Neutral Citation Number [2007] IEHC 19

THE HIGH COURT

JUDCIAL REVIEW

2006 No. 280 J.R.

IN THE MATTER OF THE IMMIGRATION ACT, 1999

BETWEEN

CHINASA R. AKUJOBI AND OKECHUKWU EMEKA AKUJOBI (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND CHINASA R. AKUJOBI)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice John MacMenamin delivered the 12th day of January, 2007.

1. The facts of this case give rise first, to a consideration of the procedure to be observed in an application for leave to seek judicial review and an injunction restraining deportation when the decision sought to be impugned is one under s. 3(11) of the Immigration Act 1999. A second issue arising is the evidential threshold in such applications where made on notice.

Prior to dealing with these issues however it is first necessary to deal with the factual background and its relationship to these procedural evidential and legal issues.

Background Facts

The applicants in these proceedings arrived in this State on 1st February, 2005 seeking asylum. After leaving their state of birth, Nigeria, the applicants state they first resided for five months in the Republic of Indonesia. Thereafter they state that they were assisted by a family from Northern Ireland, to travel from Indonesia to Belfast. Thereafter it is asserted that the same family provided them with money in order to travel to Dublin. The applicants say they have since had no contact at all with this family, who, they say, travelled with them and were instrumental in their being able to arrive in Ireland. They have not provided the asylum authorities with the full names or address of the family who were of considerable assistance to them, other than to state their surname, one not uncommon in Ireland.

2. The applications were processed by the Refugee Applications Commissioner ("RAC"), and were afterwards the subject of an appeal to the Refugee Appeals Tribunal ("RAT"). The respondent refused them a declaration of refugee status and notified them of his intention to deport them by letter dated 24th November, 2005.

3. The applicants were invited to make representations pursuant to s. 3 of the Immigration Act, 1999 ("the Act of 1999") which were submitted on their behalf by those then representing them, that is the Refugee Legal Service.

4. Having considered then the representations under s. 3(6) of the Act of 1999, the respondent decided to make deportation orders in respect of the applicants on 7th February, 2006. These decisions were notified to the applicants (whose applications were at all times considered together) by letter dated 20th February, 2006.

5. The applicants decided to retain other solicitors. By letter dated 28th February, 2006 their current solicitors submitted an application to the respondent to revoke the said deportation orders pursuant to s. 3(11) of the Act of 1999. This application included certain further documents regarding country of origin information and medical reports which are now the focus of these proceedings.

6. By letter dated 1st March, 2006 the respondent wrote to the applicants' solicitor indicating that the application had been refused.

7. The applicants' legal position within the State

While s. 9 of the Refugee Act, 1996 provides that a person who makes an application for asylum has a right to remain in the State pending that determination, once a claim has been refused such asylum seeker no longer has any legal entitlement to remain in the State and is *prima facie* liable to deportation under s. 3(2)(f) of the Act of 1999. Such person cannot actually be deported until the Minister has complied with certain procedural requirements under s. 3 of the Act of 1999. Consequently, pending the Minister making a decision as to whether to deport an individual, that former applicant has a limited entitlement to remain in the State deriving from the operation of the s. 3 procedures (see the judgement of Hardiman J. in *P,B and L v. Minister for Justice* [2002] 1 I.R. 164.

8. Deportation orders requiring the applicants to leave the State within a specified time and to thereafter remain outside the State have now been made in respect of each of the applicants. The applicants have not challenged the procedure in or the validity of these orders in these, or any other proceedings. An application to the Minister to revoke a deportation order under s. 3(11) does not have a suspensive effect and a deportation order remains valid and of full effect unless and until the Minister makes a decision to revoke it.

9. The proceedings

The applicants sought leave of the High Court to issue judicial review proceedings challenging the respondent's refusal to revoke their deportation orders on 9th March, 2006. Hanna J., directed the applicants to put the respondent herein on notice of the making of such application. The applicants did however secure an interim injunction simply preventing their deportation at that time.

At the hearing of an application for an interlocutory injunction on 15th March, 2006, for reasons outlined later in this judgment, I directed that the application for leave should be adjourned to facilitate further legal argument on the following issues:

> I. The appropriate test for an application for leave to bring judicial review pursuant to Order 84 of the Rules of the Superior Courts when the application for leave is made "*ex parte* on notice" to an intended respondent.
>
> II. The extent to which matters presented in an application to revoke a deportation order pursuant to s. 3(11) of the Act of 1999 must be materially different from those presented or capable of being presented to the Minister in the making of the deportation order itself.

and

III. Whether a material distinction, if it concerns detention, health matters, or rights and care of a minor is of sufficient gravity to justify a different approach to the leave application in an Order 84 "ex parte on notice" judicial review application for leave?

While under s. 3(6) of the Act of 1999 the Minister must have regard to a range of issues such as in the making of a deportation order such as age, duration of residence, circumstances, employment character humanitarian considerations the common good and natural security, s. 3(11) provides simply:

> 3(11) "The Minister may be order amend or revoke an order made under this section including an order made under this subsection".

10. The applicants' claim

The applicants submit that the respondent acted in breach of their right to fair procedures and natural justice in failing *inter alia* to have regard to their potential status in Nigeria as returned asylum seekers and a risk of arbitrary detention if they were to be deported to their home State. They contend the respondent failed to take into account fresh evidence identified as 'country of origin' information, and also evidence with regard to the first named applicant's medical status submitted as part of their s. 3(11) application. The applicants remained in this jurisdiction on foot of the interim injunction which was continued on consent until this hearing.

Two affidavits have been filed on behalf of the respondent in reply, in which certain factual assertions of the applicants are addressed and in which the procedure now stated to be in place for persons deported from this State to Nigeria is outlined. The respondent contends that on the basis of the matter set out in these affidavits, sworn by Detective Inspector Philip Ryan and Mr. Noel Dowling Principal Officer in the Department of Justice, Equality and Law Reform, the concerns which the applicants raise are not, in reality, borne out. The essential issues raised by the applicants are first, that there is a risk in their deportation should they be returned to Nigeria as "failed" asylum seekers of being placed in detention and, second, whether the respondent had given proper consideration to new material submitted with regard to the first named applicant's health.

The application under s. 3(11) of the Act of 1999 to revoke these deportation orders was made by the applicants within approximately one week of the actual orders by the respondent. However it is not disputed that the documentation in support of the s. 3(11) application to revoke the order was not put to the Minister in advance of the making by him of the deportation orders as part of the s. 3(6) representations made prior to the order itself.

Counsel for the respondent submits that the new "information" was either known or capable of being known to the applicants in advance of the making of the deportation order. Furthermore, counsel submits that one letter in this correspondence suggests that there has been, on the part of the applicants, a lack of candour in the making of this application. Specifically it is claimed that the new facts regarding the first named plaintiffs' medical condition were already well known to the plaintiff prior to the application. The applicants in turn suggest their then legal representatives failed to put before the Refugees Appeals Tribunal this material, through no independent evidence is adduced on this issue.

11. It is therefore necessary to consider the material in question which is at the centre of these proceedings, first in the context of the allegation of lack of good faith.

Preliminary Issue; The new material: issues of candour and credit good faith.

The submission to the respondent to revoke the deportation order was made by letter of 28th February, 2006. It will be briefly described here, and described in detail later in this judgment. As indicated, the material comes in two categories: (a) country of origin and (b) medical concerns.

(a) Country of origin information

> This information was a series of articles and other written reports regarding the claim made that the applicants might be apprehended or detained on their return to Nigeria. It is now (but not previously) contended that the applicants would thereby suffer a real risk of detention, extortion constituting a breach of fundamental rights. The material in question consists of reports or reviews containing evidence of endemic corruption and detention in Nigeria which, it is said, reinforces the applicants' own fear of detention, harassment or extortion. However with the exception of one article dated 17th February, 2005, the preponderance of the material which is actually dated significantly predates the processing of the application before the Refugee Applications Commissioner and Refugee Appeals Tribunal. The contention which the applicants now raise, that of a risk of detention, was never raised at any time prior to the application to the Minister under s. 3(11) and was only then made for the first time. Other material downloaded from the internet is undated. It has not been established in evidence that any of the material is of recent provenance, or of direct relevance to persons in the applicant's category of returned former asylum seekers.

(b) Medical Reports

> In the course of the application made on 28th February, 2006, two medical reports were included in respect of the first named applicant. The first of these is from Our Lady of Lourdes Hospital, Drogheda, dated 14th February, 2006, stating the first named applicant's need for surgery in the near future.
>
> The second is a letter from Ms. Audrey Crawford of Spirasi, (the well known organisation to assist asylum seekers) dated 23rd February, 2006, confirming that the first named applicant is receiving counselling with that organisation.
>
> On the basis of these two reports it is contended that the first named applicant is now in need of medical and psychological assistance and that it would be disproportionate and unreasonable to deport her in the circumstances of her health. The implication of the applicants' case and the supporting correspondence to the application of the 28th February 2006 suggests that the question of the applicant's health had come very recently into the picture.

12. This material, is contained in an exhibit ("CRA 6") consisting of some 59 pages on different subjects. Included as one of those pages is a letter dated 10th from Mr. Farrukh Naseem, Registrar to Mr. El-Sayed, Consultant General and Paediatric Surgeon at Our Lady of Lourdes Hospital, Drogheda. This letter is addressed to The Doctor in Charge, Mosney Centre, County Meath, where the applicants reside.

Part of the letter reads:

> "Dear Doctor,
>
> Many thanks for referring this lady who indeed has epigastric hernia, which has been giving her a good bit of discomfort. We would like to repair it surgically and we have put her name on the waiting list. She will be operated on in Louth County Hospital under the care of Mr. El-Sayed …"

The balance of the letter deals with other medical arrangements being made for the plaintiff.

But this letter was dated 10th January, 2006. It therefore significantly predates the decision to make the deportation order in respect of the applicants made by the respondent on 7th February, 2006. Furthermore, the terms of the letter imply that there had been previous correspondence between the consultant and his registrar, on the one part, and the general practitioner or doctor in charge at the Mosney Centre on the other. No letter of referral from the doctor in charge has not been exhibited, nor has any affidavit from that doctor, or the registrar or the consultant.

13. One cannot avoid the conclusion therefore that there was highly relevant medical information which was within the power and capacity of the applicant to obtain and submit prior to the decision now impugned. It is difficult to avoid the conclusion that this is not "new material" at all, and that there may have been other material important as to context in the procurement of the first named applicant though not her present lawyers.

The second letter, from Ms. Crawford of Spirasi, is dated 23rd February, 2006. It certifies that, as outlined, the first named applicant has been attending counselling sessions at the Asylum Seeker and Refugee Counselling Support Service at Mosney. However, it states that the first named applicant has been attending these sessions since 2005. Again this was material which was within the procurement of the applicant well before the decision impugned of 28th February, 2006.

As a counsel of prudence for the future I think it appropriate that if there is material of particular importance to the making of a decision impugned, or which raises issues as to the court's discretion, such documentation should be specifically and simply identified, and be exhibited separately. It should also be referred to specifically in any grounding affidavit. This is of particular importance in the light of the discretionary nature of the reliefs which are sought, and the necessity for candour in the making of such applications.

14. Suffice it to say that the submissions and evidence as to this material from the respondent and the absence of the evidence as to why it was not submitted earlier, unfortunately gives rise to an inference not rebutted by evidence, that material was being "drip fed" to the respondent, was either already within the procurement of the applicants, or not in their minds at all as a real issue. Furthermore, the contents of such material do not indicate that what is raised therein on the applicant's behalf was new at all.

Such a finding raises a question both of credit and candour. It may be seen in the light of findings on credit made by the Refugee Appeals Tribunal that the first applicant's primary reason for travelling to Indonesia was to be reunited with her husband. At no stage did she seek asylum there and apparently lived safely from September to December, 2004. A further factor, (already adverted to) is the absence of information regarding the persons who assisted the applicant to travel, it is said, to Belfast from Indonesia. It was suggested by the first named applicant to the Tribunal these people of their own volition, and from their own resources, made arrangements for the applicants to travel to Ireland, actually travelled with them, and that instead of then making arrangements to assist them to remain in Belfast, decided to put them into a taxi to Dublin. The evidence before the Tribunal was that the applicant had not exchanged contact details with this family and that they had not had further contact since arriving in Belfast. This was not accepted.

15. The Tribunal ultimately also found to be non-credible that the first applicant, having left Indonesia, had flown directly from Bangkok to Belfast and had done so with a child and without having to present any travel or passport documentation at any airport checks.

In the course of the Tribunal hearing this specific issue arose regarding the plaintiff's travel arrangements. The Tribunal member Mr. Noel Whelan B.L. dealt with the issue entirely fairly and appropriately. The applicant claimed that she and her child had flown with Mr. and Mrs. C. (the Irish family) from Jakarta to Belfast via Bangkok, Thailand. She said that all of the arrangements for her travel and presentation of her documents at the airport were done by the C's. During the course of the hearing a question arose as to whether there were, in fact, flights directly from Bangkok to Belfast. For this purpose the Tribunal Member raised the issue as to whether this point might be independently verifiable. It was agreed that the applicant would be provided with the opportunity to make subsequent written submissions on this point, or to avail of the opportunity to submit any evidence that such a flight had landed in Belfast on the night or early morning in question. The applicant was given two weeks to do so. No such corroborative material was subsequently submitted to the Tribunal. No other such evidence has been adduced subsequently. The court will now deal with the procedure applied on the direction of Hanna J.

16. The Motion on Notice

It is hardly surprising that issues, evidence, or exhibits, going to good faith may not be readily identifiable or ascertainable on a simple application for leave to seek judicial review or in an application for an interim injunction if brought *ex parte*. The course of action adopted by Hanna J. in directing that the application be brought on notice had the effect of allowing submissions to be made to this Court on matters relevant both evidentially and legally, prior to any further interlocutory order being made. This course of action would appear particularly appropriate in this case where the retainer of new legal advisers had the consequence of creating a discontinuity in the instructions between these available to the applicants' then legal advisers, before the Refugee Appeals Tribunal, as compared to the information available to those who presently act. This course of action, adopted by the applicants, must surely have contributed to the effect of presenting as new material that which was not, in fact, new at all.

In making these observations I would wish specifically to indicate that no criticism is intended of the applicants' present legal advisers who must act on their instructions. So far as the applicants themselves are concerned however, no confirmatory or corroborative evidence has been adduced from the applicants previous advisors that the material in question was, in fact new or unknown to them, nor have the other issues as to candour been satisfactorily dealt with at all.

17. Conclusion preliminary issue

In the light of the findings the court concludes it is justified in rejecting the application simply on the grounds of want of candour and lack of credit.

Lest it is found that this conclusion is in error, the court will now consider other issues which arise.

The test applicable for leave in this situation
The applicants seek leave to bring judicial review proceedings. Second, they seek an injunction to restrain their deportation.

The applicants' case has been considered at first instance and on appeal within the asylum system. It has been the subject matter of a determination by the Minister to deport having considered the determinations of both bodies. It follows that the applicants' position is considerably weaker than that which obtained prior to these decisions. Yet the apparent paradox exists that, on the basis of s. 3(II) of the Act of 1999, and current jurisprudence, the threshold for granting leave to seek judicial review *in these circumstances would appear to be lower* than that which applies in judicial review proceedings concerning a determination of the Refugee Appeals Tribunal. The court considered this apparent incongruity merited further submissions which have now been provided by counsel.

The test for an application for leave to seek judicial review made on notice of an s. 3(11) decision.
The first issue to be considered is the appropriate test for an application for leave to bring judicial review pursuant to Order 84 of the Rules of the Superior Courts when the application for leave is made "*ex parte* on notice" to the intended respondent, that is when the court exercises its discretion to direct that notice to be served on the respondent prior to entertaining the application for leave or other relief.

18. Counsel for the applicant submits that a challenge against a refusal to *revoke a deportation order* is not governed by provisions of s. 5 of the Illegal Immigrants Trafficking Act, 1999. Where s. 5 applies, the applicant must make out substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed.

Counsel submits that the law in Ireland with regard to the standard approved to be applied on an *ex parte* application for leave to grant judicial review is now well settled.

In a frequently quoted passage from *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374, Denham J. at p. 381 to 382 stated:

> "2.2 The burden of proof on an applicant to obtain liberty to apply for judicial review under Order 84, rule 20 is light. The applicant is required to establish that he has made out a stateable case, an arguable case in law. The application is made *ex parte* to a judge of the High Court as a judicial screening process, a preliminary hearing to determine if the applicant has such a stateable case."

She added:

> "This preliminary process of leave to apply for judicial review is similar to the prior procedure of seeking conditional orders of the prerogative writs. The aim is similar – to effect a screening process of litigation. It is to prevent an abuse of the process, trivial or unstateable cases proceeding, and thus impeding public authorities unnecessarily."

19. It is clear, therefore, that the burden on an applicant is light, the case need only be stateable or arguable. It is a simple screening process to remove from consideration trivial or unstateable cases.

In this context, however, the court recalls the formulation of the evidential and legal threshold propounded by Finlay C.J. in the same case. In setting down a number of "conditions or proofs" (not intended to be exclusive) he included as being two of the factors upon which leave might be granted:

> "(b) That the facts averred in the affidavit will be sufficient, if proved to support a stateable ground for the form of relief sought by way of judicial review.
>
> (c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks…"

The phraseology of Finlay C.J. is of importance in the context of this case, especially the provision as to whether the facts averred to in a grounding affidavit would be sufficient *if proved* to support a stateable ground. While in that passage Finlay C.J. goes on to refer to "those facts" in sub-para. (c), it must be recollected that the facts in question are placed in evidence by way of affidavit, but have not themselves been tested at the time leave is sought in a simple ex parte uncontested leave application such as arose in *G v. D.P.P.* A second observation is that the phrase used is that "an arguable case in law can be made …". This must of course be subject to countervailing evidence becoming available at full hearing, or in an application to set aside leave granted ex parte.

20. It will be observed further that in the course of that judgment Finlay C.J. also identified as one of the preconditions in an uncontested leave application:-

> " (e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure…"

That facts are established for the purposes of a simple leave application does not, of course, mean that such facts are conclusively proved. They have not yet been put to the test save in the simple screening process.

These observations have application in the instant case and in the context of Finlay C.J.'s observation that the conditions and proofs which he outlined in *G. v. D.P.P.* were:

> " … Not intended to be exclusive, and the court has a general discretion, since judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also as to whether the applicant has shown good faith in the making of an *ex parte* application."

Discretion: Applications on Notice
21. One of the matters upon which a court of first instance may exercise its discretion is whether or not the application for leave or an injunction should be brought on notice to the respondent.

The exercise of this discretion in cases of this type is not always an easy one. Ex-parte applications may, for reasons justified or not, be brought at "the eleventh hour" when the applicant has been asked to report to the authorities, and in circumstances where deportation may be imminent. Because of this very circumstance a judge at first instance is not always afforded the time for a

detailed consideration and scrutiny of the evidential material, especially so if such application is made out of hours. That judge does not have the benefit a replying affidavit dealing with the merits of the case or the assistance of counsel for the respondent. In such circumstances such judge may be urged to err on the side 'of caution' in granting an *ex parte* order for leave as a basis for an interim injunction to restrain deportation in order to maintain the "status quo" in circumstances where if controverting facts were known, an application for leave, and the injunction, might be declined.

The Two Tests in a Leave Application
22. It is well established however that in certain defined areas of law an application for leave is required, by statute, to be on notice to a specified person or an intended respondent. In law, therefore, there are two clearly defined means of applying for leave, first, *ex parte* pursuant to Order 84 of the Rules of the Superior Courts or, second, on notice pursuant to a statutory scheme (as for example the Illegal Immigrants (Trafficking) Act, 2000 Roads. (See also *Re Art 26 on the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 Supreme Court *Harrington v. An Bord Pleanála* [2005] IEHC 26th July 2005 Macken J. and the cases therein considered). The first, generally applicable, is that of "arguability"; the second statutority define is "substantial grounds".

The ex parte test in G. v. DPP further considered
As seen, *G. v. D.P.P.* sets out the grounds upon which leave may be granted following an *ex parte* application. Also identified is the initial evidential burden of proof to be established. The phrase of Lord Diplock in *R. v. Inland Revenue Commissioners*, *ex parte, National Federation of Self-Employed and Small Businesses Limited* [1982] A.C. 617 at pp. 643 and 644 indicates the level of scrutiny:-

> "The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

23. The Statutory test: 'Substantial Grounds' and Applications on Notice.
In *O'Brien v. Dun Laoghaire Rathdown Co Co* [2006] IEHC 1st June 2006 O'Neill J. having discussed the two tests observed in the context of the "substantial grounds" test by contrast, initially to arguability:

> "… Necessarily in my view that one must move to the next discernible step upwards. That can only in my opinion lead to the equation of "substantial" with a reasonable chance of success".

24. As noted, legislative intervention has created a number of statutory schemes requiring an applicant seeking leave to challenge designated decisions to place a specified person or body on notice of the making of such application creating an *inter partes* hearing at the initial filtering phase.

The relevant statutory threshold for granting leave is therefore raised from "arguable grounds" to "substantial", the test for which, as is well known, was first stated by Carroll J. in *McNamara v. An Bord Pleanála (No. 1)* [1995] 2 I.L.R.M. 125. Among the indicia identified by Carroll J. were:

> i. The application must not be trivial or tenuous.
>
> ii. It must stand some chance of being sustained (i.e. not be a matter determined in a previous decision).
>
> iii. It should be reasonable, arguable and weighty.

However, a challenge to a refusal of an application to revoke a deportation order under s. 3(11) of the Act of 1999 (it is submitted here) does not come within the code of designated decisions whereby it is mandated that the ground should be "substantial".

It is not in issue that a court may however in its discretion direct that an intended respondent be put on notice of the application for leave. This allows for the opportunity of hearing such intended respondent prior to coming to a conclusion as to whether leave should be granted. (See *Potts v. Minister for Defence* [2005] 2 I.L.R.M. 517 at p. 120 where Clarke J. observed that this power was part of a court's inherent discretion). In the absence of governance by a statutory scheme do such judicial review applications, though actually on notice, fall under the provisions of Order 84 of the Rules of the Superior Courts and the low evidential and legal threshold this entails?

25. The issue of standard of proof in an *ex parte* application on notice to an intended respondent was considered by the High Court in *Gorman v. Minister for Environment* [2001] 1 I.R. 306, Kelly J., where it was noted that the practice of adjourning an *ex parte* application to an *inter partes* hearing had not been the subject of any judicial comment in this jurisdiction but had received approval elsewhere. Kelly J. expressed doubt as to whether the appropriate standard of proof in such a case was necessarily that as set out in *G. v. D.P.P.* He quoted the observation of Glidewell L.J. in the case of *Mass Energy Limited v. Birmingham County Council* [1994] ENV. L.R. 296 at pp. 307 and 308 where that judge said in relation to such an application:

> "First we have had the benefit of detailed *inter partes* argument of such depth and in such detail that, in my view, if leave were granted it is more unlikely that the points would be canvassed in much greater depth or detail at the substantive hearing. In particular we have had all the relevant documents put in front of us … Thirdly, as I have already said, we have most, if not all of the documents in front of us; we have gone through the relevant ones in detail – indeed in really quite minute detail in some instances – in a way that a court dealing with an application for leave to move rarely does, and we are thus in as good a position as would be the court at the substantive hearing to construe the various documents.
>
> For those reasons taken together, in my view, the proper approach for this Court, in this particular case ought to be – and the approach I intend to adopt will be – *that we should grant leave only if we are satisfied that Mass Energy's case is not merely arguable but is strong, that is to say likely to succeed*."

This would appear to be a third test, higher again than that of substantial grounds as established by statute

The evidential and legal test for applications for leave on notice was the subject of more recent consideration in other decisions both

by this court and with the authority of the Supreme Court.

26. In *Agbonlahor v. Minister for Justice*, Unreported, High Court, (Herbert J.) 3rd March, 2006, that judge considered in some detail the test to be applied in a situation where, (as here), the test was not to the validity of the deportation order itself but as to the decision not to revoke such order. His words are apposite:

> "On a consideration of section 5 of the Act of 2000, in the context of the Act as a whole, I find that the reference in sub-section (1)(c) to section 3(1) of the Immigration Act, 1999 is incapable of being construed as embracing section 3(11) of that Act of 1999. When the Legislature sets out with great specificity and particularity in a sub-section of a statute the matters to which the section is to apply and, thereafter in the operative sub-section of the same section employs the phrase 'in respect of any of the matters referred to in sub-section (x), referring to that previous sub-section, in my judgment it would require very compelling reasons for a court to conclude that it was the intention of the Legislature that the section should further apply to other additional and unspecified matters. I am satisfied that no such compelling reasons have been established by the respondents. Section 5 of the Illegal Immigrants (Trafficking) Act, 2000 in itself and in the context of the Act read as a whole, is precise and unambiguous and there is therefore no possible justification for this court to seek to extend its operation to other sections of the asylum code which are not specifically mentioned in sub-section (1) of section 5. (*vide, EMS v. Minister for Justice, Equality and Law Reform* [2004] 1. I.R. 536, Supreme Court). It is in my view most significant that sub-section (1)(c) of section 5 refers not to section 3 of the Act of 1999 generally but specifically limits and confines its operation to sub-section (1) only of that section."

27. The correct standard to be applied where an intended respondent is on notice of an application for leave was also considered by the Supreme Court in *O'Brien v. Moriarty* [2005] 2 I.L.R.M. 321. Here, the failure in the High court to make a decision on the appropriate burden of proof *in limine* was a determining factor. As the appropriate standard of proof had not been adequately argued at first instance, the majority (Kearns J. dissenting) of the Supreme Court considered that it would not be appropriate in that case to require the applicant for leave to demonstrate a reasonably good chance of success or a strong case. The hearing in the High Court had taken place without any decision as to the applicable standard, and it would be unfair to require the applicant retrospectively to meet a more exacting standard. In addition, the Court had serious reservations as to the implications of adopting a modified standard on the renewed application for leave in the Supreme Court. Were the Supreme Court to determine at the leave stage that the case was a strong one, it would be regarded as virtually deciding the case, or at least, leaving the High Court judge in great difficulty as to the standard to be applied.

However Kearns J. dissenting stated:

> "For my part, I would be strongly of the view that in those instances where an application for leave to seek judicial review is required to be made on notice to the respondent, or where the judge having charge of the matter decides that the same should be made on notice to the respondent, and where on foot of such provision or direction a respondent is heard on the application, it is appropriate and desirable that the threshold to be surmounted by the applicant should be higher than when the application is made *ex parte*."

28. As outlined earlier, the issue was also considered by Clarke J. in *Potts v. Minister for Defence* [2005] 2 I.L.R.M. 517 where (as in *Agbonlahor*) *O'Brien v. Moriarty* does not appear to have been opened to the court. Potts is of particular relevance in that in common with *D.C. v. D.P.P.* discussed below it identifies that the *'Mass Energy'* test would appear to be higher still than the second test of substantial grounds. Clarke J. observed:

> "It would be a strange result if a yet higher standard still was required to be met by an applicant who, though not the subject of a statutory requirement to give notice and to meet a higher threshold but who is nonetheless, on a discretionary basis, required to give notice by the court hearing an *ex parte* application. It should be noted that in the statutory cases the court has all the benefits of having facts put forward by the respondents (should they so wish) and hearing legal argument addressed by the respondents. It was those factors that led to the decision in the courts of the United Kingdom referred to above. It is also clear that the statutory cases arise where the policy of the Oireachtas is that leave should only be granted in such cases where there are substantial grounds made out. Yet nonetheless it has not been suggested that in such cases it is necessary to pass a threshold which goes as far as that identified in *Mass Energy*. In the circumstances I cannot agree with the proposition put forward on behalf of the respondent that a test higher than that applicable in the statutory cases should be applied in a discretionary leave on notice application such as this."

But that judge added:

> "However, equally, I cannot agree with the proposition put forward on behalf of the applicant to the effect that it would be impossible to define a standard higher than the standard set out in *G* that fell short of the standard which would require to be reached by a successful applicant at a full hearing. Such a standard has been established in the statutory cases and it seems to me that it is the appropriate standard to apply in any case where the court has had the benefit of having evidence placed before it by both sides and heard argument from both sides on a leave application."

29. Having addressed the relevant legal considerations, Clarke J. held that a higher standard than "arguable grounds" was appropriate in an *inter partes* application for leave and went on to hold that the additional standard to be addressed was that appertaining to statutory cases – i.e. substantial grounds.

Insofar as the issue arises herein, this Court considers itself bound by the recent statement of principle set out in the Supreme Court decision of *D.C. v. D.P.P.* 2005 (Unreported, the Supreme Court) Denham J. where, on appeal from a decision of Ó Caoimh J. (where the High Court had refused leave to bring judicial proceedings and where argument had been heard on the applicable standard in an *inter partes* application), the Supreme Court nonetheless held that for the purposes of that appeal the test was a standard set out in *G. v. D.P.P.* Denham J., speaking on behalf of the court, stated:

> "Reference was made in the High Court to a different standard of proof in cases where the respondent is on notice of the application. However, I do not apply such an approach in this appeal. It appears to me that there is a real danger of developing a multiplicity of different approaches, that of *G. v. Director of Public Prosecutions*, the test applied in specific statutory schemes, and that governing the position where a respondent is on notice in a particular area of litigation. Not only may there be legal difficulties in identifying and applying each different standard, but such an approach would take up further valuable court time. In voicing this opinion I note that in both *Gorman v. Minister for the Environment* [2001] 1 I.R. 306 and other cases cited reliance was placed on English case law. However, it appears to me that the appropriate

law is that which has been well established in this jurisdiction based on *G. v. Director of Public Prosecutions*. It is that law which I apply to this application."

The application of the *G. v. D.P.P.* in cases such as the present gives rise to the following observations:

(a) it is self evidently a lower standard than the substantial grounds test;

(b) it is to be applied in circumstances where it has been suggested elsewhere the standard applicable should be that of substantial grounds;

(c) it arises in circumstances where the discretion of the court has been exercised, to direct the application should be heard on notice;

(d) the facts and legal issues herein may demonstrate that whereas, *ex parte*, arguable grounds might have been established, *inter partes* they may not have not been;

(e) it arises where the position of the applicant is weaker than in a review of a decision under s. 5 of the Act of 1999.

30. These observations beg the question as to the circumstances, save under a statutory regime, as to when an application of this kind should be heard on notice. Unless the court is to adopt a different standard from simple arguability it may be suggested, the exercise is otiose. In an application on notice, should a court engage in weighing or analysis of all the evidence, or should it accept the applicants case on arguability. By implication, also the issue arises as to the test to be applied in an application to set aside leave.

An application ex parte herein would necessarily have been heard without notice on the basis of evidence established by affidavit, but would not have been on all the relevant facts or those within the procurement of the applicant. It would certainly be open to or to being set aside on the basis of the evidence and legal submissions which have now been made available to the court in this *inter partes* hearing. But this process is hardly the "quick perusal" identified in *R. v. Inland Rev Commissioners*.

It may be said the respondent not on notice may of course apply to have a grant of leave to seek judicial review subsequently set aside. But this in turn still may raise questions as to the standard applicable, the purpose of the court's discretion to direct notice be served on an intended respondent, the effect thereof, and the fact that, in certain circumstances, an applicant might achieve an unwarranted advantage, such as critical delay, by a grant of leave and a consequent interim injunction when there may be no such entitlement at law.

31. These observations are necessarily obiter. On the basis of the decision and authority of *D.C. v. D.P.P.* this court concludes it should apply the lower test of "arguable grounds", but in any case should exercise its discretion to grant or refuse leave having taken into account relevant matters which include:

"(f) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.

(g) *That on those facts* an arguable case in law can be made that the applicant is entitled to the relief which he seeks." (*per* Finlay C.J. in *G. v. D.P.P.* – emphasis added)

In an application for leave on notice, however having heard both sides, a court must be in a better position to establish whether in law on the facts by then established, an applicant has made out arguable grounds.

32. Consideration of the facts having regard to the test in G. v. D.P.P.
Absent the preliminary finding on good faith have arguable grounds otherwise been established in this case on the two essential grounds?

What is urged on the court is that there were the new concerns expressed by letter dated 28th February, 2006 (the applicants' present solicitors having been instructed two days before). These matters must now be considered in more detail.

The Country of Origin material
The country of origin information is to the effect that the applicants were on risk of detention and cruel and inhuman treatment at the hands of Nigerian authorities on being deported to that State in breach of the applicant's rights pursuant to Article 40 of the Irish Constitution and articles 3 and 5 of the European Convention on Human Rights. This material exhibited included references in reports to the detention of deportees and an account of 160 women who were *en masse* deportees from Italy being taken directly from the airport to the police station at Alagabon, Lagos, where they were to be interviewed and were held for three to four days. The material states that another group of women deported from Guinea were detained at Alagabon which was described as "a poorly-equipped and not a long-term detention facility" for at least one month.

Also put before the respondent was a report entitled "West African Review (2003) Corruption and Human Trafficking: the Nigerian Case", which refers to the alleged corruption of Nigerian police and that returnees had been detained by that force and been subject to extortion.

33. It is not established (a) that this material is referable to the applicants, (b) that it has been in anyway the subject of a bona fide concern to them hitherto, (c) why, now, this information some of which is three years old has been adduced or, (d) how it recently came to the attention of the applicant.

There is also now the following evidential material before the court from the respondent:

a. the affidavit of Noel Dowling, Principal Officer in the Department of Justice, Equality and Law Reform, wherein it is stated that prior to the letter of 28th February 2006 every opportunity, including the provision of legal assistance, had been given to the applicants to state their alleged fears in their application for asylum before the Refugee Applications Commissioner and the Refugee Appeals Tribunal. None of these issues regarding Nigeria were raised then.

b. Mr. Dowling's deposition that the country of origin information as exhibited did not demonstrate that persons in the specific position of the applicants were subject to arbitrary and unlawful detention or of torture, cruel, inhuman or

degrading treatment if repatriated to Nigeria. Mr. Dowling refers to a bilateral agreement concluded in 2001 between the Government of Ireland and the Government of the Federal Republic of Nigeria which, it is stated, is operated in practice, despite its non-ratification on the Nigerian side.

c. The evidence of Detective Inspector Philip Ryan that, over the past twelve months, the Garda National Immigration Bureau (GNIB) has put in place a programme to ensure the wellbeing of persons deported to Nigeria (and also other states) in an immediate post-return situation. In April, 2005 the deponent personally was involved in a delegation to Nigeria where the GNIB met with senior managers in the Nigerian Immigration Services, both in Abuga and Lagos. On these visits this delegation was accompanied by the Irish Ambassador to Nigeria and Consular staff.

Detective Inspector Ryan states that each party of returnees is preceded by an advance group of a detective inspector and sergeant to Lagos. This advance party travels two days before the return operation and remains in place for 48 hours to ensure the wellbeing of the returnees, meets the aircraft and stays with the returnees until they are on their way to their homes, having been provided with food and overnight accommodation. The Detective Inspector states that, in his experience, there have been no instances of any person returned to Nigeria being detained merely as a failed returned asylum seeker further than is necessary to establish their identity. Returnees are, he avers, brought to Immigration Headquarters in Nigeria to establish their correct identities. Most returnees travel on emergency travel documents issued by the Nigerian Embassy in Dublin as they do not have passports. The deponent states that it is necessary and reasonable for the Nigerian authorities to establish the identity of returnees in such circumstances but that such process is carried out in a speedy manner, subject to the number of such persons on each aircraft, and the amount of investigation required. Finally, the Detective Inspector deposes that it has been agreed with the Nigerian Immigration Service that the advance party, together with representatives of NGOs, will remain at Immigration H.Q. until persons are processed. The GNIB is given a debriefing report by the non-governmental organisation.

34. During the course of this hearing an application was made to rely on a further affidavit by Conor O Briain, the solicitor for the applicants, dated 19th April, 2006 wherein some of these averments were disputed. However, this court had specifically ruled in adjourning this matter for argument that such argument was to take place on the basis of the material then before it, and not on the basis of a succession of supplemental affidavits. Therefore the court concluded it should consider the evidence as it stood, applying the test of arguable case.

35. Medical Information
The second aspect of the applicants' case was the medical information in respect of the first named applicant. Again it will now be analysed in more detail.

When the Refugee Legal Service made an application for temporary leave to remain on behalf of the applicants they submitted an appointment letter with a surgical clinic at Our Lady of Lourdes Hospital.

On 28th February, 2006 medical information was submitted from the Registrar to Mr. El-Sayed, Consultant General and Paediatric Surgeon, stating that the first named applicant had an epigastric hernia which had to be repaired surgically, and also stating that that applicant is awaiting an ultrasound test to her abdomen, to check if she had gallstones.

36. This material, and the sequence of its disclosure must be subject to the reservations expressed earlier in this judgment. If there was other material within the procurement of the applicant which might rebut the concerns expressed earlier herein as to the circumstances in which these contentions have now arisen it was not exhibited at the appropriate time. The court may only act on what is now before it. But simply applying the arguability test, a court might normally arrive at the conclusion that looked at in isolation, and at its height, evidence had been put before the court which is 'arguable' but by no means 'weighty'.

There was too before the respondent a report from Ms. Audrey Crawford, Project Worker with the Asylum Seeker and Refugee Counselling and Support Service, stating simply that the applicant had attended counselling since 2005, and that she was awaiting two operations in Ireland which could not be carried out in Nigeria where appropriate facilities are not available.

37. Consideration of the second question
The court should again now address the second issue of the three posed, which is the extent to which matters presented in an application to revoke a deportation order pursuant to s. 3(11) of the Act of 1999 must be materially different from those presented, or capable of being presented, to the Minister in the making of the deportation order itself.

The status of a person who has failed to secure a declaration of refugee status and who makes representations to the Minister was described by Hardiman J. in the Supreme Court as being:

> "… Persons whose application for asylum had been rejected at first instance and on appeal. They lacked any entitlement to remain in the country save that deriving from the procedures they were operating i.e. a right to await a decision on a request not to be deported …"
>
> (*P, B and L v. Minister for Justice* Unreported, Supreme Court, 30th July, 2001. Their position is therefore weaker in law than prior to such determination.

38. In *Kouyape v. Minister for Justice*, High Court, unreported, Clarke J., 9th November, 2005, that judge considered the obligations of the Minister under s. 3 where a deportation order is contemplated and observed:

> "… it would be surprising if the Minister were not entitled to place a heavy emphasis indeed on the fact that the person concerned had, as a result of going through the asylum process every opportunity to make out a case for that status and thus had every opportunity to make out a case which in substance would mean that s. 5 prohibited their deportation. Having failed to establish that status in the refugee process it is difficult to see how *in the absence of special or changed circumstances* the Minister could be under any heavy obligation to review that aspect of the matter further." (emphasis added).

In considering such representations the Minister must have regard to the nature of the matters set out at sub-paras. (a) to (h) of s. 3 which relate particularly as to whether there are personal or other factors, which notwithstanding ineligibility for asylum, might render it unduly harsh or inhumane to proceed with deportation.

39. Section 3 is not an interactive process. The requirements of natural justice and the statutory requirements are satisfied once the prospective deportee has been afforded an opportunity to make submissions and these submissions have been considered by the

Minister, particularly in the consideration of whether the principle of non-refoulement under s. 5 of the Act of 1996 has been satisfied. There is too a substantial overlap between the matters to be considered in an asylum application and under s. 5. The very fact that a person has been refused asylum may be highly relevant to the question of non-refoulement.

40. The applicants here did not set out their alleged fears nor advance arguments nor submit country of origin information which they now advance in these proceedings as being part of their representations to the Minister under s. 3 of the Act of 1999 despite such information being available or within their procurement at the time of making such representations. As a corollary of facilitating the making of representations to the Minister in advance of a decision to make a deportation order pursuant to s. 3 there is an onus upon an applicant to provide the necessary detail for such consideration at that time if it is within the procurement of the applicant.

41. In *Dada v. Minister for Justice* (Unreported, High Court, O'Neill J., 3rd May, 2006) where leave was refused to applicants who had *inter alia* advanced similar arguments as to fear of detention the applicant had been found to lack credibility both in the asylum system and by the court, the circumstances of this latter application rendered it:

> "… clear that the nature and extent of the enquiry which is appropriate in this later phase of the process, thus described, is significantly more restricted than that for example in the asylum phase. Likewise the extent of review of the later phase is undoubtedly more restrictive than in the earlier phase."

42. Peart J. in *Mamyko v. Minister for Justice, Equality and Law Reform*, High Court Unreported, Peart J., 6th November, 2003), relied particularly on the fact that nothing new had been put forward in correspondence seeking revocation and in particular that no information was available, which could not have been made known to the Minister when representations were made to him prior to the making of the original order. In particular, that judge criticised the undesirability that an applicant should be permitted to "drip feed" grounds from time to time, or that applicants should react at the "eleventh hour" to the prospect of deportation by submitting fresh applications for leave to remain, where the grounds are such to have been capable of communication at a much earlier stage, and in fact at a time when representations were made originally on their behalf.

Where a deportation order has already been made with full consideration given to all matters under s. 3(6) of the Act of 1999, the position of an applicant who makes an application for revocation under s. 3(11) of that Act must perforce be weaker than that of a person against whom only an intention to deport has been formed, where the requirements of s. 3(6) have not yet been considered. The ability of the court to interfere with the Minister's decision under s. 3, generally provided he has complied with his obligations, is limited, particularly where the applicant was a person who had participated in the asylum process. The scope for review by the court of a decision to revoke a deportation order under s. 3(11) is "if anything, more restricted still". (*per* O'Neill J. in *Dada*.)

43. Thus, an applicant making representations to the Minister for leave to remain on humanitarian grounds is obliged to actively put his or her best case forward in such representations. To address the second issue directly any such application under s. 3(11) to revoke a deportation order made having considered such representations, must advance matters which are, truly materially different from those presented or capable of being presented in the earlier application. There must be, in the words of Clarke J. in *Kouyape* "unusual, special, or changed circumstances". Furthermore, the test in law must include one further test which is as to whether the material was capable of being presented earlier. To omit this latter aspect might have the effect of actually encouraging delay in the making of an application for humanitarian leave to remain and might permit the approach which was specifically criticised and rejected by Peart J. in *Mamyko*.

44. Conclusion on leave application
As the court has already found, the applicants have debarred themselves from entitlement to seek leave for judicial review by reason of want of good faith.

Even in the absence of this finding however, the court considers that the applicants would not in any case have established grounds for leave in accordance with the test in *G. v. D.P.P.*.

In isolation from the totality of the evidence a number of points may be identified which theoretically raise arguable grounds. But this would be to ignore the weight of the evidence, and the submissions made on behalf of the respondent and the reality of the situation.

There is now a simple question of credibility. No explanation is given as to how, or why, the two specific grounds now raised and relied upon were not submitted to the Minister earlier in the s. 3(6) application. No explanation has been given as to why, if the country of origin information was genuinely a source of concern to the applicant, it was not raised before the Tribunal or in any later submissions to the Minister. It is not explained how this material came to the attention of the applicants, or when, or who made it known to them. It has not been established that the material is currently relevant. A number of the reports are undated. The most recent is dated 2005. It is not shown that this information is now relevant to persons coming within the applicant' category of former asylum seekers.

Very similar considerations apply to the medical information now relied on. It appears part of the continuing correspondence. It is not explained why it was not referred to earlier. It is not a satisfactory explanation to place blame baldly on the applicants' previous advisors. No other evidence to this effect has been adduced other than assertion. No affidavit has been filed from the applicant previous advisors, the Refugee Legal Service. It is clear that part, if not all of this evidence was within the procurement of the applicants' as and from the 10th July, 2006, before the decision impugned was made.

Applying the observations of Peart J. in *Mamyko* there is evidence of a "drip feed" of material. This takes place in the context, where, as pointed out by O'Neill J. in Dada, the range of review is necessarily more limited than arises in a s. 5 determination.

The information relied on is not therefore such as to demonstrate that there have been unusual, special or changed circumstances relevant to the applicants. (See Clarke J. in *Kouyape*).

The third question raised for consideration as to the context or subject matter of a material distinction does not therefore arise on the facts as found.

The court must therefore conclude that the evidence not being credible the case advanced by the applicants is no longer arguable and therefore the application for leave should be declined.

45. The application for an interlocutory injunction
Lest it be held the court has erred on the issue of leave, the court will now consider the application for an injunction.

In *Cosma v. Minister for Justice, Equality and Law Reform* the Supreme Court, unreported, 10th July, 2006, McCracken J. stated:

> "In this case the 'decision being appealed from' is a decision of the respondent made under section 3(11) not to revoke a deportation order against the appellant. There is no appeal and can be no appeal from the decision of the learned High Court judge refusing relief in relation to the deportation order itself. It has been held by the High Court that the deportation order is valid and that finding cannot be challenged before this Court. 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.

He added:

> "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."

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. Additionally the case made by the respondent in the application for an interlocutory injunction is that, *inter alia*, the country of origin information alleged to constitute "new material":-

> (a) Was capable of being before the Minister prior to his making of the deportation orders – the applicants were legally advised by specialist refugee lawyers for the purposes of submitting humanitarian representations under s. 3 of the 1999 Act.
>
> (b) Refers to a situation wholly different from that of the applicants, i.e. the detention of returned women trafficked for prostitution and not persons returned solely as returned asylum seekers. It is pointed out that the first applicant is a well-travelled, educated woman who arrived in the State from Indonesia. None of the country of origin information refers to a minor in the position of the second named applicant.
>
> (c) Refers to issues that are relevant to the asylum process where asylum has been sought and/or to a consideration of s. 5 of the Refugee Act, 1996 as amended, which are issues to be considered (and were so considered) in advance of the making of a deportation order.
>
> (d) Does not amount to "unusual, special or changed circumstances" (per Clarke J. in *Kouyape*).
>
> (e) Is actually a "drip feed" of such material as criticised in *Mamyko* (cited earlier) and rejected by Peart J.

46. The court has already concluded that the information underlying the applicant's medical condition could have been notified to the respondent earlier. There is no new substantive or distinct information contained in the application. Failure, if failure there was on the part of the applicants' previous legal adviser would have to be demonstrated with cogent, clear evidence to this Court. In the absence of such information blame cannot be laid at the door of the respondent.

Apart altogether from the preliminary finding and the finding on leave, on the basis of the information now before the court and placed on affidavit, has the applicant made out raised a case for interlocutory injunction?

47. This Court is undoubtedly entitled in the consideration of material for the purposes of an interlocutory injunction to weigh the evidence and consider in greater detail the entirety of the case in the light of the criteria is to be exercised. This has already been done in the application for leave. On any criterion therefore the application cannot succeed.

The applicant not having established arguability, this Court certainly cannot conclude that what has been established is a "serious issued to be tried" nor a "substantial or weighty case which has a reasonable chance of success" for the purposes of an injunction. While a somewhat greater burden may fall upon a respondent on notice in dealing with a case advanced by an applicant on the basis of simple "arguability", no such issue arises, even potentially, in the consideration of grounds which apply for an interlocutory injunction, where there must be higher threshold of "serious issue" or "weighty case" with a reasonable chance of success.

Again the court notes that no case has at any stage been advanced as to any separate circumstances appertaining to the second named applicant which might justify separate consideration of the evidence, facts, or law.

Weighing the evidence of the respondent against that of the applicants, and in particular the findings of the court as to weight, credibility, candour and good faith, no grounds have been established for an interlocutory injunction.

In the circumstances therefore, it is first the view of the court that, (applying the principle in *Kosma,*) there is in effect a valid deportation order; and second, that in even if arguable grounds for leave had been established (which they have not) no grounds of sufficient weight have been adduced which would justify the grant of an interlocutory injunction.

48. Conclusion
Having regard to the findings made on the preliminary grounds of want of candour and on the other substantive issues the court must in its discretion and as a matter of law reject these applications.