. In the absence of such language, the relevant statutory provisions would, as pointed out earlier, have no applicability to unborn children.

11.25 For these reasons it is not possible to see how Article 42A can be understood as referring to unborn children given its clear objectives described above and the clear and unambiguous terms in which it is expressed. If it had been intended that the unborn were to be included within the ambit of Article 42A, then it would be expected that this would have been expressly stated. In any event, having regard to the nature of the rights of the child intended to be protected by Article 42A, it is difficult to see any right contained therein which could avail an unborn child.

11.25 Accordingly, the trial judge was in error in concluding that an unborn child is encompassed in the phrase "all children" as used in Article 42A of the Constitution.

12 Constitutional Rights of Non-Marital Families

12.1 As previously stated, the parents of the third respondent are not married to each other and never have been. Mr. M.'s marriage to a Czech national in August 2009 does not appear to have been dissolved. The respondents do not form a family unit within the meaning of that term as contained in Article 41 of the Constitution. They can therefore be considered as an unmarried or non-marital family unit.

12.2 The point under discussion in this part of the judgment arises out of certain comments made by Humphreys J. concerning the constitutional rights of non-marital couples and non-marital families. These remarks have, it seems fair to say, caused great concern to the State, although it must be said that the respondents have not in any way attempted to rely on the observations in question. The relevant section of the judgment appears at paras. 93-99 thereof with the troubling comments from the State's perspective being found in particular at paragraphs 98 and 99.

12.3 Humphreys J. seems to have taken exception to the State position vis-à-vis the constitutional and ECHR rights of non-marital families and their children, describing them at para. 98 as submissions "that would not have been out of place in the socially-repressive Ireland of the 1950s". He endorsed the judgment of McKechnie J. in *G.T. v. K.A.O.*, which suggested that greater recognition might be considered for the type of father being discussed in that case. The trial judge added that the State's submissions remain "mired in the middle of the last century while its citizens are voting with their feet and continuing to engage in a much wider range of family relationships than the State is prepared to acknowledge as having constitutional rights." At para. 99 the trial judge explained previous decisions on the lack of rights for the non-marital family as "largely creatures of their time" and noted that "society has transformed beyond all recognition since that chain of authority was put in motion." So too, in his view, has the constitutional framework itself been radically transformed.

12.4 In this respect Humphreys J. pointed to three constitutional referendums as indicative of deep-rooted societal change: first, he stated that the Twenty Eighth Amendment, which allowed the State to ratify the Lisbon Treaty, requires recognition at a constitutional level of the wider family rights recognised by Articles 7 and 33 of the Charter of Fundamental Rights of the European Union; second, he pointed out that the Thirty First Amendment recognises the natural rights of "all children", without regard to the marital status of their parents; and, third, that the Thirty Fourth Amendment "has extended the availability of marriage to a range of same-sex relationships in contexts that would have been unthinkable when the Constitution was adopted." This, in his view, could be seen as nothing other than "a quantum leap in the extent to which the Constitution is oriented towards respect and protection for a diversity of private family relationships".

12.5 Drawing together these developments, the trial judge made the following observations which have given rise to this ground of appeal:

> "Any one of these developments, and certainly all of them taken together, as well as the fundamental shifts in society since the adoption of the Constitution, in my respectful view warrant a recognition that members of a non-marital relationship, and non-marital parents of both sexes in particular, enjoy acknowledgement of inherent constitutional rights in relation to their children and each other on a wider basis than has been recognised thus far."

12.6 Moreover, in summarising the principles discussed in his judgment, Humphreys J. stated as follows:

> "The adoption of the 28th, 31st and 34th Amendments as well as the fundamental shifts in society since the adoption of the Constitution

> warrant a recognition that members of a non-marital relationship, and non-marital parents of both sexes in particular, enjoy inherent constitutional rights in relation to their children and each other on a wider basis than recognised prior to those developments."

12.7 The Court would make a number of points in relation to these observations. First, it is clear from a reading of the judgment that the relevant comments of the trial judge were not part of the *ratio decidendi* of his decision. The central issue for determination is set out at para. 88 of the High Court judgment (cited earlier in section 5 of this judgment). As can be seen, that issue related to whether the Minister is obliged to consider the prospective situation that is likely to unfold, including the rights that the child will acquire on birth, rather than merely the situation which exists on the date that the Minister's decision is made. The trial judge's findings on this issue are contained in paras. 90 and 92 of his judgment (see the discussion *supra*). His conclusion was that the Minister, when dealing with an application under Section 3(11) of the 1999 Act, must give appropriate consideration to the rights which that child will probably enjoy into the future in the event of being born. Thus in no sense could the comments regarding the constitutional rights of non-marital families be said to have been part of the trial judge's reasoning on the critical issue calling for determination; the comments in question are better described as being general and observational in nature, but not intended to be of binding effect. That these comments were no more than *dicta* is further evidenced by the fact that the respondents made no submissions on this issue in the High Court; it simply did not form part of their case.

12.8 This perhaps explains the stance adopted by the respondents on the appeal. They stated in their written submissions that this issue regarding the rights of non-marital families does not properly fall for determination by the Court and indeed that it may be incapable of being addressed in light of the manner in which it was framed by the State. No attempt was made by the respondents to engage with the State's submissions or to stand over the comments of the High Court judge. The same stance was adopted at the hearing of the appeal, with counsel for the respondents referring to this as a "non-issue" that does not call for resolution. Counsel freely acknowledged that para. 99 of the judgment of Humphreys J., cited above, was not a "finding", as such, and that it is not connected with the operative part of the judgment, which was acknowledged as being paragraphs 88, 90 and 92 thereof.

12.9 Second, since the decision of Humphreys J. was delivered on the 29th July 2016, this Court has, on the 15th June 2017, delivered judgment in *H.A.H. v. S.A.A.* [2017] 1 I.R. 372. In that case, which arose in the context of polygamous marriages, the Court, although acknowledging that the introduction of no-fault divorce and same-sex marriage have resulted in a legal institution of marriage "that cannot be described in terms of traditional Christian doctrine" (para. 128 of the report), nonetheless rejected the proposition that "the concept of marriage no longer has a legal meaning, or that the legal meaning is a concept flexible enough to accommodate any variation no matter how different to the traditional model" (para. 129). Indeed the Court noted that marriage remains a central feature of Irish life for the majority of people and stated that "[t]he constitutional pledge to guard the institution of marriage with special care remains in place and must be accorded full respect." In so doing the Court affirmed that marriage is a specific, constitutionally-protected relationship which must be guarded with special care.

12.10 This approach is reflected in other decisions, including *J. McD. v. P.L.* [2010] 2 I.R. 199, where this Court reaffirmed that the concept of the "family", as recognised in the Constitution, does not encompass the relationship between a mother and a father who are not, and never were, married. (See also *C.O'S. & T.B. v. Judge Doyle & Ors.* [2014] 1 I.R. 556, and in particular the comments of MacMenamin J. at paragraphs 24-25 thereof).

12.11 Indeed, counsel for the respondents accepted in his oral submissions that *H.A.H.* is one of a long line of cases, stretching back as far as *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567, affirming that Article 41 affords protection to

the family based on marriage. Accordingly, even if the trial judge's comments were intended to be read as other than *obiter dicta*, they could not have the force of precedent on this point in light of the consistent case law of this Court to the contrary stretching back decades and reaffirmed on several recent occasions. In any event, these observations must be regarded as entirely *obiter*.

12.12 In dealing with this matter in the manner which it has, this Court is not suggesting that, if a definitive evidential framework was created within which issues of the type raised by the trial judge became central, the same would not have to be accorded due and proper respect. It cannot be doubted but that Irish society, in many fundamental ways, has changed quite dramatically in a relatively short period of time, with perhaps the greatest intensity in this regard occurring in the last twenty to twenty-five years or so. The reasons for such change and their recognition by formal structures such as those referred to by the trial judge can be viewed in a wider context as reflecting the prevailing mores of the majority of its citizens. That being so, at some point in the future the question may arise as to whether the legal and constitutional position of unmarried parents, as between themselves and their children, should be afforded greater recognition than presently exists. In the particular context of immigration that might occur if an unmarried family was to be treated less favourably than a married family.

12.13 However, the Court stresses that such issues do not arise in this case and accordingly cannot be regarded as having been decided by the trial judge.

13 Conclusions

13.1 This judgment is lengthy. The range of issues raised in the High Court and debated on this appeal together with their complexity, and importance more generally, has meant that it was necessary to discuss the law in some detail. Without detracting from the matters discussed in this judgment it is still possible to give the following summary of the Court's considerations.

13.2 (i) The legal issue in this case relates to the process which must be followed when an application is made to revoke a deportation order under Section 3(11) on grounds that the proposed deportee is likely to become the father of an Irish citizen child.

(ii) The Minister maintained that there was no obligation to give any separate regard to the position of the unborn.

(iii) The High Court decided that this approach was invalid on a number of wide ranging grounds including a contention that the Minister was obliged to have regard to the fact of pregnancy and moreover to the likely impact of deportation on the rights which the Irish citizen child would acquire on birth. More broadly the High Court held that the unborn, at the time the Minister was asked to revoke the deportation order, had actual existing constitutional rights which the Minister was obliged to consider where were not limited to Article 40.3.3, and most relevantly included a right to the care and company of her father. In holding that the rights of the unborn were not limited to the provisions of Article 40.3.3 the High Court in this case differed from the previous decision in the High Court (Cooke J.) in Ugbelase.

(iv) In coming to this conclusion the High Court relied on certain decisions at common law and some statutory provisions as reflecting a general legal view that the unborn had enforceable legal rights not limited to Article 40.3.3 of the Constitution.

(v) The High Court also relied on passages from decisions of the Supreme Court and High Court prior and subsequent to the passage of the Eighth Amendment as support for its decision that the unborn had constitutional rights other than as provided for in Article 40.3.3.

(vi) The High Court also decided that the unborn was a child for the purposes of Article 42A and was therefore protected by the provisions

that Article.

(vii) Finally the High Court made observations about the nature of the Family protected by the Constitution.

(viii) Accordingly the High Court held that the Minister's decision was invalid and made a declaration that the Minister, in considering an application under Section 3(11) for revocation of a deportation order, is required to consider the current and prospective situation of Mr. M. including the prospective child of Mr. M. unborn at the time of the application.

(ix) It should be noted that this declaration is in narrow terms and does not reflect the broader terms of the judgment.

13.3 For the detailed reasons set out in this judgment this Court has come to the following conclusions.

(i) The Minister is obliged to consider the fact of pregnancy of the partner of a proposed deportee as a relevant factor in any decision to revoke a deportation order and is obliged to give separate consideration to the likely birth in Ireland of a child of the potential deportee.

(ii) Moreover the Minister is obliged to take account of the fact that an Irish citizen child will acquire on birth constitutional rights which may be affected by deportation.

(iii) The weight that the Minister must accord to these factors is not an issue in this case. It is not the case that the Minister, having considered these matters, is precluded from refusing to revoke the deportation order.

(iv) Accordingly the decision of the High Court on this aspect of the case was correct and the declaration made is upheld. It follows that the Minister's appeal against that declaration will be dismissed.

(v) However, neither the common law cases and statutory provisions, nor the pre and post Eighth Amendment cases relied on, when analysed and understood, support the High Court's conclusions that the unborn possesses inherent constitutionally protected rights other than those expressly provided for in Article 40.3.3.

(vi) The most plausible view of the pre Eighth Amendment law was that there was uncertainty in relation to the constitutional position of the unborn which the Eighth Amendment was designed to remove. In addition the provisions of the two subparagraphs to Article 40.3.3 introduced by the Thirteenth and Fourteenth Amendments support the Court's view that the present constitutional rights of the unborn are confined to the right to life guaranteed in Article 40.3.3 with due regard to the equal right to life of the mother.

(vii) While it does not alter the outcome of this case, the Minister is accordingly not obliged to treat the unborn as having constitutional rights other than the rights contained in Article 40.3.3. It is accepted that the right to life is not implicated in the deportation (or revocation) decision in this case. The High Court determination in this regard is reversed.

(viii) The High Court determination that the unborn is a child for the purposes of Article 42A is also reversed.

(ix) The Court is satisfied that it is not necessary to address on this appeal any argument in relation to the status of the Family, which it was accepted was not part of the High Court reasoning in coming to its conclusion.

(x) Accordingly, the formal order of this Court will be to dismiss the Minister's appeal and affirm the declaration made by the High Court.

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