Neutral Citation Number [2012] IEHC 542

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2011/1054 J.R.

Between:/

ERVIS TROCI AND SHARON MARY HEALY

APPLICANTS

-AND-

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

RESPONDENTS

AND

THE REFUGEE LEGAL SERVICE

NOTICE PARTY

JUDGMENT OF MR JUSTICE DANIEL O'KEEFFE, delivered on the 7th day of December 2012.

1. The applicants are a married couple. The first applicant Mr Troci is an Albanian national. His wife Ms Healy, the second applicant, is an Irish citizen. They seek leave to apply for orders of certiorari quashing three decisions made in relation to Mr Troci – (i) the Minister's decision dated 16th February 2011 that he is ineligible for subsidiary protection; (ii) the Minister's subsequent decision to make a deportation order in respect of him; and (iii) the Minister's refusal dated 27th October 2011 to revoke the said deportation order. They require an extension of time to challenge decisions (i) and (ii).

2. The hearing took place over seven days between 26th April and 15th November 2012. Mr Conor Dignam S.C. appeared for the applicants with Mr John Stanley B.L. and later with Ms Bríd Moriarty B.L., instructed by Daly Lynch Crowe and Morris, Solicitors. Ms Siobhán Stack B.L. appeared for the respondents instructed by the CSSO.

BACKGROUND

3. Mr Troci claims to have arrived in Ireland by ferry in October or November 2007. He says he was fingerprinted by Gardaí upon arrival, showed the authorities an Italian I.D. and was placed in a B&B but then ran away and lived with a cousin's friend until he applied for asylum on 26th June 2008. He submitted his Albanian passport and birth certificate and presented as a Muslim born on 16th September 1990. He said he feared persecution arising from a blood feud in Albania. He said his father and cousin dealt in prostitution and drugs and in 2003 a prostitute who worked for his cousin died which gave rise to conflict with his cousin's (named) friend. That man killed his cousin in Naples in December 2004. In retaliation, Mr Troci's father and cousins destroyed a bar run by the men they suspected of the killing. Those men then tried to kill Mr Troci's father who reported the matter to the police. One man was arrested but he was released after bribing the police. In 2005 the other man abducted Mr Troci's female cousin and her two children and held them for two weeks. Efforts between the families to resolve the dispute failed and the two men remain intent on killing Mr Troci's father who in turn wanted to kill them. Fearing that he would be killed when he turned 18 Mr Troci fled in April 2007 before finishing school and spent 20 days in Serbia and six months with relatives in Italy before coming to Ireland. His parents and one sister remain in Albania while his second sister Amarilda lives in Ireland.

4. Being 17 years of age Mr Troci was treated as an unaccompanied minor and was taken into the care of the HSE. In September 2008 he turned 18. Some two months later the Refugee Applications Commissioner made a negative recommendation in his case based on negative credibility findings. The authenticity of documents submitted relating to the feud was not verified. A photograph from an Italian website sourced by the Commissioner was relied on; its caption indicated that a person bearing the name of Mr Troci's cousin was murdered northwest of Naples in 2004 by affiliates of the Camorra, an Italian organised crime organisation, because he was dealing drugs in an area controlled by the Camorra. This was found to undermine Mr Troci's credibility.

5. Mr Troci appealed through the Refugee Legal Service (RLS), taking issue with the credibility findings made against him. His oral hearing took place in June 2009 and in October 2009 the Refugee Appeals Tribunal affirmed the negative recommendation, noting discrepancies in his evidence and finding additional documentation submitted at the hearing to be internally inconsistent. The Tribunal also found by reference to country of origin information (COI) that state protection is available to those involved in blood feuds in Albania. Mr Troci did not challenge the Tribunal decision.

6. By letter dated 23rd November 2009 he was informed that he had been refused a declaration of refugee status. He was invited to apply within 15 days for leave to remain and subsidiary protection. He took no action for more than a year until 6th December 2010 when the RLS made simultaneous applications on his behalf.

Subsidiary Protection

7. In support of his subsidiary protection application, the RLS repeated the blood feud narrative presented to the asylum authorities. Submissions were made with regard to the effectiveness of state protection in Albania and it was submitted that it would be unreasonable to expect Mr Troci to relocate internally as he is *"a single and vulnerable man who effectively lacks family or other supports"*. His file was examined by an Executive Officer of the Repatriation Unit on 1st February 2011 and her conclusions were approved by an Assistant Principal on 16th February 2012. The primary conclusion was that COI shows that the Albanian State is willing and able to provide effective protection from blood feuds. Doubts were again expressed about the documentation furnished and it was also found that because of the Tribunal's doubts about his credibility, he did not warrant the benefit of the doubt. By letter dated 17th February 2011 he was informed that the Minister had found him ineligible for subsidiary protection.

Leave to Remain
8. In his leave to remain application dated 6th December 2010, submissions were made under each of the headings set out in s. 3(6) of the Immigration Act 1999. As to his family and domestic circumstances it was stated that he had been resident in the State for over three years and had integrated well. He had completed work experience in Killarney. He completed language classes before enrolling in secondary school in Dublin and later in Killarney. Testimonials were furnished from those schools. He was now in sixth year and due to sit his Applied Leaving Certificate exams in June 2011 and he would like to pursue third level studies in engineering. He played soccer in Dublin for one month. His sister Amarilda and her spouse had residency in Ireland and they have one child aged around seven years. It was stated *"Our client instructs that he has very little contact with his sister, however."* Submissions were made about his employment prospects, the economy in general, humanitarian considerations and the principle of non refoulement. The facts advanced during the asylum process were also put forward and it was submitted that his claim was borne out by COI. With respect to state protection and internal relocation it was submitted, as in the subsidiary protection application, that he was "*a single and vulnerable young man who effectively lacks family or other supports*".

9. By letter dated 13th December 2010 the RLS wrote to the Acknowledgements Unit of the *Irish Nationality and Immigration Service* (INIS) at Burgh Quay as follows:-

> *"Dear Sir / Madam*
>
> *Our client instructs that he wishes to get married in early January 2011 and that the Registry Office has requested that he submit his passport to them. We would therefore be obliged if you would return his passport to us for onward forwarding by our client to the Registry Office.*
>
> *Yours faithfully [etc]".*

10. That letter bore his asylum and RLS reference numbers. By reply dated 16th December 2010 the INIS Repatriation Unit indicated that his original passport could not be furnished until a decision was made on his case but a photocopy was furnished.

11. On 4th February 2011 the applicant's file was examined by the same Executive Officer who had examined his subsidiary protection application. She found that there was nothing to suggest that he should not be returned to Albania. In considering Article 8 of the European Convention on Human Rights (ECHR) she noted:-

> *"He is not married and he does not have any children. he has not submitted that he is in a relationship in this State. Both of Mr Troci's parents are residing in Kamez, Tirana. He has two sisters one of whom resides in Albania and the other resides in Ireland. He does not reside with his sister in Ireland."*

12. It was therefore found that his deportation would not constitute an interference with his right to respect for his family life. The recommendation made to the Minister was that a deportation order should be made, which recommendation was approved by a more senior official on 16th February 2011. The Minister made a deportation order on 21st February 2011 and this was notified to Mr Troci by letter dated 24th February 2011. He was directed to leave the State by 13th March 2011 and to remain outside the State thereafter. He was further instructed to attend at the GNIB at Burgh Quay on 15th March 2011 to make arrangements for his deportation.

Subsequent Events
13. On 1st March 2011 the applicants married in the Registrar's Office in Killarney. On the same day, the RLS wrote to Mr Troci advising him to seek the services of a private solicitor in relation to the deportation order and advising that if he could not obtain a private solicitor he should revert to them. The following day, he contacted the RLS and advised that he had married an Irish citizen. He was again advised to seek private representation. On 7th March 2011 a named solicitor based in Killarney contacted the RLS and advised that he might not be best placed to take the client's case. It was agreed that he would discuss the matter with the assigned RLS solicitor the next day.

14. By letter dated 8th March 2011 the Killarney solicitor furnished a copy of the applicants' marriage certificate to the Minister and formally applied for amendment or revocation of the deportation order pursuant to s. 3(11) of the Immigration Act 1999 on the basis of Mr Troci's marriage to an Irish citizen. Evidence of Ms Healy's citizenship and their cohabitation since at least September 2010 was furnished. Later that day the Killarney solicitor told the assigned RLS solicitor that he could not take judicial review proceedings on behalf of the applicants. Later that day, the case was referred to the RLS judicial review unit, a solicitor in that unit was assigned and an application for a legal aid certificate for counsel's opinion was made.

15. The application for a certificate for counsel's opinion was refused on 21st March 2011. The RLS appealed and on 18th April 2011 a certificate for counsel's opinion was granted. Senior counsel was briefed and contact was maintained with the first applicant while her opinion was awaited. A change of Senior Counsel was necessitated and an opinion was received on 28th July 2011. That same day the RLS applied for legal aid to institute proceedings. The Director of Legal Aid sought a supplemental opinion from Senior Counsel which was furnished on 5th September 2011. That day, a decision was taken not to grant legal aid to institute proceedings. That decision was notified to the first applicant by phone on 6th September and by letter dated 9th September 2011. On 13th September 2011 he instructed his current solicitors who received his file from the RLS on 20th September 2011. On 12th October 2011 they sought the opinion of counsel. Counsel was about to revert with draft proceedings when events intervened on 25th October 2012.

Revocation Application
16. On 25th October 2011 the first applicant was arrested when he attended at Burgh Quay pursuant to directions. He was detained at Cloverhill prison on suspicion of an attempt to evade deportation. His current solicitors wrote to the Minister that day seeking his release from custody, asking for clarification of the basis for his detention and seeking a copy of any decision on the revocation application made by his Killarney solicitor in March. The Minister was informed that the applicant and his wife knew each other for two years, that they were living together for 1 ½ years, that Ms Healy works in a named hotel in Killarney, and that they had moved in with her family owing to financial difficulties. It was submitted that it would not be possible for Ms Healy to move to Albania owing to language, cultural and employment reasons and that it would be unduly harsh, unreasonable and disproportionate to expect her to do so.

17. Additional submissions were made the following day in support of the revocation application which at that stage was considered extant. It was stated that Mr Troci's sister Amarilda is now an Irish citizen and that her children born in 2003 and 2005, who are Irish citizens, are the applicants' godchildren. It was stated that the deportation of Mr Troci would affect his sister and her husband, an Albanian citizen resident in Ireland since June 2003, and their two children. Submissions were also made with regard to Ms Healy's parents and her sister and brother who are Irish citizens, and the applicants' many friends. It was stated that Ms Healy has been

working in the same hotel for the past ten years, that Mr Troci had developed a very positive relationship with his in-laws and his parents in law would be hugely upset at his deportation and the breakdown of their daughter's marriage. Detailed submissions were made with respect to the applicants' rights under Article 41 of the Constitution and Article 8 ECHR.

18. Personal statements written by the applicants and by Mr Troci's sister were appended to the submissions made on 26th October 2011. The applicants each described how they had met and how their relationship had developed. Ms Healy stated that she had been introduced to Mr Troci's parents over the internet and speaks to them most days and was trying to learn Albanian. She said that if her husband was deported she would try to live in Albania but would find it near impossible owing to language, race, culture and religion. She said Mr Troci proposed on his birthday (16th September) 2010 and they registered their intention to marry on 22nd September 2010. Mr Troci's sister said she had become close to him over the previous three years and he had done everything possible for her two children whose father is not around regularly around for them. She said he is the only immediate family and support she has in Ireland. She said she thought Ms Healy would find it very difficult to adjust to the different culture and life in Albania. She said it would ruin her family life if her brother was deported.

The First Revocation Decision
19. On 27th October 2011 the applicants' solicitors issued proceedings [2011/1042 J.R.] and counsel brought an application for an interim injunction restraining the deportation of Mr Troci pending the determination of his extant revocation application. In circumstances unknown to this Court, that became an application for his release pursuant to Article 40 of the Constitution [2011/2185 S.S.]. In that context the applicants became aware that the Minister had decided on 14th October 2011 to refuse the revocation application made by the Killarney solicitor, and that decision had been notified the said solicitor and to Mr Troci at his last known address. By then the applicants had moved house and changed solicitors although Mr Troci says he notified the GNIB of his change of address. It is common case that the Minister has now furnished a copy of the decision to the applicants and their current solicitors. That decision is extant; it not challenged in these or any other proceedings.

The Second Revocation Decision
20. On 27th October 2011, having received the representations made by his current solicitors on 25th and 26th October and the enclosures thereto, the Minister's officials re-examined Mr Troci's case which had previously been considered in February 2011 and October 2011. Consideration was given to his rights under Article 8 ECHR and Article 41 of the Constitution. The five questions identified in *R (Razgar) v. Secretary of State for the Home Department* [2004] 2 A.C. 368 were examined. It was accepted that his deportation would interfere with his right to respect for his family life but it was found that the proposed interference was in accordance with law and pursued a pressing social need and the following legitimate aims of the State:

> *"(a) to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State*
>
> *(b) to ensure the economic well being of the State."*

21. It was also found that his deportation was necessary in a democratic society and that he has been given an individual assessment and due process in all respects and that *"there is no less restrictive process available which would achieve the legitimate aim outlined above"*. Consideration was next given to the proportionality of the decision. The submissions made by and on behalf of the applicants and her parents and his sister and nieces were summarised. It was noted that when they married, the applicants were aware of the precarious status of Mr Troci and that the Minister was proposing to make a deportation order against him and that he had no legal basis for residing in the State and may be required to leave. He was illegally in the State when they married. It was a matter of choice for them whether they live together as a family in Albania and the State is under no general obligation to respect the choice of residence of married couples. It was found that there were no exceptional circumstances or compelling reasons which would mean that the enforcement of the deportation order would be contrary to Article 8. Although relocation might involve a degree of hardship to Ms Healy, there were no insurmountable obstacles to her moving to Albania to maintain family life with Mr Troci.

22. With regard to Article 41 of the Constitution it was found that there is no authority to support the proposition that an Irish citizen has a right to reside in the State with his or her spouse. Reference was made to the rights of the State with regard to immigration control and the economic well-being of the State and those factors were found to be weightier than the rights of the individual family. It was stated that the State has the right to uphold the integrity of the State, to control the entry, present and exit of foreign nationals and to ensure the economic well-being of the State. These were identified as substantial reasons associated with the common good which require his deportation. The deportation order was therefore affirmed and the decision was furnished to Mr Troci in court on 28th October 2011, the return date of the Article 40 application.

DELAY
23. As noted above the applicants have sought an extension of time to bring these proceedings. The relevant dates are as follows. The subsidiary protection decision was notified by letter dated 17th February 2011 and the deportation decision by letter dated 24th February 2011. The subsidiary protection decision is governed by the six-month rule set out in (pre-amendment) Order 84 RSC which also requires litigants to act promptly within that time. Those six months expired in mid-August 2011. Proceedings issued on 1st November 2011 and the leave application was moved on notice to the respondents on 26th April 2011. The deportation decision is governed by the shorter 14-day limit established by s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. Those 14 days expired in mid-March 2011. An extension of 7 ½ months is therefore required to challenge that decision. No extension is required to challenge the revocation decision.

24. The applicants' solicitor has sworn a detailed affidavit dealing with the delay in issuing proceedings and exhibiting an RLS memo setting out the steps which they took and their correspondence with the Killarney solicitor. It is averred that the case was fraught with administrative difficulty but that the applicants acted at all times with due diligence and they are not culpable for the delay. It is also averred that the delay has not prejudiced the respondents.

25. The respondents do not take issue with the delay up to 9th September 2011 when the RLS informed Mr Troci that they would not be taking proceedings on his behalf. The respondents contend however that there was unexplained delay thereafter. They contend that the subsidiary protection challenge should have been moved *ex parte* and that it follows from *S.P. v. The Minister & Others* [2012] IEHC 18 that time does not cease to run until an *ex parte* application is moved in Court. The applicants have not explained why they did not move *ex parte*. The respondents further contend that the applicants have not shown that they formed an intention to challenge the decisions within the relevant time, which is necessary in light of the judgment of Denham J. in *S v. The Minister* [2002] 2 I.R. 163. In the respondents' contention, Mr Troci's actions belie the contrary intention insofar as he opted, having accessed legal advice, not to challenge the decisions but instead to seek revocation of the deportation order. Finally, the respondents submit that the applicants cannot blame their lawyers for the delay; reliance is placed on the judgment of McCracken J. in *S.M. v. The Minister & Others* [2005] IESC 27.

26. The Court considers that the question of whether good and sufficient reason has been shown for an extension of time encompasses an assessment of the merits of the case. The Court will therefore consider the merits before coming to a decision on delay. Leave was sought on grounds 1 to 25 of the applicants' statement of grounds; ground 26 was not formally pursued and grounds 27 to 32 are merely explanatory.

I. CHALLENGE TO THE SUBSIDIARY PROTECTION DECISION

27. Grounds 1 to 15 of the applicants' statement of grounds relate to the subsidiary protection decision. Ground 2 will be dealt with by way of an addendum to this judgment. Grounds 7, 8, 10 and 14 are merely explanatory. Grounds 1 and 15 relate to the familiar argument that the subsidiary protection procedures adopted by the State are deficient because there is no right of appeal. Ground 6 is also frequently rehearsed; it relates to the contention that there is no effective remedy for a breach of the EU law right to apply for subsidiary protection. These arguments have been refused on a consistent basis in a large number of judgments which do not require to be recited here. The applicants conceded this point at the leave hearing and it seems leave was formally sought in order to preserve the applicants' position on appeal. Leave is therefore refused on grounds 1, 6, 7, 8, 10, 14 and 15. Leave is also refused on ground 13 as it is clear from S.I. No. 518 of 2006 that the Minister is the designated determining authority responsible for an appropriate examination of a subsidiary protection application and the perceived lack of a formal designation procedure cannot prejudice the applicants.

28. Grounds 3, 4, 5, 9, 11 and 12 relate to a procedural argument which has come to be known as *"Enmeshment"*. There are several limbs to this argument but it boils down to the contention that because subsidiary protection is considered as part of the deportation process and not as part of a unified protection process, Mr Troci was disadvantaged. Not only was he told that his permission to remain in the State has expired before he was invited to apply for subsidiary protection, he was also told that if he chose to apply for subsidiary protection and was unsuccessful, he would no longer be in a position to leave the State voluntarily without attracting a deportation order. Leave has been granted on analogous arguments in *J.C.M. and M.L. v. The Minister* (Unreported, High Court, 12th October 2012) and *V.J. (Moldova) v. The Minister* [2012] IEHC 337. The applicants contend that they have even stronger grounds than the applicants in those two cases, given that in this case the rights of an EU citizen are at stake.

29. The respondents concede that there are arguable grounds in relation to the enmeshment argument. They contend however that leave should not be granted because of the unexplained delay in challenging the subsidiary protection and because of the failure to explain why the challenge was not moved *ex parte*. The Court is not persuaded by the respondents' argument on delay. The affidavit sworn by the applicants' solicitor establishes that there was institutional delay with regard to legal aid within the Legal Aid Board. That is not to criticise the RLS which is undoubtedly under an immense workload. The crucial point is that Mr Troci sought and followed the advices given to him by the RLS. He promptly sought private representation in Killarney but the solicitor approached could not bring proceedings on his behalf. Mr Troci then reverted to the RLS and maintained contact with them while his case was being processed. He also continued to attend at Burgh Quay as directed. He was informed by letter dated 9th September 2011 that the RLS could not bring proceedings on his behalf and by 13th September 2011 he has instructed his current solicitors. There was undoubtedly some additional lawyer-driven delay thereafter but the applicants were in no way blameworthy; again the Court does not seek to criticise – counsel were briefed during the legal vacation and at the busy beginning of the legal year, and this is a case of considerable complexity. Indeed the fact that the leave hearing took seven days and that 25 grounds and 20 reliefs were sought in the original statement of grounds and a further 5 grounds and an additional declaration were sought by way of the motion to amend are evidence of the complexity of the case.

30. The Court is equally unpersuaded by the respondents' complaint that the applicants have not shown that they formed the intention to pursue their challenge within the relevant time. The RLS wrote to Mr Troci on the day of his wedding asking him to seek private legal advice regarding the deportation order. He contacted them the very next day and within five days thereafter he had sought out the advice of a local solicitor. The Court considers that it can be inferred from his actions that he had indeed formed the intention to challenge the subsidiary protection and deportation decisions and was seeking assistance to launch his challenge. Moreover the steps taken on his behalf seeking revocation or amendment of the deportation order are not necessarily inconsistent with an intention to challenge the deportation order.

31. The respondents' final argument with regard to delay in relation to the subsidiary protection decision is that the applicants have not explained why they did not move *ex parte*. Subsidiary protection decisions are not caught by s. 5 of the 2000 Act and should therefore be sought *ex parte* and, pursuant to the judgment of Cooke J. in *S.P.* (cited above), time does not run until the motion is moved in Court. In this case, the applicants and their legal representatives chose to wait and move the leave application on notice together with the challenge to the deportation order. The respondents submit that this was a procedural error. However the Court considers that in the particular circumstances of the case, they ought not to be refused an extension of time. The procedural challenges to the subsidiary protection decision is bound up with the deportation challenge and it perhaps seemed most prudent to move both applications for leave together, on notice to the respondents. The Court sees some merit in that approach; it may have been more sensible for the challenges to travel together and be heard by one judge. The respondents were not prejudiced by the approach adopted; in fact it is more likely that it was to their advantage as they were on notice and therefore in a position to respond.

32. Given that leave has already been granted in at least two other cases on the *"Enmeshment"* point, the Court is satisfied that the applicants should not be prevented from challenging the subsidiary protection decision on that point simply because of a technical procedural error as to the manner in which leave was sought. An extension of time will be granted and ***leave will be granted on grounds 4, 5 and 11 (a), (b) and (c)***. Leave will not be granted on grounds 3 and 9 which are unduly wide, or on grounds 11 (d) and (e) and 12 which the applicants did not address by way of oral submission.

II. CHALLENGE TO THE DEPORTATION DECISION

33. Grounds 16 to 18 of the statement of grounds relate specifically to the deportation decision. They relate to the consideration given to the applicants' family rights under Article 41 of the Constitution, Article 8 of the ECHR and Article 7 of the Charter of Fundamental Rights of the EU when the file was examined in February 2011. The applicants say the Minister was on notice of their intended marriage as and from the 13th December 2010 when the RLS wrote to the Acknowledgements Unit in the terms set out at paragraph 9 above, seeking the return of Mr Troci's passport to allow him to marry. That letter bore his INIS and RLS reference numbers as did the Repatriation Unit's letter of reply sent three days later and so, that Unit must be taken to have had not merely constructive but actual notice of the intended marriage. Nonetheless the examination of file made no reference to the intended marriage; instead it stated that he is unmarried and that he had not submitted that he was is a relationship in Ireland.

34. The Court is satisfied that there is no merit to the applicants' complaints with regard to the consideration given to their family rights in February 2011. Insofar as they complain that the Minister did not take the letter of 13th December as notice of their intended marriage, the applicants have sought to impose too high an onus on the Minister. As the respondents have pointed out, the detailed written representations of 6th December 2010 made no reference to the intended marriage or to the applicants' relationship;

they presented the applicant as a single young man without family support. In fact, the applicants had been engaged since 16th September 2010 and they had registered their intention to marry on 22nd September 2010 with an intended date of January 2011. The Minister was not on notice of that information. The intention to marry signalled in the letter of 13th December 2010 is wholly inconsistent with the information proffered in the letter of 6th December 2010. Moreover, the letter of 13th December did not state whom Mr Troci intended to marry, where they intended to marry, whether the ceremony would be religious or civil or both, how long they had been in a relationship or what citizenship his fiancée held. The letter was entirely bereft of detail. For all the Minister knew, Mr Troci who is a Muslim intended to engage in a religious ceremony in a mosque with a third country national who was illegally in the State. Furthermore the applicants failed to make updated submissions when a decision was taken to postpone their intended marriage from January to March 2011 owing to illness in the family. A further point emerging therefrom is that at the time when the deportation order was made, the marriage had not yet occurred and so the protection of Article 41 of the Constitution did not technically extend to the applicants.

35. It is well established that foreign nationals who seek permission to remain in the State are not passive participants in the process. Rather it is for the applicant to put his or her best foot forward and to put all relevant information before the Minister, if necessary by way of updated submissions. The Supreme Court has affirmed these principles in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 1 I.R. 1 and in *Oguekwe v. The Minister* [2008] 3 I.R. 795. The Minister's obligation under s. 3(6) (c) of the Immigration Act 1999 to have regard to family and domestic circumstances applies only *"insofar as they appear or are known to the Minister."* The Minister is under no obligation to conduct fact-finding exercises and he ought not to engage in impermissible speculation or conjecture. Leave is therefore refused on grounds 16, 17 and 18.

III. COMBINED CHALLENGE TO DEPORTATION & REVOCATION DECISIONS

36. Grounds 19 to 25 relate both to the deportation decision and to the (second) refusal to revoke. Ground 19 and 23 overlap insofar as both relate to the general proportionality of the decisions. Ground 20 and 22 respectively concern the consideration given to the couple's rights under Article 41 of the Constitution and Article 8 ECHR; grounds 21 and 24 address their rights under the Charter of Fundamental Rights of the EU and ground 25 relates to their rights under Article 20 TFEU. The Court will begin by reference to the EU law aspects and then return to the other arguments.

Article 7 of the Charter

37. The applicants contend that the Minister erred in failing to consider their rights under Articles 1, 7, 47 and 49 of the Charter of Fundamental Rights of the EU. Article 1 sets out the right to human dignity; Article 7 the right to respect for private and family life; Article 47 the right to an effective remedy and a fair trial; and Article 49 the principles of legality and proportionality or criminal offences and penalties.

38. The Court is satisfied that this argument is fundamentally misconceived. The judgment of the CJEU in *Dereci & Others v. Bundesministerium für Inneres* (Case C-256/11, 15th November 2011) does indicate that circumstances may arise where Article 7 of the Charter may give rise to an obligation on a Member State to grant a residence permit to a family member of an EU citizen. However, the CJEU stressed that under Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing EU law. The Court is satisfied having regard to Article 51 that the provisions the Charter have no application when the Minister is considering whether to make or revoke a deportation order. The power to make a deportation order under s. 3(1) of the Immigration Act 1999 and the power to revoke under s. 3(11) of that Act are functions which are exclusively within the purview of domestic law. This is clear from *Lofinmakin (an infant) & Others v. The Minister* [2011] IEHC 116 where, in the context of a challenge to a deportation order, the applicants sought to rely on the Charter. Cooke J. rejected the attempt thus:

> *"The provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union and apply to the Member States "only when implementing Union law" (See Article 51.) The making of a deportation order under s. 3 of the Act of 1999 is wholly unconnected with the implementation of Union law."*

39. The Minister was therefore under no obligation to consider the applicants' rights under the Charter before making a deportation order or refusing to revoke it.

Article 21 TFEU

40. The applicants further contend that Minister should have considered Ms Healy's rights as a Union citizen under Article 21 of the *Treaty on the Functioning of the EU* (TFEU) and her husband's derivative rights. This interesting argument was rehearsed at length during the course of the leave hearing by reference to the judgments the CJEU in *Zambrano v. ONEm* (Case 34/09, 8th March 2011); *McCarthy v. Secretary of State for the Home Department* (Case C-434/09, 5th May 2011) and *Dereci & Others* (cited above). The applicants argue that if there is any doubt about where they lie on the *Zambrano / McCarthy / Dereci* spectrum, a preliminary reference should be made to the CJEU. They seek to distinguish themselves from *McCarthy* (where no breach was identified) on the basis the CJEU considered that Mrs McCarthy, a UK citizen, and her Jamaican spouse could reside elsewhere in the EU and so, the refusal to grant him permission to reside in the UK did not contravene Article 21 TFEU. The contention in this case is that the deportation of Mr Troci will not only result in his exclusion from Ireland but also, potentially, from the territory of the EU. This is because the Minister has signalled to an unrelated person and by way of the long title to the *Immigration, Protection and Residence Bill 2010* that the State intends to opt in to *Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals* and to adopt implementing regulations.

41. The Court is satisfied, having considered *Zambrano, McCarthy and Derici*, that in light of the particular facts relating to these applicants, there was no obligation on the Minister to consider their EU Treaty rights, as the applicants' situation has no factors linking it to EU law but is instead governed solely by domestic law. The information before the Minister was that Ms Healy, a national of Ireland, has always lived in Ireland and has worked in the same hotel in Killarney for the past ten years. There is no evidence that Ms Healy has ever exercised her right to free movement, either individually or with Mr Troci. This was also the position of Mrs Shirley McCarthy. The CJEU in *McCarthy* considered whether Article 21 TFEU was applicable in her situation, with the added complication that Mrs McCarthy had dual Irish / British citizen. The CJEU found that the refusal of a residence permit to her Jamaican husband Mr McCarthy would not deprive Mrs McCarthy of the genuine enjoyment of her rights as a Union citizen under the principles established *Zambrano*, for the following reasons:-

> *"48. As a national of at least one Member State, a person such as Mrs McCarthy enjoys the status of a Union citizen under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against his Member State of origin, in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States ….*
>
> *49. However, no element of the situation of Mrs McCarthy … indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her*

status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU. […].

50. In that regard, by contrast with the case of Ruiz Zambrano, the national measure at issue in the main proceedings in the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union. Indeed … Mrs McCarthy enjoys … an unconditional right of residence in the United Kingdom since she is a national of the United Kingdom."

42. The CJEU concluded at paragraph 55 that *"the situation of a person such as Mrs McCarthy has no factor linking it with any of the situations governed by European Union law and the situation is confined in all relevant respects within a single Member State."* As a result, the Treaty rules governing freedom of movement for persons and the measures adopted to implement them were inapplicable in her case.

43. The CJEU affirmed this approach in *Dereci & Others*, where it was asked for a ruling on a number of questions referred to it by Austrian Ministry of Home Affairs in relation to five families comprising various combinations of EU citizens and third country nationals with different degrees of dependency. The CJEU was essentially asked to identify in which cases the refusal of a residence or work permit would deprive the Union citizen of the genuine enjoyment of his / her citizenship rights and in which it would not. The CJEU stated as follows at paragraphs 66-69:

"[…] the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.

That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.

Consequently the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted." (Emphasis added)

44. The CJEU found that it is a matter for national courts to verify whether the refusal of a residence permit to a third country national family member would lead, for the EU citizen, to the denial of the genuine enjoyment of the rights as a Union citizen. Unfortunately, the CJEU did not give specific consideration to the five scenarios referred.

45. Since the hearing in the present case, the CJEU reaffirmed its finding in *McCarthy* and *Derici* at paragraphs 43-50 of its judgment in *O, S and L v. Maahanmuuttoviras* (Joined Cases C-356/11 and C-357/11, 6th December 2012). Those cases concerned the rights of third country national step-fathers of Finnish citizen children. The CJEU identified several distinguishing factors between the children in those cases and the children in *Zambrano* insofar and found that the Union citizen children in *O, S, and L* would not be obliged to leave the territory of the Union if their step-fathers were refused permission to remain, as their mothers had permanent residence in Finland, their step-fathers did not have custody of the Union citizen children, and they were not legally, financially or emotionally dependent on their step-fathers.

46. Until the CJEU gives further guidance in relation to the parameters of the rights identified in *Zambrano*, there are three objective yardsticks by which the denial of genuine enjoyment of rights emanating from EU citizenship can be measured: (i) the case of Ruiz Zambrano, (ii) the case of Mrs McCarthy and (iii) the cases of the Finnish citizen children in *O, S and L*. The Court considers that Ms Healy's position falls much closer to Mrs McCarthy and the Finnish children than to Mr Zambrano. In fact, the Court cannot identify any factor which would distinguish the position of Ms Healy from that of Mrs McCarthy, save the dual citizenship of Mrs McCarthy which the CJEU appears to have considered irrelevant. Although this is not determinative, both Ms Healy and Ms McCarthy are 'stationary EU citizens' - neither has exercised her right to freedom of movement. Like Mrs McCarthy, Ms Healy enjoys an unconditional right of residence in Ireland. Most importantly, Ms Healy is not at risk of having to leave the territory of the EU. The deportation of Mr Troci will not see her deprived of her means of subsistence as she is not financially dependent on him, which was one of the distinguishing factors between the position of the Union citizen children in *Zambrano* and those in *O, S and L*. Ms Healy might prefer to reside with her husband in Ireland but it is clear from *Dereci* and *O, S and L* that such a desire is not determinative. The CJEU does not appear to have placed any great emphasis on Mrs McCarthy's reliance on State benefits and so this Court does not consider that for the purposes of Articles 20 and 21 TFEU the work history of Ms Healy puts her in a different position to Mrs McCarthy who never worked.

47. Moreover it has not been established that there is any real impediment to Mr Troci and Mr Healy establishing family life elsewhere in the EU. The arguments made as to the potential effect of Directive 2001/40/EC are, in the words of the respondents, a canard and do not establish a real impediment to reunion elsewhere in the EU. Directive 2001/40/EC is a Title IV measure and by virtue of the *Protocol (No. 21) on the Position of the UK and Ireland in respect of the Area of Freedom, Security and Justice*, such measures are not binding upon or applicable in Ireland unless the State notifies its intention to take part in the adoption and application of the measure or its intention to no longer be covered by the terms of the Protocol. Recital (8) to that Directive states that the UK opted in to the Directive in 2000. There is no evidence before the Court that Ireland has signalled its intention to opt in. Reference to the Directive in the long title of a redraft of a Bill which was published two years ago and has stagnated ever since cannot constitute evidence of such intention. In any event, the status of the Directive in Ireland is immaterial as it is clear from Article 1(3) thereof that the Directive *"shall not apply to family members of citizens of the Union who have exercised their right of free movement."* It follows that even if Ireland was to opt in, it would not automatically mean that the deportation of Mr Troci would preclude him from gaining rights under Article 7 of Directive 2004/38/EC in a host Member State in which Ms Healy was exercising her Treaty rights, provided that she fulfilled the relevant criteria. It is most likely for this reason that the CJEU in *McCarthy* paid no attention to the Directive 2001/40/EC.

48. For the foregoing reasons, the Court is satisfied that the principles applicable to free movement under the TFEU and the rights protected by the Charter have no applicability in this case. Leave is refused on grounds 21, 24 and 25.

Article 41 of the Constitution

49. Ground 20 sets out the contention that the Minister did not properly consider the applicants' rights under Article 41 of the

Constitution. Relying on the judgment of Clark J. in *S v. The Minister* (Unreported, High Court, 13th October 2011), the applicants submit that the Minister ought to have considered revoking the deportation order and granting Mr Troci a limited visa with conditions attached, subject to renewal and on condition that he did not become a charge on the State and was of good behaviour. They further rely on *X.A. (a minor) & Others v. The Minister* [2011] IEHC 397 where Hogan J. held – departing from the decision of Clark J. in *H.U. v. The Minister* [2010] IEHC 371 – that it was "*a pure fiction*" to suggest that the Irish citizen wife had a "*choice worth speaking of*" insofar as she faced a choice between remaining in Ireland with her Irish citizen child and her older foreign national children from a previous relationship and moving to Nigeria to maintain family life with her Nigerian husband who was being deported. The applicants contend that their situation is akin to that of the mother in *X.A. (a minor)*.

50. The respondents referred the Court to a long line of judgments including *Osheku & Others v. Ireland* [1986] I.R. 733; *Pok Sun Shum & Others v. Ireland & Others* [1986] ILRM 593; *P. and L. v. The Minister* [2002] 1 I.R. 164; *A.O. and D.L. v. The Minister* [2003] I.R. 1; *C. (Cirpaci) v. The Minister* [2005] 4 I.R. 109; *Margine v. The Minister* [2004] IEHC 127; *A.A. v. The Minister* [2005] 4 I.R. 564; *Alli (a minor) v. The Minister* [2010] 4 I.R. 45 and most recently *P.U.O. & C.M. v. The Minister* [2012] IEHC 458. The following general principles emerge from those cases. The rights of the family under Article 41 of the Constitution are not absolute and cannot be seen in isolation from the inherent right of the State to control immigration, which is generally accepted to be in the interests of social order and the common good. On a very basic level, Article 41 protects families against arbitrary interference in their marital relations. However, it does not create a right for foreign national family members to reside in Ireland. Marriage to an Irish citizen confers neither Irish citizenship nor a right of residence in Ireland on a foreign national spouse. Married couples comprising one Irish citizen and one third country national are not entitled to impose their choice of residence on the Irish State. Equally the State is not obliged to respect that choice and is entitled to enforce legitimate immigration and border control in a fair and orderly fashion.

51. It is clear also from the case law that the Minister is obliged, when considering the deportation of a foreign national family member of an Irish citizen, to take account of the personal circumstances of the couple and to carefully weigh their interests against the interests of the State. Ultimately the Minister's decision must be proportionate to the aims to be achieved. This means there should not be any more interference with citizen's constitutional rights than is necessary. Among the relevant considerations to be weighed in the balance are the duration of the relationship, the duration of cohabitation as a family unit and the immigration history of the foreign national family member. The Supreme Court held in *A.O. and D.L.* (cited above) that if the Minister wishes to make a deportation order which will potentially interfere with family life, he must identify a substantial reason associated with the common good which requires such interference but provided that the personal circumstances of the family are considered, the reason identified need not be specific to the private character of the proposed deportee; it may relate to the general imperative of immigration control. The applicants have not established any reason to depart from that well-established principle.

52. The question of whether a proportionate decision has been reached must be assessed by reference to the particular facts of the family in question. The applicants in this case have not pointed to any relevant factor which was not considered by the Minister. It is clear that he knew of the applicants' personal circumstances and it is inconceivable that he was unaware of the consequences which the deportation of Mr Troci might have upon their family unit. Indeed it was specifically noted that there might be a degree of hardship for Ms Healy if she was to move to Albania. In the circumstances the Court is satisfied that the Minister complied with the requirements identified in the case law cited above. He weighed all relevant factors in the balance and the applicants now effectively argue that he should have reached a different conclusion.

53. The Court is further satisfied that the conclusion reached by the Minister, i.e. that there were no insurmountable obstacles to the couple relocating to Albania, was not unreasonable in all the circumstances. Given its apparent departure from an established line of decided cases, including successive judgments of the Supreme Court, the Court is not persuaded that the reasoning adopted in *X.A. (a minor)* is of general application. No reason has been identified to this Court which would justify departure from the established line of decisions including *Osheku, Pok Sun Shum, A.O. and D.L.* and *Oguekwe*. The position of the applicant remains as stated by Clark J. in *H.U.* (with the obvious caveat that the husband in that case was from Nigeria, not Albania):-

> *"The choice the wife now faces is whether to remain in Ireland and raise her son here without her husband, or relocate to Nigeria with him and raise their son together there. This is a choice faced by many couples who come from different countries or even different parts of large countries. Married inter-racial or inter-religious couples often face choices which involve compromise and sacrifices in relation to their choice of residence, standards or beliefs. Adults who marry must make these decisions themselves without seeking the answers in constitutional rights which are neither guarantees nor immunities but must be seen in the context of social order and the common good."*

54. In this case, the representations to the Minister suggested that Ms Healy would encounter difficulties in a social, cultural and linguistic sense in Albania and it was submitted that she would find it difficult to secure employment there. However, those submissions were lacking in specificity and they were somewhat inconsistent with the parallel submission that she had been learning Albania and has become quite good and had established a relationship with her in-laws in Albania over the internet. No submissions were made with regard to potential difficulties arising from her religious beliefs or indeed those of her husband. There was no compelling evidence that it would be unreasonable to expect her to join Mr Troci in Albania.

55. The applicants have sought to reopen the debate about whether the absence of a less restrictive process is a substantial reason associated with the common good which requires the deportation of a foreign national spouse. They accept that the judgment of Clark J. in *Alli* [2010] 4 I.R. 45 is against them but they contend that her judgment in *S v. The Minister* [2011] IEHC 417 leaves open the possibility that a less restrictive process should be considered depending on the case. The Court does not accept the applicants' argument. It is clear that the circumstances of the *S* case were radically different to the present case. Mrs S was a Nigerian citizen who obtained leave to remain in Ireland after giving birth to an Irish citizen child in 2000, fathered by a Nigerian national. Two years later she met Mr S, also a Nigerian national, who had been refused asylum. They married in early 2003 and shortly afterwards Mr S was deported. The Minister was not informed of his relationship with Mrs S prior to the deportation or of the impending birth of their child who would be entitled to Irish citizenship.

56. In July 2003 Mrs S gave birth to their Irish citizen child. In 2005 she returned to Nigeria and found Mr S in a condition of homelessness and abject poverty. She found accommodation for him and after returning to Ireland she continued to support him. She returned each year to visit him. In 2008 he sought a join-spouse visa through the Irish Embassy in Abuja. He was advised that he would have to first seek revocation of the extant deportation order. Extensive submissions were made to the Minister with regard to the situation of the family including the mental health problems experienced by Mrs S who was operating as a single parent in Ireland. It was submitted that she would be in a position to support her husband financially if he was granted a visa to enter the State. It was the Minister's refusal to revoke the deportation order in S which came before Clark J. and it was in those very specific circumstances that she made comments on the failure to consider a less restrictive process than deportation such as the grant of a visa subject to conditions. Her comments have no bearing whatever on the assessment of the proportionality of a decision to deport a foreign national who is currently in Ireland.

57. Finally, the applicants contend that Article 41 should not be so weakly interpreted as to sanction reverse discrimination under EU law. Ms Healy is severely disadvantaged, it is argued, because she is an Irish citizen and not a national of another Member State. Hogan J. granted leave on this point in *O'Leary v. The Minister* [2011] IEHC 256. However, the reliefs sought were refused by Cooke J. in *O'Leary v. The Minister* [2012] IEHC 80 and no reason has been put before this Court which would warrant a departure from that judgment. Leave is therefore refused on ground 20.

Article 8 ECHR and Proportionality
58. Ground 22 sets out the contention that the Minister did not properly consider their rights under Article 8 and he failed to apply Article 8(2) properly. This overlaps with grounds 19 and 23 which set out the contention that the Minister's decision to make a deportation order and his subsequent refusal to revoke the order were disproportionate and were neither necessary nor properly justified. In their oral submissions to the Court the applicants took issue with the *"legitimate aims"* of the State identified by the Minister and the reasons given as to why the deportation is "*necessary in a democratic society*" and they contend that the absence of a less restrictive process is not determinative of the latter issue. Insofar as they challenge the finding that there were no insurmountable obstacles to the establishment of family life in Albania, they rely on *Huang v. Secretary of State for the Home Department* [2007] 2 W.L.R. 581; *VW (Uganda); AB (Somalia) v. Secretary of State for the Home Department* [2009] EWCA Civ 5 and *S v. The Minister* (Unreported, High Court, Clark J., 13th October 2011).

59. The respondents contend that the law in relation to Article 8 ECHR is well settled. They rely on *Agbonlahor v. The Minister* [2007] 4 I.R. 309; *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840; *R (Razgar) v. Secretary of State for the Home Department* [2004] 2 A.C. 368; *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 EHRR 471; *N v. Secretary of State for the Home Department* [2005] 2 A.C. 296; *B.I.S. (Sanni) v. The Minister* [2007] IEHC 398; *Alli (a minor) & Others v. The Minister* [2010] 4 I.R. 45; *Bouchelkia v. France* (1997) 25 EHRR 686 and *Boujlifa v. France* (2000) 30 EHRR 419.

60. The Court considers that the applicants are attempting to re-open an argument as to the circumstances in which Article 8 ECHR will operate so as to prohibit the deportation of the foreign national spouse of an Irish citizen, which has been definitely determined in a large number of cases. The applicants have not identified any factor which would distinguish them from the volume of cases in which that issue has been decided. It is not open to them to re-argue a point which has so clearly been decided without any point of distinction. The Strasbourg Court held in *Abdulaziz* at § 67, with respect to Article 8, that *"this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to the taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals"*. It further stated at § 68-69 of that judgment that:-

> *"68. […] The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.*
>
> *In the present case, the applicants have not shown that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them.*
>
> *In addition, at the time of their marriage*
>
> > *(i) Mrs Abdulaziz knew that her husband had been admitted to the United Kingdom for a limited period as a visitor only and that it would be necessary for him to make an application to remain permanently, and she could have known, in the light of draft provisions already published (see paragraph 20 above), that this would probably be refused;*
> >
> > *(ii) Mrs Balkandali must have been aware that her husband's leave to remain temporarily as a student had already expired, that his residence in the United Kingdom was therefore unlawful and that under the 1980 Rules, which were then in force, his acceptance for settlement could not be expected.*
>
> *In the case of Mrs Cabales, who had never cohabited with Mr Cabales in the United Kingdom, she should have known that he would require leave to enter and that under the rules then in force this would be refused.*
>
> *69. There was accordingly no "lack of respect" for family life and, hence, no breach of Article 8 taken alone."*

61. This approach was echoed by Clark J. in *Alli* where she held at paragraph 50:

> *"It is clear from the case law that the European Court of Human Rights commences its assessment from the perspective that contracting states are not obliged to respect the choice of residence of a family and, wherever appropriate to the facts, that knowledge on the part of one spouse at the time of marriage that the right of residence of the other spouse was precarious is a consideration."*

62. A similar approach was adopted by Feeney J. in *Agbonlahor* where he stated:-

> *"It is also of significance that in considering the issue of family life that it is appropriate to have regard to the lawfulness and length of stay as being significant factors in seeking to identify the exceptional cases where a state might be prevented from exercising the state's unquestioned entitlement to impose immigration control."*

63. Likewise in *B.I.S.*, Dunne J. reviewed a series of Strasbourg Article 8 immigration decisions and found that *"the issue as to whether Article 8 rights have been engaged depend[s]on the facts and circumstances of each and every case."* She held that, as had been the case in *Agbonlahor*, the applicant in that case was in truth asserting a choice of the State in which he would like to reside, instead of a disproportionate interference by the State with his Article 8 rights. Like Feeney J. in *Agbonlahor*, she too adopted the finding of Lord Bingham in *Razgar* that *"Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."* This is not to apply an "exceptionality" principle, as was held by Clark J. in *Alli* – it is merely to recognise that the Strasbourg Court has held that in order for a deportation to fall foul of Article 8, insurmountable obstacles must be shown to the couple enjoying family life in the country of origin of the proposed deportee.

64. With respect to the circumstances in which family life was created for the present applicants, it cannot be overlooked that the applicants in this case married after a deportation order had been made and notified to Mr Troci. It is clear from Ms Healy's personal

statement to the Minister in support of the revocation application that she had been made aware of Mr Troci's precarious immigration status before she entered into a relationship with him. Moreover there is no doubt that both were aware when they married that he had no entitlement to remain in the State. Thus Ms Healy must have been aware, when she married Mr Troci, of the possibility that he might be required to leave Ireland and that they might have to live in Albania. No factor particular to the applicants has been identified which would support the proposition that it is unreasonable to expect Ms Healy to follow Mr Troci to Albania if she wishes to maintain family life with him. Ms Healy has been learning Albanian and has a pre-existing relationship with her Albanian in-laws with whom she says she has frequently conversed over the internet. Both she and Mr Troci are young and, it appears, in good health. There are no children of the marriage who would be uprooted if their mother decided to leave the State to maintain family life elsewhere. It is clear that the Minister was aware of all relevant facts and circumstances pertaining to the applicants and that he weighed them in the balance with the indisputable rights and obligations of the State which have been repeatedly acknowledged by the European Court of Human Rights. The applicants have not pointed to any relevant issue which was disregarded or on which undue weight was placed. Leave is refused on ***grounds 19, 22 and 23***.

IV. MOTION TO AMEND

65. The first day of the leave hearing in this case coincided with the grant of leave in *Sivsivadze & Others v. The Minister* [2011] IEHC 317 to seek a declaration that ss. 3(1) and 3(11) of the Immigration Act 1999 are unconstitutional and incompatible with Article 8 of the ECHR insofar as a deportation order has potentially life long exclusionary effect. The fourth applicant in the *Sivsivadze* case, Mr Arabuli, was a Georgian national with a particularly chequered immigration history. He had made multiple asylum applications in different Member States using different aliases and false documents. A deportation order was made against him. Thereafter he entered a relationship with Ms Sivsivadze, also a Georgian national, who had humanitarian leave to remain in Ireland as she had been grievously abused by a family member in Georgia, and she gave birth to their daughter. In 2008 Mr Arabuli applied for revocation of the deportation order which was refused. The couple married the following month and a second daughter was born to the couple one month later. Mr Arabuli again applied for revocation and a further negative decision issued. He was eventually deported. The family then brought proceedings challenging the final refusal to revoke. In his decision of 26th April 2012, Hogan J. held:

> *"It would be difficult to say that the Minister could not reasonably have decided to deport Mr. Arabuli in view of his decidedly chequered immigration history. […] The real point here is whether the Minister is entitled to insist that the deportation order should have indefinite effect."*

66. On the day after leave was granted in *Sivsivadze*, the applicants in this case signalled their intention to bring a motion to amend their statement of grounds to seek additional grounds and reliefs arising from *Sivsivadze.* A motion to amend was filed on 10th May 2012 and was moved before this Court on 19th July 2012, the third day of the leave hearing. The applicants' statement of grounds does seek declarations that s. 3(1) and / or s. 3(11) of the Immigration Act 1999 are invalid having regard to the provisions of the Constitution and are incompatible with the ECHR; however, none of the grounds related to the declarations sought. They sought to remedy that situation by adding to the reliefs sought a declaration that s. 3(11) does not satisfy the requirements of Article 15.2.1° of the Constitution, and five additional grounds relating to the proportionality of a life-long deportation order. Needless to say, a substantial extension of time is required.

67. The substantive hearing in *Sivsivadze* was fast-tracked and on 21st June 2012 Kearns P. refused the reliefs sought. The applicants have sought to argue that the judgment of Kearns P., at least with regard to s. 3(1), is specific to the facts of the *Sivsivadze* family whose situation can be distinguished on the basis of Mr Arabuli's lack of candour and *mala fides*. This Court is satisfied, however, that the judgment of Kearns P. is not specific to the facts relating to the *Sivsivadze* family and that it also determines the issues in the within case. Kearns P. certainly had regard to the staggering extent of Mr Arabuli's deceptions and he found that having regard to his particular history and the need to maintain effective immigration controls, the applicants could not contend that the statutory provision under which Mr Arabuli was deported operated disproportionately. Kearns P. did not stop there, however; he went on consider the proportionality of indefinite exclusion in a general sense, divorced from the specific facts of the *Sivsivadze* case. This Court is satisfied that the judgment of the President in that regard also determines the issues raised by way of the motion to amend in this case. No reason has been put before this Court to depart from the views expressed by the President. With respect to the challenge to s. 3(11), the applicants have effectively conceded that the judgment of Kearns P. was not specific to the facts of that case. Leave to amend the statement of grounds is therefore refused and so, the question of an extension of time does not arise.

CONCLUSION

68. For the foregoing reasons, and extension of time will be granted in relation to the subsidiary protection decision and leave will be granted on **grounds 4, 5 and 11(a), (b) and (c)** to seek **reliefs 1, 5, 6, 7, 9, 14, 15, 19 and 20** with reference only to the subsidiary protection decision.

ADDENDUM – GROUND 2

69. Ground 2 of the applicants' statement of grounds pleads that the Minister failed to properly cooperate with the first named applicant pursuant to Article 4(1) of Directive 2004/38/EC. This is a matter in which Hogan J. made a preliminary reference to the Court of Justice (CJEU) in *M.M. v. The Minister* (Case C-277/11). The CJEU delivered judgment in that case on 22nd November 2012. It is clear from the *M.M.* judgment that the specific ground pleaded by the applicants in their statement of grounds has been rejected – the CJEU held at paragraph 60 of its judgment that Article 4(1) of the Directive does not require the Minister, before adopting a negative subsidiary protection decision, to supply the applicant with the elements on which he intends to base his decision and to seek the applicant's observations in that regard. The CJEU went on however to stress that in a two-stage system such as that applicable in Ireland, the right to be heard must be guaranteed at both the asylum stage and at the subsidiary protection stage. The CJEU held that it is for the national court to ensure observance of the right to be heard in the sense that the applicant must be able to make known his views before the adoption of any decision.

70. This Court afforded the applicants a period of approximately two weeks within which to address the net issue of the significance of that judgment on ground 2 by way of written submissions. The Court has considered the additional submissions of both parties. The Court is of the view that the applicants' additional submissions are not contained within the grounds set out in the statement of grounds. This would require a motion to amend the statement of grounds. The applicants have not brought a motion to amend their statement of grounds to rely on the 'right to be heard' aspect of the *M.M.* judgment. Moreover, should they have done so, they would have faced considerable obstacles on grounds of delay. The Court is therefore satisfied that **leave should be refused on ground 2.**