Neutral Citation Number: [2006] IEHC 56

THE HIGH COURT

[2006 No. 147 JR]

BETWEEN

OLIVIA AGBONLAHOR, GREAT AGBONLAHOR (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, OLIVIA AGBONLAHOR) AND MELISSA AGBONLAHOR (A MINOR SUING BY HER MOTHER AND NEXT FRIEND OLIVIA AGBONLAHOR)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice Herbert delivered the 3rd day of March, 2006

Issues

1. At paragraphs d(1) and d(2) of the Statement required to ground their application for Judicial Review, the Applicants seek the following reliefs:-

> 1. A Declaration that the decision of the First Named Respondent dated 21st January, 2006, to enforce the deportation orders made by him on 15th September, 2005, in respect of the Applicants was *ultra vires*, arbitrary and unreasonable, disproportionate contrary to natural and constitutional justice and was contrary to the Respondent's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms and the protocols thereto.
>
> 2. An Order of *Certiorari* to quash the decision of the First Named Respondent to enforce the said Deportation Orders.

2. It is submitted on behalf of the Applicants that the provisions of s. 5(1)(c) of the Illegal Immigrants (Trafficking) Act, 2000, do not apply to their application for leave to seek Judicial Review. Their application, they say, relates to a decision of the First Named Respondent, made pursuant to the powers vested in his by s. 3(11) of the Immigration Act, 1999, not to revoke the deportation orders made by him in respect of the Applicants on 15th September, 2005, and that, 5(1)(c) of the Act of 2000 makes no reference to s. 3(11) of the Act of 1999.

3. By s. 5(1) of the Act of 2000, it is provided that a person shall not question the validity of fifteen indicated steps in the asylum process, which are very clearly identified in that subsection, otherwise than by way of judicial review. Section 5(2)(b) of the Act of 2000 provides that an application for leave to apply for Judicial Review, "in respect of any of the matters referred to in subs. (1)", shall:-

> "Be made by motion on notice…to the Minister…and said leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed."

4. The Respondents contend that the reliefs sought by the Applicants at d(1) and d(2) of their Statement of Grounds questions the validity of the deportation orders made by the First Named Respondent in respect of the Applicants on 15th September, 2005. Therefore, the Respondents say, the application comes within the ambit of s. 5(1)(c) of the Act of 2000.

Standard of Proof

5. Section 5(1)(c) of the Illegal Immigrants (Trafficking) Act, 2000 refers specifically to "a deportation order made under s. 3(1) of the Immigration Act, 1999".

6. Section 3(1) of the Act of 1999 is in the following terms:-

> "Subject to the provisions of s. 5 (prohibition of refoulement), of the Refugee Act, 1996, and the subsequent provisions of this section, the Minister may by order, (in the Act referred to as a 'deportation order'), require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State."

7. Section 3(11) of the same Act of 1999 provides that:-

> "The Minister may by order amend or revoke an order made under this section including an order under this subsection."

8. It was accepted on all sides at the hearing of this application, that the ordinary onus on Applicants seeking leave to apply for judicial review under Order 84 rule 20 of the Rules of the Superior Courts is to show that they have an arguable case to be granted the relief sought on the facts averred on affidavit, (*"G" v. The Director of Public Prosecutions and Another* [1994] 1 I.R. 374, - Supreme Court). However, senior counsel for the Respondents argued, relying on the reasoning of the Court of Appeal for England and Wales in *Mass Energy Limited v. Birmingham City Council* [1993] Env. L.R. 298 at 307 per Glidewell L.J., and at 311 per Scott L.J., that even if the provisions of s. 5 of the Act of 2000 do not apply to this application, the Applicants should be required to establish that their case is not just arguable but that it is a good one and likely to succeed.

9. In my judgment unless the provisions of s. 5 of the Illegal Immigrants (Trafficking) Act, 2000, apply to this application I am bound to follow the decision of the Supreme Court in *"G" v. The Director of Public Prosecutions and Another* (above cited), despite the fact that the three considerations which moved the Court of Appeal in *Mass Energy Limited v. Birmingham City Council,* (above cited), to adopt the more stringent test of, "not merely arguable but strong, that is to say is likely to succeed", are present also in the instant case.

10. Senior counsel for the Respondents referred to the decision of this Court in *Lelimo v. The Minister for Justice, Equality and Law Reform* [2004] 2 I.R. 178 as supporting his argument. At pages 189 and 190 of her judgment, Laffoy J., held as follows:-

> "Counsel for the Applicant having, properly in my view, conceded the non-retrospectivity of the Act of 2003, the issue which remains is whether the enforcement of the deportation order, which, if it takes place, will take place after the coming into operation of the Act of 2003, could constitute a breach of s. 3(1), if the deportation order was lawfully made.

> In my view, it could not. Such authority as any organ of State has to enforce the deportation order derives solely from the deportation order. The enforcement process cannot be severed from, and has no basis in law distinct from, the order itself. The decision to make the deportation order and the order itself both predate the coming into operation of s. 3(1). They are immune from challenge under the Act of 2003. Therefore, in terms of the application of the Act of 2003, it must be assumed that the deportation order is valid. If it is, its enforcement could not constitute a breach of s. 3(1). Of course, for the purpose of this analysis, the fact that the deportation order is being challenged for alleged non-compliance with the Criminal Justice (United Nations Convention Against Torture) Act, 2000 is deliberately ignored."

11. In my judgment, this decision of the High Court has really no relevance to the matter at issue on this application. In this application I find that the Applicant's challenge is undoubtedly to the manner in which the First Named Respondent exercised the power vested in him by s. 3(11) of the Immigration Act, 1999, to revoke or to amend the deportation orders made by him in respect of the Applicants on 15th September, 2005. They do not challenge the making of those deportation orders or the form of those deportation orders. They argue that the decision of the First Named Respondent, to refuse to revoke these deportation orders was wholly or, alternatively, "indefensible for being in the teeth of plain reason and common sense" and disproportionate having regard to the evidence then available to him and in violation of s. 3(1) of the European Convention on Human Rights Act, 2003, and the provisions of Article 3 and of Article 8 of the First Schedule of that Act.

12. Though neither side in this application made reference to them, the court is aware of the ex-tempore judgment of Finlay Geoghegan, J., in *Malsheva and Clare v. The Minister for Justice Equality and Law Reform, Ireland and The Attorney General,* (Unreported, High Court, July 25th, 2003); *Parolya and O'Sullivan v. The Minister for Justice Equality and Law Reform,* (Unreported, High Court, June 17th, 2004, Butler, J.,) and the ex-tempore judgment of O'Neill, J., in *Mekudi Yau and The Minister for Justice Equality and Law Reform and the Governor of Cloverhill Prison*, (Unreported, High Court, October, 14th 2005).

13. In my judgment, only incidentally, indirectly and remotely does this application relate in any way to the validity of the Deportation Orders. If the Applicants should be granted leave to seek judicial review and, were then successful in that application, the First Named Respondent might be obliged to reconsider their applications and might then decide, in the exercise of his discretion in the light of whatever findings this Court might make, to revoke the deportation orders or might decide not to do so. Accordingly, one could not say that the validity of the deportation orders is in any real sense an issue before this Court on this application. In my judgment such a remote contingency could not possibly qualify for inclusion within the scope and ambit of s. 5(1)(c) of the Act of 2000.

14. On a consideration of s. 5 of the Act of 2000, in the context of the Act as a whole, I find that the reference in subs. 1(c) to s. 3(1) of the Immigration Act, 1999, is incapable of being construed as embracing s. 3(11) of that Act of 1999. When the Legislature sets out with great specificity and particularity in a subsection of a statute the matters to which that section is to apply and, thereafter in the operative subsection of the same section employs the phrase, "in respect of any of the matters referred to in subsection [X], referring to that previous subsection, 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 subs. (1) of s. 5. (*Vide, E.M.S. v. The Minister for Justice Equality and Law Reform* [2004] 1 I.R. 536, Supreme Court). It is in my view most significant that subs. (1)(c) of s. 5 refers not to s. 3 of the Act of 1999 generally but specifically limits and confines its operation to subs. 1 only of that section.

15. I therefore find that the test expounded in "*G" v. The Director of Public Prosecutions and Another* (above cited) is the test which the Applicants are required to meet in this application.

The Facts

16. The First Named Applicant and her husband arrived in Italy from Nigeria in 1996. She is a trained beautician and hair stylist. Her husband is a journalist and a writer. The Second Named Applicant and Third Named Applicant are twins and were born in Italy on 2nd March, 2001. The First Named Applicant claims that as a result of an exposé of a Nigerian "drug baron" living in Italy, written by her husband, they started to receive threatening telephone calls. On 7th January, 2003 she was attacked by Nigerians in Turin and her right hand was injured with a machete. She states that she reported this attack to the Police in Turin. She states that in February 2003 she was threatened by two Nigerian men and while attempting to escape from them ran in front of a bus. She decided that they should leave Italy for their safety but her husband refused. On 5th March, 2003 while her husband was on a working assignment in Florence and Rimini she took her children and fled to this State where she applied for refugee status. She has not had recent contact with her husband: she believes that he is in hiding and she is fearful for his safety.

17. On 30th December, 2003 the First Named Applicant was notified by the Refugee Applications Commissioner that her application for refugee status was unsuccessful. On 20th April, 2004 she was notified by the Refugee Appeals Tribunal that her appeal from the decision of the Refugee Applications Commissioner was unsuccessful. Submissions were made through the Refugee Legal Service to the First Named Respondent on 27th September, 2005, that the Applicants be permitted to remain in this State on humanitarian grounds. This was unsuccessful and, the First Named Applicant was notified to present herself to the Garda National Immigration Bureau on 4th October, 2005 for deportation from the State. The Refugee Legal Service was successful in obtaining a deferral of this deportation on the grounds that the Second Named Applicant had been given an appointment for assessment at a Regional Autistic Spectrum Disorder Clinic on 4th October, 2005. This appointment had to be rescheduled on that date and on the 13th October, 2005 because the Second Named Applicant was ill. On 11th October, 2005 the Second Named Applicant and the Third Named Applicant were taken into the care of the appropriate Health and Welfare Authorities after the First Named Applicant had harmed herself. From 12th October, 2005 to 17th October, 2005 the First Named Applicant was hospitalised under the care of a consultant psychiatrist. She was released from hospital and was arrested by officers of the Garda National Immigration Bureau.

18. On 4th November, 2005 Brophy, Solicitors lodged a further detailed submission with the Department of Justice, Equality and Law Reform requesting the First Named Respondent to revoke the deportation orders made by him on 15th September, 2005 by reason of the changed circumstances of the Second Named Applicant. The First Named Applicant was released from custody while this submission was being considered by the First Named Respondent.

19. On 8th November, 2005 the Second Named Applicant, then aged four years and seven months and a pupil at a local National Primary School, was assessed by Lorna Barrett, a Speech and Language Therapist and by Dr. Jill Bannon, a Senior Clinical Psychologist. They concluded as follows:-

> "[The Second Named Applicant] does not have sufficient features to meet the criteria required for an Autistic Spectrum Disorder. However, he does meet the criteria according to D.S.M.I.V. for a diagnosis of Attention Deficit Hyperactivity

Disorder … in addition to intellectual disability. It is also considered that [the Second Named Applicant] may be presenting with some sensory integration issues."

20. Dr. Bannon recommended as follows:-

"1. The First Named Applicant required to be trained in behavioural management by a mental health professional.

2. The Second Named Applicant required special schooling, either in a special class with one to one tuition or in a special school for children with intellectual disabilities.

3. The Second Named Applicant required speech and language therapy.

4. The Second Named Applicant needed the attention of a Special Needs Assistant.

5. The Second Named Applicant required a Sensory Integration evaluation by an Occupational Therapist.

6. The Second Named Applicant required further assessment of Mother-Child attachment patterns.

7. The Second Named Applicant should be referred to a paediatrician for a full medical examination and advice on the genetics of his clinical issues."

21. Professor Stella Kanu, of the Department of Social Education, University of Ibadan, Nigeria is stated to have informed Brophy, Solicitors as follows:-

1. That there are no public schools for children with A.D.H.D. in Nigeria.

2. That children with developmental disabilities go undiagnosed in Nigeria because of a lack of facilities.

3. That such a failure of diagnosis would be devastating for a child like the Second Named Applicant.

4. That she knows of only one school catering for special needs children in Nigeria.

5. That this school is a private facility in Victoria Iagos State and, caters for children suffering from Down's Syndrome only and is very expensive.

6. That the normal teacher pupil ratio in ordinary schools in Nigeria is 1:40.

7. That the diagnostic facilities at the University of Ibadan and at University College Hospital, Ibadan are not adequate to meet the demand on them.

22. Dr. Denise Ross, Associate Professor of Psychology and Education at the Teachers College, Columbia University, is stated to have told Brophy, Solicitors that parents at a workshop for children suggested that there were not enough facilities in Nigeria for children with disabilities.

23. Pastor Olu Jaiyebo, a U.S. attorney and a Nigerian citizen is stated to have told Brophy, Solicitors, that he worked in the past in conjunction with Dr. Ross and, he was unaware of facilities in Nigeria that would be able to provide continuity of care for the Second Named Applicant.

24. In the submission dated 16th November, 2005 by Brophy, Solicitors, to the Department of Justice, Equality and Law Reform, it is stated that Dr. Jill Bannon had informed that firm that an A.D.H.D., sufferer who learned coping mechanisms would be regarded as a workaholic, a person who lived on their energy and, could appear irrepressible and capable of carrying on five or six jobs at the one time. Such persons would be regarded as entrepreneurs and highly successful and admired individuals. However, if a person with an A.D.H.D. disorder went undiagnosed and was not treated, this person could often end up in prison and would be described as a classically anti-social individual with serious personality difficulties which at that stage would be almost untreatable.

Conclusions

25. In the case of, "*Baby O*" (suing by mother and next friend I.A.O.) *and I.A.O. v. The Minister for Justice Equality and Law Reform, Ireland, The Attorney General and James Nicholson,* [2002] 2 I.R. 169 at 184 it was held by the Supreme Court that neither this Court nor the Supreme Court has any jurisdiction to interfere with a determination by the First Named Respondent that the submitted change in circumstances would not justify him in revoking the deportation order already made. In that case Counsel for the Applicant argued that the deportation of the Second Named Applicant, while pregnant, to Nigeria would constitute a failure on the part of this State to defend and vindicate the right to life of her unborn child in breach of the provisions of Article 40.3.3 of the Constitution. In that case Dr. Jo Murphy – Lawless Ph. D., sociologist and research fellow at the Centre for General Women's Studies in Trinity College, Dublin, deposed on affidavit that there would be serious risks in relation to the pregnancy in the even of the Second Named Applicant being returned to Nigeria because of the lack of adequate anti-natal and hospital care available to the Second Named Applicant in Nigeria. Dr. Adeyemi Coker, a consultant obstetrician and gynaecologist at Harold Wood Hospital, Essex, England deposed as follows:-

"As the difference in healthcare and maternity services in Nigeria compared with the Republic of Ireland is significant, where [the Second Named Applicant] delivers her baby would significantly influence the outcome in terms of pre-natal mortality and the morbidity. If her baby was born premature (below thirty weeks) it would have little chance of survival in Nigeria."

26. This evidence of Dr. Coker and Dr. Murphy-Lawless was uncontradicted.

27. In delivering the judgment of the Supreme Court, Keane C.J., (as he then was), held as follows, (at page 182):-

"In this case neither the State nor any of its organs was seeking to terminate the second Applicant's pregnancy and the fact that the standard of ante or post-natal care available to her in Nigeria was less than would be available to her in this country was entirely irrelevant to the legality of her deportation. If the Second Named Applicant had arrived in this country accompanied by a young infant and both of them had been refused refugee status and ordered to be deported, the life expectation of the infant, and for that matter the second Applicant herself, might have been less. That would

plainly not be a ground for interfering with the deportation. If the State's right to deport persons who have been refused refugee status and who have no legal right to remain in this country were thus circumscribed, it would be, in a great range of cases, virtually negated. It is obvious that the rights of the born, in this context, cannot be less than those of the unborn".

28. In that case also, as in the instant case, lengthy written submissions were made on behalf of the Second Named Applicant in support of her application for leave to remain in this State on humanitarian grounds, despite her failure to be afforded refugee status. From the terms of the judgment the Supreme Court clearly accepted that the First Named Respondent should observe fair procedures in exercising the powers vested in him by s. 3(11) of the Immigration Act, 1999, to revoke or to amend a deportation order in the light of alleged changed circumstances. In the instant case it was accepted on behalf of the Respondents that the First Named Respondent in reaching his determination was obliged to have regard to the provisions of the European Convention on Human Rights Act, 2003. At paragraph 6 of the Replying Affidavit of Dermot F. Cassidy, sworn on 16 February, 2006, it is deposed as follows:-

> "It is also evident from the submissions prepared for the benefit of the Minister that the human rights aspect of the case was considered. Indeed there is an express reference to the terms of Article 8 of the European Convention on Human Rights."

29. A detailed Review, dated 17th November, 2005, of the application on humanitarian grounds by Mrs. Abgonlahor and her children to remain in this State was furnished to the First Named Respondent by Mr. Noel Dowling, Principal Officer, Repatriation Unit, Department of Justice Equality and Law Reform. At paragraph 10 of that review, the author records that the First Named Applicant suffers from Hepatitis B and from high blood pressure, for which she is on daily medication. At paragraph 11 of the review he comments as follows:-

> "Neither of these medical conditions, which are common, warrants the revocation of the deportation order. It goes without saying that we deport persons to countries where the standards of medical care are less than here. To claim anything else would be to effectively state that Ireland has an obligation to provide non-acute, non-emergency medical care of a standard which the general population enjoys to persons who otherwise have no right to be in the State".

30. At paragraphs 12, 13 and 14 of the Review the author deals as follows with the medical condition of the Second Named Applicant:-

> "12 Great is not suffering from autism. He suffers from Attention Deficit Hyperactivity Disorder (A.D.H.D.). He was assessed by Gillian Bannon, Psychiatrist with the Regional Autistic Spectrum Disorder Service, who says that Great is significantly more debilitated than other children with A.D.H.D. in that he also has associated disorders such Detachment Disorder, Cognitive Delay and Sensory integration issues. The diagnostic reports attached to the letter of 16th November, 2005, give a significant level of detail in relation to Great's behavioural and developmental problems.
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> 13 The solicitors submit that if Olivia and her children are returned to Nigeria, Great will not receive adequate treatment for his condition because of poor treatment facilities in Nigeria. To deport them would condemn Great to a life of profound anti-social and disruptive behaviour and would cause further distress to his sister who would be seen as having a 'Voodoo' sibling. This humanitarian claim is dealt with as follows. The associated legal point is dealt with from paragraph 15 below.
>
> 14 As with Olivia's condition it can hardly be claimed that Ireland has an obligation to provide (non-emergency) comprehensive and time unlimited standards of medical care commensurate with that provided to its own citizens, to non-nationals who have no right to be in the State. To concede such a point, at a humanitarian level, would be foolhardy. Ireland's medical services are subject to economic realities and to effectively advertise the country as a destination for unrestricted medical care, regardless of the illegality of the person's status in the State, would soon result in the general diminution in the quality of those services as a whole."

31. At paragraphs 15 and 16, Mr. Dowling refers to the argument, made by the solicitors for the Applicants, that to return the Second Named Applicant to Nigeria would be a breach of Article 8 of the European Convention on Human Rights. He also comments on and provides summaries of the decisions of the House of Lords of the United Kingdom in *R. (Razgar) v. Secretary of State for the Home Department* (2004) and *"N" v. Secretary of State for the Home Department* (5th May, 2005). At paragraph 20 of the Review, Mr. Dowling concludes as follows:-

> "I have reviewed this file. It is true that Great and his mother have health problems and, in an ideal world, everyone should have the same standard of medical care as applies here. However, it is not an ideal world and it is in recognition of that fact that all States operate immigration and asylum controls. The deportation orders made in this case were consistent with the Minister's obligations to impose those controls and were in conformity with all domestic and international legal obligations. I therefore recommend that the Minister affirms the deportation orders in this case."

32. It was admitted on both sides of this Application that on 20th January, 2006, the First Named Respondent endorsed this Review as follows:-

> "(1) I am satisfied that Great is *not* autistic.
>
> (2) I am also satisfied that the asylum application was without foundation.
>
> (3) Leave to remain is refused."

33. Senior Counsel on behalf of the Applicants submitted that this decision of the First Named Respondent was unreasonable and disproportionate having regard to the facts and involved a breach of fair procedures in the manner in which the application to revoke the deportation orders was considered by him. Senior Counsel submitted that on the facts, to which I have already adverted, the case of the Second Named Applicant was sufficiently strong and exceptional to amount to arguable grounds or even substantial grounds for considering that the First Named Respondent had acted *ultra vires* and in violation of Article 40.3.2 of the Constitution and of Article 3 and Article 8 of the First Schedule of the European Convention on Human Rights Act, 2003. It will be recalled that I have already decided that the relevant test to be applied in this application for leave to seek Judicial Review is whether the Applicants have an arguable case. It is important to note that the decision of the Supreme Court in the "*Baby O*" case was given on 14th February, 2002, and the reasons for the decision were given on 6th June, 2002. The European Convention on Human Rights Act, 2003, did not become operational until 31st December, 2003.

34. It has been decided that despite the reference to "citizen" in Article 40.3.2 of the Constitution, the State is obliged to defend and to vindicate the life and possessions of those persons who are not citizens of the State but who are present in the State. Whether or not this obligation on the State extends to what are generally termed, "socio-economic rights", such as the right to medical treatment, is a matter of doubt even in the case of citizens of the State. However, there can be no doubt but that Article 42.4 of the Constitution obliges the State to make available free primary education, which has been held to include, primary education suitable for children with special educational needs. However, the existence of such rights is not absolute and unqualified. In the instant case they are subject to the right of the State in the interests of the common good to deport persons who have been refused refugee status, (subject to the provisions of s. 5 of the Refugee Act, 1996, (prohibition on refoulement) and s. 4 of the Criminal Justice, (United Nations Convention Against Torture) Act, 2000) and now, in my judgment, Article 3 of the First Schedule of the European Convention on Human Rights Act, 2003.

35. In the course of his speech in the case of *"N" v. Secretary of State for the Home Department* [2005] 2 A.C. 296 at 304 E. and F. Lord Nicholls of Birkenhead, stated as follows:-

> "It would be strange if the humane treatment of a would-be immigrant while his immigration application was being considered where to place him in a better position for the purposes of article 3 than a person who never reached this country at all.
>
> True it was that a person who came here and received treatment while his application was being considered would have his hopes raised. But it is difficult to see why that should subject this country to a greater obligation than it would to someone who was turned away from the port of entry and never received any treatment."

36. In my judgment the same reasoning is equally valid in respect of an argument raised as to the availability of fundamental rights under the Constitution of this State. To repeat what was said by Keane, C.J., (as he then was) in the "*Baby O*" case, at page 182, "If the State's right to deport persons who have been refused refugee status were thus circumscribed, it would be, in a great range of cases, virtually negated". I find that the Applicants do not have an arguable case by reference to the provisions of Article 40 or Article 42 of the Constitution.

37. In my judgment, the statement of the law in this State by the former Chief Justice is the "*Baby O*" case (above cited), is in total accord with the decision of the European Court of Human Rights at Strasbourg in the case of *Henao v. The Netherlands*, (Unreported, Application on 13669/03, June 14th, 2003) where the court held as follows:-

> "According to established case law aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a contracting State in order to benefit from medical, social or other forms of assistance provided by the expelling State. However, in exceptional circumstances an implementation of a decision to remove an alien may owing to compelling humanitarian considerations result in a violation of Article 3".

38. The facts in the "*Baby O*" case were very much stronger and, the plight of the Applicants in that case more immediately pressing, even to the extent of being life threatening, than in the instant case.

39. During argument reference was made to the decisions in *Bensaid v. U.K.* [2001] 33 E.H.R.R. 10, (proposed expulsion from the U.K., of an Algerian national undergoing treatment for schizophrenia in the U.K.); *Regina (Razgar) v. Secretary of State for the Home Department* [2004] 2 A.C. 368, House of Lords, (proposed expulsion to Germany of Iraqi of Kurdish Origin who was receiving treatment in the U.K., for a psychiatric condition which treatment allowed him a measure of autonomy which would not be available in Germany so that he was at risk of committing suicide if deported) and, *"N" v. Secretary of State for the Home Department* [2005] 2 A.C. 296, House of Lords, (proposed expulsion to Uganda from U.K., of AIDS suffer where the treatment she required would not be available to her and where it was claimed she would die in months whereas if permitted to remain in the U.K. she could live for decades).

40. In the case of *"N" v. Secretary of State for the Home Department* (above cited), the House of Lords of the United Kingdom, dealt exhaustively with the jurisprudence of the European Court of Human Rights at Strasbourg, since the decision in *"D" v. The United Kingdom* [1997] 24 E.H.R.R., 423. In the latter case the Strasburg Court extended the reach of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms to cover cases exhibiting "exceptional circumstances", where, "given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the Applicant would be a violation of Article 3", which requires that, "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".

41. The essential facts of that case were that the Applicant "N" with the assistance of the modern drugs and skilled medical treatment available in the United Kingdom, should remain well for decades, but without such facilities, "her prognosis was appalling" and, she would suffer ill health, discomfort and death within a year or so. Lord Nicholls of Birkenhead found that the "cruel reality" was that if "N" was deported to Uganda her ability to obtain the necessary medication was problematic, - "it was similar to having a life support machine switched off". "D" by contrast, was dying from AIDS and was beyond the reach of further medical treatment and, if returned to St. Kitts had no prospect of medical care or of any family support [301-2].

42. Lord Nicholls at page 303 of the report expresses his opinion that the jurisprudence of the Strasbourg Court since the case of "*D" v. The United Kingdom* (above cited) establishes that, "Article 3 of the Convention does not require contracting States to undertake the obligation of providing aliens indefinitely with medical treatment lacking in their home countries. This is so even where, in the absence of medical treatment, the life of the would-be immigrant will be significantly shortened. Lord Nicholls pointed to the fact that the non-availability of appropriate medical care or family support was not in itself sufficient to constitute an "exceptional circumstance", nor was the degree of humanitarian appeal even when of a very high order.

43. At page 304 of the report, Lord Nicholls continues as follows:-

> "The problem derives from the disparity of medical facilities in different countries in the world. Despite this disparity an AIDS sufferer's need for medical treatment does not as a matter of Convention Right, entitle him to enter a contracting State and remain there in order to obtain the treatment he or she so desperately needs."
>
> "Strasbourg post 'D' cases reiterate that Article 3 imposes no such "medical care" obligations on contracting States. Strasbourg jurisprudence confirms that Article 3 cannot be interpreted as requiring contracting States to admit and treat AIDS sufferers from all over the world for the rest of their lives or to give an extended right to remain to would-be immigrants who have received medical treatment while their applications were being considered. If their applications were refused the improvement in their medical conditions brought about by this interim medical treatment and the prospect of

serious or fatal relapse on expulsion cannot make the expulsion inhuman treatment for the purpose of Article 3."

44. Lord Hope of Craighead, at page 308 of the report points out that, "the correct interpretation of the Convention as an international instrument can only be expounded authoritively by the Strasbourg Court". In *Lelimo v. The Minister for Justice Equality and Law Reform* (above cited), Laffoy, J., at page 186 held that, "It is not correct to say that the Convention has been incorporated into domestic law. What the European Convention on Human Rights Act, 2003 has done is to give effect to rights recognised in the Convention in Irish law." Section 4 of that Act of 2003 provides as follows:-

> "Judicial notice shall be taken of the Convention provisions and of –
>
> > (a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction, and the court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments."

45. After a careful and most detailed review of the decisions of the Strasbourg Court in relation to difficulties of access to medical treatment in HIV and AIDS cases and, other diseases with a serious prognosis, such as Psychotic illness and schizophrenia, (as in *Bensaid v. The United Kingdom* [2001] 33 E.H.R.R. 205), Lord L. Hope at page 315 of the report states as follows:-

> "48 The conclusion that I would draw from this line of authority is that Strasbourg has adhered throughout the two basic principles. On the one hand the fundamental nature of the article 3 guarantee applies irrespectively of the reprehensible conduct of the Applicant. It makes no difference however criminal his acts may have been or however great a risk he may present to the public if he were to remain in the expelling state's territory. On the other hand, aliens who are subject to expulsion cannot claim any entitlement to remain in the territory of a contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State. For an exception to be made where expulsion is resisted on medical grounds the circumstances must be exceptional. In May, 2000 Mr. Lorezen, a judge of the Strasbourg court, observed at a colloquy in Strasbourg that it was difficult to determine what was meant by 'very exceptional circumstances'. But subsequent cases have shown that *'D' v. United Kingdom* is taken as the paradigm case as to what is meant by this formula. The question on which the court has to concentrate is whether the present state of the Applicant's health is such that, on humanitarian grounds, he ought not to be expelled unless it can shown that the medical facilities that he so obviously needs are actually available to him in the receiving State. The only cases where this test has been found to be satisfied are *'D' v. United Kingdom* 24 E.H.R.R. 423, where the fatal illness had reached a critical stage, and B.B. v. France where the infection had already reached an advanced stage necessitating repeated stays in hospital and the care facilities in the receiving country were precarious. I respectfully agree with Laws L.J.'s observations in the Court of Appeal par 39, that the Strasbourg court has been at pains in its decisions to avoid any further extensions of the exceptional category of case which *'D' v. United Kingdom* represents."

46. Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood adopted the reasoning of Lord Hope and Lord Walker of Gestingthorpe agreed with the other members of the House. At pages 322 and 323 of the report Baroness Hale states as follows:-

> "As Lord Hope's analysis shows, the later cases have made it clear that it the patient's present medical condition that is the crucial factor. The difficulty is in understanding where conditions in the receiving country fit into the analysis. Even in those cases where the illness is not in an advanced or terminal stage, the court does refer to the medical care and family support available there. But it does so in terms of their being "no prospect" of such care or support, rather than in terms of its being likely to be available. It is difficult to see, therefore, whether this consideration adds anything in those cases. Where the illness is in an advanced or terminal stage, then conditions in the receiving country should be crucial. It is not yet clear whether the Applicant has to show that appropriate care and support during those final stages was unlikely to be available or whether again the "no prospect" test applies. That was undoubtedly the situation in *'D' v. United Kingdom* and the court has made it clear that the "compelling humanitarian considerations" are those which arise in a case where the facts come close to those in 'D'. But if it is indeed the case that this class of case is limited to those where the Applicant is in the advanced stages of a life-threatening illness, it would appear inhuman to send him home to die unless the conditions there will be such that he can do so with dignity. As the European Court of Human Rights said in *Pretty v. United Kingdom* (2002) 35 E.H.R.R. 1, para. 65, 'The very essence of the Convention is respect for human dignity and human freedom.'
>
> 69 In my view, therefore, the test in this sort of a case is whether the Applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity. This is to the same effect as the test proposed by my noble and learned friend, Lord Hope of Craighead. Its sums up the facts in 'D'. It is not met on the facts in this case.
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> 70 There may, of course, be other exceptional cases with other extreme facts, where the humanitarian considerations are equally compelling. The law must be sufficiently flexible to accommodate them. The European Court of Human Rights took very seriously the claim of the schizophrenic patient in Bensaid v. United Kingdom 33 E.H.R.R. 205 who risked relapse into hallucinations and psychotic delusions involving self harm and harm to others if deprived of appropriate medication. But it nevertheless concluded at paragraph 40:
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> > 'Having regard however to the high threshold set by article 3, particularly where the case does not concern the direct responsibility of the contracting State for the infliction of harm, the court does not find that there is a sufficiently real risk that the Applicant's removal in these circumstances would be contrary to the standards of article 3. It does not disclose the exceptional circumstances of the 'D' case…where the Applicant was in the final stage of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St. Kitts.'
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> 71 For these reasons I conclude that we would be implying far more into our obligations under Article 3 than is warranted by the Strasbourg jurisprudence, if we were to allow the appeal in this case, much though I would like to be able to do so."

47. Since no decision of the Supreme Court expounding or even suggesting different principles has been opened to me, and for my own part, I am unaware of any such, I find the reasoning of Lord Nicholls of Birkenhead and Lord Hope of Craighead, compelling and in no way incompatible with the law in this State. Applying the principles expounded by them in the passages from their speeches to

which I have referred, to the affidavit evidence in the instant case and, assuming that what is deposed in the grounding affidavit will be proved, I am satisfied that the Applicants do not have an arguable case that the decision of the First Named Respondent, not to revoke the deportation orders, was an infringement of their rights under Article 3 of the First Schedule of the European Convention on Human Rights Act, 2003. In my judgment the facts of the instant case are nowhere approaching the level of a certainty of immediate appalling suffering or loss of life that would be required to establish an arguable case for judicial review based on "exceptional circumstances" as that term has been defined by the Strasbourg Court.

48. Baroness Hale of Richmond adverts to the fact that the case law of the European Court of Human Rights, "did not exclude that treatment which does not reach the severity of article 3 treatment may nonetheless breach article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity". The relevance of Article 8 of the Convention to 'health and medicine' cases fell to be addressed by the House of Lords of the United Kingdom in the case *R. (Razgar) v. Secretary of State for the Home Department* [2004] 2 A.C. 368 in which case Baroness Hale cites the above passage from the judgment of the European Court of Human Rights in *Bensaid v. United Kingdom* [2001] 33 E.H.R.R. 205 at 219 paragraph 46.

49. In the course of his speech in Razgar, Lord Bingham of Cornhill refers to the decision of the Strasburg court in *Henao v. The Netherlands* (Application No. 13669/03) (Unreported, E.C.H.R., June 24th, 2003). Lord Bingham points out that *Henao* illustrated the stringency of the test applied by the Strasburg court when reliance is placed on article 3 to resist a removal decision. At page 388 of the report Lord Bingham states that he has no doubt that the Strasburg court would adopt the same approach in an application based on Article 8 of the Convention. Dealing (at page 381 etc.) with the decision of the European Court of Human Rights in the case of *Bensaid v. United Kingdom* (above cited), Lord Bingham states as follows:-

> "7. The court then turned to consider the Applicant's complaint based on article 8. For the Applicant it was submitted, at p. 219, para. 44 that
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> > 'Withdrawal of [N.H.S. treatment since 1996] would risk a deterioration in his serious mental illness, involving symptoms going beyond horrendous mental suffering – in particular there would be a real and immediate risk that he would act in obedience to hallucinations telling him to harm himself and others. This would plainly impact on his psychological integrity. In addition to the ties deriving from his 11 years in the United Kingdom, the treatment which he currently receives is all that supports his precarious grip on reality, which in turn enables some level of social functioning'
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> The Government, at p. 219, para. 45, did not accept that the removal of the Applicant from the United Kingdom, where he was illegally, to his country of nationality, where medical treatment was available would show any lack of respect for his right to private life. Even if there was an interference, such would be justified under article 8(2) on the basis that immigration policy was necessary for the economic well-being of the country and the prevention of disorder and crime.
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> 8. The court concluded that implementation of the decision to remove the Applicant to Algeria would not violate article 8 of the Convention, for reasons set out in paras. 46-48 of its judgment, at pp. 219-220:
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> > '46 Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect for private life guaranteed by article 8. However, the court's case law does not exclude that treatment which does not reach the severity of article 3 treatment may none the less breach article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity.
> >
> > 47 Private life is a broad term not susceptible to exhaustive definition. The court has already held that elements such as gender, identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by article 8. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.
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> > 48 Turning to the present case, the court recalls that it has found above that the risk of damage to the Applicant's health from return to his country of origin was based on largely hypothetical factors and that it was not substantiated that he would suffer inhuman and degrading treatment. Nor in the circumstances has it been established that his moral integrity would be substantially affected to a degree falling within the scope of article 8 of the Convention. Even assuming that the dislocation caused to the Applicant by removal from the United Kingdom where he has lived for the last 11 years was to be considered in itself as affecting his private life, in the context of the relationships and support framework which he enjoyed there, the court considers that such interference may be regarded as complying with the requirements of the second paragraph of article 8, namely as a measure 'in accordance with the law', pursuing the aims of the protection of the economic well-being of the country and the prevention of disorder and crime as well as being 'necessary in a democratic society' for those aims."

Lord Bingham of Cornhill then continues:-

> "9. This judgment establishes, in my opinion quite clearly, that reliance may in principle be placed on article 8 to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties which the Applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving country. The threshold of successful reliance is high, but if the facts are strong enough article 8 may in principle be invoked. It is plain that 'private life' is a broad term, and the court has wisely eschewed any attempt to define it comprehensively. It is relevant for the present purposes, that the court saw mental stability as an indispensable precondition to effective enjoyment of the right to respect for private life. In Pretty v. United Kingdom (2002) 35 E.H.R.R. 1, 35-36 para. 61, the court held the expression to cover 'the physical and psychological integrity of a person' and went on to observe that: "Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world". Elusive though the concept is, I think one must understand 'private life' in article 8 as extending to those features which are integral to a person's identity or ability to function socially as a person. Professor Feldman, writing in 1997 before the most recent decisions, helpfully observed ("The Developing Scope of Article 8 of the European Convention on Human Rights" [1997] E.H.R.L.R. 265, 270):
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> > "Moral integrity in this sense demands that we treat the person holistically as morally worthy of respect, organising the state and society in ways which respect people's moral worth by taking account of their need for security.'

> 10. I would answer the question of principle in para. I above by holding that the rights protected by article 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal does not violate article 3, if the facts relied on by the Applicant are sufficiently strong. In so answering I make no reference to 'welfare', a matter to which no argument was directed. It would seem plain that, as with medical treatment so with welfare, an Applicant could never hope to resist an expulsion decision without showing something very much more extreme than relative disadvantage as compared with the expelling State."

50. On the facts in the *Razgar* case, Lord Bingham of Cornhill concludes that one could not "rule out in limine the possibility of a finding, properly made, that the deportation of Mr. Razgar to Germany would violate his rights under article 8. Lord Steyn (who did not deliver a separate opinion) and, Lord Carswell (who did), both agreed with the opinion of Lord Bingham. Lord Walker of Gestingthorpe and Baroness Hale of Richmond while agreeing with the principles expounded by Lord Bingham disagreed with their application to the facts in that particular case.

51. It is important, I believe, at this point to give a brief summary of the facts in the *Razgar* case. Mr. Razgar entered the United Kingdom in 1989 and was permitted to remain there until 1992. He married a citizen of the United Kingdom and was granted indefinite leave to remain in that country as a "foreign spouse". In 1996 he went for a holiday to Algeria for a month. On his return to the United Kingdom he was refused liberty to re-enter that country on the basis that his "marriage" was a mere "marriage of convenience". Prior to this he had been diagnosed as suffering from severe psychotic illness with schizophrenia. Compulsory detention in a mental hospital was considered as his illness was regarded as very severe. Fortunately he responded to treatment after a brief period in hospital. Mr. Razgar feared that if he was deported to Germany he would loose his autonomy while there and would probably be returned to Algeria. In Algeria the nearest hospital where he could get treatment was approximately eighty kilometres from his native village. Part of his serious psychotic symptoms included the hearing of voices urging him to harm others and himself.

52. At p. 391 of the report in that case Lord Walker of Gestingthorpe at para. 28 sections (e) to (g) expresses the position as follows:-

> "28. On the (so far untested) evidence of the respondent Mohammed Ali Razgar and on the medical reports (so far unchallenged) of a distinguished psychiatrist, Dr. Sathananthan, the respondent is in a fragile mental state. He claims on grounds which appear credible to have been tortured in Iraq, where his father was hanged. He says that he still suffers pain, insomnia and nightmares when he does sleep. He is described as severely depressed with feelings of personal worthlessness and hopelessness about the future. He said that he will kill himself if returned to Germany. When he saw the psychiatrist on 10th September, 2002, he spoke of two suicide attempts which he made in this country, in 2000 and 2001, although neither seems to have been mentioned during his examination (at the Gatwick Detention Centre) on 7th June, 2001. The psychiatrist's opinion on 7th June, 2001, was that if sent back to Germany or Iraq the respondent would make a serious attempt to kill himself. On seeing the respondent on 15th April, 2002, (after his release from custody) the psychiatrist considered that the respondent 'was not suicidal but was determined that he would kill himself if he was sent abroad.' After seeing him again on 10th September, 2002, the psychiatrist recorded that the respondent had seen other young men kill themselves, and at times had suicidal ideation himself. There is no evidence of his present condition."

53. Lord Walker of Gestingthorpe and Baroness Hale of Richmond, while agreeing with Lord Bingham's observation that where the Respondent's case is based on his need for medical treatment or on his welfare, he could never hope to resist expulsion without showing "something very much more extreme than relative disadvantage" (as between the deporting State and the receiving State), were not content to find that Mr. Razgar's case was exceptional in the way in which that term was employed by the Strasburg court in the decisions in *Bensaid v. United Kingdom* (above cited) and *Henao v. The Netherlands* (above cited).

54. At page 394 of the report at para. 37 Lord Walker states:-

> "Even in the most enlightened host country asylum seekers often have to deal with bleak accommodation or even loss of liberty, public hostility and material deprivation, and these (on top of their earlier sometimes horrendous, experiences) naturally lead to anxiety, depression and feelings of hopelessness. But neither the truism of human imperfection, nor the evidence (taken at its highest) of conditions in Germany, leads to the conclusion that the respondent's treatment in Germany would probably be so much worse than his present condition as to amount to a flagrant infringement of his human rights – an infringement so serious as would (in the language used in *Devaseelan* [2003] Imm A.R. 1) result in the rights in question being completely denied or nullified. In my view it would need much clearer and more compelling evidence to lead to that conclusion."

55. At page 400 of the report at para. 59, Baroness Hale of Richmond expressed the following opinion:-

> "Although the possibility cannot be excluded, it is not easy to think of a foreign health care case which would fail under article 3 but succeed under article 8. There clearly must be a strong case before the article is even engaged and then a fair balance must be struck under article 8(2). In striking that balance only the most compelling humanitarian considerations are likely to prevail over the legitimate aims of immigration control or public safety. The expelling state is required to assess the strength of the threat and strike that balance. It is not required to compare the adequacy of the health care available in the two countries. The question is whether removal to the foreign country will have a sufficiently adverse effect upon the Applicant. Nor can the expelling State be required to assume a more favourable status in its own territory than the Applicant is currently entitled to. The Applicant remains to be treated as someone who is liable to expulsion, not as somebody who is entitled to remain."

56. I have already found that the standard of proof required of the Applicants in this application for leave to seek Judicial Review is not the "substantial grounds" standard of s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act, 2000, but the much lesser "arguable case on the facts averred in the grounding affidavit" standard explained in "*G" v. The Director of Public Prosecutions* [1994] 1 I.R. 374 at 378, Supreme Court. I am persuaded by the reasoning of Lord Bingham of Cornhill. Applying the principles identified by him from his analysis of the pertinent decisions of the European Court of Human Rights, I find, having regard to the affidavit evidence before this Court, that the Applicant's have an arguable case. As in relation to Article 3, I have not been referred to any decision of the Supreme Court in any way inimical to the opinions expressed by Lord Bingham and, I am not aware of any. The former Supreme Court in the case of "*Baby O" v. The Minister for Justice Equality and Law Reform and Others* (above cited), had no occasion to and did not consider how the provisions of Article 8 of the Convention might impinge on the right of this State to deport persons who had been refused refugee status.

57. The court will therefore grant leave to these Applicants to seek an order of certiorari by way of Judicial Review on the sole ground

that on the evidence before him on 20th January, 2006, the decision of the First Named Respondent not to revoke the deportation orders made by him on 15th September, 2005, in respect of the Applicants was a violation of their rights under Article 8(1) of the First Schedule of the European Convention on Human Rights Act, 2003.