Neutral Citation: [2015] IEHC 32

**THE HIGH COURT**

**[2011 No. 176 J.R.]**

**BETWEEN**

**A.A.R.**

**APPLICANT**

**-AND-**

**MINISTER FOR JUSTICE, EQUALITY & LAW REFORM**

**RESPONDENT**

**JUDGMENT of Ms. Justice Stewart delivered on the 22nd day of January, 2015**

1. A preliminary issue arose at the outset of the hearing with regard to an extension of time within which the applicant sought to commence the judicial review leave application.

2. The applicant states that he was served with a deportation order on the 3rd February, 2011. The applicant then contacted the Refugee Legal Services (RLS) within the allowed time and moved to a private solicitor with a view to challenging the decision by the 10th February, 2011. The file was sent to a barrister on the 10th February and papers were returned on the 18th February. The delay was not inordinate and in any event counsel on behalf of the respondent indicated that no issue and/or objection was being taken to the extension of time, so in those circumstances I am satisfied there were good and sufficient reasons to extend the time within which to bring the proceedings at the commencement of the hearing before this Court.

3. A second preliminary issue arose which was raised in the respondent's written submissions and which related to the reliability and/or admissibility of the applicant's grounding affidavit. This arose in circumstances where the applicant had stated on official forms that he did not speak English at the time he entered the country on the 16th June, 2008. In those circumstances a query arose in relation to the applicability of O.40, r.14 (Rules of the Superior Courts) and the requirement according to that rule as follows:

> "All persons taking affidavits shall certify, in the jurat of every affidavit taken by them either that they know the deponent himself, or some person named in the jurat who certifies his knowledge of the deponent. Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature or mark in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent."

The provision of this order was considered by Mr. Justice Cooke in *Saleem v. Minister for Justice, Equality & Law Reform* [2011] IEHC 223, where he stated at paras. 33-34:

> "The court has not been informed whether the applicant can read and write any language other than English, but it is clear that he is illiterate so as far as concerns an affidavit in the English language. On that basis alone, the requirement of O.40, r.14 applied in this case and the *jurat* should have contained an appropriate certificate. That not having been done, the affidavit could not be used unless the court was satisfied that it had been read over and "perfectly understood" by the applicant. Obviously, this court could not be so satisfied given the applicant's admission that the affidavit contained an incorrect statement which he did not understand to be there.
>
> Secondly, as the applicant appears to have little or no understanding of English, this was not a case in which the affidavit should in any event have been sworn in the English language. The correct approach is that the affidavit should be sworn originally by the applicant in the language he speaks. This should be translated by an appropriately qualified translator and both the original and the certified translation should be put in evidence as exhibits to an affidavit in English sworn by the translator."

Mr. Justice Cooke further stressed the responsibility of the solicitor or commissioner of oaths administering an oath for the purpose of taking an affidavit. He stated at para. 35 as follows:

> "In the view of this court, a solicitor or Commissioner for Oaths administering an oath for the purpose of taking an affidavit owes a duty to the court to be satisfied that the deponent is competent to make the affidavit in English. Such a duty is inherent in the nature of the function being performed and the authority conferred by law on such officers to administer an oath for that purpose. If the deponent is illiterate the procedure of O.40, r.14 must be followed and if the deponent does not speak English the affidavit must be sworn first in the foreign language."

4. This case had been listed for hearing in May, 2014, but was not reached. The submissions on behalf of the respondent were dated 5th May, 2014, and at that juncture it appeared no explanation had been given as to why the grounding affidavit was sworn in English. On the 7th May, 2014, an affidavit of Ángel Bello Cortés, the applicant's instructing solicitor from Messrs. KOD Lyons Solicitors, was sworn. On 5th November, 2014 a further affidavit, sworn by Ángel Bello Cortés, attempts to address the question of the applicant's command of the English language. At para. 4 of the affidavit he states as follows:

> "I say that I was retained by the Applicant herein on or around the 3rd February 2011, approximately 2 years and 8 months after his arrival in the State. I say that I have been satisfied at all times that he has a reasonable command of English, although I am instructed that English is not his first language. I further say that I am satisfied that the Applicant fully understood the contents of his grounding affidavit herein, sworn on the 21st of February 2011. I say that this is the reason why said grounding affidavit was not translated and/or an interpreter was not used."

At para. 5 of that affidavit he avers as follows:

> "I say that at paragraph 10 of the Applicant's grounding affidavit he states that "*I do not speak English or Tanzanian Swahili which I am advised are the two national languages of Tanzania*". I say and am so instructed that what was meant by the Applicant was that he did not speak English at the time of his arrival in Ireland (as previously stated at paragraph 5 of his grounding affidavit), which is clear from the ASY1 form, questionnaire and interview. The sentence at paragraph 10 of the affidavit is therefore incorrect because it says "I do not" have English instead of "I did not" have English but this is not the fault of the applicant. Nobody picked up in this mistake at the time (*sic*)."

At para. 5 of that affidavit he avers as follows:

> "I acknowledge a further affidavit sworn by the Applicant clarifying these matters would be useful. However, as stated in my previous affidavit, the Applicant instructs that he lives in Tanga, Tanzania, in very precarious conditions, supported by a local mosque and that he is very ill. The Applicant instructs that he cannot swear an affidavit at this time. I say and believe that in order for said affidavit to be admissible before this Honourable Court it would have to be signed by the Applicant in the presence of an Irish Consular official (in lieu of a practising solicitor or a commissioner for oaths), and the Applicant instructs that he is not in a position to travel to the Irish Embassy, in Dar es Salaam in order to swear a supplemental affidavit."

5. In any event, the respondents conceded that while not entirely satisfactory the affidavit of Mr. Cortés had attempted to address the non-compliance with O.40, r.14 and in those circumstances I do not propose to deal with the matter further at this juncture. However, I should say that if the matter was opposed by the respondent I may have taken a different view in relation to the matter. I deem the grounding affidavit admissible, in this instance. Suffice to say, however, the very careful comments of Mr. Justice Cooke in the *Saleem* decision ought to be adhered to in the preparation of the grounding affidavit in proceedings such as these.

6. The applicant illegally entered Ireland on the 16th June, 2008. He states that he was born on 3rd July, 1974 and is a member of the Bajuni ethnic group. He stated that he lived on the island of Chula with his wife and five children. The applicant stated that he fled Somalia with his brother due to persecution by an Islamist militia fighting the then government. He stated that they travelled by boat in February, 2008 and then, in June, 2008, from Nairobi to Dublin by aeroplane, transiting through the Netherlands.

7. The applicant attended the Office of the Refugee Applications Commissioner on 17th June, 2008, and sought a declaration pursuant to s.8 of the Refugee Act 1996 (as amended) on the basis that he was a Somali national and a member of the Bajuni ethnic group.

8. Information had been provided by the UK Border Agency which indicated that the applicant's fingerprints matched those of a Tanzanian national who had successfully applied for a visa to visit the UK for medical treatment. He completed the ASY1 form and he completed the questionnaire. On p.12 of the questionnaire, in relation to the travel details, he was asked if he had travelled outside his country of origin before, to which he ticked "no". At question 31(b), in relation to the date he returned to his country of origin, he inserted "N/A" (not applicable). In relation to question 32(a), "were you ever issued with a passport?" he did not tick either yes or no. In relation to the place of issue he then answered 'N/A'. At question 32(b) he was asked "if no, please explain why not" and he responded "I never had a plan to travel outside of my country". He was asked did he have a visa to enter any country and he ticked "no". At question 45 he was asked if he completed the questionnaire himself and he answered "no" and replied that [name given] of [address given], Dublin 7 completed the questionnaire. He did not describe his relationship to the applicant and in relation to the reason why the applicant was unable to complete it himself, the entry reads: "he can't write or speak English". The record of his interview commences at p.60 of the booklet of pleadings, book one, and he proceeded to answer a variety of questions which were put to him in relation to his background.

9. From p.60-84 of the interview notes the applicant was asked questions by the interviewer and his answers were recorded. At p. 85 of the interview record, question 15, no. 6 the applicant was informed that he had answered incorrectly a number of questions on Somalia and Bajuni culture that had been asked of him earlier. The interviewer then put a number of questions to him with regard to the detailed information and answers in respect of the Somalia and Bajuni people. On p.87 he was asked had he told the interviewer all the reasons why he might be afraid to return to Somalia and his response was that the situation there is not secure. When asked if he had anything else to add he replied: "Here I am undergoing treatment. If I am taken somewhere else it will be difficult". The applicant makes much in his submissions to the Court that the respondent, in arriving at the decision, the subject of these proceedings, placed too much reliance on the UK border agency fingerprint match and had insufficient regard to the other matters put forward on behalf of the applicant. It seems to me that it is clear from both the content of the interview notes and the subsequent documentation which I will refer to later in this judgement that the fingerprint match supplied by the UK border agency was but one feature of the entire decision-making process. The inability and the perceived lack of knowledge on the part of the applicant to answer questions in relation to Somalia and the islands off the coast of Somalia, one of which he claimed to originate from, and his general lack of knowledge in relation to clan structure of the Bajuni ethnic group, were a feature of the decision-making process.

10. Further, Sprakab performed a language analysis based on a recording of the applicant on 14th August, 2009. On 17th August, 2009, Sprakab produced a language analysis report which is at exhibit B of the booklet of pleadings. With regard to the applicant's native language, the report stated:

> "The person speaks a variety of Swahili found
>
> [X] **with certainty not in: Somalia**
>
> [X] **with certainty in: Kenya**"

11. The applicant was informed by letter dated the 28th October, 2009, from ORAC that the Commissioner had recommended that he should not be declared a refugee. The letter further enclosed a leaflet setting out the appeals process which was available to him within 10 working days after the sending of the letter. A s.13 report pursuant to the Refugee Act 1996 (as amended) was also enclosed with the said letter. On the 11th day of November, 2009, the applicant's representative from the RLS, by cover of letter of that date, furnished a form 2 notice of appeal in respect of the ORAC decision. By letter dated 29th January, 2010, the decision of the Refugee Appeals Tribunal pursuant to s.16(2)(a) of the Refugee Act 1996 (as amended) was furnished to the applicant. The tribunal determined that the applicant was not a refugee within the meaning of s.2 of the 1996 Act.

12. The conclusion of the tribunal decision set out at p.16 of the decision was as follows:

> "The tribunal has considered all relevant documentation in connection with this appeal including the Notice of Appeal,

country of origin information, the Applicant's Asylum Questionnaire and the replies given in response to questions by or on behalf of the Commissioner on the report made pursuant to section 13 of the Act. Accordingly, pursuant to section 16(2) of the Act, I affirm the recommendation of the Refugee Applications Commissioner made in accordance with section 13 of the Act."

The decision was dated the 21st January, 2010. No challenge was taken by the applicant to the findings of the RAT.

13. On the 24th February, 2010, by letter in writing from the Irish Nationalisation and Immigration Service (INIS) a letter was sent by registered post to the applicant informing him that:

> "The Minister for Justice, Equality and Law Reform has decided to refuse to give you refugee status and that the reasons for this decision were set out in the recommendations made by the Refugee Appeals Tribunal."

The letter further went on to advise that the applicant's entitlement to stay in the State had expired and the Minister now proposed to make a deportation order against him pursuant to s.3 of the Immigration Act 1999 (as amended) and three options were set out for the applicant.

> a) Option one: Leave the State before the Minister decides on a deportation order
>
> b) Option two: Consent to a deportation order
>
> c) Option three: Apply for a subsidiary protection and/or submit representations under s.3 of the Immigration Act 1999 (as amended),

14. In response to that letter of the 24th February, 2010, from INIS, the RLS on behalf of the applicant, by letter in writing dated the 16th March, 2010, submitted an application for leave to remain in the State pursuant to s.3 of the Immigration Act 1999. At item no.10 on p.2 of that letter under the heading of 'Humanitarian Considerations for the Minister's attention' the letter stated as follows:

> "Our client Mr. [A.A.R.], Trc69/1354/08, is currently receiving medical treatment for chronic Myeloid Leukaemia in St James' Hospital, Dublin 8 in the state. You will note from the letter submitted to ORAC on the 12/10/09 on asylum file report from St Vincent's University Hospital from Dr. Kamal Fadalla, Haematology Registrar to Dr. Karen Murphy, Consultant Haematologist, dated 15/10/09, for your urgent consideration.

The RLS quoted from the said medical report as follows:

> "He now must go for his second line treatment of his leukaemia which will probably be a bone marrow transplant and will be done under the haematology service at St James' Hospital. Mr. [R.] requires his treatment for his leukaemia as we are expecting his condition to get worse if he does not get any further treatment. This type of treatment is available in very few centres in the world. We think that his prognosis is very poor without getting the appropriate treatment."

The letter goes on to state:

> "Our client (*sic*) brother Mr. [S.A.R.] donated his bone marrow to facilitate a transplant circa 14th February 2010 to save his brother's life, supporting medical documentation will be forwarded as soon as same to hand."

15. On the 28th April, 2010, INIS wrote to the applicant in person advising that the Minister for Justice, Equality and Law Reform intended to process his application on the basis that he is a Tanzanian national. He was afforded a period of 15 days from the date of that letter to submit any observations or comments setting out reasons as to why the Minister should process his subsidiary protection application and his representation under s.3 of the Immigration Act 1999 on the basis that he was a Somali national. He was finally advised that if he didn't respond to the letter within the timeframe set out, i.e. 15 working days, the Minister would proceed to consider his case based on the information already on file, i.e. the information in relation to the Tanzanian passport used in his UK visa application in Dar-es-Salaam, which indicated that he was a Tanzanian national. On the 18th May, 2010, RLS responded to INIS referring to the letter of the 28th April, 2010, and noting the contents therein. By letter dated the 11th June, 2010, the RLS submitted an unsigned application for subsidiary protection on behalf of the applicant indicating that the RLS would arrange to forward a signed copy in due course.

16. On the 10th January, 2011, the applicant was written to by INIS indicating that the Minister had determined that he was not a person eligible for subsidiary protection. A copy of the report setting out the Minister's determination was enclosed for his attention. On the same date, 10th January, 2011, a letter was written to the RLS enclosing copies correspondence which had been sent directly to the applicant.

17. Exhibit P of the applicant's grounding affidavit contains a letter written on his behalf by the RLS and dated the 26th January, 2011. The letter was sent for the attention of the Minister for Justice/Authorised Officer, Acknowledgements Unit, Irish Naturalisation and Immigration Service, Department of Justice, Equality and Law Reform, 13/14 Burgh Quay, Dublin 2. It is headed "*Urgent Per Courier*". It states that it encloses a confidential medical report of Dr. Eibhlin Conneally of the haematology services at St James Hospital dated 25th January, 2011, for inclusion on the applicant's file and quotes from it as follows:

> "I have been seeing [the applicant] since November 2008 when he was referred for consideration of an allogenic bone marrow transplant for Chronic Myeloid Leukaemia in accelerated phase… ultimately he had a bone marrow transplant in February 2010 in St James's Hospital. Through the years [the applicant] has had many complications related to his transplant which is generally to be expected. These patients remain very immunocompromised for a prolonged period of time and it takes many years for their immune system to recover."

The letter goes on to state that:

> "There is no doubt in my mind that should [the applicant] return to Somalia that the level of specialist care that he requires will definitely not be available and he will inevitably die."

The letter from RLS went on to refer to the case of *D. v. United Kingdom* (1997) 24 E.H.R.R. 423.

18. An affidavit was sworn on the 14th April, 2011, by Mr. Pat Carey of the Legal Services Support Unit, Department of Justice and

Equality. At para. 19 thereof he states that the letter dated the 26th January, 2011, from the RLS enclosing a medical report from Dr. Conneally dated the 25th January, 2011, was not received by the Minister until after he had made the deportation order in this case.

19. The applicant sets out a number of grounds in the statement required to ground application for judicial review. At para. 5(1) it is alleged that the respondent failed to address relevant considerations and/or considered irrelevant considerations and in particular the situation in Tanzania as to which the applicant had made no submissions at all.

20. In 5(2) it is alleged that the respondent failed to consider the detailed submissions made by the applicants on the 24th May, 2010, on the issue of whether a UK visa could be issued in Tanzania for a person such as the applicant using a false passport.

21. At 5(3) it is alleged that the finding that the applicant was certainly Tanzanian on the basis of the UK visa application only when there was no further information to suggest he was Tanzanian, when the language he speaks indicated otherwise, was unreasonable.

22. At 5(4) the applicant alleged that, contrary to provisions of reg. 4(5) of the EC (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006), the application for subsidiary protection was considered at the same time as the application for leave to remain/deportation. The leave to remain/ deportation recommendation decision and the subsidiary protection decision were both signed off on the 10th January, 2011. The applicant alleged that the respondent did not therefore proceed to consider the matter referred to in s.3(6) of the Immigration Act 1999 and deportation after the subsidiary protection decision as required. The leave to remain/ deportation recommendation was made without reference to the subsidiary protection decision. In the light of the decision of Mr. Justice Cooke in the case of *O.O. & anor. v. Minister for Justice, Equality and Law Reform & anor.* [2011] IEHC 165, which points to the fact that it is within the Minister's discretion to consider applications in or about the same time, in the interest of efficiency, it was conceded at the hearing on behalf of the applicant that this ground was not being pursued before this Court. Grounds 5(5) and 5(6) contained interrelated issues and were, as a result of the aforementioned, not pursued at this stage of the proceedings.

23. At ground 5(7) the applicant's medical condition is set out and the applicant alleged that a further medical report was submitted by courier on the 26th January, 2010: the day the deportation order was made. It indicated that the transplant had taken place but complications had arisen as such that "he will inevitably die" if the specialist care was not continued and this care would not be available in Somalia. The applicant alleged that the respondent failed to consider the second medical report in making the deportation order.

24. At ground 5(8) the applicant complained that the finding that the country of origin information indicated that treatment for the applicant's condition is available in Tanzania, but that this does not follow from the country of origin information reports. The position in Somalia was not considered at all.

25. At 5(9) the applicant alleged that the respondent failed to consider adequately, or at all, whether deportation would violate the applicant's right to life and his right to protection against inhuman and degrading treatment pursuant to Articles 2 and 3 of the European Convention on Human Rights and/or his right to life recognised in Article 40.3.2 of the Constitution. The applicant further pleaded in the alternative that the respondent did not properly consider or consider at all the threefold test developed by the European Court of Human Rights in relation to Article 3 cases.

26. The applicant's legal submissions in relation to this matter were filed on the 1st May, 2014. On receipt of those legal submissions the respondent prepared replying submissions dated 5th May, 2014 and further a statement of opposition was prepared on behalf of the respondent and that is dated the 7th May, 2014.

27. The written submissions on behalf of the applicant at para.11 of the submissions, in the final sentence, the applicant submitted that the respondent breached the principles of *audi alteram partem* and did not operate fair procedures in this case. It was pointed out at para. 3 of the statement of opposition that no such ground is alleged in the statement of grounds nor has any application been made in the intervening period, nor indeed at the hearing, to amend the grounds to include such an allegation. In the circumstances, I accept the submission of the respondent that the allegation of the breach of the principle of *audi alteram partem* and the lack of fair procedures does not form part of this case.

28. The statement of opposition on behalf of the respondent sets out in detail the procedures that were adhered to by the respondent and which ultimately culminated in the signing of the deportation order by the Minister on the 26th January, 2011, and broadly can be summarised as contending that at all stages the relevant officials gave due consideration to the matters before him or her, the matter moved through the Department, in accordance with the structures within that Department and ultimately the decision of the various officials, having been approved over a period of months, was finally put before the Minister. The examination of file was approved by the Minister and the deportation order was signed in person by the Minister on the 26th January, 2011.

29. The acknowledgement letter was dated the 31st January, 2011, and was received at the RLS on the 2nd February, 2011. The respondent submits, and it is averred to by Mr. Carey, that the respondent considered all of the applicant's circumstances: his medical condition, his private life and his representation for leave to remain, as they were made known to the Minister and the Department. I accept this submission. The applicant underwent the bone marrow transplant surgery on the 14th February, 2010. This was referred to in the extensive letter supporting the application for leave to remain. Indeed, that letter went on to state that a further medical report would be furnished when same comes to hand. There is no explanation in the pleadings and evidence before the Court as to why this report was not furnished in the intervening months and in the period leading up to the 10th January, 2010, when the decision to refuse subsidiary protection and to recommend deportation by the Minister was taken. The subsidiary protection report and the report prepared for the purposes of the deportation decision were prepared by the same official and reviewed by other officials.

30. In the circumstances it appears to me that the respondent was entitled to arrive at the conclusion and decision which he so did on the 10th and 26th January, 2011, and that he did so having undertaken a thorough examination, as is set out clearly in the examination of file. It sets out extensively the basis on which the applicant's claims were considered, which, having been reviewed *as per* inter-departmental procedures and annotated in handwriting by officers operating at different levels within the Department, was ultimately stamped and approved by the Minister, and the deportation order signed in person by the Minister.

31. Much legal argument was taken up at the hearing in relation to the submissions and the authorities dealing with threat to life and the decisions of the Irish courts interpreting the decisions of the European Court of Human Rights starting with the *D. v. United Kingdom* (1997) 24 E.H.R.R. 423.

32. In the case of *N. v. United Kingdom* (2008) 47 E.H.R.R. 39, a Grand Chamber decision of the European Court of Human Rights of the 27th May, 2008, where the court set out at para. 42 and thereafter in summary the Court observes that since *D. v. United*

*Kingdom* it has consistently applied the following principles:

> "Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D. v. the United Kingdom* case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support."

33. At para. 43 the Court went on to say that:

> "The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D. v. the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country."

34. At para. 44 the Court stated:

> "Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32). Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see *Soering v. the United Kingdom*, 7 July 1989, § 89, Series A no. 161). Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States."

35. At para. 45:

> "Finally, the Court observes that, although the present application, in common with most of those referred to above, is concerned with the expulsion of a person with an HIV and AIDS-related condition, the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost."

36. The Court was referred to a number of authorities from this Court in relation to the manner in which the D. and N. cases have and ought to be interpreted within this jurisdiction. Mr. Colm O'Dwyer, S.C. relied on the decision of this Court in Makumbi v. Minister for Justice, Equality and Law Reform [2005] IEHC 403, a decision of Ms. Justice Finlay Geoghegan. He contends that the level of detailed analysis that is required to be conducted in relation to medical conditions in order to satisfy the tests laid down by the ECHR in the N. and D. cases is completely absent in this case. Ms. Fiona O'Sullivan B.L. on behalf of the respondent also referred to the *N.* and *D.* decisions of the ECHR. The Court was referred to the decision of *M.E.O. (Nigeria) v. Minister for Justice, Equality and Law Reform* [2012] IEHC 394. At p.7, para. 26 where Mr. Justice Cooke states as follows:

> "The fundamental question which this situation raises accordingly, is who is responsible in international law for the applicant: Ireland or Nigeria? Can an individual already in poor health who enters the State illegally but with a view to making a claim for asylum which is determined to be unfounded, impose upon the host State a liability in law to provide continuing medical treatment by reason only of the fact that equivalent treatment in the country of origin is inferior, even grossly inferior, and the individual's personal circumstances are such as to leave her without immediate family support? If the applicant, on arrival in November 2006, instead of claiming asylum had immediately sought permission to remain for the express purpose of accessing ARV treatment because it was unavailable to her in Nigeria, could the Minister have been compelled in law to grant her an indefinite or temporary permission to remain for that purpose? Does the legal position in that regard change because the State, for humanitarian reasons and in compliance with its obligations under the Convention Relating to the Status of Refugees, 1951 and later obligations of the Common Asylum Policy of the European Union, allows the asylum seeker to access remedial treatments while the asylum application is being processed?"

37. Mr. Justice Cooke then analyses the constitutional protection afforded by Article 40.3.2 of the Constitution at para. 27 and, thereafter, in his judgement. At para. 33 he concludes:

> "For these reasons, the Court is satisfied that no provision of the Constitution imposes a positive obligation on the State to provide or to continue to provide any particular type of medical treatment to an individual citizen as a matter of right based upon the protection afforded by Article 40.3.2.

38. In para. 35, in the context of the proposed deportation of non-citizens, Mr. Justice Cooke pointed out that "it is also necessary to distinguish between those cases where the impediment to deportation is the exposure of the prospective deportee to probable risk to life or person at the hands of forces or individuals in the country of destination". Further in the paragraph he states:

> "It does not oblige the State to undertake the positive task of protecting citizens, and, a *fortiori* non-citizens, from the natural consequences of illness or disease. In the absence of some circumstance of direct or vicarious responsibility on the part of the State for such a condition or person, Article 40.3.2 does not impose upon the State a positive obligation to ensure a particular level of health treatment to individuals (whether citizens or not,) who suffer from a life threatening condition."

39. Mr. Justice Cooke then goes on to consider Article 3 of the European Convention on Human Rights and in particular the decisions

of *D.* and *N. (supra).* At para. 60 of his judgment Mr. Justice Cooke states:

> "Having regard to this review of the Strasbourg case law, it seems to this Court that in its application to expulsion cases, it remains the primary function of article 3 to provide protection against threat to life or person from intentionally inflicted acts by public authorities in the country of destination or by non-state actors from whom the public authorities are unable or unwilling to provide protection. This does not however exclude the article being relied upon to provide protection where the threat to life takes the form of exposure to inhuman treatment resulting from the absence of necessary treatment for an existing and life threatening illness which has reached a critical stage and which is irreversible if currently provided treatment is withdrawn. It seems to this Court that the essential elements which determine whether or not a violation of article 3 of the Convention is potentially raised by a proposal to deport a third country national who is illegally present in a Contracting State and has there been receiving treatment for a life-threatening condition includes at least the following:-
>
> (i) First and foremost, the current state and seriousness of the person's medical condition; the prognosis as to its future evolution with and without the continuation of that treatment;
>
> (ii) Secondly, the practical consequences for the person's health of removal to the country of origin including consequences of interruption of the treatment and the limited availability or non-availability of adequate treatment in the country of origin;
>
> (iii) the personal circumstances of the individual including age, sex, family and the conditions likely to be faced in the country of origin;
>
> (iv) the particular context in which the person has received treatment in the host State including the length of time and whether the person's presence in the State was originally lawful, or for the purpose of claiming asylum;
>
> (v) whether the diagnosis of the medical condition predated the person's arrival in the host State;
>
> (vi) whether the individual is physically fit to be deported and not likely to suffer a material worsening of the condition as a result of the transportation itself; and
>
> (vii) whether any anticipated deterioration in the condition is likely to occur whether or not a deportation takes place."

40. Mr. Justice Cooke then looked at the examination of file memorandum before applying the principles already set out to the said examination of file.

41. In this case, the examination of file, pursuant to s.3 of the Immigration Act 1999 (as amended), which is set out at p.276 of book one of the pleadings, was carried out by three officials: a Higher Executive Officer, an Assistant Principal Officer and the Minister's Secretary. An Executive Officer in the Repatriation Unit, on the 4th August, 2010, produced a memorandum in writing at the conclusion of which he recommended that the Minister makes a deportation order in respect of A.A.R. (aka A.S.R.).

42. This examination of file was considered by a Higher Executive Officer on the 11th August, 2010, and he has noted on the memorandum that he agreed with the recommendation that a deportation order be made in respect of the applicant and he signed same on that date.

43. The matter was considered by an Assistant Principal Officer, on the 10th January, 2011, and he agreed with the recommendation that the Minister make a deportation order as he signed this on the 10th January, 2011.

44. The matter was then brought to the attention of the Minister and the examination of file is stamped "*approved by the Minister*" and on the 26th January, 2011, the deportation order was signed in person by the Minister.

45. The examination of file document runs to seventeen pages. At p.2, in relation to the humanitarian considerations, the report states that the applicant's legal representatives, RLS, refer to the applicant's medical problems and, in particular, to his suffering from chronic myeloid leukaemia and to him requiring a bone marrow transplant.

"The RLS submitted, *inter alia*:

> *Our client (sic) brother [name given] donated his bone marrow to facilitate a transplant circa 14th February 2010 to save his brother's life, supporting medical documentation will be forwarded as soon as same to hand."*

46. The memorandum continues:

> "To date no further documentation has been received regarding the applicant's current state of health.
>
> In the Case of *N. v. United Kingdom*, European Court of Human Rights, Grand Chamber (Application 26565/05), Strasbourg, 27 May 2008, the Court draws attention to the principles to be drawn from case-law appertaining to those seeking to remain in a Contracting State on the basis of serious illness and the lack of or lesser treatment available in the home country."

47. Paragraph 42 quotes from the *N.* case:

> "In summary, the Court observes that since *D. v. the United Kingdom* it has consistently applied the following principles.
>
> *Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the D. case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could*

*not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support."*

48. Paragraph 43 of the memorandum continues with the quote from the *N.* case:

> *"The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in D. v. the United Kingdom and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country."*

49. At the bottom of p.3 of the report the examination of file states that:

> "There is nothing in the medical evidence supplied to date to show that the applicant's medical condition is such as to be considered 'exceptional' within the meaning of the above."

50. It goes on to state:

> "There is a functioning health care system operating in Tanzania, in the form of a pyramid from the level of the village up to the Referral/ Consultant Hospital, as COI access at [website given] on 4 August 2010 shows."

51. At p.6 the examination states:

> "the applicant's legal representatives, the Refugee Legal Services (RLS), submit, *inter alia,* country of origin reports outlining the situation in Somalia. However, it is not accepted that the applicant is a Somali national. The applicant's claim was not found to be credible by both ORAC and RAT. Furthermore, the applicant used a valid Tanzanian passport to obtain a UK visa. This would require the applicant to be physically present at the issuing office in Dar es Salaam, Tanzania, as well provide documentation and fingerprints. This amounts to convincing documentary evidence that the applicant is from Tanzania. The applicant was informed by letter dated 28 April 2010 that it was intended to process his application on the basis that he was Tanzanian. The applicant, despite being afforded an opportunity to do so, has not made any submission or representation regarding any fears he may have relating to Tanzania."

52. The document continues:

> "Having considered the humanitarian information on file in this case there is nothing to suggest that A.A.R. aka A.S.R. should not be returned to Tanzania."

53. It seems to me that, having considered the subsidiary protection decision and the examination of file, all matters were properly and carefully considered by all relevant officials, and ultimately by the Minister, prior to the making of the deportation order on the 26th January, 2011. The respondent made the decision based on the information before it at the time the decision was taken and was entitled to do so.

54. In light of the foregoing I accordingly refuse the leave sought. This being a telescoped hearing, no further order is required.