THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 678 J.R.]

BETWEEN

D. E. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND A. E.)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE COMMISSIONER OF AN GARDA SIOCHANA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

(No. 3)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 26th day of June, 2017

1. The applicant's mother arrived in Ireland on 23rd January, 2009, while pregnant. The applicant was born in the State on 26th March, 2009. A deportation order was made against him on 1st July, 2011.

2. A first judicial review application [2011 No. 637 J.R.] was brought against the deportation order and dismissed by Cross J. at leave stage (*D.O.E. v. Minister for Justice and Equality* [2012] IEHC 100 (Unreported, High Court, 1st March, 2012)) on the basis that there were no substantial grounds for the challenge due to a lack of evidence of there being exceptional circumstances which would permit the applicant to remain in the State to avail of medical treatment. The Minister was held to have given due consideration to the medical situation and it was held that there was no deficiency in the consideration of art.3 of the ECHR.

3. Between 14th June, 2012, and 22nd July, 2014, the applicant's mother (and by necessary extension the applicant, albeit that he was not personally responsible) evaded the Garda National Immigration Bureau.

4. In the meantime an application to revoke the deportation order had been made, which was refused on 8th July, 2014. A second set of judicial review proceedings [2014 No. 526 J.R.] was brought against that refusal.

5. On 24th November, 2014, Mac Eochaidh J. struck out the second judicial review application on the grounds of mootness because of a second s. 3(11) application.

6. On 29th July, 2016, the second s. 3(11) refusal was issued. That gave rise to the present proceedings, the third judicial review in the matter.

7. On 23rd August, 2016, Murphy J. granted an interim injunction restraining the deportation of the applicant up to 10th October, 2016. This order was perfected on 24th August, 2016.

8. On 2nd November, 2016, I granted an order extending the injunction pending determination of the application for leave to seek judicial review. That order was perfected on 8th November, 2016.

9. In a judgment dated 14th November, 2016 (*D.E. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 650) I refused leave to seek judicial review. As of the date of hearing of the present application for a stay, on 29th May, 2017, that order had not been perfected.

10. On 9th May, 2017 (*D.E. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 276) I refused leave to appeal to the Court of Appeal against the leave refusal decision. Again, as of the hearing date, that order had not been perfected.

11. On 15th May, 2017, I granted costs to the respondents (the leave to appeal application having been made on notice) and continued the injunction until 29th May, 2017. That order was perfected on 17th May, 2017.

12. Mr. Michael Conlon S.C. (with Mr. Paul O'Shea B.L.), in a measured and skilful submission on behalf of the applicant, is applying now for an injunction or stay pending an intended application for leave to appeal to the Supreme Court. While to some extent he may have been hindered in appealing to the Supreme Court due to the absence of a perfected order, he has not shown any efforts to actually obtain the order in the 6 and a half month period since 14th November, 2016. Nor at any stage has he prepared a draft notice of application for leave to appeal.

The test for a stay

13. In written submissions the applicant suggested that the Supreme Court determination in *P.I. v. Governor of Cloverhill Prison* [2016] IESCDET 145 sets out a test for injunctions or stays pending appeal as opposed to a pending hearing, but I fully considered this in *Y.Y. v. Minister for Justice and Equality (No. 3)* (Unreported, High Court, 24th March, 2017) in which I held that the test in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152 applies (see also *C.C. v. Minister for Justice and Equality* [2016] IESC 48).

In what circumstances does the court have jurisdiction to restrain deportation in a revocation case?

14. As noted above, the deportation order in this case was made on 1st July, 2011. Judicial review proceedings were brought against that order and dismissed. The applicant subsequently made an application for revocation of the order under s. 3(11) of the Immigration Act, 1999, which was rejected. Judicial review proceedings against that rejection were struck out. He then made a further s. 3(11) application which has led to the present, third set of judicial review proceedings.

15. A threshold question arises as to whether in a judicial review relating to revocation of a deportation order, the court has jurisdiction to restrain the enforcement of the original order, in circumstances where it is either unchallenged or unsuccessfully challenged (and therefore now unchallengeable).

16. Ms. Nuala Butler S.C. (with Ms. Fiona O'Sullivan B.L.) for the respondents draws attention to the fact that this question regarding jurisdiction is currently pending before the Supreme Court in the *P.I.* case, having regard to the fifth issue on which leave to appeal was granted, namely "*what is the jurisdiction of any court to grant a stay or an injunction to restrain the deportation of an individual pending appeal when the underlying deportation order has never been challenged*" (at s. 5 of the determination). She preferred to leave the jurisdiction question to the *P.I.* case but submitted that an injunction preventing the operation of a valid deportation order ought not be granted as no new material has been advanced by the applicant that was not known or considered by the Minister at the time of the making of the deportation order, and that this is not an exceptional case which would warrant the granting of an injunction.

17. In considering this question it makes little difference whether an original underlying deportation order has not been challenged or has been unsuccessfully challenged, because the same outcome of an unchallengeable order results.

18. It seems to me that this is probably ultimately a semantic question. There is no operational difference between saying that there is no jurisdiction to grant such an injunction unless circumstance X applies, or saying that there is a jurisdiction but it should only be exercised in circumstance X.

19. It is noteworthy that the Court of Appeal in the P.I. case took the view that it did not have such jurisdiction. As set out in s. 3 of the Supreme Court determination, "*following the hearing in the Court of Appeal, an application was made to the Court of Appeal on the 22nd November, 2016 for a stay on the deportation order pending the determination of an application for leave to appeal to the Supreme Court but the application was refused on the basis that the court could not grant a stay or an injunction to restrain the execution of a valid deportation order*".

20. The concept that the court should not (except in exceptional circumstances) restrain a valid deportation order in proceedings other than those challenging the order itself follows from the important Supreme Court decision in *L.C. v. Minister for Justice* [2007] 2 I.R. 133 [2006] 7 JIC 1001 (*per* McCracken J. (Kearns and Macken JJ. concurring)), which dealt with an application for an injunction to restrain deportation in a case where an application to revoke the deportation order had been made and rejected, and a challenge to that rejection had also been rejected by the High Court and was under appeal to the Supreme Court (a situation with parallels to the present case).

21. As I noted in *K.R.A. v. Minister for Justice and Equality (No. 4)* [2016] IEHC 703, at para. 41, the Supreme Court held in *L.C.* that: "*If the court were to grant an injunction such as is being sought by the appellant, the effect would be to thwart the operation of the perfectly valid deportation order and would, at least to some degree, prevent the operation of a perfectly valid and unappealable High Court order*."

22. The only exception even potentially envisaged by the court was as follows: "*There might indeed be circumstances, although it is hard to envisage them, where the Supreme Court might exercise its inherent jurisdiction to grant an injunction which could have this effect, for example it might conceivably be exercised when a previously unknown fact comes to light, being a fact which was unknown at the time of making of the deportation order, and which is one of such gravity as might stay implementation of the deportation order. No such case has been made out before us*."

23. I also noted at para. 42 of *K.R.A.* that a similar approach to *L.C.* was applied by McDermott J. in *K.N. v. Minister for Justice* [2013] IEHC 566, and I took a similar view in my own decision in *P.O. & G.E. v. Minister for Justice and Equality* [2016] IEHC 543 (Unreported, High Court, 3rd October, 2016). I also noted that *L.C.* did not appear to have been open to the Supreme Court in *Okunade*, and while opened to the Court of Appeal in *Chigaru* was not mentioned in the judgment of Hogan J. in that case, possibly because it was not felt relevant to the issue in that case.

24. Either in its reported or its unreported form, *L.C.* has been cited in some but by no means all of the injunction and stay cases and it is perhaps unfortunate that it (and the stream of jurisprudence following it) was not opened to the Supreme Court in *Okunade* when that court was seeking to synthesise the jurisprudence on this issue. The cases in which it has been cited are as follows

> (i). *C.R.A. v. Minister for Justice Equality and Law Reform* [2007] 3 I.R. 603 in which MacMenamin J. said at p. 630: "*Where, as here, the original order for deportation has not been impugned in any proceedings, it stands unchallenged and thus no injunction should be granted at all*."
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> (ii). *V.S. v. Minister for Justice Equality, and Law Reform* [2008] IEHC 269 where Edwards J. relied on the High Court decision in L.C. on the merits in upholding the respondent's submission that the Minister "*is not obliged to permit a failed asylum seeker to remain in the State on the ground that her medical condition may be better in this country or on the ground that better treatment may be available in this country than in her country of origin*."
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> (iii). *Ezeike v. Minister for Justice Equality and Law Reform* [2010] IEHC 110, which is probably the most helpful case from the applicant's point of view. *L.C.* is distinguished on the basis *inter alia* that the applicant made a protection application after the original deportation order and was seeking the injunction within the proceedings challenging the refusal of subsidiary protection. Indeed analogously I would have no difficulty in restraining deportation (even on foot of an unchallengeable deportation order) if the applicant sought an injunction in the context of establishing a right to be in the State to pursue a protection claim made after that order. But no such considerations apply here. Cases where this would arise are limited (bearing in mind that an abusive or repeated reapplication for protection confers no right to remain in the State, and nor does the bringing of proceedings challenging a refusal of protection, still less a refusal to revoke).
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> (iv). *Q.L. & Y.Y. v. Minister for Justice, Equality & Law Reform* [2010] IEHC 223 where Cross J., in refusing injunctive relief, referred to the judgment of McCracken J. in *L.C.* regarding the exceptional jurisdiction of the Supreme Court to grant interlocutory relief which, it was held, was also applicable to the jurisdiction of the High Court (paras. 20-21)).
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> (v). *P.O. & S.O. v. Minister for Justice and Equality* [2015] IESC 64. The issue was not reached as the injunction was moot in any event, though Charleton J. referred to *L.C.* and noted that the deportation order had not been challenged and that no new facts had come to light since the date of the order, and thus no arguable case had been made out for the grant of an injunction (paras. 42-43).
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> (vi). *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 where the case was cited in connection with the separate issue of the scope of s. 5 of the 2000 Act.
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> (vii). *K.R.A. (No. 4)* [2016] IEHC 703 where I followed *L.C.* in similar circumstances (currently under appeal).

(viii). *Y.Y. v. Minister for Justice and Equality (No. 3)* [2017] IEHC 334 where I followed *L.C.* (also currently under appeal).

25. The decision of the Supreme Court in *L.C.* is of course binding but even apart from the question of authority, the whole scheme of s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 is that a limited period (currently 28 days) is afforded to applicants in order to challenge a range of decisions set out in or under the legislation. Where a timely challenge is brought, the court can of course restrain the enforcement of the decision pending the outcome, or even ultimate outcome, of that challenge. But where the decision is either not challenged or is unsuccessfully challenged, the underlying decision becomes final. What is under consideration in a revocation case is not whether the applicant should be deported; that is the subject of a final and unchallengeable decision. Instead, what is in issue in s. 3(11) judicial review proceedings is whether the Minister should be compelled to reconsider a rejection of an application to revoke that order.

26. On what basis therefore can it be said that this invocation of the jurisdiction of the court somehow reaches back and renders open to review that which is specifically provided by law as being beyond review? This is in the context where s. 5 was the subject of a presidential reference under Article 26 of the Constitution and was upheld by the Supreme Court in terms that make clear that the decisions to which it applied should not be the subject of collateral challenges in other proceedings. The procedural exclusivity of s. 5 was upheld even as against Article 40.4 - "*The fact that the deportation order has previously been unsuccessfully challenged in judicial review or had not been challenged at all within the time permitted by s. 5 may be sufficient to constitute the deportation order as a lawful basis for that person's detention*": *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 398.

27. It seems to me that interfering with a deportation order which is itself unchallenged or has been unsuccessfully challenged by means of orders in a revocation case is precisely the sort of procedure that is contrary to s. 5, save in the sort of extreme circumstances envisaged in *L.C.*, particularly a radically new factual situation that could not have been considered originally.

28. So I proceed on the basis that the court has jurisdiction to grant an injunction to restrain an unchallengeable deportation order where there has been a fundamental change of circumstances such that deportation would be unconstitutional or unlawful on some ground that could not have been contemplated when the order was made originally. But such a situation could not conceivably arise here. The applicant's medical condition has been there since the beginning. It is not a new point any more than, for example, a new adverse medical development of a known injury would allow a personal injuries plaintiff to reopen a decision of a court assessing damages in a negligence action. It does not become a new point because there is a new medical report.

29. The additional authorities relied on by Mr. Conlon are not of huge assistance:

(i). *The State (Quinn) v. Ryan* [1965] I.R. 70 is not hugely relevant to this issue.

(ii). *D.U. v. Minister for Justice Equality and Law Reform* [2007] IEHC 337 is about restraining a transfer order and is not relevant to the issue at hand.

(iii). *Efe v. Minster for Justice* [2011] 2 I.R. 798 establishes that s. 3(11) is the mechanism for new facts to be taken into account in deportation cases. That is all well and good but it is not a mechanism for s. 5 to be set at nought.

(iv). *P.B.N. v. Minister for Justice* [2014] IESC 9 where an injunction was brought following a protection application made after an unchallengeable deportation order; the case is moderately helpful to the applicant but it is a protection re-application case not a s. 3(11) case which is fundamentally different, as discussed above; and in addition, *L.C.* is not cited or considered in the judgment of Laffoy J.

(v). *Chigaru v. Minister for Justice* [2015] IECA 167 was a challenge to the underlying order, not a revocation case.

(vi). Mac Eochaidh J.'s decision in *I.R.M. v Minister for Justice and Equality (No. 1)* [2015] IEHC 873 involved the grant of an injunction in a s. 3(11) case but in that case there had been a major change in the underlying factual matrix since the underlying order (the pregnancy of the second named applicant).

30. Finally under this heading, I should mention that it is not clear to me that the *L.C.* case has featured in the *P.I.* appeal thus far (it certainly did not feature when that case was before me at first instance), and because it appears to be directly relevant to one of the questions set out in the determination I would respectfully suggest to the parties in that matter to ensure that it and the related caselaw is duly brought to the Supreme Court's attention in the context of its consideration of that question.

Conclusions on the issue of whether any jurisdiction should be exercised

31. Such limited jurisdiction to grant an injunction to restrain an unchallengeable deportation order as might exist should not be exercised except in those exceptional circumstances where fundamental matters have changed since the deportation order in a way that could not have been contemplated at that time. Those circumstances do not arise here.

32. Time has elapsed since the deportation order was made (largely due to evasion plus continued availing of all legal avenues) with all that implies in terms of getting on well in school, but all that was readily foreseeable from the beginning. Likewise he has updated medical reports now but nothing that fundamentally changes the position that at all material times his medical condition was known. Thus the application for an injunction should be dismissed *in limine*.

Assessment of the *Okunade* criterion of arguability

33. If I am wrong about the foregoing then it is necessary to go on to consider how the *Okunade* criteria apply to the present case.

34. The first issue is showing arguable grounds. Now where a leave application has been dismissed, by definition the court is of the view that there are not substantial grounds for the propositions being advanced. Does it therefore follow that there cannot be a stay pending appeal? In this context, "arguable grounds" is perhaps best understood as meaning arguable grounds for the proposed application for leave to appeal rather than for the leave application. While refusal of leave presumptively means that the points should not be regarded as arguable for this purpose, it is conceivable in some cases that one could take a broader view. It depends on the points and in particular on why they were rejected. As appears from the *D.E. No. 2* judgment, the applicant's questions of law for the s. 5 appeal would not have made a difference to the result, or are based on an assumption that does not obtain, or arise from a misunderstanding, or in relation to the last point, arises because the point was dreamed up after the hearing of the leave application. Under those circumstances I do not think that arguable grounds in the *Okunade* sense exist.

35. In response perhaps to my views in the No. 2 judgment the applicant has somewhat unnervingly indicated an intention to apply to the Supreme Court in relation to a point on which he did not attempt to seek leave to appeal to the Court of Appeal, namely whether

the respondent failed to have regard to the practicality of the applicant being able to access medical care in Nigeria, having regard in particular to the crucial issue of the cost thereof and given the applicant's contention that there is an absence in Nigeria of an effective healthcare system for those who cannot afford to pay.

36. A point that was not raised at the hearing or in the application for s. 5 leave to appeal does not constitute an arguable ground for the purposes of seeking a stay.

37. Furthermore, beyond some glancing reference in a UNICEF report to a quotation of general comments about Nigeria, this does not seem to be a point that was advanced to the Minister, and certainly not as a contention that this particular applicant would be unable to access medical care.

38. In addition, in supplementary submissions Mr. Conlon flagged yet a further question in relation to which leave would be sought from the Supreme Court, namely an alleged conflict of jurisprudence. Mr. Conlon relies on a recently published article by Darragh Coffey, "Standards of Scrutiny in Judicial Review of Deportation Decisions Involving Article 3 ECHR: X.X. v. Minister for Justice and Equality", (2017) 57 *Irish Jurist* 144. Coffey criticises *X.X.* and suggests a conflict with the decision in *P.B.N. v. Minister for Justice and Equality* [2016] IEHC 316 (Faherty J.) where *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 is expressly followed (para. 180) (at the same time *X.X.* is impliedly criticised for seeing relevance in *Meadows* (p. 155) even though it was a case relied on *by the applicant* (para. 154 of *X.X.*)). He repeatedly describes Faherty J. as engaging in appropriately heightened scrutiny and describes *X.X.* as applying lesser scrutiny (even being "*highly deferential*" (p. 160)). The rationale for this distinction is not made out as both judgments have regard to *Meadows*, which rejects the concept of anxious or heightened scrutiny. It is hard not to see in Mr. Coffey's repeated complaints a slight touch of argument from the result: *P.B.N.* just must have applied a more rigorous approach because the Minister's decision was quashed; *X.X.* just must have been more deferential because the ministerial decision was upheld. Such a yah-boo approach does not add a lot to elucidating the issues involved. More fundamentally one might question the methodology of contrasting just two art. 3 decisions and claiming a conflict of jurisprudence. Why not look at all art. 3 cases? Or if a selection, why these cases in particular? Why not put the decisions in a practical context? Perhaps the administrative decision being reviewed in *X.X.* was just not that unreasonable? That possibility does not seem to have been given much airtime.

39. At p. 158 Coffey makes the error – endemic in the context of the formation of statements of grounds in immigration cases – that failure to spell something out involves a failure to consider it. *X.X.* is criticised for not outlining in detail, for example, the content of the Minister's analysis. But not reciting something narratively is not the same as not considering it. Judgments are long enough already. The same goes for the complaint that the applicant's legal submissions in relation to *Meadows* were not rehearsed *in extenso*.

40. Coffey's speculative conclusion is that "*[i]t is clear that*" *P.B.N.* and *X.X.* "*diverge*" in the "*approach to scrutiny of decisions involving fundamental rights*" (p. 160). There is a time and place for the phrase "*it is clear that*", but this may or may not be it. The approach to scrutiny of decisions involving fundamental rights has been set forth by the Supreme Court in *Meadows*, a case that also involved the equally absolute right to non-*refoulement*. To this extent Mr. Coffey would be at home in the world of asylum and immigration practice where a legal groundhog day awaits one; any adverse decision is liable to be re-run at will. In *Y.Y. (No. 2) v. Minister for Justice and Equality* [2017] IEHC 185, I noted an attempt to re-run *Meadows* on the basis of the judgment of Lord Sumption in *R. (Lord Carlile of Berriew Q.C.) v. Secretary of State for the Home Department* [2015] AC 945, at para. 34; a development which Coffey would no doubt be cheering on from the side-lines.

41. His attempt to suggest that *X.X.* inadequately implements the ECHR falls particularly flat. In a somewhat confusing passage, various pieces of ECHR and national jurisprudence are stitched together giving the impression that *X.X.* majored on the applicant's duty without regard to the state's obligation to dispel doubts raised (pp. 148-149). But the judgment specifically says at para. 127 that "*[t]he onus is on the applicant in the first instance to adduce evidence to show a real risk* (*Saadi*, para. 129). *If he succeeds in doing so then it is for the government to dispel that risk.*" Thus Coffey's statement on p. 149 that "*[t]he totality of the written judgment suggests that [the judge] understands the ECtHR's insistence on a rigorous approach to considering breaches of art.3 as requiring scrutiny of the applicant's submissions only*" is contradicted on the face of the judgment. He goes on to unfavourably compare the approach taken with the fact that Strasbourg will consider additional material *motu proprio*; this obscures the fact that an Irish court on judicial review generally only considers the material before the decision-maker (see e.g., *Efe v. Minster for Justice* [2011] 2 I.R. 798).

42. Irrelevantly, Coffey emphasises paraphrases of the test in the judgment, whereas the test itself is quoted from *verbatim* in para. 123: "*In* Saadi v. Italy *(Application no. 37201/06) (2009) 48 E.H.R.R. 730, the Grand Chamber of the European Court of Human Rights rejected the argument that where a threat to national security existed, stronger evidence had to be adduced regarding a risk of ill-treatment (para. 140). The U.K. submitted that in such a situation, a risk of ill-treatment should only be found where it was* "more likely than not". However, the European Court of Human Rights upheld the established test that "*substantial grounds…have been shown for believing that there is a real risk*" of treatment contrary to art. 3." All of this leads to Coffey's tendentious conclusion that the "*highly deferential approach … in X.X. stands in marked contrast to the rigorous scrutiny applied … in P.B.N. This latter approach is likely to be more in line with what is required under art. 13 of the ECHR*". Someone whose awareness of the jurisprudence was limited to the version of those judgments presented by Coffey might agree, but for reasons outlined, this dramatic conclusion has not been made out. Indeed the suggestion that art. 13 of the ECHR was not complied with does not seem to have been substantiated thus far given the discharge of the rule 39 indication. Overall Coffey's article is a spirited and interesting contribution to the debate from the applicants' side of the house, but somewhat coloured by selective quotation and presentation in the service of a cheer-leading, argumentative position that ultimately has not been stood up; or at least not by this piece. For present purposes I do not accept Mr. Conlon's suggestion that there is a divergence of jurisprudence, or at least not in any way that goes above and beyond the inevitable position that no two cases present on the same precise facts. Even if *arguendo* there was a conflict, it was evident as of the date of *X.X.*, and did not arise because Mr. Coffey wrote an article about it, so there was nothing stopping Mr. Conlon from having sought leave to appeal under s. 5 on the basis of any such question. The idea of dreaming up new questions of law after the event to launch a constitutional leave to appeal application is not one that strikes me as the sort of thing that Clarke J. in *Okunade* had in mind by having an arguable case for the purposes of a stay.

43. Thus the applicant falls at the first *Okunade* hurdle. But assuming I am wrong about that I will go on to consider the remaining criteria.

The applicant's status as a person born in Ireland is irrelevant

44. Mr. Conlon submits that it is an extra factor in favour of the applicant that he was born here. I am afraid that I must completely reject that contention. The applicant is not in any better position in law than someone who arrived in Ireland as a new-born. While Mr. Conlon submits that birth in Ireland gives rise to a greater level of connection to the State, that is legally immaterial and firmly in the realm of the *ad misericordiam*.

45. In the 27th Amendment of the Constitution Act 2004, the People of Ireland made a deliberate decision to amend the Constitution to deprive applicants of legal rights to citizenship or nationality that could have been acquired simply on the basis of birth in Ireland. While we are dealing here with a right to be present in the State under an injunction or stay, as opposed to citizenship or nationality, it is not for the courts to quixotically tilt in a direction at odds with the clearly expressed will of the People by subverting the amendment through giving cognate rights to such persons *via* the back door. The applicant may have been born in Ireland but that does not make him Irish or give him any additional entitlement to be here either temporarily or at all. Daniel O'Connell made the point long ago when he said of the Duke of Wellington in 1843 that "*being born in a stable does not make a man a horse*" (Shaw's *State Trials* (Dublin, 1844), p. 93).

46. I appreciate that judges sometimes humanely make points indicating sympathy to applicants, such as that an applicant has known no other country or has lived here all their life. That may be so but I do not think that such *obiter* comments are intended to dilute the position that in law the assessment of *ad misericordiam* matters is a question for the Minister. Whether it necessarily helps for the court to indicate that it might put weight itself on *ad misericordiam* points that did not appeal to the Minister may depend on the circumstances. But in the present case, and almost by definition in similar cases, the Minister was unquestionably fully aware that the applicant has known no other country.

47. It is true of course that the applicant did not ask to be born as an illegal non-national but none of us asks to be born either at all or at the time and place or to the parents we are born. His status as an illegally present non-national arises from his legal situation on birth and is not dependent on fault on his part. His legal position is indistinguishable from someone who is an immigrant *stricto sensu*.

Application of *Okunade* criteria

48. In relation to the *Okunade* criteria, the public interest in the implementation of a valid decision clearly leans against a stay as the default position.

49. The orderly implementation of the relevant scheme also leans against a stay.

50. The public interest in the measure being implemented pending appeal again militates against a stay. While Ms. Butler does not make much of the applicant's mother's conduct of blatant breach of the immigration system, nonetheless that does not enhance the applicant's case in this regard. As I discussed in *K.R.A.*, it is not unjust to visit those consequences on a child applicant. However I do not need to give this element weight in the present case given that the respondents are not pressing it.

51. The next issue is that of consequences for the applicant. Under the heading of disruption to the applicant's life, Mr. Brian Burns, solicitor for the applicant, has put in an affidavit sworn on 9th May, 2017, indicating that the applicant is doing well in school, plays the tin whistle, attends Bible studies and so on. However, these are matters analogous to those that would apply to anybody in this situation. If such children were not excelling at the tin whistle or reading the Bible they would be playing chess or reading books about science; and indeed many such activities are portable across national boundaries. There is nothing in the question of disruption to his life that goes beyond the norm that would apply to any child being asked to move back to his or her country of nationality. Indeed Mr. Conlon ultimately conceded that "*there may be nothing to distinguish him from other children of that age*" under the heading of disruption. I do of course have regard to such disruption as will inevitably arise. Generally however, the disruption of an illegal non-national whether child or adult is of very limited weight in the overall context of the orderly enforcement of the immigration system. Otherwise the court itself would be in effect operating its own immigration policy contrary to that of the Minister, without the qualifications, information, knowledge, expertise, entitlement or authority to do so. It would only add insult to injury for the usurpation of power involved to be clothed in plausible legal language and camouflaged by the plasticity of legal doctrines.

52. I have endeavoured to set out more full reasons for such an approach in *K.R.A. (No. 4)* and it would be tedious to repeat that discussion here but obviously I have in this case considered the authorities discussed there (see in particular paras. 31 to 33).

53. The second element of consequences for the applicant is the health aspect and the fear that the applicant may not get adequate care for what he says is a life threatening illness.

54. The problem for the applicant is that non-citizens, whether adults or children, do not have a right to stay in Ireland to avail of healthcare (or any social, economic or other rights) save only in the exceptional cases envisaged by art. 3 of the ECHR or other truly extreme situations. The applicant's sickle cell condition is not so exceptional as to put him in such a category. He has millions of fellow sufferers in Nigeria. Vast numbers of these must have severe conditions or must require occasional blood transfusions. I assume for the purpose of this discussion that the applicant will be afforded reduced quality of medical treatment, and that would be unfortunate, but it follows from the fact that the applicant has no legal entitlement to be in the State. Of course in assessing the applicant's application, the Minister found that appropriate medical care is available in Nigeria. The bottom line is that a Nigerian unlawfully present in Ireland should not be in a better position than a Nigerian in Nigeria, and likewise for the national of any other third country.

55. The applicant's predicament is somewhat dressed up by reference to him having had "*life-saving*" treatment here, the inference being that his life would not have been saved elsewhere. But that is not so. Is anyone seriously suggesting that one cannot get a blood transfusion in Nigeria? The most the applicant's medical advisers can say is that the Irish blood supply is secure unlike that in Nigeria. It is not evident to me that there is any basis to think that the applicant's Irish doctors know anything about the security of the blood supply in Nigeria, nor is it obvious historically that the security of the Irish blood supply has been anything to write home about (see e.g., the findings of the Tribunals of Inquiry chaired by Finlay C.J. in 1997 and Her Honour Judge Alison Lindsay in 2002); the fact that donation criteria today (which should of course be matters for dispassionate scientific judgment) are the subject of contentious public campaigning does not necessarily inspire confidence in the criteria being applied, depending on your point of view. At its height, the applicant's case is that if he needs a blood transfusion in Nigeria there will be some (wholly unquantified and unsubstantiated) increased risk to him because the quality of Irish-sourced blood is (in some unspecified and unsubstantiated way) better than that of Nigerian-sourced blood. That is not a basis for an injunction to remain in Ireland.

56. Furthermore, it is something of an illusion to say that the applicant should be allowed to stay pending the hearing of a leave to appeal application, because that is only the first step in what would be a long march. He would have to obtain leave to appeal, and then win the appeal in the Supreme Court; then, following the grant of leave to apply for judicial review, proceed to prosecute his substantive application for judicial review in the High Court and then win either in this court or on appeal. The applicant having won the case it would then be a matter for the Minister to reconsider the deportation order, which he might at that stage decide to uphold. It would only be if he decided to revoke the order that the question of the applicant being free to apply to come back to Ireland will arise. Ms. Butler confirms that if the order is revoked when the applicant is outside the jurisdiction, he will be at liberty to apply to come back. That it seems to me is a mechanism to balance convenience for the applicant against enforcement of the law. Ms. Butler submits that the applicant's approach, essentially, is that as long as you keep litigating you can stay. That is not the law.

57. The next issue is that of the strength or weaknesses of the applicant's case. In the present case it appears that the applicant's argument is distinctly weak at a legal level. Assessment of it at a humanitarian level is a matter for the Minister and not the court.

58. Furthermore, the applicant can make his case without a personal presence in the State. That is not specifically spelt out in *Okunade* but it arises from the Supreme Court decisions in *Nicolas v. Minister for Justice* (Unreported, Supreme Court, 20th February, 2007) and *Zadeh v. Minister for Justice* (Unreported, Supreme Court, 2nd November, 2007).

The State's power to control entry of non-nationals

59. Any assessment of whether to grant a stay must also have regard to the overriding fact that it is for the executive and not the judiciary to determine the admission of non-nationals into the State*. Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593 and *Osheku v. Ireland* [1986] I.R. 733 are still the law, although one would not necessarily know it from the extensive attempts made by applicants to have immigration policy dictated by judges. In *Pok Sun Shum* it was held that the executive "*must have very wide powers in the interest of the common good to control aliens, their entry into the state, their departure and their activities within the State*" (at p. 54).

60. In *Osheku* it was held that "*The control of aliens … is an aspect of the common good related to the definition, recognition, and the protection of the boundaries of the State. That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concord maintained with other nations in accordance with the objectives declared in the preamble to the Constitution*" (at 746). Such contextual considerations reinforce the default position arising from *Okunade* that the Minister's determination to deport any given individual should not be thwarted by injunctions or stays.

Conclusion

61. The infinite loop that seems to apply in the immigration area is well-illustrated by this case. The applicant is on his fourth written judgment of the High Court, his third judicial review and his second s. 3(11) application, with no end in sight. One assumes that the s. 3(11) applications will keep coming (no doubt next time based on updated information as to his doing well in school, &c.) until such time, if ever, as he is actually deported. Such a merry-go-round is all well and good for applicants, and involves considerable effort and ingenuity on behalf of their legal advisers, but the court ultimately must be concerned about the rule of law. A process of endless litigation backed up with ongoing injunctions or stays sets at nought the immigration system of the State. Such a process is just simply not compatible with the obligation on judges to "*uphold the Constitution and the laws*" (Article 34.6.1°).

62. The fundamental issue that applies not just here but across the legal landscape is that the law must be made to work for people who play by the rules, rather than those who do not. The applicant (whose position is in this respect essentially derivative on that of his mother) has, since the end of an initial relatively brief period of lawful residence while making an unfounded asylum claim, been unlawfully present in the State. Given his minority status, his degree of compliance with the law is dependent on the acts of his next friend who has flouted immigration law for many years and continues to do so, both on his and on her own behalf. Yet the law seems to have worked reasonably well for her; following two years' presence on foot of a meritless asylum claim we had one year's presence prosecuting a failed judicial review that was dismissed at leave stage. There followed two further years' presence by way of evasion, and then three years' presence prosecuting two further failed judicial reviews. I am now asked to grant yet a further stay to enable this endless process to continue. A legal process that facilitates those in fundamental breach of their obligations distorts the interests of distributive justice at stake, and not simply because it potentially diverts resources from persons who are in compliance with law. Such a process dilutes the incentive for compliance with law and thereby weakens the extent of voluntary compliance with legal obligations. If law is not going to be enforced, or is not going to work for those who comply with their duties as opposed to those who do not, the courts will have set the scene for a dilution of their own credibility and ultimately of their societal acceptance and therefore of lawful behaviour more generally. Human behaviour is significantly influenced by incentives, and a system with perverse incentives will generate perverse results.

63. The applicant was as a matter of fact born here, but that is legally irrelevant and his position is the same as any other similarly situated illegal immigrant. His argument that he needs to stay in order to avail of superior Irish medical care is not a sufficient basis to warrant an injunction, particularly in a case where the underlying deportation order is now unchallengeable and where his medical condition was there at the time of that order.

We would not regard it as a valid objection for a gate-crasher to complain, when being thrown out of a party, that it is unjust to be removed because the provisions on offer there are better than what he has at home. Acknowledging the legally irrelevant fact that he was born here, and shorn of humanitarian emphasis and legal camouflage, the applicant's basic position is a larger and more acute version of that fallacy. A person does not have any right in law or logic to remain in a place to enjoy the superior conditions that apply there if it is a place where he or she has no right to be at all. Nor should a court use the plasticity of equitable remedies in order to sustain such an untenable situation. In the event that following the conclusion of any appeal or further litigation, the deportation order is revoked and the applicant is given permission to enter the State, he can be brought back.

Order

64. Having regard to the foregoing I will order that the applicant's application for a stay on deportation be refused.