Neutral Citation: [2013] IEHC 566

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 867 J.R.]

BETWEEN

K.N. AND K.M. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND K.N.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 6th day of December, 2013

1. The first named applicant is the mother of the second named applicant, who was born on 17th February, 2007. On 17th June, 2008, both arrived in Ireland. The second named applicant was fourteen months old. The first named applicant applied for a declaration of refugee status which was rejected following a decision by the Refugee Appeals Tribunal of the 13th May, 2009, notified by letter dated 29th July. The second named applicant was included in his mother's application. By letter dated 30th July, 2009, the first named applicant was informed by way of a "three options" letter that it was proposed to consider the deportation of both applicants from the state and informing them of their rights to apply for subsidiary protection and/or leave to remain in the state pursuant to s. 3 of the Immigration Act 1999.

2. The application for subsidiary protection was considered and a determination was reached refusing the application on 10th June, 2011. An examination of file in respect of the s. 3 application for leave to remain was concluded on 29th August, 2011, following which deportation orders were made in respect of both applicants on 7th September and subsequently notified to them by letter of 13th September.

3. An application was made seeking the revocation of the deportation orders pursuant to s. 3(11) of the Immigration Act 1999, on 10th August, 2012, following the death of the first named applicant's husband, the child's father, and based upon that new fact and further details of the first named applicant's educational, social and political activities and a reference from her son's school where he was enrolled in September, 2011 following a year in playschool. A number of references were also submitted and the application was refused in a letter dated 25th June, 2013, following a consideration of the application which was completed on 5th June. The applicants were advised "that there is no undertaking in place in relation to your removal" which simply reflected the legal reality that a lawful deportation order was in force which could be acted upon by the relevant authorities at any time. The applicants were obliged to present themselves to the Garda National Immigration Bureau at Anglesea Street on 22nd July, 2013, in order to make arrangements for their removal from the state. They were also informed that the enforcement of these orders was an operational matter for the Bureau and that all future queries in relation to their removal should be directed to that office. The deportation order in respect of the first named applicant was amended to indicate that her name was K.N., also known as F.K.N.

4. On 8th August, 2013, a second application was made pursuant to s. 3(11) of the Immigration Act 1999, seeking the revocation of the deportation orders. This application is purportedly based on additional factors including the delay in implementing the deportation order made on 7th September, 2011, as a result of which the applicants had developed a private life over the period of that delay and during the period leading up to the making of the deportation order since their arrival in the state. It was claimed that the execution of the orders at this stage would breach the applicants' right to respect for their private lives under Article 8 of the European Convention on Human Rights, and the application contains legal submissions concerning the accrual of Article 8 rights by persons in the asylum/deportation process. Country of origin information was also submitted highlighting the risks to women and children of return to the Democratic Republic of Congo which replicate many of the submissions made in the earlier application for revocation on 10th August, 2012. An additional report of the United States Department of State 2012 *Country Reports on Human Rights Practices – Democratic Republic of Congo*, 19th April, 2013 dealing with armed conflict, the lack of an independent and effective judiciary and impunity throughout the country for many serious abuses of human rights by the security services was also submitted at the time.

5. As part of this application a request was made that the respondent give an undertaking "not to remove our clients from the state pending your consideration of this application". Reliance was placed on the decision of the Supreme Court in *Okunade v. the Minister for Justice, Equality and Law Reform & Ors* [2012] IESC 49, and the following extract from the judgment of Clarke J.:-

> "So far as the facts of this individual case are concerned I am of the view that the court should only be prepared to determine whether the decision made by the trial judge not to grant a stay or injunction pending the hearing of the application for leave to seek judicial review in this case was correct on the facts before the trial judge. It seems to me that that question comes down to an assessment of whether there was any sufficient countervailing factor to alter the default position that the deportation order should take its course. For the reasons analysed by the trial judge it does not seem to me that the applicant put forward any significant basis for suggesting that there would be a real risk of harm on deportation such that the risk of injustice on that basis would go beyond the "ordinary" risk that someone might be deported in circumstances which were ultimately found to be unjustified.
>
> However, I feel that it is not possible on the facts of this case to overlook the fact that one of the applicants is a child of some four years of age who has known no other country other than Ireland. It is hardly the fault of that child that the substantial lapse of time involved in this whole process has led to such a situation. Rather that current status is a function of the lack of a coherent system and sufficient resources. As pointed out earlier, a significant disruption of family life is a countervailing factor which, provided it be of sufficient weight, can be enough to tip the balance in favour of the granting of a stay or an injunction.

> On the facts of this case I have come to the view that the trial judge was wrong in failing to afford sufficient weight to that factor and was, therefore, wrong in failing to grant an injunction restraining deportation until the hearing of the application for leave."

It was submitted to the Minister that because the applicants were said to be potentially at risk owing to the security situation in Democratic Republic of Congo and because of the representation made on the application under s. 3(11) that they had "a clear and solid case that they have an entitlement to continue to remain in the state". It was also submitted that the second named applicant, who was six years old and had been in the state for approximately five years, was in a similar position to the child applicant in *Okunade* having regard to his age and the length of time that he had spent in the state.

6. A further request seeking an undertaking not to deport the applicants was made on 23rd October, 2013. The applicants continued to meet the requirements to present themselves at the Garda National Immigration Bureau which they were obliged to do on 11th November.

7. By letter dated 25th October, the respondent indicated that he was unable to provide the applicants with the undertaking requested and advised "that your application is non-suspensive of the deportation order made in respect of your client".

8. The respondent has not yet determined the second s. 3(11) application seeking revocation of the deportation orders. However, the applicants contend that they are entitled as a matter of right to remain in the state pending the determination of that application. They claim a declaration that a refusal of the respondent of 25th October, 2013, to grant the applicants' request that the respondent undertake not to deport them pending the consideration of the application was unlawful and/or an order of *certiorari* of the refusal. They also seek an injunction restraining the respondent from taking any step to deport the applicants pending the determination of their application and/or a stay in respect of the applicants deportation order pending a decision under s. 3(11). The relief is sought upon the following grounds:-

> (i) The applicants are in a position to demonstrate weighty reasons as to why they should not be deported pending a decision by the respondent in their case. In particular, the applicants rely on the following factors or any of them:-
>
> > (a) the applicants have demonstrated a strong basis for the revocation of their deportation orders;
> >
> > (b) the applicants have put down roots in the state over a period of five years – in particular the second applicant has attended school for two years here and spent all of the first year of his life in the state;
> >
> > (c) the applicants have identified appreciable risks which are posed to them in their country of origin – owing both to the general prevailing conditions in the DR Congo which are extremely volatile, and risks heightened in respect of them in particular as a single mother and a young child.
>
> (ii) Enforcing their deportation orders would deprive the applicants of their right to an effective remedy in relation to their deportation orders."

9. This Court granted an interim injunction on an *ex-parte* application made on 25th November, 2013. On 2nd December, the applicants sought an interlocutory injunction restraining the respondent from taking any steps to deport the applicants pending the determination of their application under s. 3(11) and/or a stay as set out above, together with leave to apply for judicial review.

10. The s. 3(11) application now awaiting a decision was made several weeks after the refusal of the first s. 3(11) application on 25th June. No application was made to challenge the refusal of asylum, the refusal of subsidiary protection, the deportation orders made in September, 2011 or the refusal to revoke the orders following the first s. 3(11) application. At each stage of the process the detailed submissions of the applicants were received and considered. It is clear that it was not accepted that there was a fear of persecution on the part of the first named applicant arising out of events in the Democratic Republic of Congo to justify the grant of asylum. It was not accepted that the applicants were in need of subsidiary protection and it was concluded that there were no substantial grounds for believing that they would be exposed to a serious and individual threat to their lives or person by reason of indiscriminate violence in respect of internal or international conflict: nor was it accepted that protection would not be accessible to them there. The examination of the applicants' file under s. 3 of the Immigration Act 1999, prior to the making of the deportation orders considered all the required matters under s. 3 of the Act. Though noting that the applicants had made commendable efforts to integrate in Irish society since their arrival it was, nevertheless, concluded that the granting of leave to remain was not warranted on humanitarian grounds. The numerous representations made on behalf of the applicants were considered. In particular, s. 5 of the Refugee Act 1996 (Prohibition of Refoulement) was considered in a detailed nineteen page assessment. It was determined that the repatriation of the applicants was not contrary to section 5. It was also concluded that their repatriation would not be contrary to s. 4 of the Criminal Justice (United Nations Convention against Torture) Act 2000.

11. Of particular relevance to this case the private and family rights of the applicants under Article 8 of the Convention were addressed in detail. It was acknowledged that their repatriation could amount to an interference with private life. At that stage, the child was approximately four and a half years old and was about to start school in September, 2011: he had attended pre-school for the previous year. An assessment of the educational and social ties which the applicants had formed within the state since their arrival was carried out and other matters relating to their personal development during that period were also considered. However, it was concluded, having weighed and considered the various courses and social schemes engaged in by the first named applicant and correspondence regarding her good character, that repatriation would not constitute a breach of their right to respect for private life under Article 8.

12. The applicants' family rights were also considered. It was noted that they were alone in the state but that the first named applicant had three other sons and one daughter in the Democratic Republic of Congo, although she was unsure of their whereabouts. At that time she had no knowledge as to her husband's whereabouts. Her father had died and her mother resided in the Democratic Republic of Congo. She had three other sisters and one brother also living there. It was concluded that repatriation would not constitute a breach of family rights under Article 8.

13. The deportation decision was never challenged. A submission was not made that the passage of time was so great since the arrival of the applicants in the state that the making of deportation orders would constitute a failure to respect their right to private life. Indeed, the consideration of the right to private life necessarily concerned an analysis of whether the proposed removal of the applicants at that stage constituted an interference with their right to private life as it had developed since their arrival in the state. This analysis of the potential interference with that right and the resultant conclusion occurred some three years and two months

following their arrival in the state.

14. The first s. 3(11) application dated 10th August, 2012, relied on a number of new factors. Following the making of the deportation order against the applicants, the first named applicant claimed that she became aware that her husband had been murdered on 19th February, 2010, due to his involvement in the Bundu Dia Kongo (BDK), a politico religious movement in the Democratic Republic of Congo of which she claimed to be an active member during the asylum process, in the course of the application for subsidiary protection and when seeking humanitarian leave to remain. A copy of her husband's original death certification was obtained and submitted. This new fact was relied upon in support of the case that the applicants faced a serious harm if returned to the Democratic Republic of Congo and that repatriation would amount to a breach of s. 5 of the Refugee Act 1996, as amended. An additional nine references were submitted dated May, 2012 as evidence of the continuing efforts of the applicants to integrate in Irish society, advance their social involvement and their education.

15. Additional country of origin information was said to demonstrate continuing violence in the Democratic Republic of Congo, a heightened risk of violence and sexual abuse against women, a fear that the United Nations Force and Administration (Monusco) had failed to prevent a resurgence of violence and a continuing risk to failed asylum seekers if returned to the Democratic Republic of Congo. Five new reports containing country of origin information dated 2011 were also submitted. A letter was supplied from the second named applicant's new primary school which established that he was a pupil at the school from 1st September, 2011.

16. An undertaking was also sought, when making this application, that the applicants would not be deported pending the determination of the s. 3(11) application: this was refused on 15th August, 2012.

17. By letter dated 25th June, 2013, the application was refused. The consideration of the applicants' case culminated in that refusal. In the meantime, information was also received from the United Kingdom Border Agency that the first named applicant under the name of Florence Kamosi Ndeke, born on 31st December, 1975, had applied for and obtained a United Kingdom visa from the British Embassy in Kinshasa on 16th January, 2008. She had travelled on her own passport and entered the United Kingdom in accordance with the terms of the visa on 13th February, 2008. She claimed that she returned to the Democratic Republic of Congo on 5th March, 2008. This information was completely contrary to her denial of ever having left the Democratic Republic of Congo or obtained a passport or a visa in the past. Though she maintained that she returned to the Democratic Republic of Congo on 5th March, 2008, no passport was produced indicating the dates of her entry to the United Kingdom or return to Democratic Republic of Congo, and in the absence of that proof, it was not accepted that she had returned to the Democratic Republic of Congo on that date or that she had left the United Kingdom prior to arriving in Ireland to claim asylum on 17th June, 2008, with her son.

18. In addition, the death certificate submitted as part of the new evidence was not deemed to have probative value because it simply stated that a person said to be her husband died on 19th February, 2010, and was buried in the nominated cemetery.

19. The first named applicant's claimed association with the BDK had already been called into question. Her account was not accepted by the Refugee Applications Commissioner and the Refugee Appeals Tribunal, which found her story to be implausible.

20. The additional submissions and references furnished in the application were considered together with up to date country of origin information from the United Kingdom Home Office dated 9th March, 2012, and the applicant's further letter of 17th May, 2013, in respect of her involvement with BDK which was disbelieved. It was concluded that no refoulement issue arose in respect of the applicants' case.

21. It is important to note, having regard to the emphasis now placed on the applicants' private life rights under Article 8 of the European Convention on Human Rights that this matter was considered in the examination of file on the first application to revoke as follows:-

> "Consideration was also given to the right to private and family life under Article 8 of the European Convention on Human Rights (ECHR) and as no information which would attest to a change in fact, or in the circumstances of the applicant in relation to these issues has been submitted, it is not proposed to reconsider those issues."

22. Seven weeks later on 8th August, 2013, the second s. 3(11) application was made, which is still pending. It was specifically confined in its ambit to a claim based on "private life rights which have accrued" under Article 8 of the Convention. It is clear that there are no new facts asserted in the second application that were not already considered or could have been advanced during the course of the first s. 3(11) application. A legal submission concerning the accrual of Article 8 private life rights was made relying alternately upon the passage of time since the applicants arrived in the state and claimed asylum to date, or the passage of time between the making of the deportation orders to date. The court notes that the references and documents relied upon were precisely those which were relied upon in the first application concerning their period of residence and community participation, the development of friendships and social ties and the development of a settled lifestyle in Ireland. It was claimed that the applicants had been allowed to reside in the state for a period of in excess of five years and that the life they had lived, the social ties they had established and the roots they had set down engaged the right to private life under Article 8. Particular emphasis was placed on the fact that the second named applicant had been attending national school since September, 2011 and consequently, had developed significant private life rights in the intervening two school years. The court notes that this fact was already well known at the time of the refusal of the first application to revoke and is considered in that decision. The decision maker was well aware that the second named applicant had been attending the national school for two full school years by the time the decision was made on 25th June, 2013.

23. It is correct to state that the applicants were lawfully within the state awaiting the outcome of their asylum applications from 17th June, 2008, to 29th June, 2009, when notified that the application had failed. Thereafter, the applicants applied for subsidiary protection, during which they were entitled to remain in the state until that application was determined on 10th June, 2011. The application made for leave to remain was rejected on 13th September, 2011, and the deportation orders were made. The deportation order was not immediately enforced which enabled the applicants, while still in the state, to make an application pursuant to s. 3(11) on 10th August, 2012, ultimately refused as set out above on 25th June, 2013.

24. It is against this procedural and factual history, that the applicants now seek an interlocutory injunction restraining the respondent from taking any steps to execute the deportation orders made against them, or a stay upon their removal from the state until the determination of the pending s. 3(11) application in relation to the further submissions made concerning the accrual of Article 8 private life rights. The respondent has refused to give an undertaking not to implement the deportation order which was requested as part of the second application.

25. The court also notes that the country of origin information relied upon in the second application is substantially the same as that

relied upon in the first application. There is some additional country of origin information which, in the words of the application, indicates that "the position has not improved" in the Democratic Republic of Congo.

26. The court is now invited to grant leave to apply for judicial review in respect of the refusal of the respondent to accede to the request not to deport the applicants pending the consideration of their second application under s. 3(11). The court is mindful that no decision has been made by the respondent on this application, but it is entitled to consider the scope and contents of that application in the context of the procedural history in the case and, in particular, the first application under s. 3(11).

27. In the *Okunade* case Clarke J. (delivering the judgment of the court) stated that:-

> "…that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:-
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> (a) The court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;
>
> (b) The court should consider where the greatest risk of injustice would lie. But in doing so the court should:-
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> (i) Give all appropriate weight to the orderly implementation of measures which are prima facie valid;
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> (ii) Give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and
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> (iii) Give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;
>
> but also
> (iv) Give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.
>
> (c) In addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages.
>
> (d) In addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

28. Clarke J. then elaborated on the application of those principles in immigration cases and stated:-

> "10.2 The entitlement of the executive of any country to exercise a significant measure of control, within the law, of its borders is an important aspect of the public interest of any state. It seems to me, therefore, that a significant weight needs to be attached to the implementation of decisions made in the immigration process which are *prima facie* valid. It would, in my view, be an insufficient recognition of the legitimate entitlement of the state to ensure the orderly conduct of the immigration and asylum process not to place a high weight on the need to respect orders and decisions made in that process unless and until they are found to be unlawful…
>
> 10.3 On the other hand it is also clear that a person, who asserts either an entitlement to remain in the state or an entitlement to have consideration given to their being allowed to remain in the state in circumstances where it is said that the consideration given to date was not in accordance with law, will suffer some injustice if that person were to be removed from the state pending the result of a challenge to the legality of the decision to deport but where the court ultimately found in favour of the challenge in question to the extent that either deportation did not follow or a further process was required which was ultimately resolved in favour of the applicant concerned. On this later point it must be recalled that, in at least some of the cases, the only consequence of a successful judicial review challenge will be a rehearing…the possible injustice to an applicant, to which I have referred, is a factor to which weight must also be given, independent of any additional consequences that might be said to flow from deportation on the facts of the individual case.
>
> 10.4 However, in the absence of any additional factors on either side, it seems to me that, if faced simply with an assertion on the part of the Minister that it is desired that a deportation order be enforced unless and until it be found invalid and an assertion on the part of an applicant that the applicant in question does not wish to run the risk of being deported only to be readmitted if the relevant proceedings are sufficiently successful, the position of the Minister would win out. It should also be taken into account that, at least in many cases, the result of a successful judicial review challenge will not necessarily lead to the applicant in question being entitled to remain indefinitely in Ireland or if already out of Ireland to be entitled to come back to Ireland for the purposes of remaining here indefinitely. In very many cases the only consequence of a successful challenge is, as has been pointed out, that issues of substance will require to be considered again…that too is a factor to which appropriate weight should be attached and which favours, in the absence of material countervailing factors, the implementation of a deportation order.
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> 10.5 The default position is, therefore, that an applicant will not be entitled to a stay or an injunction. However, it may be that, on the facts of any individual case, there are further factors that can properly be taken into account on either side…
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> 10.6 Furthermore, if an applicant can demonstrate that deportation, even on a temporary basis, would cause more than what one might describe as the ordinary disruption in being removed from a country in which the relevant applicant wished to live, such as a particular risk to the individual or a specific risk of irremediable damage then such factors, if sufficiently weighty, could readily tilt the balance in favour of the grant of an injunction or a stay.
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> 10.7 In that context it does need to be noted that counsel on behalf of the Okunades placed reliance on the fact that the rights invoked on their part are fundamental human rights guaranteed both by the Irish Constitution, by the Charter of

> Fundamental Rights of the European Union, insofar as applicable to European Union measures such as subsidiary protection, and by the ECHR. That the right to be protected from being deported to a situation where one is placed in significant danger is an important or fundamental right can hardly be doubted. However, regard has to be had, on the facts of any individual case, to the basis put forward for the suggestion that there is a real risk of harm should the person concerned be deported. Where, as will frequently be the case, such a person has had the opportunity to have the facts underlying their claim to such a risk analysed by a series of administrative and judicial bodies, then the court will, as the trial judge in this case was, be in a much better position to form a judgment on the question of whether there is a real risk of serious harm should a deportation order be implemented. Where, on an arguable grounds basis, the situation with which a judge of the High Court is faced when considering an interlocutory injunction application in this field is one where there is a credible basis for suggesting that a real risk of significant harm would attach to the applicant on deportation, then it would require very weighty considerations indeed to displace the balance of justice on the facts of that case, certainly if what was intended was a deportation back to the country in which the relevant applicant would face those risks…
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> 10.8 It also seems to me that, in the context of deciding what is to happen on a temporary basis pending trial or a leave application, a disruption of family life which has been established in Ireland for a significant period of time is a material consideration. As pointed out earlier the reason why the maintenance of the status quo is considered as part of the ordinary interlocutory injunction jurisprudence is that the risk of injustice is increased when action is taken so that some justification for action must be found. In addition it seems to me that it has to be taken into account that part of the problem which gives rise to a risk of disruption of family life stems from the highly complicated structure of the statutory regime applicable in circumstances such as those with which the court is concerned in this case with the consequent prolongation of the process. That is a factor which is within the state's control and does often lead to situations where parties (most particularly children) have put down roots. All due weight needs to be attached to the undesirability of disrupting family life involving children in circumstances where, after a successful conclusion of both the judicial review proceedings and any other process which might follow on, the children concerned might be allowed to remain in or return to Ireland.
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> …
>
> 10.10 …at an interlocutory stage the court is not considering whether a relevant infant has the right to remain in Ireland as such, but rather the court has to decide where the least risk of injustice lies in formulating a temporary measure to cover the situation which is to prevail until the substantive legal rights of the infant concerned are established. The court is not, therefore, concerned with whether an infant, citizen or otherwise, who has remained in Ireland for a significant period… is entitled, as a matter of substantive right, to remain in Ireland. Rather the court has to weigh in the balance of convenience the consequences for such an infant, in all the circumstances of the case, of being deported only to find that the infant concerned may become entitled to return to Ireland if the relevant proceedings are sufficiently successful."

29. In the *Okunade* case, though it was held that the trial judge had correctly concluded that no arguable basis of significant risk on return to Nigeria had been established by the applicants, nevertheless, on the facts of the case, the disruption to family life was sufficient to tip the balance of justice in favour of the granting of an interlocutory order. One of the children in that case was a child aged four who had known no country other than Ireland. The applicants claim that the infant in this case is in a similar situation to the child in *Okunade*. However, it is clear that there was a direct challenge to the deportation order in the *Okunade* case. There is no such challenge in this application either to the deportation decision or the refusal to revoke that order.

30. In *Smith & Smith v. the Minister for Justice and Equality & Ors* (Unreported, Supreme Court, Clarke J., 1st February, 2013), a decision delivered some three and a half months after the *Okunade* decision, the applicants sought leave to apply for judicial review to challenge the validity of a refusal by the Minister to revoke a deportation order made against the father of the family. This refusal was the second such decision. The application for leave had been refused in the High Court.

31. The trial judge, Cooke J. determined at para. 14 of his judgment that:-

> "It is well settled that the Minister is not obliged to entertain an application for revocation under s. 3(11) unless it is based upon some new fact or information or some change of circumstance which has come about since the deportation was made and which, if established, would render the implementation of the deportation order unlawful."

This test was approved by the Supreme Court.

32. Clarke J. in the course of his judgment discussed the rationale of this test:-

> "5.4 While there are many aspects of the system which contribute to the delay of which I have spoken, there can be little doubt but that permitting persons to make repeated applications for revocation of deportation orders in the absence of significant new materials or circumstances would contribute to such delays and have an adverse affect on the orderly implementation of the Irish immigration system. It seems to me to follow that it is only where a relevant applicant can point to some significant feature, not present when the original deportation order was made, that there can be any obligation on the Minister to give detailed reconsideration to the question of deportation. It likewise follows that a similar situation arises where, as here, there is a second or subsequent application for revocation of a deportation order. Where, as here, neither the original deportation order nor the first or earlier application for revocation was challenged in the courts by judicial review (or where any such challenge failed), it must be assumed that the analysis of the Minister, on the basis of the facts, materials and considerations then before the Minister, was correct. It follows that the only basis on which a challenge to a second or subsequent refusal on the part of the Minister to revoke a deportation order can be brought is where reliance is placed on a suggestion that there were new circumstances not before the Minister when the deportation order or any previous decision not to revoke same was determined and where the challenge is directed to the consideration by the Minister of the application in the light of such new circumstances."

33. Clarke J. stated that in the vast majority of cases it is reasonable to assume that any person seeking the revocation of a deportation order on the basis of the rights of other family members will address in their relevant application to the Minister any points which can be made in favour of the revocation sought which derive from those rights. It was also important to recall that:-

> "5.6 …there is an obligation on persons seeking to invoke their right to invite the Minister to revoke a deportation order to put before the Minister all relevant materials and circumstances on which reliance is sought to be placed. The question of

> the presence of new and significantly material considerations such as might justify a reconsideration of a previous deportation decision (including a previous refusal to revoke) must be judged against that obligation. The mere fact that what is said to be a new consideration was not before the Minister when an earlier decision was made does not of itself render it the sort of consideration which requires the Minister to actively reconsider. If what is asserted to be a significant material new consideration was actually available to the applicant at the time of the previous application, but was not advanced or brought to the Minister's attention, then, in the absence of special circumstances, it is difficult to see how the existence of such a consideration can properly be advanced as a new consideration requiring an active reassessment by the Minister of the substantive merits of the case. For new circumstances to require such a reassessment it must either have arisen after the earlier decision of the Minister or there must be a compelling explanation as to why notwithstanding its existence at the relevant time, it was not then advanced."

Clarke J. concluded that there was no basis on the facts of the *Smith* case to conclude that the applicant had difficulty in asserting any of his rights in the course of his various applications to the Minister. It was against that background that it was necessary to assess the arguability of the grounds asserted on behalf of the *Smith's* which were said to constitute new and changed circumstances.

34. Clarke J. emphasised that a party could not artificially create a new point by the simple expedient of making multiple applications for the revocation of a deportation order:-

> "Where, however, there has already being an application to revoke which has been refused and where the refusal either has not been challenged or where any challenge to such refusal has failed in the courts, then legal certainty requires that such refusal must be taken to represent a correct determination based on the facts and materials as they stood at the time of that refusal. Those facts and materials must be taken to include matters actually before the Minister together with any matters not before the Minister which the applicant ought to have placed before the Minister. It follows that a second or subsequent application to revoke must put forward some new facts, materials or circumstances beyond those which existed at the time of the first refusal to revoke (or which, while existing at that time, could not with reasonable diligence have been expected to have been placed before the Minister by the relevant applicant)…"

35. In the *Smith* case it was argued that the legal framework within which the consideration of family rights ought to have been considered had changed by reason of the decision of the European Court of Justice in *Zambrano* [2011] ECR 1-0000 (Case C-34/09). Clarke J. noted that the points arising from the *Zambrano* decision would have applied equally at the time of the first refusal to revoke the deportation order in the case because *Zambrano* had been decided well before the first application to revoke had been made. If the points had any merit, they should have been fully addressed to the Minister at the time of the first application for revocation and if it were felt that the Minister's consideration of the points did not conform with law, a challenge to the Minister's decision, at that time, should have been brought. He stated:-

> "5.14 It is incumbent on any party seeking revocation of a deportation order to put forward the entire argument which they wish to advance (subject, as pointed out earlier, to any undiscovered points which could not, with reasonable diligence, have been discovered), so as to enable the Minister to consider all such points. It is also incumbent on any party who feels that the Minister's determination does not conform with law to bring a timely challenge to that decision. A party cannot bypass those obligations simply by making a renewed application without new grounds. Where a renewed application is made, then the Minister is only required to revisit the overall merits of the case where there are new and material grounds put forward. There is nothing to suggest that there was any material change in the legal framework between the time of the first refusal to revoke and the refusal which is the subject of challenge in this case. There is, therefore, in my view, no basis for challenging the Minister's second decision to refuse to revoke based on grounds which were available when the first decision not to revoke was made and which were not put forward at that time as a basis for a challenge."

36. The court is satisfied that the applicants were entitled to bring this application for injunctive relief as recognised by Cross J. in *A.D.S. (Ghana) v. Minister for Justice and Equality and the Commissioner of An Garda Síochána* [2012] IEHC 73. The initial issue is to determine whether in this case the grounds for an interlocutory injunction have been made out having due regard to the principles set out in *Okunade* and *Smith*. As in *A.D.S.* the immediate issue is whether the applicant has established that there is a fair issue to be tried as to the existence of stateable or adequate grounds as to why the deportation ought to be suspended pending the determination of the s. 3(11) applications and, if there is, whether the balance of convenience then favours the granting of an injunction.

37. I am satisfied that no new facts were put forward in respect of the private rights of the applicants in this case in the second application under s. 3(11) now pending. I am also satisfied that the bulk of the country of origin information submitted in the second application was identical to that submitted on the first. The updated country of origin information that was additional was said by the applicants' solicitor simply to confirm that the position had not changed in respect of the security and human rights issues in the Democratic Republic of Congo since the last decision was made. The legal submissions, which are additional, could easily have been made at any stage of the process. Counsel was unable to indicate at what point the passage of time became so egregious as to give rise to such an accrual of Article 8 private life rights that would by reason of the passage of time give rise to a violation of Article 8 if the applicants were to be deported. The argument was not made at the deportation order stage in excess of three years after their arrival in Ireland. It was not made during the course of the application under s. 3(11), which was refused. It is not suggested that it accrued in the intervening seven weeks between the making of that decision and the drafting of the second application under s. 3(11). If there was a good point to be made, it should have been made on the first application. No element of this argument was put before the Minister. I find the fact that it should arise a mere seven weeks after the refusal to revoke, extraordinary. The assertion of the point as new is, having considered all of the papers furnished in the case, unconvincing and artificial.

38. It is important to recall that the leave to apply for judicial review in this case is directed at the refusal by the Minister to undertake not to implement the lawful order of deportation where he has refused to revoke it once already. The determination of whether there is a stateable or arguable basis upon which to grant leave to apply for judicial review must, in the courts view, be assessed against the failure to make the point now advanced on the first application. I am not satisfied that the applicants have established the grounds set out at para. 5(i). They have failed to demonstrate "weighty reasons" which they claimed to exist as to why they should not be deported pending a decision by the respondent in their case. In my view, for the purposes of this application, I am entirely unconvinced that there is any merit in the application under s. 3(11) for the reasons set out above. I do not accept that the applicants have demonstrated a strong or any basis for the revocation of their deportation orders. The matters set out at 5(i) (b) and (c) have already been considered in the first s. 3(11) application and nothing new has been offered.

39. The application under s. 3(11) is part of the effective remedies available to an applicant. In *Efe v. the Minister for Justice,*

Equality and Law Reform & Ors (No.2) [2011] IEHC 214, Hogan J. at para. 43 stated that:-

> "In the immigration sphere, the applicants have a tailor-made remedy which can address new post-decision facts, namely, the power to revoke the deportation order under s. 3(11) of the 1999 Act. Should, for example, the Minister fail to revoke the deportation order in the light of new material facts, then this Court could quash that decision in an appropriate case: see, e.g., *S. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 92."

The applicant in this case claimed that the failure to undertake not to deport the applicants pending a decision in respect of s. 3(11) would deprive the applicants of an effective remedy since the deportation may have taken effect by the time the decision was reached. As already noted, the key aspect of any such application was the existence and presentation of new facts as set out in the *Smith* case. I am satisfied, having had the opportunity during the course of the interlocutory application, to consider the submissions and materials relied upon in the previous application and in the making of the deportation orders and the refusal to revoke same, that no new facts have been presented or exist in this case. I make this finding having due regard to the fact that the decision is still pending, but also to the necessity to consider the forensic history and reality of this case against which the application for the interlocutory injunction must be assessed. In that context, I have given due weight and consideration to the strength and weakness of the applicants' case as presented.

40. I am satisfied that the applicants in this case have not raised a fair issue to be tried and have not advanced any arguable or stateable grounds upon which the refusal to give the undertaking requested could be challenged. The court is not satisfied that disgruntled applicants may seek and obtain injunctions against the Minister restraining their removal from the state by the simple device of writing to the Minister seeking revocation under s. 3(11) regardless of the merits of any such application, and in circumstances in which the lawful deportation orders stand unchallenged and unrevoked following a refusal of a previous s. 3(11) application which was also unchallenged and recently made.

41. I am completely satisfied that the further ground at 5(ii) that the failure to give the undertaking would deprive the applicants of their right to an effective remedy is also unstateable and unarguable having regard to the facts of this case. Consequently, I am satisfied that the applicants have not established a factual or legal basis upon which to grant an injunction in this case.

42. I am also satisfied that even if the applicants had established a fair issue to be tried in the case, the balance of convenience would not lie in favour of granting such an injunction having regard to the history of the case as already set out.

43. The court is obliged to consider the relevant factors relating to the balance of convenience as outlined by Clarke J. in *Okunade* and *Smith*. I am obliged to attach significant weight to the implementation of decisions made by the Minister which are *prima facie* valid. Valid orders are entitled to proper recognition in order to ensure the orderly conduct of the immigration and asylum process. In this case to grant an injunction would be to wholly disregard the validity of previous ministerial decisions and block the implementation of a valid deportation order in circumstances where the applicants have failed to place before the Minister all relevant aspects of their claim in respect of Article 8 rights at the appropriate time. They have chosen instead to advance further legal submissions without additional factual matters in a piecemeal fashion. To grant an injunction on those circumstances would be to undermine the orderly consideration of s. 3(11) applications generally to the detriment of the public interest.

44. I am also obliged to give weight to any additional matters arising on the facts of this case. There are none. Furthermore, I must further consider the consequences for the applicants of being required to leave the state pending the determination of the application and that the refusal of the undertaking may be found to be unlawful. Having regard to my earlier finding, I do not consider that there any arguable or stateable grounds upon which to make that contention. Even so, no additional facts have been advanced which would indicate any additional challenges that might be encountered by the applicants if returned to their country of origin that have not already been considered. There is no evidence of any particular risk to the applicants or irreparable damage that may flow from their removal other than the alleged risks that have already been considered in earlier decisions.

45. I have also considered the age of the child applicant involved in this case. However, it is clear that all the issues relating to the child's education and wellbeing canvassed in the present pending application have been previously canvassed in the examination and the consideration of file at the time of the making of the deportation orders and subsidiary protection refusal respectively.

46. I have also considered the undesirability of disrupting family life involving children where the applicants have been established in Ireland for a significant period. In that context, I must have regard to the possibility that having been removed from the state the child at some future date might be entitled to return if successful in the s. 3(11) application. Though the age of the child and the length of time for which he has been in the State are significant factors to be considered in determining the balance of convenience, the child's interest must be balanced against the weak nature of the case advanced and the existence of unchallenged previous decisions in the absence of new facts. Having regard to the history of the case to date and the absence of new facts contained in the new application, I do not think any great weight can be attached to that possibility due to the improbability of a successful application. I am, therefore, satisfied that on the particular facts of this case, the balance of convenience lies against the granting of an injunction. I, therefore, refuse the application for an interlocutory injunction and leave to apply for judicial review.