Neutral Citation Number [2008] IEHC 8

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 1395 J.R.]

BETWEEN

B.J.N.

PLAINTIFF

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

RESPONDENTS

AND
THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of McCarthy J. delivered the 18th day of January, 2008.

1. These proceedings were commenced by originating notice of motion dated 20th December, 2005. Subsequently, application was made by an undated notice of motion seeking to amend the statement of grounds upon which reliance was placed originally. Liberty to issue that notice of motion returnable for 28th February, 2007 was granted. I am not told whether or not any order was made on that application but I assume it was so made, since the matter was dealt with without objection at the hearing of the proceedings. The relief sought in the amended statement of grounds is, to a degree, repetitious and is, substantively, firstly, an application to quash a deportation order made by the Minister for Justice, Equality and Law Reform on a date which is unclear on the face of the order itself but appears to be 15th November, 2005: notification of the fact that this order was made was received by the applicant on or about 10th December, 2005. Secondly, by letter dated 13th November, 2006, the Minister was requested to revoke the order and it is sought to quash the refusal on his part to do so. The applicant did not abandon the first aspect at the hearing, though it seems fair to say that the primary focus of the application must now be the second ground, namely, that the refusal to revoke was unlawful and quashed accordingly.

2. In summarising the relief sought and the grounds therefor I propose to attenuate them somewhat or to summarise. On this basis, firstly, the relief sought, as the pleadings have been amended, may be summarised as follows:-

(a) *Certiorari* of the deportation order with a declaration that it was *ultra vires*;

(b) A declaration that the Immigration Act, 1999 (Deportation Regulations, 2002) are *ultra vires* the Act.

(c) Relief by way of injunction restraining deportation pending determination of these proceedings, something which is now irrelevant since the same will not take place before that time. I am not told whether or not an order was made to this effect or an undertaking given by the Minister.

(d) A declaration that the Minister has acted in breach of the applicant's constitutional rights or the European Convention on Human Rights Act, 2003, by which latter I assume a breach of the Convention itself is alleged and, in particular, a breach of article 5(1) of the Convention, by virtue of the rule of law governing the grant of judicial review (which might be colloquially called the threshold for judicial review) as set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. In fact the provision which is engaged here is article 13 of the Convention.

(e) An order of *certiorari* of the refusal of the Minister to revoke the Deportation Order with a declaration that it was made "without regard" to her rights under article 2 of the Convention.

3. The amended statement of grounds may be summarised as follows:-

(a) The decision of the respondent to make the impugned deportation order is *ultra vires* and unsustainable in law by reason of mistake of law.

(b) The respondent erred in finding that the issue of refoulement does not arise on account of the designation of South Africa as a safe country of origin.

(c) The respondent did not consider whether the provisions of s. 5 of the Refugee Act, 1996 (as amended) applied.

(d) The respondent could not reasonably have come to the view which he did in the light of country of origin information.

(e) The respondent failed to vindicate the right to life of the applicant guaranteed by Article 40.3.2 of the Constitution.

(f) The respondent failed to consider the rights afforded to the applicant by the European Convention on Human Rights.

(g) The respondent failed to properly or adequately consider the representations for leave to remain submitted by or on behalf of the applicant. In the alternative, the respondent could not reasonably have come to the conclusion arrived at.

(h) The respondent failed to apply the provisions of the Criminal Justice (United Nations Convention Against Torture) Act, s. 5 of the 1996 Act, s. 3 of the Immigration Act, 1999, article 3 of the Convention Against Torture, and other cruel or inhuman or degrading treatment or punishment in the light of s. 2 of the Act of 2003.

(i) The deportation order failed to state the place the applicant was to be deported to (a point which has already been decided against the applicant's contention) and the Deportation Regulations aforesaid were in excess of the powers under the Act and null and void.

(j) The respondent failed to consider the harshness of returning the applicant to South Africa in the light of the child sex abuse, child rape and risk to life on account of her medical condition.

(k) The respondent, his servants or agents have taken into account irrelevant considerations and failed to take into account those which are relevant.

(l) It is disproportionate to make the deportation order.

(m) Absence of constitutional justice.

(n) Insofar as the threshold for judicial review is the so-called "*O'Keeffe* test" the same is inadequate and contrary to the rights guaranteed by the Convention with, if appropriate, a declaration of incompatibility of that test with the Act of 2003.

(o) The reports made to the Minister and the recommendations to him were unreasoned and/or unreasonable, irrational and in the face of common sense in the light of all the circumstances of the case.

(p) An error of law in finding that there was nothing contained in representations seeking revocation dated 15/11/2006.

(q) That the respondent failed to consider the application for revocation in the context of her rights under Article 40.3.2 of the Constitution and article 2 of the Convention.

4. I think that the first matter which I should address is the issue of the threshold or test to be applied to the grant of judicial review since this must inform my consideration of the matter. It is, of course, the case that leave should be granted only where there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed. In deciding whether or not substantial grounds exist, one considers the law applicable to all judicial review applications where the intervention of the court is sought in respect of the decisions of an administrative body and, as we know, the traditional test or threshold for grant of judicial review is stated by Finlay C.J. in *O'Keeffe v. An Bord Pleanála*, approving Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, as follows:-

(a) It is fundamentally at variance with reason and common sense.

(b) It is indefensible for being in the teeth of plain reason and common sense.

(c) Because the court is satisfied that the decision maker has breached his obligation whereby he "must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision".

5. Mr. O'Halloran, however, seeks to advance the proposition that a different test applies and in particular what is described as that of "anxious scrutiny" or "careful scrutiny" or, in the further alternative, "heightened scrutiny". No doubt all courts exercise all of their power anxiously or carefully but these, of course, are used as terms of art here and they constitute a lower bar or threshold and, in particular, he submits the true test is that judicial review should be granted if the court is satisfied:-

(a) that on the facts as found, it would have raised different inferences and conclusions, or

(b) that the case against the decisions was stronger than the case for them.

the decisions should be quashed.

6. I am referred to a number of decisions in this respect by him; the proposition that he advances is that a distinction may (and I stress may) be drawn between a class of case where constitutional rights are at stake, such as the present one, and others. I am not at all sure that such a distinction can be validly drawn, or if it can be so drawn, I think it must be said that a great many applications for judicial review, in fact, raise issues of constitutional rights in one form or another, such as breach of the principles of constitutional justice, say, in relation to a planning decision or the grant or refusal of a licence or the dismissal of an office holder. Indeed, it might with justice be said that, if the new or lower threshold was applied, it would blur the distinction between an appeal and judicial review, as historically elaborated, because the test which he advances seems to import of the proposition that once primary facts are found and a number of alternative secondary facts (or inferences) may be drawn therefrom, the court might intervene or that, by analogy with civil procedure generally, the case against the decision was stronger than for it. Be that as it may, I am clearly bound by the principles set out by Finlay C.J. and those principles do not contemplate any exceptional or special test in a case of this kind. Nor can I accept, as submitted to me, that the application of the *O'Keeffe* test does not afford the applicant an effective remedy against a decision contrary to the provisions of article 13 of the European Convention on Human Rights and Fundamental Freedoms which is as follows:-

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

In this regard, I now turn to a number of authorities pertaining to this Article which were opened to me.

7. I have been referred to a passage in *Vilvarajah v. United Kingdom*, [1992] E.H.R.R. 248. This is advanced as authority for the proposition that "the courts have stressed that their special responsibility to subject administrative decisions in this area to the most anxious scrutiny where an applicant's life or liberty may be at risk". I am explicitly referred to para. 125 of the judgment (at p. 292), as follows:

"It is not in dispute that the English courts are able in asylum cases to review the Secretary of State's refusal to grant asylum with reference to the same principles of judicial review as considered in the *Soering* case and to quash a decision in similar circumstances and that they have done so in decided cases. Indeed, the courts have stressed their special responsibility to subject administrative decisions in this area to the most anxious scrutiny where an applicant's life or liberty may be at risk. Moreover, the practice is that an asylum seeker will not be removed from the U.K. until proceedings are complete once he has obtained leave to apply for judicial review."

8. In *Soering v. United Kingdom* [1989] 11 E.M.R.r. 439, it was sought to extradite the applicant to the United States and, effectively, long-established principles (applied in this jurisdiction) set out in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223 were applied as to whether or not to review the order for his extradition; it was argued on behalf of the applicant in *Vilvarajah* in the European Court that it was only where the facts were not in dispute between the parties and where the issue was only whether or not no reasonable Secretary of State could have made it, that judicial review as traditionally understood could constitute an effective remedy as contemplated by article 13 of the Convention; it was asserted by the applicant that in *Vilvarajah* the very substance of the dispute pertained to the facts. In the former case, the court considered that judicial review proceedings were an effective remedy, even when judicial review was on the basis of the so-called "*Wednesbury*

principles" and was of the view that there was no material difference between that case and *Vilvarajah* which would lead it to reach a different conclusion. I have quoted the passage which encapsulates the basis of its decision. In *Vilvarajah*, of course, the applicants were Tamils who had experienced ill treatment by Sinhalese forces, who had, apparently, continued to suffer ill treatment on their return (in the context of the civil war raging in that country). In the head note it is interesting to note that the decision is summarised as follows:

> "Judicial review, which assesses the procedural propriety and reasonableness of decisions but does not re-try the merits and which is exercisable by the highest tribunals in the land, provides an effective degree of control over the decisions of administrative authorities in asylum cases. In particular, the courts reviewed asylum decisions with the most anxious scrutiny since an applicant's life or liberty might be at stake."

Of course, as I have said, such scrutiny exists in this jurisdiction. I do not think *Vilvarajah*, accordingly, is authority for the proposition advanced, indeed, the contrary.

9. In *Gashi v. Minister for Justice & Ors*. (Unreported, High Court, Clarke J., 3rd December, 2004) it was determined that for the purpose of a leave application it is arguable that such higher scrutiny is required, a view which is repeated in *Idiakhua v. Minister for Justice* (Unreported, 10th May, 2005) though he does not explicitly say that he was applying this test in his decision to grant leave.

Reference is also made to *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 124 and *Z. v. Minister for Justice* [2002] 2 I.L.R.M. 215 and also, in the former case, to the judgment of Fennelly J.

10. In *Z.* (at p. 236) (and I do not quote the passage *in extenso*) McGuinness J. pointed out:

> "The court is committed to submitting the decision-making process in all cases to careful scrutiny. In the instant case the learned High Court Judge delivered two lengthy, careful and detailed reserved judgments. It cannot be argued that he did not subject the appellant's claim to the most careful scrutiny."

11. She went on to say that she found it difficult to interpret the phrases "anxious scrutiny", "heightened scrutiny" and similar phrases and also, in effect, that in point of law it was difficult to define the difference between mere "scrutiny" and these supposedly different tests. She said that, pending full argument in another case, she considered it sufficient that the applicant's judicial review application received careful scrutiny under the established standards relating to unreasonableness. She went somewhat further (with concurrence by Fennelly J.) in *A.O. and D.L.*, although the issue of the test was not argued there. She stated that:

> "I would, however, concur with Fennelly J. in believing that where constitutional rights are at stake as in this case, the standard of judicial scrutiny as set out in particular in *O'Keeffe* … may fall short of what is likely to be required for their protection."

12. In *A.O. and D.L.*, it was pointed out by Fennelly J. that the view of Denham J., with whom Hamilton C.J. agreed, in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26 (at p. 62) was that review of deportation orders is to be conducted in accordance with the O'Keeffe principles. Speaking obiter, it seemed to Fennelly J. that where, as was the position in the instant case, constitutional rights were at stake, such a standard of judicial scrutiny "must necessarily fall well short of what is likely to be required for their protection" and he referred to the apparent modification of the traditional test in such cases in England, in particular in *R. (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840. Of course, McGuinness J. had, in concurring with Fennelly J., expressed the view that "the standard of judicial scrutiny as set out in [the *O'Keeffe* case] may fall short of what is likely to be required for [their] protection of [rights such as those which arise here]".

13. I am satisfied, accordingly, that the decision in *O'Keeffe* has not been overruled or departed from by the Supreme Court but that the observations of McGuinness and Fennelly JJ. are not binding, to say nothing of what was said in *Laurentiu* and which refers to the traditional rule. The issue of the test applicable is the subject of an appeal to the Supreme Court, leave in that regard having been granted by my colleague, Gilligan J. in *Meadows v. Minister for Justice & Ors*. on 19th November, 2003; I am informed that this matter has not yet been determined and, accordingly, I proceed on the basis of existing law.

14. It might be argued that judicial review (as referred to by Clarke J.) could be granted on the sole ground that so-called "heightened scrutiny" (to put the matter shortly) is applicable to the decision, whatever the apparent merits of that decision at this stage. Having regard to the present state of the authorities as to the application of this new or different test I respectfully do not agree and, accordingly if and insofar as judicial review is sought solely upon the test to be applied, I will not grant it upon that basis.

15. As to the facts, these are comparatively straightforward and are to be found in the several affidavits filed by or on behalf of the applicant, namely, her affidavit of 17th December, 2005, that of Mr. Mulvihill, her solicitor, dated 26th February, 2007 and that of Mr. McNamara, on behalf of the respondent Minister, dated 27th March, 2006. I believe that it is also proper for me to have regard to the decision of the Refugee Appeals Tribunal of 6th February, 2004; I, of course, consider also all exhibits in the affidavits (which include what I might describe as the complete file of papers ultimately furnished to the Minister for his decisions).

16. It appears that the applicant was born on 27th June, 1982, that her father died in 1994 and, her mother having re-married, her step-father raped or otherwise sexually abused her on a serial basis. She says that she is HIV positive and contracted this from her step-father. He, as is common in cases of alleged sexual abuse, if the evidence of the applicant to the effect that it occurred is accepted, threatened her with death should she tell anyone of the abuse (something which she says she believes); his violence apparently including biting, burning her with hot stones, cutting her with knives and pointing a gun at her. She says she gave birth to two children, in 1998 and 2002; perhaps strangely these have not been brought by her to this jurisdiction. She says that an uncle resident in Ireland, one John Dumbu, financed her flight from South Africa by transferring funds into a bank account in Johannesburg, that when she knew she was in a position to escape she informed her mother of the abuse but that the latter did not believe her, her step-father becoming more violent when her mother became engaged in the matter. She flew from her home and lived in the forest, ultimately going to Johannesburg, obtained a South African passport and arrived here on 26th February, 2004, thereupon applying for asylum orally.

17. She made an application in writing thereafter and attended for interview before an officer of the Refugee Appeals Commissioner on 19th May, 2004 and 21st June, 2004, and records of her interviews are furnished to me. On 16th November, 2004, however, the Commissioner informed her that he was recommending that she should not be declared a refugee and his report thereon was furnished to her. She appealed to the Refugee Appeals Tribunal on 30th November, 2004 and the Tribunal refused her appeal, notifying her of this fact on 18th January, 2005. Thereafter, in the usual course, she was informed that the Minister had decided to refuse her a declaration as a refugee, subject to any representations for leave to remain which she might make, these being furnished by letters of

23rd February, 2005 and 15th March, 2006. Ultimately, she was informed on 7th December, 2005 that a deportation order had been made. She was requested to make herself available for deportation but then retained a solicitor, ultimately, by virtue of proceedings of this Court, the deportation being postponed until the determination hereof. By letter of 13th November, 2006 she sought a revocation of the deportation order on the basis of what are described as "updated details" of her medical condition and treatment for HIV/AIDS, based upon a medical report of Dr. Conor McNiece of 6th November, 2006. Her health is a crucial issue in this application. The most recent medical report refers to the fact that:

> "… [she] … suffers from active HIV infection. She is under the care of Dr. Mary Horgan, Consultant in Infection Diseases at Cork University Hospital. She has a significant viral and CD4 load at present but is doing well on intensive therapy and supervision. … In my opinion, any interruption in her therapy at present would be likely to have a very deleterious effect on her progress and would, I feel, diminish her prospects for a good long-term outcome in her illness."

18. The original medical report of 11th March, 2005 was briefer and was to the effect that:

> "This is to confirm that the above lady who is a patient of this practice is HIV positive. She is under the care of Dr. Mary Horgan, Consultant in Infectious Diseases at Cork University Hospital."

19. There is no reference to the health of the applicant in her interview with the Refugee Appeals Commissioner's officer nor, accordingly, in her report. The first reference to such is in her notice of appeal to the Tribunal (at ground 1) to the effect that she "has been diagnosed as HIV positive which she believed she contracted from her step-father". There is no reference in the decision of the Tribunal to such a health issue and her notice of appeal only makes that limited reference thereto: it is only, if and insofar as her appeal (or ultimately these proceedings) were based upon a well-founded fear of prosecution on the grounds of her membership of a particular social group, (and it does not appear to have been contended that such social group was constituted by persons who were sufferers from AIDS or otherwise) that it might be considered relevant to any other ground of claim. Significantly, the medical report of 11th March, 2005 was not, of course, before the Tribunal.

20. Whether or not by a failure to explicitly address the medical condition to which reference is made in the Notice of Appeal to the Tribunal, on the part of the Tribunal, was an omission by the latter, is of course irrelevant at this stage and I have concluded, in any event, that it was not pursued or relied upon in any meaningful or substantive way there (and certainly not, on the basis that, or, reliance upon, AIDS sufferers were a social group or due to absence of medical treatment). Effectively, therefore, the first substantive mention of the medical condition of the applicant was in her representations of the 23rd February, 2005 and the 15th March, 2005 to the Minister following the fact that she was informed that he proposed to make a deportation order, in particular in the context of humanitarian considerations. In that respect she referred to the fact that she was HIV positive, that she was been monitored and under investigation so that the treatment required could be determined, that her next appointment was on the 5th March 2005 and that she feared the consequences of a return to South Africa due to the lack of affordable medical treatment. In the context of reliance upon the Refugee Acts, 1996, as amended, or the Convention there is no reference to such medical condition, nor is any reference made to any question of her constitutional rights. It was only under the cover of the letter of 15th March, 2005 that the first medical report was furnished.

21. It is clear that consideration was given to it on behalf of the Minister and a recommendation made to him by one Joy X. Ryan in a report dated the 22nd July, 2005. Under the heading of humanitarian considerations it appears that consideration was given by her to the medical condition of the applicant, including the State's obligations under the Convention, with reference not merely to the entire file of papers, which plainly were considered, but certain information contained a document described as "U.S aid website – latest up-date 19th July, 2005", containing country of origin information on this topic. The matter was further considered by Stephen M. Joyce of the Minister's Department and it appears on the face of the matter that the Minister made a deportation order, notwithstanding the representations received for leave to remain, on the basis of these two examinations.

22. Subsequent to the deportation order the representations made on 13th November, 2006 seeking its revocation, as referred to aforesaid, are on the basis of the second or up-to-date medical report which were in turn was considered on behalf of the Minister who refused to so revoke it. The Minister appears to have made his decision on the basis that nothing contained in the additional representations made on the basis of that medical report would warrant a change in the Minister's original decision and in particular that this was known at the time of the consideration of the leave to remain application on 22nd July, 2007. This basis of refusal was set out in a letter from Mr. Fitzpatrick of the respondents department, to the applicant, dated 19th December, 2006, namely, that the position remained unchanged from the time when the deportation order was made and that there was nothing contained in the medical report in question which would cause the Minister to change his decision.

23. In *Agbonlahor v. Minister for Justice* [Unreported, High Court, 2007, Feeney J.) (at para. 2.1) it was pointed out that in

> "Carrying out the functions which are the subject of review by this court, the Minister is performing a function as an organ of the State within the terms of s. 3(1) of the Act of 2003 (and the Convention) and it therefore follows that if the Minister's decision not to revoke was incompatible with the State's obligations under the Convention provisions that such decision would be unlawful pursuant to s. 3 of the 2003 Act."

24. The applicant's solicitor, in the application for revocation, also furnished material downloaded from the internet headed "Human Imuno Deficiency Virus" with the sub-heading "HIV management". It appears from that material that the virus which causes AIDS was first described and is known as human imuno deficiency virus (HIV). There is a distinction between HIV infection, according to this material, and the development of AIDS, apparently, the virus in question gradually having effects on the blood and spreading throughout the body. It further appears that the average time for progression from initial infection to AIDS is eight to ten years. The virus is associated with a decline in the number of "CD4 cells" and these phenomena (i.e. significant development of the virus and the related CD4 cells decline in the blood) are indicative of the fact of the infection with the virus. Whilst there is a reference in the report of 6th November, 2006 to "active HIV infection" on this material it does not appear that there is a distinction between that condition and HIV positive. There is no suggestion, in any event that there is a difference between the fact of active HIV infection or being HIV positive and the facts of the existence of what is described in the second report as "a viral and CBH load" seems to be an element of the infection. The applicant is apparently in receipt of intensive therapy and supervision and this is directed, since she has not developed AIDS, to treating the virus, which itself means (or constitutes being) HIV positive and to that extent she so remained at the time of the application to revoke, as she was at the time of the initial report under the care of a consultant. Thus, the present medical condition seems to me to follow rationally from and, is in substance part of, the fact that she was HIV positive and that the only additional information is a higher degree of specificity in the nature of the treatment. In other words, in as much as she has not developed AIDS she remains in substantially the same condition as she was when the original report was furnished. Obviously, the Minister must consider any new information furnished to him even after a deportation order is made on the occasion of an application for revocation.

25. The fact that the person who is applying for revocation is a person who has no right to be in the State has an effect on the decision making process. In particular in *Chinasa Akujjobi and another v. Minister for Justice and Equality and Law Reform* [Unreported, High Court, MacMenamin J., 11th January, 2007) it was stated that:-

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

26. Of course, in so far as the conclusion of fact by the Minister that the second report provides no new (substantial) information and that there, is accordingly, no change from the time when the original order was made, it can only be open to question if it is "fundamentally at variance with reason and common sense" or "is indefensible for being in the teeth of plain reason and commonsense" or if the decision maker (the Minister has breached his obligation not to "flagrantly reject or disregard fundamental reason or common sense". Needless to say, similar principles apply, at the risk of repetition, in respect of conclusions of fact based on country of origin information. A court might or might not make different findings of primary fact or draw different inferences of secondary fact to those of the decision maker in respect of each of the impugned decisions but that would be permissible only if the threshold which I have rejected were applicable.

27. In the first instance I do not doubt what was said by Finlay Geoghegan J. in *Makumbi v. Minister for Justice, Equality and Law Reform,* (Unreported, High Court, Finlay Geoghegan J., 15th November, 2005) that on the basis of her present medical condition the applicant's right to life is "perhaps the most fundamental of such human rights… recognised by the Constitution in Article 40.3." and, further, as held by the Supreme Court in In *Re The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360 that notwithstanding the fact that a person not entitled to be in the state cannot enjoy constitutional rights co-extensive with those of citizens and persons lawfully residing in the state there is a constitutional obligation to "uphold the human rights of the person affected which are recognised, expressly or by implication, by the Constitution although they are not co-extensive with the citizens constitutional rights". It is clear, also, that in making any of the impugned decisions by virtue of s. 2 of the 2003 Act the respondent is obliged to perform his functions "in a manner compatible with the State's obligations under the convention provisions" and this, it is plain, the Minister did on the revocation application; both on the original decision and on perusal of the submissions the Minister; further, there is reference in the earlier submission pertaining to the deportation order to the submissions on behalf of the applicant pertaining to the convention and it can only be inferred or is implicit in the recommendation that those rights were addressed in the context of the applicant's medical condition. It is clear having regard to the consideration given on the basis of Country of Origin Information (referred to above) that consideration was given to her medical condition in a manner which would fulfil (even without explicit reference to it) the provisions of Article 40(3)(2) of the Constitution.

28. It is contended on behalf of the applicant that the Minister failed to have any regard, both in making the deportation order and in refusing to revoke it, to the findings of the tribunal in the context of the alleged "serious risk or serious harm" to which the applicant would be exposed on refoulement and in particular to consider the threat to her life by reason of her membership of a particular social group and her exposure to discrimination, including discrimination leading to loss of life, on account thereof. In that regard reliance was placed on the decision of *E.M.S. v. The Minister for Justice and Others,* (Unreported, High Court, Clarke J., 21st December, 2004) that:-

> "Having reviewed the voluminous material that was placed before the Minister I have come to the view that it is at least arguable that some of this material could give rise to a conclusion that by virtue of a view taken by the authorities within South Africa the level of treatment been given to person suffering from AIDS within that jurisdiction falls below that level which could reasonably be expected, having regard to the seriousness of the problem within South Africa and the resources available within that country… I am also satisfied that it has been established that there are, at least arguably, materials contained within the documentation supplied to the Minister that would place the Minister on inquiry as to whether there might not be other discrimination in the form of shunning or exclusion which the authorities are unable or unwilling to counteract."

Certainly, the document downloaded from the internet and furnished in support of the request for revocation says nothing about that class of difficulty. I can find nothing in the documentation furnished to the state which might give rise to an implication that there was discrimination against persons who were HIV positive or suffered from AIDS in the form of shunning or exclusion which the authorities are unable or unwilling to counteract. Notwithstanding absence of explicit reference to the materials supplied in respect of HIV or AIDS it is explicitly stated in the recommendations to the Minister that all of the material furnished has been considered.

29. Reference was also made by the applicant to *Msengi v. The Minister for Justice*, (Unreported, High Court, MacMenamin J., 26th May, 2006) where he stated that it was arguable that there were, in that case, such materials before the tribunal (which was a co-respondent), and that the applicant would be the victim of discrimination as a HIV positive woman in South Africa which the authorities there would not only be unwilling to counteract but would be instrumental in perpetuating. Again here, there is no suggestion in any of the materials furnished to the Minister either on the original opposition to the making of the deportation order, or leave to remain, and also on the application for revocation. Further, reference is made by *Akoya v. Refugee Appeals Tribunal* (Unreported, High Court, Gilligan J., 29th July, 2005) where Gilligan J. was of the view that the tribunal (or the Minister, by implication) when faced with the question of determining whether the applicant faced persecution in the country of origin on the basis of being HIV positive there was an obligation to consider that aspect – an unexceptional proposition. A similar principle can be derived from *O.A. v. Refugee Appeals Tribunal*, (Unreported, High Court, Peart J., 26th May, 2004) where it was held that being diagnosed as HIV positive it became a possibility that there might be discrimination against the applicant and that the shared burden of proof "kicked in" that it became necessary to pass on to further stage of investigation, perhaps by obtaining any available country of origin information about the condition or plight of HIV positive sufferers. It at least merited "investigation", Peart J., further stated that the applicant "might, as a result, be part of a particular social group exposed to discrimination in Nigeria…". I repeat that there is nothing here in the country of origin information which would have given rise to any such obligation to enquire; it begs the question as to how exhaustive the enquiry of the Minister should be and obviously that case was decided on its own facts. I cannot speculate as to whether or not the fact that someone is HIV positive gives rise to some form of discriminatory treatment. The country of origin information was certainly ample in this instance.

30. In *Kozhukarov v. The Minister for Justice*, (Unreported, High Court, Clarke J., 14th December, 2005) the question of whether or not deportation might be justified by reason of immigration control, and the extent thereof was considered. My colleague made the point that:

> "There have been certain cases determined by the European Court of Human Rights in which the degree of interference with the right to respect for the family life of a person sought to be expelled was such as that the interference was found to be disproportionate to the legitimate stating of maintaining immigration control."

31. One would find it hard to doubt the latter proposition and I have due regard to it: similarly so far as article 8 of the Convention is concerned (i.e. that pertaining to respect for the private and family life, home and correspondence of the applicant) I cannot disagree with the decision of *Bode v. The Minister for Justice Equality and Law Reform*, (Unreported, High Court, Finlay Geoghegan J., 14th November, 2006) where she referred to the fact that, at that time, the European Court of Human Rights had held that "respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings" and, further, that the concept of "private life" was recognised as being wide in ambit, covering (*inter alia*) a person's professional and business activities. She referred also to *Sisojeva v. Latvia* and *Kutzner v. Germany*, [2002], 35 E.H.R.R. 653 where it is asserted that "the boundaries between the state's positive and negative obligations… do not lend themselves to precise definition… in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation."

32. So far as the European Court of Human Rights is concerned a generalised breach of the applicant rights under the Convention is alleged and, also, of her right to life under Article 40.3.3 of the Constitution. The applicant has specifically advanced in submissions a breach of article 8 of the Convention, which provides as follows:-

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of this order or crime for the protection of health or morals, or for the protection of the rights and freedoms of others."

This provision is relied upon in the present case only with respect to the private life of the applicant, by reference to her medical condition and the fact that she is in receipt of treatment. In truth, this is the gravaman of this case, namely, that because of the fact that she has HIV positive and that that appears to be a developing condition so called "significant viral and CD4 load" giving rise to intensive treatment the interruption whereof would be likely to have a "very deleterious effect on her progress and would, I feel, diminish her prospects for a good long term outcome to her illness (see extract from report of Dr. Conor McNiece dated the 6th November, 2006, set out above).

33. This issue has been dealt with by Feeney J. in *Agbonlahor and Others v. The Minister for Justice* (Unreported, High Court, 2007). In that case he relied substantially upon the decision of the House of Lords in *N. v. Secretary of State for the Home Department*, [2005] 2 A.C. 233/332. Medical issues fell to be considered in that case because the minor applicant (son of the first applicant) was diagnosed with a medical condition as ADHD (attention deficit hyperactivity disorder) intellectual disability and "sensory integration issues" which would not have been available in Nigeria (the country of origin whom I might term the pugitive deportees). It was not contested that the applicant minor's disorder had the desirability that he would be treated for it formed an aspect of "his private life" pursuant to article 8 of the Convention but, of course, it was contended that removal of the minor applicant (and other members of his family) did not constitute a breach of his right to respect for private life. Feeney J. refers to a number of decisions of the European Court of Human Rights which I need would not repeat here but the burden of which is that private life extends beyond the concept of privacy to "moral and physical integrity", that the latter comes into play even though what I might term the want of respect or invasion of such integrity was not so severe as to amount to inhuman treatment prohibited under article 3 of the Convention. That was not explicitly relied upon here but I think it appropriate to quote it at this juncture as follows:-

> "No one shall be subjected to torture or to a human or degrading treatment or punishment."

Feeney J. further quoted with approval decisions of the European Court of Human Rights (to the effect that whilst there might be positive obligations on the part of a State to respect the family) and presumably by analogy here to respect an individual's private life that "a State has a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals". This, in the context of the issue of whether or not an obligation under article 8 is a purely negative one or whether or not it also has a positive component. He has further pointed out that in considering emigration law under article 8 the Court has focussed on an analysis of the individual facts in each particular case to ascertain whether the individuals asserting breach of rights are in truth asserting a choice of the State in which they would like to reside as opposed to an interference by the State with their rights under article 8. Such a choice, of course, might well be made because there are better medical facilities in which I might describe is the State in which asylum has been claimed and an individual's home State.

34. The decision of Feeney J., in terms of Convention rights is substantially based upon the decision of the House of Lords in *N. v. Secretary of State for the Home Department*, [2005] 2 A.P. 296, even though that dealt with rights under article 3 rather than article 8. As article 3 called for a higher level of severity or gravity of alleged infringement he was in a position, by analogy, to rely thereon. This case is instructive in as much as the applicant had been diagnosed as HIV positive and had been in receipt of treatment from the NHS whilst he was in the United Kingdom for the purpose of having his asylum claim considered and he asserted that his rights under article 3 would be breached or if he was returned to his home State (Uganda) since the treatment that she needed would not be available to her there and that she would die in a matter of months; there is no suggestion that the applicant herein is of such gravity and it is plainly conceived that she may recover, as pointed by Feeney J., the House of Lords concluded that it was bound by the principles to be derived from the *juris prudence* of the European Court of Human Rights to the effect that article 3 of the Convention did not impose an obligation on a contracting State to provide aliens indefinitely with medical treatment which was unavailable in their home countries, even if the absence of such treatment would significantly shorten their lives and that article 3 could be extended to apply only in exceptional circumstances where the present state of health of the person who is subject to expulsion was such that, on compelling humanitarian grounds, he ought not be expelled unless it could be shown that the medical and social facilities that he would need to prevent acute suffering while he was dying were available to him in the receiving State. There never was any suggestion be for the Commissioner or the Tribunal or the Minister (on both occasions) that the applicant's state of health fell into that extreme class.

35. Feeney J. was satisfied that rights under article 3 required no higher level of severity in the alleged threat to article 8 rights and that the approach and analysis adopted in N. in respect of article 3 rights represented a correct and proper approach to the analysis of article 8 rights. *Inter alia*, he quoted from the decision of Lord Hope of Craighead to the effect it was a general principles of the Strasbourg jurisprudence that:-

> "… A comparison between the health benefits and other forms of assistance which are available in the expelling State and those in the receiving country does not itself give rise to an entitlement to remain in the territory of the expelling State …"

and, further,

> "That aliens cannot in principle claim any entitlement to remain on the territory of a contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State."

Feeney J. was also satisfied that this approach was consistent with a decision of the Supreme Court in *A.O. and O.J.O. v. The Minister for Justice*, [2003] 1 I.R. 1 (per Hardiman J.). Further, he quoted Lord Hope to the effect that:-

> "It would have the effect of affording all those in the appellant's condition a right of asylum in this country until such time as the standard of medical facility is available in their home countries where the treatment of HIV/AIDS had reached that which is available in Europe. It would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country. This would result in a very great and no doubt unquantifiable commitment of resources which it is to say the least, highly questionable the State's party to the Convention could ever have agreed to".

Feeney J. pointed out that that statement "identifies the real and substantial basis for there being public policy considerations to be considered as part of the asylum process. In *R. (Razgar) v. Secretary of State for the Home Department* [2004] 2 A.C. 368 five questions were identified which should be addressed in terms of considering article 8 rights, as follows:-

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private … life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security public safety or the economic well-being of the country, for the prevention of disorder or crime for the protection of health or morals, or for the protection of the rights and freedoms of others? and,
>
> (5) If so if such interference proportionate to the legitimate public end sought to be achieved?

36. It seems to me that there would be no interference by a public authority with the exercise of the applicant's right to respect for his private life in the absence of a positive obligation upon the State to provide medical treatment of the kind which the applicant is now undergoing, and even if there was such interference it does not seem to me that the consequences are of such gravity as to engage the operation of article 8. One need compare this only with the facts of *N*. The remaining questions accordingly do not need to be answered.

37. As to the question of the constitutional rights under Article 40.3.2 I have already referred to *Makumbi*. That case concerned a transfer order pursuant to Article 7 of the Refugee Act, 1996 (s. 22) O. 2003 requiring the applicant to leave the State and go to the United Kingdom pursuant to the provisions of Council Regulation (EC) No. 343/2003. Subsequent to the transfer order it was submitted to the Minister that the applicant therein was suffering from clinical depression and had a history of attempts to take her own life, medical opinion being given to the effect that deportation would "without question exacerbate (her depression) to a level where I would be concerned about her own safety given her history of delivering self harm in the past…. Pursuant to that Regulation there was no doubt that the United Kingdom was the Member State responsible for examining the applicant's application for asylum. Finlay Geogheghan J. held that the State had a right but not an obligation to transfer the applicant to the United Kingdom. She further held that in exercising the power or duty to implement such an order, the State was obliged to uphold the applicant's right to life, on the occasion of any such transfer, or protect such right under Article 40.3.2. She did not, on the particular facts of the case, of course, conclude that the medical evidence pertaining to the applicant "necessarily warranted a decision by the respondent to exercise the discretion which I have found to exist not to implement the transfer order". If however there is no right to remain in the jurisdiction for the purpose of receiving medical treatment in circumstances of the kind referred to by Feeney J. on the evidence in the present case, I cannot see how it might be held that one could contend that one's constitutional right in this regard would be breached. No authority has been opened to me suggesting that the applicant's rights under Article 40.3.2 import of an entitlement to medical treatment in the State.

38. I have not been explicitly addressed about article 2 of the Convention even though it is one of the two articles pleaded. This is as follows:-

> "Everyone's right to life shall be protected by law…"

In the absence of any explicit submission I cannot see how this is engaged. I cannot see how, if there is no obligation to refuse deportation or to revocate, even in the event that death might, for example, probably result, there could be a breach of rights under that Article. It will appear from the tenor of what I have said that I do not think that any question of refoulement arises, and, also that I could be satisfied of any breach of the Criminal Justice (United Nations Convention Against Torture) Act, or, indeed, any cruel or inhuman or degrading treatment or punishment "in the light of s. 2 of the Act of 2003", upon which no submission was explicitly made to me.

39. For the sake of completeness I might add that I have not been addressed about article 5 of the Convention, which provides:-

> "Everyone has the right to liberty and security of a person …"

This was raised in the context of the threshold for judicial review (a topic with which I have dealt) and seems to have no relevance to that issue which, as I have said engages article 13.

40. I therefore refuse the reliefs sought herein.