

THE HIGH COURT

[2018 No. 788 JR]

BETWEEN

MH AND SH (A MINOR SUING BY HER MOTHER AND NEXT FRIEND MH)

APPLICANTS

– AND –

MINISTER FOR JUSTICE AND EQUALITY (NO. 2)

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 2nd September, 2020.**A. Nature of Application**

1. This is an application for a certificate of the court pursuant to s.5(6) of the Illegal Immigrants (Trafficking) Act 2000, as amended. Such a certificate is necessary if the respondent is to appeal the court's judgment in *MH and SH v. Minister for Justice and Equality* [2020] IEHC 360 ('the previous judgment') to the Court of Appeal.

B. Recapitulation of Background Facts

2. It is useful to recall in summary form the background facts which underpinned the previous judgment. (The applicable facts are more comprehensively addressed in the previous judgment).
3. Ms MH is a Pakistani national. She lived in Pakistan until 2009. She married her husband in 1999. They had a daughter (Ms SH). Unfortunately, Ms MH's husband died in 2009. Previously, Ms MH's blood-brother had emigrated to the United Kingdom in or about 2001, and at some point became a UK national. As a widowed mother, Ms MH was in a precarious position until her brother stepped in to help her. He brought her first to the United Kingdom to live with him there. In July 2014, when Ms MH's blood-brother got a job here in Ireland, she came here with him and has remained settled since then in County Offaly, getting a maths-related qualification and putting her daughter through school (the daughter having now proceeded, the court understands, to further studies). An EU treaty rights application took place on or about 1 May 2015. In the verifying affidavit filed in support of the EU treaty rights application, there are circa. 150 pieces of documentation relating to the familial arrangements in the United Kingdom, including the financial support situation. On 26 November 2015, the respondent refused the EU treaty rights application on the basis that insufficient evidence of dependency on the EU national had been provided.
4. On 14 December 2015, a review of the just-mentioned decision was sought. The letter seeking this review described the dependent relationship outlined above, both as it existed in the UK and also in Ireland. A number of requests followed from the respondent seeking further information, which information was provided, some of it for the second time. In the course of this to-ing and fro-ing, the applicants issued an offer to obtain DNA evidence at their expense. Surprisingly, in a context in which a DNA test result that was favourable to the applicants would essentially favour the version of events that they had recounted from the outset and in a context where, at least implicitly, the State was dubious as to the existence of the claimed relationship, and where the applicants (not

wealthy people) were prepared to pay for the test themselves, the respondent did not welcome the offer and await the outcome of that test.

5. On 23 February 2017, the respondent wrote to Ms MH to indicate that the review had been unsuccessful, stating, *inter alia*, that “[Y]ou do not fulfil the criteria in respect of permitted family member as set out in Regulation 3(5) of the [EC (Free Movement of Persons) Regulations 2015]”. Regulation 3(5) has nothing to do with those criteria (it addresses who is a “qualifying family member”), so there was a clear error of law presenting in this regard; that said, that decision is not the subject of these proceedings. Also on 23 February 2017, the respondent indicated that a deportation process would ensue. Thereafter, by way of letter of 16 March 2017, submissions were made by the applicants’ solicitors pursuant to s.3 of the Immigration Act and also concerning the applications that had been made pursuant to the free movement regulations seeking that the applicants be treated as permitted family members. These latter submissions were made on foot of the wording of the confirmation of refusal and the failure to have regard to the correct legal provision in reaching that confirmatory decision. No response has yet been received to the letter of 16 March, save for a letter of acknowledgement.
6. On 5 September 2018, the respondent wrote to the applicants to inform them that it had been decided to deport them. No reason has ever been offered for the appallingly protracted near 18-month period that it took to reach the decision to deport. The court can think of no other walk in life in which a party would take nearly 18 months to make a decision, offer no explanation for why the decision-making process was so protracted, and come to court expecting that that would be considered appropriate. The court heard the within leave application on 27 August 2020 and is giving judgment six days later; it can only imagine what the look on the face of counsel would have been if at the close of the hearing of the application which preceded this judgment, the court had said ‘Thanks for those submissions. I’ll be back with a judgment sometime in February 2022’, without offering any good reason for such a protracted decision-making period – and in the example just given, the court would at least have put a timeframe on when its decision would be forthcoming; the applicants were left ‘dangling’ with no idea as to when a decision would be forthcoming; we now know that it took almost 18 months to reach the decision to deport, but that is with the benefit of hindsight; the applicants had no way of looking into the future and identifying how long the decision whether or not to deport would take. Just to put a human perspective on matters, during that near 18-month period, the applicants had to wake up every morning thinking that this might be the day when there was a call or a letter from their solicitors bringing them the bad news of a deportation order, and with no idea as to when the ordeal of waiting would end. As the court indicated in the previous judgment, though the point is worth repeating, leaving people in the lurch like that for such a protracted period, without any explanation, is no way to treat people.

C. Section 5(6) of the Act of 2000, as amended

7. The respondent considers, as is its entitlement, that this is a case in which an appeal to the Court of Appeal is desirable. The applicants disagree. Both sides agree that there is a

high hurdle that the respondent must vault before it can bring such an appeal. That high hurdle exists under s.5(6) of the Act of 2000, as amended. The court was not provided with a copy of the current text of that provision by the respondent in an application that is its to make; however, a perusal of www.irishstatutebook.ie suggests that the correct version of s.5(6) remains that inserted by s.34 of the Employment Permits (Amendment) Act 2014, which provides, *inter alia*, that:

"[N]o appeal shall lie from the decision of the High Court to the Supreme Court [now the Court of Appeal] [in a matter such as that constituted by the within proceedings]...except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court." [Emphasis added].

8. Following on the 33rd Amendment of the Constitution, the reference to the Supreme Court falls now to be read as a reference to the Court of Appeal.
9. If the respondent is to be believed, in the 7½ double-spaced pages of the previous judgment that appears on the *courts.ie* website the court managed to raise no fewer than 5 points of law of exceptional public importance. In truth, given that about 3½ pages of that judgment are devoted to the facts and closing remarks, it would seem that the court managed, again if the respondent is to be believed, to raise these 5 points in 4 pages of double-spaced text, so one every ⅕ of a double-spaced page. That would be remarkable if true, but of course nothing of the sort occurred – it would be something of a miracle if it did – and it reflects poorly on the respondent that it has sought to advance such a far-fetched proposition. The respondent is respectfully reminded that, as Lord Donaldson MR astutely observed in his renowned judgment in *R. v. Lancashire CC, ex parte Huddleston* [1986] 2 All ER 941, at p. 945:

"Notwithstanding that the courts have for centuries exercised a limited supervisory jurisdiction by means of the prerogative writs, the wider remedy of judicial review and the evolution of what is, in effect, a specialist administrative or public law court is a post-war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.

With very few exceptions, all public authorities conscientiously seek to discharge their duties strictly in accordance with public law and in general they succeed. But it must be recognised that complete success by all authorities at all times is a quite unattainable goal. Errors will occur despite the best of endeavours. The courts for their part, must and do respect the fact that it is not for them to intervene in the administrative field, unless there is a reason to inquire whether a particular authority has been successful in its endeavours. The courts must and do recognise that, where errors have, or are alleged to have, occurred, it by no means follows

that the authority is to be criticised. In proceedings for judicial review, the applicant no doubt has an axe to grind. This should not be true of the authority."

10. Implicit in the foregoing is, of course, the unfortunate truth that, sometimes, a decision-making authority may, regrettably, fall to attract a degree of respectful criticism, where that criticism is merited and true. But to Lord Donaldson's more general point that the post-war development of a rigorous judicial review process "*has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration*", which common aim, in Ireland, includes (where appropriate) the granting of a s.5 certificate allowing a matter to proceed to the Court of Appeal, the realisation of that aim is not at all assisted if, when it comes to making an application under s.5, a public decision-maker succumbs to the temptation of seeking to elevate a quite fantastic number of appeal points to the status of points of law of exceptional public importance which it is desirable in the public interest should be adjudicated upon by the Court of Appeal. Points of law of exceptional public importance which it is desirable in the public interest should be the subject of a decision on appeal do not flourish in super-abundance – and the respondent well knows that fact.

D. Law Applicable to the Within Application

11. In terms of the law governing the within application, counsel have pointed the court to *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 250 and *I.R. v. Minister for Justice (No.2)* [2009] IEHC 510. The court was not provided by the respondent with copies of these judgments which it has sourced separately in order to re-read. Moreover, it would add to the foregoing judgments, the supplementary observations made about applications such as that now presenting in *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646. The learned judges in *Glancre, I.R.* and *S.A.* observe, *inter alia*, as follows:

Glancre, para.7

"[T]he following principles are applicable in the consideration of the issues herein.

- 1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of exceptional importance being a clear and significant additional requirement.*
- 2. The jurisdiction to certify such a case must be exercised sparingly.*
- 3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.*
- 4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court...*

5. *The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.*
6. *The requirements regarding 'exceptional public importance' and 'desirable in the public interest' are cumulative requirements which although they may overlap, to some extent require separate consideration by the court...*
7. *The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word 'exceptional'.*
8. *Normal statutory rules of construction apply which mean inter alia that 'exceptional' must be given its normal meaning.*
9. *'Uncertainty' cannot be 'imputed' to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.*
10. *Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases."*

I.R., paras. 5-6

- "5. *The criteria to be applied by this Court in ruling on an application for a certificate under s. 5 are not in dispute...*
6. *So far as relevant to the present application the principles...include, inter alia, the following:*
 - *It is not enough that the case raises a point of law: it must be one of exceptional importance;*
 - *The jurisdiction to grant a certificate must be exercised sparingly;*
 - *The area of law involved must be uncertain such that it is in the common good that the uncertainty be resolved for the benefit of future cases;*
 - *The uncertainty as to the point of law must be genuine and not merely a difficulty in predicting the outcome of the proposed appeal or in appraising the strength of the appellant's arguments;*
 - *The point of law must arise out of the court's decision and not merely out of some discussion at the hearing;*
 - *The requirements of exceptional public importance and the desirability of an appeal in the public interest are cumulative requirements."*

S.A., para.2:

"[T]o the criteria for the grant of leave to appeal including *Glancre Teoranta v. An Bord Pleanála [2006] IEHC 250 (Unreported, High Court, McMenamin J., 13th July, 2006)*....I would add four further criteria as follows:

- (i). *The application for leave to appeal should be made promptly and ideally within the normal appeal period (10 days in the case of a leave application and 28 days in the case of a substantive decision)...*
- (ii). *The question of law should be one which is actually determinative of the proceedings, not one which if answered differently would leave the result of the case unchanged.*
- (iii). *The grant of leave should provide some added value to any matters already before the Court of Appeal; thus the fact that an issue is independently the subject of a pending appeal would tend to dilute the public interest in the point being brought before that court a second time.*
- (iv). *The question must be formulated with precision in a manner that indicates how it is determinative of the proceedings and should not invite a discursive, roving, response from the Court of Appeal."*

E. One Additional Factor

12. One further factor must, regrettably, be added to those identified in the just-mentioned cases. That factor is this: an application under s.5 must proceed by reference to the judgment that the court actually delivered, not a judgment that the court might have delivered but did not. In this regard, the court notes that the written submissions of the respondent state, inter alia, that:

- (i) "[T]he court found that it was incumbent on the Minister of his own motion to revisit the Deportation Order after the DNA test was supplied",
- (ii) (a) "*The judgment accepts the legality of the Applicants' attempt, in the representations of 16 March 2017, to revisit the previous, unsuccessful, applications under the EC (Free Movement of Persons Regulations 2006-2008*", and
(b) "[The judgment accepts] *the action of the Applicants in seeking to make a free-standing, parallel application, along with the s.3 representations*".

13. The court made no such finding in the previous judgment; nor does that judgment accept either proposition (ii)(a) or (ii)(b).

14. As to assertion (i), when the court queried this at hearing, it was referred to paras. 2 and 13 of the previous judgment. Those paragraphs state as follows:

- "2. *The court accepts that the DNA evidence followed on the decision that is impugned in the within proceedings. However, the ultimate object of government and of any branch of government is to do what is lawful and right. Here, the review of the decision on the deportation order included words like 'purported' in relation to the*

blood relationship between the applicants and Ms MH's brother. That adjective clearly no longer applies after the DNA testing, albeit that that testing followed on the decision. The court admits to surprise that, in the course of these proceedings, the respondent has not elected to re-visit the decision to deport in light of the fact that the DNA evidence shows that the applicants have been telling the truth all along as to their being blood relatives of Ms MH's brother. That being the truth, Ms MH's claims as to having been supported by and dependent upon her brother – claims which for so long have, at least implicitly, been disbelieved by the respondent – become so credible as, surely, to merit re-visitation of her application.

....

13. *It was as claimed by the applicants, inter alia, during the proceedings, that the respondent in the EU treaty rights application erred in law and/or in fact in concluding that there was insufficient evidence that the applicants be regarded as permitted family members. In this regard, the court would but note that the time for challenging the decision of 23 February 2017 has long expired and the application for an order for mandamus as regards the granting of EU residence cards has not been made out (and cannot in any event be granted). That said, the court would have expected that, in a bid to do right, given what is now known as regards the blood relationship between the applicants and the brother/uncle some effort would have been made to re-visit that decision, not because that is legally required but because it would be entirely proper in light of the changed circumstances now known (thanks to the DNA evidence) to present. After all, a widowed mother of a young child (a) living with her UK national, blood brother in England because she cannot live by herself in her country of origin, who (b) comes with that brother to Ireland when he takes up employment here, and who (c) (if the respondent is to be believed) has limited employment prospects, would seem a near-classic example of someone who (i) is a dependent family member of an EU national, (ii) has entered Ireland in the company of same, and (iii) all else being equal, the type of person whom one would instinctively expect the Minister to determine was a permitted family member within the meaning of the applicable regulations”.*

15. When it came to the above-quoted observations, counsel for the respondent submitted, *inter alia*, at the hearing of this application that “[Y]ou did expect the Minister, on receipt of the DNA to revisit matters...without an application being made to the Minister”, and “[T]he court did quash...on the basis that the Minister should have revisited”. A few points might be made concerning these submissions which, with every respect, proceed in the face of the express text of the previous judgment:
 - (a) the court admits to surprise at an interpretative approach that would have one construe a judgment which expressly states (in para.13) that a particular action is “not...legally required” as in fact meaning that such action is legally required. Judgments are not exercises in irony: they mean what they state and they state what they mean, not the opposite.

- (b) it seems to the court to be patently clear from the above-quoted text, not least through the use of the verb 'elect' in para.2, and the denial in para.13 that there was any legal obligation, that all the court 'expected' was that the respondent would behave with ordinary decency and, on learning, albeit belatedly, in February 2019, that Ms MH was in fact the blood-sister of her brother, would have acted responsively and proceeded by reference to this truth instead of saying in effect 'My decision to deport is a sound decision that resulted from a sound process, notwithstanding that the decision and the process implicitly did not accept as true what Ms MH, belatedly proved to be true before this matter came to hearing, namely that she is her blood-brother's sister'. At no point in the previous judgment did the court suggest, nor in this judgment does it suggest, that the respondent was required as a matter of law to do what ordinary decency would, the court suspects, prompt most decisionmakers to do, and take a fresh look at the impugned decision to deport in the circumstances belatedly understood to present, specifically that Ms MH was her brother's blood-sister. Nor was the respondent's decision quashed on that basis. Indeed, it involves a profoundly wrong reading of the previous judgment, and in particular the above-quoted text – a reading that would involve ignoring the verbs carefully used by the court, as well as its express statement of the absence of a legal obligation – to conclude and contend (mistakenly) that the court quashed on the basis that the respondent should, as a matter of law, have done what the court expressly indicated that the respondent, as a matter of law was not required to do.
- (c) on a related note, just as a point which is not made in a judgment cannot be the subject of an appeal, so too an *obiter* point that is in a judgment cannot be the subject of a s.5 certificate.
- (d) it seems to the court to be, with all respect, obdurate of the respondent to contend that it would not revisit any aspect of the process "*without an application being made to the Minister*". These proceedings were commenced in October 2018. Among the reliefs sought in the notice of motion were an order of *certiorari* quashing the deportation orders against Ms MH and her daughter. In seeking this relief, what did the respondent, with all its experience of judicial review proceedings, contemplate that Ms MH was seeking but, among possible ends, to have the decision to deport revisited?
16. For the avoidance of doubt – though the applicants seemed perfectly to understand what the court had to say in this regard in the previous judgment – a point that the court sought to make (and made) in the previous judgment, which was touched upon above and which appears to have caused misapprehension on the part of the respondent, is *not* that it was incumbent on the respondent of his own motion to revisit the deportation order after the DNA test was supplied, but the simpler point (truism) that one can do the lawful without doing right; here the later-provided DNA evidence conclusively established that Ms MH is her brother's blood-sister as she had all along claimed, a point which the respondent implicitly never accepted in the decision-making process. The court suspects

that most State actors presented, even at the doorway of the court, with evidence which conclusively established in a definitive manner (by way of DNA evidence) the truth of a proposition which had previously been implicitly doubted by that State actor during an impugned decision-making process would sit back and say 'Oh, that may well change things; why don't you do X and I'll look at matters for you again?' Few State actors, the court suspects, would decide in such circumstances 'I'll continue to defend as sound a decision [here to deport] that was made at the end of a decision-making process which was informed by a proposition that has been proved belatedly, but proved nonetheless, to be wrong'.

17. As to point (ii), the previous judgment expressly states, at para.13, that “[T]he time for challenging the decision of 23 February 2017 has long expired and the application for an order for mandamus as regards the granting of EU residence cards has not been made out (and cannot in any event be granted)”. The previous judgment at no point states that one can make a fresh EUTR application by way of, or along with, a s.3 submission. At para.10, the previous judgment states what it states (and states the uncontroversial) as regards *P.O. v. Minister for Justice* [2015] IESC 64.

F. Lack of Evidence; Judicial Notice

18. Before proceeding further, it is necessary to touch on a point broached at the hearing of the leave application, viz. the claim by the respondent that the court could take judicial notice of the fact that the previous judgment was likely to impact on a large number of cases. Thus, counsel for the respondent in her initial remarks stated, *inter alia*, as follows:

“I think the court can take judicial notice of the fact that [the findings in the previous judgment which it is sought to impugn]...are likely to affect a large number of, or could potentially affect a large number of cases where deportations are made or are about to be made or indeed have been made”.

19. Later, after the court queried whether, in the absence of any evidence (and there is no evidence before the court on this point), it could in fact take judicial notice of any (if any) potential for the previous judgment to impact on a large number of cases, counsel for the respondent indicated as follows:

“You do get cases on the Asylum List where, for example, there is a challenge to the exercise of the discretion under the Dublin III Regulation and then a large number of either High Court proceedings are issued or a large number of administrative applications are stayed, pending the outcome of a High Court decision or an appeal, and it is possible to put in an affidavit saying how many [applications] at the date of the affidavit were affected, but my submission is different, qualitatively, because what I am saying is [that] the propositions of law that have been applied in the judgment are systemic in that they apply as a matter of law to all decisions under s.3 into the future. So, I can't give you an affidavit as to how many it affects because I simply don't know, but once you have a general finding as to in what circumstances a s.3 decision, for example, is reviewable or you have a judgment on the basis of which it is reviewable, then it just follows as a

matter of law that all future judicial reviews of a deportation order will be affected by the judgment.”

20. It seems trite but necessary to observe that, when it comes to precedential effect, no case can be fully divorced from its facts. Yes, to some extent an analogy may be drawn between one case and another; that is how the common law has evolved. But there are limits to analogy and there is a limit to the suasive effect of any one case. Here, this application is, and the previous judgment was, concerned with a deportation order in respect of two third-country nationals (a widowed mother and her child) who lived with the mother’s blood-brother (a UK national) in England, followed him to Ireland when he came here for work purposes, have lived with him ever since, and who made a failed EUTR application, followed in the heel of a near-18 month hunt by a decision to deport which, notably, was preceded – and this seems a feature by reference to which the future import of the previous judgment seems likely to be greatly limited – by a decision-making process in the course of which the decisionmaker at all times proceeded, at least in part, on what has since been conclusively shown by way of DNA evidence to be the mistaken view that the widowed mother was but a purported sister of her blood-brother. The import of the previous judgment is constrained by the foregoing facts, just as the import of any judgment is to some extent constrained by its facts; the court, to borrow from the wording of counsel for the respondent did not make some abstract “*general finding as to in what circumstances a s.3 decision, for example, is reviewable or...a judgment on the basis of which it [a s.3 decision] is reviewable*”; it made a decision that was bounded by its facts, here very particular facts.
21. The court respectfully does not accept that it was not possible for any of the respondent’s officials to provide an affidavit stating, for example (and this is solely by way of illustration, not prescription and could be subject to whatever caveats were deemed appropriate):

‘We have about [NUMBER] EUTR applicants each year. Each year, with respect to [NUMBER] per cent of these applications, a deportation order process ensues. We have about [NUMBER] cases in which challenges to a proposed deportation order proceeds to court. We have about [NUMBER] cases in which such a challenge ultimately succeeds. Of the particular type of case before this court, we have perhaps [NUMBER] such cases a year. We estimate that about [NUMBER] cases in any one year would be impacted by the court’s finding on [Point of Law #1, #2, etc.]’.
22. Of course, s.5(6) does not establish a ‘numbers game’: a point of law of exceptional public importance could present which would impact on only a few cases or on a great many cases, but when counsel for the respondent comes before the court and contends that the sheer number of cases that would be affected is among the factors that clothe the point/s contended for with the necessary public importance and/or make the appeal contended for desirable, then some form of evidence ought to be provided, if at all possible. Here the court does not, as indicated, accept that this was impossible. In

passing, the court notes that when it comes to matters of evidence, the submissions of counsel, however distinguished s/he may be, are not evidence.

23. It is important to remember too that judicial notice is essentially a simplifying process, which makes easier the task of conducting litigation. That simplifying process involves assuming for the purposes of the instant litigation certain elements which experience has shown to be safely assumable. Does experience show it to be safely assumable that because a particular conclusion is reached by a court by reference to the factual matrix presenting in a particular deportation process, a like conclusion must or should necessarily apply in every particular factual matrix presenting in every ensuing deportation process? The short but complete answer to the just-posed question is clearly 'no'.

G. Points of Law Contended For

24. The court proceeds now to consider the remarkable number of points of law of exceptional public importance contended for.

25. The applicant raises points (i), (ii)(a) and (ii)(b), as considered above at Section E ("One Additional Factor"). Those points, as indicated above, arise from a fundamental misreading of the previous judgment.

26. Two further points were raised. The first such point was that there is a divergence between the previous judgment and the judgment of Clarke J., as he then was, in *Kouaype v. Minister for Justice and Equality* [2015] IEHC 389. That was a case in which Mr Kouaype unsuccessfully sought an order quashing a deportation order made against him. The core of his challenge focused on what, it was contended, was the reasoning set out in the recommendation by a civil servant to the respondent minister, from which, it was claimed, it was possible to infer the matters that had been taken into account by the minister in making his decision to make the deportation order. In the course of his consideration of the power of the Minister to make a deportation order, Clarke J. observed, *inter alia*, as follows:

"4.1 [When it comes to] *the Minister's decision to make a deportation order which requires him to consider the factors identified in s.3(6)...*[i]t is clear from the above authorities that the only obligation that arises in those circumstances is to afford the person concerned an opportunity to make submissions and, provided that the submissions are made in accordance with the Act, to consider them or, if no submissions be made, to consider the matters set out in s.3(6) 'so far as they appear or are known to the Minister'. The weighing of the various matters which might legitimately be taken into account under the section and which have been loosely described as 'humanitarian grounds' is, in accordance with those authorities, entirely a matter for the Minister. In the absence of evidence that the Minister did not give the person concerned an opportunity to make submissions in accordance with the statute or did not consider those submissions, it does not seem to me that that aspect of the Minister's decision is reviewable by the courts....

5.1 *For all of the above reasons it seems to me that the grounds upon which a decision by the Minister to make a deportation order in respect of a failed asylum seeker, can be challenged are necessarily limited. Without being exhaustive it seems to me that it would require very special circumstances for such a review to be possible....[I]t should be noted that it is incumbent on the Minister to consider any matters which have come to his attention (whether by way of submissions or representations on behalf of the applicant or otherwise) which would tend to show a change in circumstance from the position which obtained at the time the original decision to refuse refugee status was made".*

27. A trio of points might usefully be made:

- first, in terms of facts, the within application is not concerned with deportation of a failed asylum-seeker; it concerns the deportation of a third-country national who lived with her blood-brother (a UK national) in England, followed him, with her minor child, to Ireland when he came here for work purposes, has lived with him ever since, made a failed EU Treaty rights application, and was then the subject of a deportation decision-making process in which, notably, the decisionmaker at all times implicitly proceeded on what has since been conclusively shown to be the mistaken view that the adult whom it was proposed to deport was but a purported sister of her blood-brother.
- second, even if one accepts that the two situations, i.e. that presenting in *Kouaype* and here are directly analogous, Clarke J., as one would instinctively expect of so distinguished a judge, repeatedly envisions that there could be cases where special circumstances could bring different factors into play than those which he identifies. What more special circumstances could there be in a challenge to a deportation order than that a woman who implicitly was not believed to be the blood-sister of her brother has since conclusively established before the challenge comes on for hearing – so yes, belatedly, but life does not always proceed neatly – that she is the blood-sister of her brother?
- third, although Clarke J., in the last portion of the above-quoted text (“[I]t should be noted...”) is dealing with a point in time that comes before the decision to (or not to) deport is made, the court does not believe that once that moment had passed, Clarke J. would have been of the view (and he offers no view in this regard, so the court cannot be diverging from his judgment) that the respondent decisionmaker ought, thereafter, ever to proceed in the face of the truth – and, again, here the truth, now known to all, is that Ms MH is the blood-sister to her brother, a truth previously implicitly doubted by the respondent, a truth belatedly proved by Ms MH, but a truth nonetheless.

28. There is no divergence between the judgment in *Kouaype* and the previous judgment. Even if the court accepts that the two cases are directly analogous, it does not see even a glimmer of daylight between the judgment in *Kouaype* and the previous judgment. Clarke J., doubtless alive to the vagaries of life and the infinite variety of cases that constantly

present before the courts, expressly envisions that special circumstances could present in which the standard position that he envisions would not unyieldingly apply. The within case is but a case that presents with special circumstances on its own (very) particular facts.

29. The second additional point was that “[T]he Court was critical of the lapse of time between the sending of the proposal pursuant to s.3(3) of the 1999 Act and the making of the Deportation Order. Such delay to date has not been held to give rise to rights for the proposed deportees”. A couple of points ought to be made:
- (i) lest misapprehension arise, 17 days elapsed between the receipt of the proposal pursuant to s.3 and the sending by the solicitors for the applicants of their considered s.3-related submissions; any delay falls to be counted from sometime after those submissions were received. (In passing, the court notes that it took the respondent about 30 times longer than that 17-day period to revert with its decision as to deportation. Considered decision-making takes time, but that is a very long and still unexplained time to make and formulate a decision).
 - (ii) dealing with the substantive point made in the above-quoted text, when it came to the issue of delay, the court, in the previous judgment, *inter alia*, invoked precedent from the highest courts, praying in aid *P.O. v. Minister for Justice* [2015] IESC 64, para.33, and *E.B. (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41, paras. 14-16.
30. In passing, the court notes the submission made at the hearing of this application by counsel for the respondent that “*The lapse of time in this case, approximately 18 months, is one which is not so extreme, it is not seven or eight years*”. The court must admit to a certain incredulity that 7-8 years would be offered by the respondent as an apparent benchmark for offensive delay, with an approximately 1½ year period to produce a decision being treated as essentially fine. Perhaps such a timeframe *might* be found to be unobjectionable (though it is a very long time) if good explanation had ever been offered, but it has gone entirely unexplained. As mentioned above, the court can think of no other walk in life in which a party could or would take nearly 1½ years to make a decision, offer no explanation whatsoever for why it took so long, and come to court expecting that that would be considered appropriate.
31. Given that the respondent, as indicated in the preceding paragraphs of this Section G (or in the paragraphs referred to therein), rests its proposed points of appeal on a mistaken factual and/or legal basis, those points cannot be said to arise from the previous judgment and hence the series of questions contended, at para.11 of the written submissions, to arise from these points, cannot be certified. However, even if they had been well-grounded questions (and they are not; they are rooted in an erroneous reading of the previous judgment and/or in erroneous assertions concerning the previous judgment), the court cannot but respectfully agree with the following observations of counsel for the applicants at the hearing of the within application:

"[The said series of questions have been] *manufactured...to support the certificate [application]....[T]hey don't have any reality to what we're looking at....These issues [in the proposed questions] have already been considered, not only by the High Court. They have been considered by the Supreme Court, never mind the Court of Appeal. I [referred]...the court to Meadows. There is the Mallak decision as well. These issues are well known to the court[s]....There are no matters of uncertainty....I don't believe that there has been any point of law demonstrated by my friend that is of exceptional importance....I don't think there's any uncertainty about a proper review....The point of law must arise out of the court's decision; as I've said I don't believe that there's any point of law....I believe that we're simply dealing with a situation where the review was inadequate. I believe that the law is well settled on these issues".*

32. Finally, the respondent, having observed, *inter alia*, in its written submissions that "[t]he Court held that Article 8 ECHR was breached by the deportation of a Union citizen resident in the State and of his niece (who was approaching her majority at the time of the making of the impugned orders)", moves on to propose that the following question be raised with the Court of Appeal, viz. "In what circumstances does Article 8 ECHR create an obligation on the State to refrain from deporting the adult sibling or niece or nephew of a non-national who is lawfully settled in the State?" A number of points fall to be made in this regard:

- (i) Ms SH was born in November 2001, she appears to have been brought to England in September 2009, she commenced schooling in Ireland in September 2014, the possibility of a deportation order was first mooted in a letter of February 2017, and it seems for no good reason (certainly no reason has been offered) a decision on the deportation matter was not made until September 2018. Thus, Ms SH was a minor (recently turned 15 years of age) when the deportation order was mooted and a minor (not yet 17 years of age) when the decision to deport was made. Perhaps only in a world where an unexplained near 18-month timeframe for making a decision is considered unobjectionable would it seem correct to describe a child of 16+ years as "approaching her majority at the time of the making of the impugned orders". That is a description which one might apply to a minor who has long turned her 17th birthday – though she would still at law be a minor and fall to be treated as a minor – not to a child who has not yet even attained her 17th birthday. Childhood is short enough without the respondent seeking to foreshorten it so as to advance its position in particular proceedings.
- (ii) had Ms SH turned 18 years of age during the unexplained near-18 month timeframe before the decision to deport order was made, good reason would have had to be forthcoming from the respondent before it could have been allowed to rely on a happenstance that would have occurred, and it did not in fact occur, that happenstance being the attainment of the age of majority during a 1½ year-long decision-making process, in circumstances where no explanation, never mind a

good explanation, for such a protracted decision-making timeframe, had ever been given.

- (iii) the question posed, concerning as it does the circumstances in which Art.8 ECHR creates an obligation on the State to refrain from deporting the "*adult sibling or niece/nephew of a non-national lawfully settled in the State*" does not arise on the facts of this case; Ms SH was not an adult when the order was made.
- (iv) in any event, regardless of all the foregoing,
 - (a) as counsel for the applicants rightly contended at the hearing of this application, the Art.8 point in the previous judgment was in the nature of an additional point, after the court had already found for the applicants. In other words, the point of law contended for in this regard does not satisfy the criterion identified in S.A. that "*The question of law should be one which is actually determinative of the proceedings, not one which if answered differently would leave the result of the case unchanged*"; Here, even if the Art.8 point had been answered differently, the result of this case would have been unchanged.
 - (b) the law in this area is not in any state of uncertainty: this appears to be the first Irish case which treated with the aspect of Art.8 decided, and there is no conflict between this aspect of the court's decision and any national or international case-law (certainly none has been drawn to the attention of the court by the respondent in an application that is its to make).

33. If the court might be forgiven a final *obiter* observation, just recalling, as it has, the chronology of events concerning Ms SH's arrival in England and then Ireland, it must admit to considerable sympathy for Ms SH, who came to Europe as a young child, came to Ireland before she was a teenager, and yet has had the prospect of deportation hanging over her for years, when Europe/Ireland has been her home for most of her life. Childhood, Millay wrote, "*is the kingdom where nobody dies*"; it ought not to be the kingdom where the terror of deportation is allowed a considerably protracted reign for which no justification is ever volunteered.

H. Conclusion

34. Having regard to the foregoing, the certificate sought in the within application is, respectfully, refused.