Neutral Citation: [2015] IEHC 11

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 400 J.R.]

BETWEEN

O.O. AND F.O.AND A.O.

APPLICANTS

AND

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

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION IRELAND

NOTICE PARTY

JUDGMENT of Ms. Justice Faherty delivered on the 16th day of January 2015

1. This is a telescoped application for judicial review of two decisions of the Minister. The first and second applicants seek an Order of Certiorari by way of application for judicial review quashing the decision of the Minister making a Deportation Order against them and notified to the first named applicant not earlier than 28th March 2010. The third named applicant seeks an Order of Certiorari by way of application for judicial review quashing the decision of the Minister against her and notified to her not earlier than 14th April 2010.

2. The first named applicant is the mother of the second and third named applicants. The second named applicant's application, throughout the asylum process and subsequently, was dealt within the scope of his mother's application. The third named applicant was born in this State following the initiation of her mother's asylum claim, and presumably this is the reason for the third named applicant's application having been dealt with separately at all relevant stages.

Background Facts

3. The first and second named applicants arrived in Ireland from Nigeria on the 13th October 2005. Each of them was born in Nigeria. The third named applicant was born in Ireland on the 2nd November 2005. An asylum application was commenced by the first named applicant on the 13th October 2005 on her and on the second named applicant's behalf. It was rejected by the Commissioner and by the Refugee Appeals Tribunal on appeal. A legal challenge in respect of the Tribunal's decision was not successful. An asylum application was made on behalf of the third named applicant on the 15th March 2006 but was rejected by the Commissioner. An appeal was not lodged with the Refugee Appeals Tribunal. Following the procurement of legal representation from the Refugee Legal Service, an application pursuant to s. 17(7) of the Refugee Act 1996 was made on behalf of the third named applicant on the 30th June 2006 seeking re-entry into the asylum system. This was refused by letter dated 9th October 2006. Representations seeking leave to remain were made to the Minister on behalf of the third named applicant by the Refugee Legal Service on the 5th July 2007. On the 10th August 2007, via her current solicitor, the third named applicant made an application for subsidiary protection and made further representations seeking leave to remain. On the 4th September 2007, the n presentations for leave to remain were further augmented.

4. By letter dated 1st March 2010, subsidiary protection was refused to the third named applicant. A copy of the report setting out the Minister's determination was enclosed with the letter to the third named applicant. On the 12th March 2010, her solicitor wrote to the Repatriation Section of the first named Respondent making "a strong plea to grant the applicant Leave to Remain along with her mother and brother" and enclosing two testimonials in this regard. The first named Respondent was asked to take into consideration all the correspondence which had been forwarded in conjunction with the first named applicant's application (discussed more fully below). By letter dated the 14th April2010, the third named applicant was advised that the Minister had decided to make a Deportation Order in respect of her pursuant s. 3 of the Immigration Act, 1999. A copy of the Deportation Order and a copy of the Minister's considerations, ("examination of file"), pursuant to s. 3 of the 1999 Act and s. 5 of the Refugee Act, 1996 were enclosed with the letter. The Deportation Order was dated 9th March 2010.

The chronology with regard to the first and second named applicants

5. On the 28th April 2009, in the wake of their failed applications for refugee status, the Minister wrote to the first named applicant advising her that the Minister had accepted the recommendation of the Refugee Appeals Tribunal and that he was refusing the first and second named applicants refugee status. She was further advised that the Minister proposed to make a Deportation Order in respect of both herself and the second named applicant. Pursuant to s. 3 (4) of the 1999 Act, three options were advised to the first and second named applicants:-

1. To leave the State before the Minister decided on a Deportation Order;

2. To consent to a Deportation Order;

3. To apply for subsidiary protection and/or make representations to remain temporarily in the State.

The first named applicant took up option 3.

6. Under cover of letter dated 18th May 2009, her solicitor forwarded Forms CP/01 Part 1 and CP/01 Part 2 duly completed by the first named applicant. Included with her application for subsidiary protection were a number of documents in support of her claim of

fear of serious harm if deported. She was further relying on the documentation which had been submitted with her (now failed) asylum application. Attached also were some 26 testimonials from third parties in support of the first and second named applicants' application for leave to remain. Further such representations were made on the 21st May 2009. It would appear that the representations seeking leave to remain were made in respect of all three applicants.

7. There the matter rested for a number of months.

8. By letter dated the 1st March 2010, the first named applicant was advised by an Executive Officer of the Repatriation Unit as follows:-

> *"I am directed by the Minister for Justice Equality and Law Reform to refer to your application for subsidiary protection under the EU (Eligibility for Protection) Regulations 2006 S.I No. 518 of 2006 ("The Regulations").*
>
> *"Your application was considered in accordance with the above regulations and the Minister has determined that you are persons eligible for subsidiary protection. A copy of the Report setting out the Minister's determination is enclosed for your information. "*

9. It is not in dispute but that the enclosed report was totally at odds with the contents of the letter of 1st March 2010 in that the report concluded that substantial grounds had not been shown for believing that the first named Applicant would face a real risk of suffering serious harm if returned to Nigeria.

10. On the 9th March 2010, the applicant's solicitor received the following faxed correspondence from the Minister's Office:-

> *"I am directed by the Minister for Justice, Equality and Law Reform to refer to your correspondence dated 8/3/2010 Please be advised that the letter issued to your applicant and copied to your office contained a clerical error. Please be advised that the letter issued to your applicant should read:*
>
> *"Dear Olawunmi Oloyede,*
>
> *I am directed by the Minister for Justice, Equality and Law Reform to refer to your application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations, 2006 S.I No. 518 of 2006 ("The Regulations").*
>
> *Your application was considered in accordance with the above Regulations and the Minister has determined that you are persons not eligible (or subsidiary protection. A copy of the Report setting out the Ministers determination is enclosed for your information. "*
>
> *"As can be seen from the copy of the report forwarded to your client and copied to your office, your client's subsidiary protection application has been refused"*

11. That letter triggered a flurry of correspondence on behalf of the first and second named applicants to the Minister commencing with a letter of the 9th March 2010 making further representations against deporting the applicants and which enclosed 8 testimonials in support of the first named applicant's application for leave to remain.

12. Further correspondence to the Minister followed:

- A letter of the 10th March 2010 (enclosing 5 testimonials in support of the application for leave to remain);
- 11th March 2010 (enclosing 5 testimonials);
- 12th March 2010 (enclosing 2 testimonials);
- 18th March 2010 (enclosing 2 testimonials);
- 22nd March 2010 (enclosing 5 testimonials);
- 24th March 2010 (enclosing 4 testimonials).

13. It is submitted on behalf of the applicants that those representations were directed at seeking leave to remain and dissuading the Minister from making a Deportation Order.

14. On the 25th March 2010, the Repatriation Unit wrote to the applicant's solicitor enclosing a copy of a letter dated 25th March 2010 which had issued to the first and second named applicants and copies of the enclosures therein contained, namely the "examination file" under s. 3 of the Immigration Act 1999 and two Deportation Orders dated 9th March 2010 made against the first and second named applicants respectively.

15. The letter of 25th March made reference to "*further correspondence*." This was a reference to the letters and representations which had been forwarded to the Minister on behalf of the applicants between the 9th and 24th March 2010. The applicant's solicitor was duly advised that as this correspondence was received post signature of the Deportation Order by the Minister, it would therefore be considered under s.3 (11) of the Immigration Act 1999.

16. The 25th March 2010 letter addressed to the first and second named applicants and which enclosed the Deportation Orders advised them, inter alia, that they were obliged to leave the State by the 11th April 2010.

17. The present proceedings issued on the 1st April 2010.

Preliminary issue on jurisdiction

18. The respondents object to the applicants' attempt to use the within proceedings as a vehicle to challenge the Deportation Order dated 9th March 2010 in respect of the third named applicant, as the present proceedings pre-date the communication of that Order and were never amended to incorporate any challenge to it. Accordingly, it is argued that the Court has no jurisdiction to consider the third named applicant's challenge to her Deportation Order.

19. I do not find merit in the objection raised by the respondents in the following circumstances:

20. It is common case that at the time of the institution of these proceedings (1st April 2010), the third named applicant was not in receipt of a Deportation Order from the Minister. That notwithstanding, the third named applicant was joined as a party to these proceedings. The statement of grounds described all three applicants as individuals who have been refused refugee status, subsidiary protection and leave to remain in the State. Some four weeks prior to the initiation of the proceedings, the third named applicant was in receipt of the Minister's letter of 1st March 2010 deeming her not eligible for subsidiary protection.

21. Paragraph 15 of the grounding affidavit sworn by the first named applicant on 31st March 2010 avers, in part, as follows:-

> *"By letter dated 25th March 2010 and received on or about 28th March 2010, I was notified of the making of the Deportation Orders in respect of the second named applicant and I. The Departmental analysis underpinning the decisions and the Deportation Orders were enclosed. The said analysis stated that a recommendation to make a Deportation Order in respect of the third named applicant had been made. I have not received notification of the said Deportation Order to date, and a further Affidavit will be sworn on receipt of same... "*

22. The first named applicant made the above averment in circumstances where the examination file with regard to the first and second named applicants made specific reference to the third named applicant as follows:-

> *"[The third named applicant's] case is also the subject of a consideration under s. 3 of the Immigration Act 1999 (as amended) and a recommendation is being made that the Minister makes a Deportation Order in her case also."*

23. In the statement of grounds, under "*relief sought*", the applicants sought, inter alia, "*an Order providing for the amendment of the within proceedings on receipt of the notification of the Deportation Order in respect of the third name applicant*."

24. On the 19th April 2010, the applicant's solicitor swore an affidavit exhibiting therein the 14th April 2010 letter from the Repatriation Unit and the enclosed Deportation Order and the examination file analysis conducted in respect of the third named applicant. This affidavit was filed on the 30th April 2010.

25. In all of those circumstances, and notwithstanding that the anticipated amendment application was not pursued, I do not find merit in the respondent's objection. By virtue of the third named applicant having been named from the outset as a party to the proceedings and where some four years ago and within three weeks of the issuing of the proceedings the third named applicant's Deportation Order was effectively subsumed into these proceedings, I am satisfied that this Court has the power to review the said Deportation Order for the purposes of a consideration as to whether leave should be granted.

The Grounds of Challenge

26. Essentially, the applicants advance two grounds of challenge to the Deportation Orders dated 9th March 2010.

27. The section 3 challenge

It is argued that the Minister's "mistake" of the 1st March 2010 (erroneously advising the first named applicant that she was eligible for subsidiary protection and, as submitted by Counsel for the applicants, thereby lulling the first named applicant into a false sense of security), together with the prompt further representations made on behalf of the applicant in response to the Minister's letter of the 9th March 2010 advising that she was not eligible for subsidiary protection was such that it behoved the Minister to set aside the Deportation Order dated 9th March 2010 and embark on a fresh consideration of the applicant's representations, pursuant to s. 3(3) of the Immigration Act 1999.

In the statement of grounds, the applicants put it thus:

"*In particular, the Respondent failed to consider representations of a significant nature submitted in advance of notification of the deportation orders. Further, the Respondent's statement that the said representations would be considered under Section 3(11) of the Immigration Act is unlawful, particularly in circumstances where this Honourable Court has stated, and to the knowledge of the Respondent, that Section 3(11) decisions presume the existence of valid deportation orders already being in existence*;".

28. The applicants submit that in the "*unique*" circumstances of this case, namely the first named applicant having been advised she was eligible for subsidiary protection and then told she was not, the Minister's response that he would consider the representations furnished between 9th and 24th March 2010 in the context of the discretion he enjoys pursuant to s. 3(11) of the 1999 Act to revoke a Deportation Order did not meet the justice of the case.

29. In their written submissions the applicants further contend:-

> *"In our submission, the further representations should have been considered before the deportation order was made. The terms of reference for a decision to deport are completely different from the terms of reference for a decision whether or not to revoke an order. The courts have on countless occasions made clear that the question on a revocation application is a limited one: has the applicant produced new material which would warrant the revocation? See, for example, Smith V MJE [2013] IESC 4, unreported 1 February 2013, where Clarke J refers to the need to produce "new material, which was not available at the time the deportation order was made."*
>
> *On the other hand, the decision whether or not to make a deportation order is a much more complex one. This decision is governed by the procedure on considerations set out in s 3 of the Immigration Act 1999 and is also subject to the refoulement provisions contained in s 5 of the Refugee Act 1996.*
>
> *Since a substantial period of time had elapsed between the applications for subsidiary protection and leave to remain (18 May 2009) and the Minister's decision to refuse subsidiary protection (notified by faxed letter of 9th March 2010), we submit the Minister should in fairness have taken into account the further representations, made promptly on receipt of the faxed letter, before considering the decision to deport.*
>
> *There was no obligation on the Minister to treat the further representations as an application to revoke. Given the circumstances, the proper course in our submission would have been to revoke the deportation order and to treat the representations in accordance with the provisions of the s 3 of the 1999 Act."*

30. In essence therefore, the applicants' argument is that the Minister should have of his own volition set aside the Deportation Order dated 9th March 2010 and considered afresh the application for leave to remain, before making a decision to deport the applicants. It is submitted that in all those circumstances, the decision to consider the representations only within the narrow scope of s.3 (11) of the 1999 Act was unfair.

The Respondents' Submissions on the Section 3 Point

31. The Respondents refute any suggestion that the Minister was obliged to consider the representations submitted on behalf of the applicants between 9th and 24th March 2010 otherwise than as an application under s. 3(11) to the Minister to revoke the Deportation Orders made on the 9th March 2010. The respondents submit that consequent on the Minister's refusal on 29th April2009 to afford refugee status to the first and second name applicants, their application for leave to remain dated 18th May 2009 with enclosed representations and testimonials, together with further representations submitted on the 21st May 2009, were duly considered by the Minister pursuant to s. 3(3)(b) of the 1999 Act, as annotated on their examination file.

32. Section 3(3)(b) imposes a mandatory duty on the Minister to take into consideration any representations duly made to him before deciding to deport. The respondents submit that that is what the Minister did in the present case. Counsel for the respondent relies on the dictum of Hardiman J. in *GK V Minister for Justice* [2002] 1 ILRM 401 where he stated:-

> *"a person claiming that a decision making authority has, contrary to its express statement ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case. "*

33. In fact, the case is not made by the first and second named applicants that the Minister failed to consider the submissions which accompanied the application for leave to remain in May 2009.

34. The respondent further submits that s. 3(6)(i) of the 1999 Act has been complied with.

35. With regard to the letter sent to the first named applicant on 1st March 2010, the respondents contend that the letter could not have given the first named applicant cause for jubilation in view of its conflict with the accompanying report. They contend that no one here was lulled into a false sense of security. They argue that the Minister's letter of the 9th March to the first named applicant denying her subsidiary protection was an indicator that the first named applicant's case had reached the "top of the queue" (for deportation consideration), thus triggering, on behalf of the applicants, the flurry of correspondence already referred to.

36. It is argued that by the time the Minister was in receipt of this correspondence and the accompanying testimonials, the Deportation Orders had been signed. Further, the respondents state that it is noteworthy that the first named applicant's solicitor did not make any immediate enquiry upon receipt of the letter of 1st March 2010, despite the apparent conflict between it and the accompanying report. On this point, I note that reference is made in the Minister's letter to receipt of a letter of 8th March from the applicants' solicitor but the court was not advised of the nature or content of that correspondence.

37. The respondents also submit there was nothing in the representations that went to the Minister between 9th and 24th March 2010 that could not have been supplied at an earlier stage, i.e. prior to the signing of the Deportation Orders on 9th March 2010. The respondents argue that the testimonials furnished refer to activities on the part of the applicants in respect of which the Minister could have been apprised prior to 9th March 2010. In this regard, the respondents rely on the dictum of Peart J. in *Lupascu V Minister for Justice Equality and Law Reform* [2004] IEHC where he states:-

> *"It is claimed also that the Minister "ought to have afforded the applicant a further opportunity to make updated submissions". In this regard it is clear that any updated submissions which the applicant wished to make could have been made at any time prior to 14th December 2003, and if he had done so, then almost certainly the Minister would have been obliged to have considered them, and would have done so. That follows in my view from what I stated in Botusha, where the Minister was made aware that a medical opinion was being obtained, but he made the Deportation Order without allowing a reasonable time to receive the promised report. It is another matter completely to say that in all cases where there has been a certain amount of delay, the Minister must communicate with such an applicant and invite a further submission. In this particular case, the applicant himself who is possessed of all relevant knowledge about his own circumstances was aware as of the 26th March 2003 that his application for leave to remain was under consideration and that the Department had stated that it was not in a position at that time to issue him with an identification document. That was a very clear signal which ought to have prompted the applicant to update his situation if he so wished.*
>
> *I do not consider it to be arguable that the .Minister is in breach of any obligation, statutory or otherwise as far as fair procedure is concerned, to communicate with the applicant and invite a further submission. The applicant is not simply an inactive or passive participant in this process. He is obliged to act in his own interests, and in this case it is a fact that he sat back and waited for things to happen and he cannot now complain in that regard"*

38. Further reliance is placed by the respondents on the dictum of Peart J in *B.F. v Minister for Justice Equality and Law Reform* [2008] IEHC 126 where he opined:

> *"In the present case, it was the applicant alone who failed to comply with the obligation upon her to keep in touch with the Minister's office if her circumstances here changed at any time and in any material respect following the representations made for leave to remain. She cannot simply sit back and presume that the Minister will write to her and seek out any further information before making the decision. A person in the position of the applicant is not a mere passive participant in the process, albeit that she was very young. There is an onus upon her, and not upon the Minister, to ensure that anything which she wished the Minister to take account of was furnished to him. She had at all times legal advice available to her and could at any time have sought to have her circumstances updated through them if she had wished, or directly by communicating herself with the Minister's office.*
>
> *The Minister's obligation is to consider such representations as are made to him, and it was made perfectly clear in the letter to which I have referred that the applicant was free to keep her information updated as required ahead of the decision being made, and that she should do so immediately there was any relevant change in her circumstances which she wished to have taken into account. In my view the Minister was entitled to, and did, make his decision on foot of representations made to him by the applicant and he was entitled to presume that if there were any other matters which needed to be taken into account, these would have been communicated to him by or on behalf of the applicant.*

In my view there are no substantial grounds made out for contending that the decision made was one which breached fair procedures. "

39. With regard to the applicants' counsel's submission that the Minister, in light of the mistake made on 1st March 2010, should have of his own volition set aside the Deportation Order and considered afresh the applicants' representations, the respondents state that while it may be that the Minister has a discretion to so do, in the present case the applicants' counsel has not cited any case law to the Court to say that that discretion should have been exercised here.

40. It is further contended that had the Minister exercised such discretion upon receipt of the applicants' solicitors letter of 9th March 2010 and reconsidered the applicants' leave to remain application but nonetheless made a Deportation Order, the arguments being advanced on behalf of the applicants in this case would suggest that upon receipt of the next set of representations that came in from the applicant, the Minister would again be obliged to set aside his Order and consider anew the application for leave to remain. This, the respondents submit, is an untenable position.

Consideration

The regulatory framework governing deportation orders is as follows:

Regulation 4(5) of the European Communities (eligibility for Protection) Regulations 2006 provides:

"*Where the Minister determines that an applicant is not a person eligible for subsidiary protection, the Minister shall proceed to consider, having regard to the matters referred to in section 3(6) of the 1999 Act, whether a deportation order should be made in respect of the applicant*"

Section 3(1) of the 1999 Act makes the following provision

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

Following notification of a proposal to deport pursuant to s 3(3)(a), the procedure for the making of representations is dealt with in Section 3(3)(b) of the 1999 Act as follows:

"*A person who has been notified of a proposal [to deport]..may, within 15 working days of the sending of the notification, make representations in writing to the Minister and the Minister shall-*

(i) before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and

(ii) notify the person in writing of his or her decision and of the reasons for it ... "

Section 3(6) of the 1999 Act provides that:

"*In determining whether to make a deportation order in relation to a person, the Minister shall have regard to -*

(a) the age of the person;

(b) the duration of residence in the state of the person; (c) the family and domestic circumstances of the person;

(d) the nature of the person's connection with the State, if any;

(e) the employment (including self employment) record of the person;

(f) the employment (including self employment) prospects of the person;

(g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);

(h) humanitarian considerations;

(i) any representations duly made by or on behalf of the person; (j) the common good; and

(k) considerations of national security and public policy, so far as they appear or are known to the Minister. "

Section 3(11) states:

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

It is worthy of note that the obligation on the Minister to consider representations made by or on behalf of a proposed deportee is twice referred to in Section 3 of the 1999 Act.

It is against the backdrop of the above legislative framework that the Court must consider whether the Minister was correct in law when he advised that the representations submitted on behalf of the applicants between 9th and 24th March 2010 were to be considered only in the context of an application to revoke the Deportation Orders made by him on the 9th March 2010.

41. In the first instance, I'm satisfied that the applicants' solicitors letter of 9th March 2010 alerted the Minister to the contradiction between the contents of the letter sent to the first named applicant on the 1st March 2010 (where she was advised that "The Minister has determined (emphasis added) that you are persons eligible for subsidiary protection") and the contents of the accompanying report furnished to the first named applicant and which was under the signature of three officials in the Minister's Department. Furthermore, it has to be inferred from the available chronology that at the time of the signing of the Deportation Orders the Minister had knowledge that on 1st March 2010 the first named applicant had received a letter advising her that she was eligible

for subsidiary protection.

42. While it appears to be acknowledged by all concerned that the conflict between the letter and the accompanying report was caused by a clerical error (the absence of the word "not" in the letter of 1st March 2010), to my mind this conflict was nonetheless of sufficient weight as to put the Minister on enquiry as to the first named applicant's confusion as to her exact status between 1st and 9th March 2010, particularly when her solicitor, on the latter date and in prompt response to the Minister's letter, alerted the Minister of the uncertainty as to the first named applicant's status, expressed as follows:-

> *"..I would ask the Minister to grant the applicant leave to remain as I am unsure of her present status, as she was granted subsidiary protection on the 1/3/2010 and her daughter was refused, but reading the determination of the applicant's case, it is confusing how she was granted subsidiary protection. "*

43. Once in receipt of this letter, the Minister was aware that he was perceived by the first named applicant to have effectively given with one hand and to have taken away with the other. What was the obligation of the Minister in such circumstance? Section 3(11) of the 1999 Act clearly vests in the Minister the discretion to revoke a deportation order. The exercise of that discretion is not predicated on there having to be an application to revoke by a recipient of a deportation order. The provision simply states "*The Minister may by order amend or revoke...."* In these circumstances and in the interests of fairness, it behoved the Minister, to exercise the discretion vested in him pursuant to s. 3 (11) of the 1999 Act, to, *of his own volition*, revoke the Deportation Orders he had signed on the 9th March 2010, and consider afresh the applicants' application for leave to remain submitted in May 2009, including whatever other representations had been made by them or on their behalf by the time that reconsideration commenced. At a minimum, upon receipt of the applicants' solicitor's letter of 9th March 2010, the Minister had a further 8 testimonials, in addition to the representations which had been furnished in May 2009. I am not satisfied to accept the respondents' arguments that the Minister's only obligation was to treat the correspondence of 9th to 24th March as an application to revoke valid deportation orders in circumstances where he was on notice of the confusion the letter of 1st March had caused. Nor do I find merit in the argument that if the Minister was obliged to reconsider the leave to remain application under s. 3(3) on or after 9th March 2010, this would effectively open the floodgates in these type of applications. That argument is only tenable if the Minister's response to the applicants' solicitor's letter of 9th March 2010 was without infirmity, which, as I have found, is not the case here. Had the Minister set aside the Deportation Orders signed on 9th March 2010 (as he in fairness should have for the reasons set out above), his statutory obligation, upon commencement of his new determination, was to consider whatever representations were before him at the time of that reconsideration and no more. This is in line with the dictum of Peart J. in *B.F.*, referred to above. If he then went on to make a deportation order following hiss. 3(3) consideration, thereafter, any further representations as may be received by him would fall to be considered in the context of an application under s. 3(11) to revoke the deportation order. In the event of such a revocation application, the applicants here would have to establish that they satisfied the requirements laid down in *Smith v MJE* [2013] IESC 4.

44. With regard to the respondents' reliance on the dictum of Peart J. in *Lupascu* (already quoted), while I am in agreement with the general sentiments expressed therein, the case cannot be viewed as dispositive of the issue that arose for determination here and it was thus of no particular assistance to this court.

45. For the reasons set out above, I am satisfied that the first and second named applicants have established a ground to warrant the quashing of the two Deportation Orders made against them. There is no basis to quash the Deportation Order made in respect of the third named applicant on the s. 3 ground as the infirmity found by the court arose in the processing of the applications of first and second named applicants.

The Article 8 Ground

46. On behalf of the applicants, it is submitted that the author of the examination of file conducted in respect of the first and second named applicants and the third named applicant respectively erred in law in that the Minister failed to accept that their Article 8 rights were engaged. It is argued that the assessment of the applicants' private life rights under Article 8 was irrational and that there was no consideration of the proportionality of the decisions to make Deportation Orders in respect of them. The applicants rely on the judgement of MacEochaidh J in *C.I. V Minister of Justice Equality and Law Reform*, [2014] 7 JIC 3118 (hereinafter referred to as *the Irehovbude Case*).

47. In the "examination file" under s. 3 of the 1999 Act pertaining to the first and second named applicants, the following is stated under the heading "*Consideration under Article 8 of the European Convention on Human Rights (ECHR)* "

> *"If the Minister signs a Deportation Order in respect of[the first and second named applicants] this decision would engage their rights to respect for private and family life under Article 8(1) of the ECHR.*
>
> ***Private Life:***
>
> *If the Minister decides to deport ... . this may constitute an interference with their right to respect for their private life within the meaning of Article 8(1) of the ECHR. This relates to their work, educational and social ties that they may have formed since their arrival in the State. [The first and second named applicants] claim to have made every effort to integrate into their new surroundings since their arrival. [The first named applicant] has taken part in many community activities, and is a member of voluntary groups including cultural groups and has made friends in the State. [The second named applicant] is attending primary school at present and there is correspondence on file stating that he is progressing well in school and has made friends.*
>
> *However, it is not accepted that such interference will have consequences of such gravity as potentially to engage the operation of Article 8.*
>
> *As a result, the decision to deport [the first and second named applicants] in pursuance of lawful immigration control does not constitute a breach of the right respect for her private life under Article 8 of the ECHR.*
>
> ***Family Life***
>
> ***…… ……."***

48. With regard to the third named applicant, the Article 8 consideration is addressed in her "examination file" as follows:-

> *"If the Minister signs a Deportation Order in respect of[the third named applicant], this decision will engage her rights to*

respect for private and family life under Article 8(1) of the ECHR.

Private Life

It is accepted that a decision by the Minister to deport .... may constitute an interference with her right to respect for her private life within the meaning of Article 8(1) of the ECHR. This relates to her work, educational and other social ties that she has formed in the State as well as any matters relating to her personal development since her arrival in the State. It has been submitted that the applicant wishes to remain in Ireland, inter alia, to further her education.

In the application for leave to remain the applicant's solicitors submit that the applicant is in poor health .....

The applicant's solicitors have submitted country of origin information which, they submit, support their client's contention that she would not get adequate care and attention in Nigeria"

49. After a consideration of the country of origin information, the "examination file" analysis continued:-

"The foregoing country of origin information illustrates that public health services do exist in Nigeria. Whilst not up the standard common in western countries there is provision for the availability of health professionals and medicines.....disease treatment and child care services are also available in Nigeria.

However, it is not accepted that such interference will have consequences of such gravity as potentially to engage the operation of Article 8. As a result, the decision to deport [the third named applicant] in pursuance of lawful immigration control does not constitute a breach of the right of "respect" for [her] private life under Article 8 of the ECHR.

Family Life

…… ……"

The preliminary objection raised by the Respondents: the applicants' failure to plead Article 8 of the ECHR in the statement of grounds

50. The respondents object to the applicants invoking (in the context of the written and oral submissions) Article 8 of the ECHR as a ground of challenge to the Minister's Deportation Orders and the respondent argues that this is an attempt on the part of the applicants to introduce a new ground of challenge which was not pleaded in their statement of grounds. In the course of written and oral submissions, they argue that in the absence of any reference to Article 8 in the statement of grounds, it is not now open to the applicants, some four years after the commencement of the within proceedings, to introduce a new ground of challenge. Even after receipt of the respondents' written submissions in July 2014, when on notice of the respondents' objection, no attempt was made by the applicants to seek to amend their pleadings, albeit that such an attempt would be late in the day. It is further argued that the applicants have not sought to explain why they did not include the Article 8 ground at the time of the commencement of the judicial review pro1:eedings or shortly thereafter. In the respondents view, this is all the more puzzling given that the applicants' counsel in the present case were the same legal team who specifically pleaded the Article 8 ground in the judicial review application in *Irehovbude* which had been initiated a year prior to the present case.

51. The respondents cite a considerable body of case law to forestall any consideration by this Court of the Article 8 ground.

52. In particular, the respondent relies on the dictum of Finlay Geoghegan J in *Mursean V Minister for Justice* [2003] where she states:-

"The express requirement in sub-s. 2(b) of s. 5 of the Act of2000 that the application be made by motion grounded in the manner specified in 0. 84 which itself requires a statement of grounds setting out the grounds relied upon indicates that the Oireachtas intended not only that any decisions covered by sub-s. I of s. 5 be challenged within a short space of time but also that the applicant be obliged to set out the grounds of challenge within such short space of time. Accordingly if an applicant seeks to amend so as to introduce an entirely new ground of challenge the intention ofs.5(2) of the Act of 2000 appears to be that he or she must satisfy the High Court that there is good and sufficient reason for extending the period within which such new challenge may be made."

53. The applicants have not acted with "*great despatch*" as required by the legislative intent set out in the 2000 Act and in this regard the respondents rely on the dictum of Peart J. in *Azubugo V Refugee Appeals Tribunal* [2007] IEHC 290. Nor, it is contended, did the applicants form the intention to challenge the deportations on Article 8 grounds in 2010 notwithstanding that they could have done so at that time given that that very point had been pleaded by their lawyers in *Irehovbude* a year earlier.

54. The respondents submit that the delay here is in excess of four years, 100 times the statutory time limit provided for judicial review proceedings of decisions such as are sought to be impuned in the present proceedings. Reliance in this regard is placed on a number of authorities. The first is the decision of Cooke J. in *S.M.O. V Refugee Appeals Commissioners & Ors* which, quoting Costello J. in *O'Donnell V Dun Laoghaire Corporation* [1991], set out that the onus is on the plaintiff to explain any justify any delay. Reliance is also placed on the dictum in *Guo V Minister for Justice & Ors* [28th April 2010], which was adopted in *Lofinmakin V Minister for Justice & Ors* [2011] IEHC 38, wherein Herbert J. (in *Guo*) suggested that the time limits exist to prevent an abuse of the judicial review process.

55. Particular reliance is placed by counsel for the respondent on the approach adopted by Hanna J. in *Ugbo V Minister for Justice Equality and Law Reform & Ors* [2010] IEHC 80 where he states:-

"The Court notes that the delay in pleading or seeking to plead the new grounds in relation to refoulement ran to more than jive times the length of time allowed to the applicants under the statute. Thus it is clear that the delay was substantial in the light of the short time frame envisaged by the Oireachtas... The Court is satisfied that the proposed grounds in relation to refoulement could, with reasonable diligence, have been pleaded in the original statement of grounds... "

The Court is urged to follow the approach adopted by McDermott J. in *S.J. V Refugee Appeals Tribunal & Ors* [2014] IEHC 108 (cited with approval by Barr J. in *Bah V RAT & Ors*, 2nd October 2014) where McDermott J. states:-

"An applicant is obliged to initiate any proposed amendment at the earliest possible opportunity having regard to the

strict time limits that apply in respect of judicial review, and that the nature of such proceedings require a clear and focused statement of grounds relevant to the facts of the case to be advanced at the earliest possible opportunity.

To allow an amendment in this case would, in effect, allow the applicant to advance an entirely new cause of action. It clearly entails a significant enlargement of the applicant's case. Although the nature of the relief sought remains unchanged by the proposed amendment, it completely transforms the nature of the challenge to a substantive attack on the subsidiary protection decision. To do so at this stage would be unfair to the respondent. "

56. Furthermore, the respondents argue that insofar as the applicants rely on grounds 4 and 5 of the statement of grounds as encompassing an Article 8 challenge, those grounds, as pleaded, fail the precision requirement enunciated by Cooke J in *Lajinmakin*.

57. Counsel for the respondents also rejects any suggestion that the respondents could have understood that the reference to "disproportionate" in ground 4 was in fact a challenge to the deportation under Article 8(2) of the ECHR.

58. As can be gleaned from their extensive submissions on the issue, the respondents approached the matter in the context that the applicants Article 8 arguments was a new ground of challenge and on there being no basis, in light of established jurisprudence, upon which this Court could entertain an application to amend the proceedings to include such a ground so late in the day.

59. Counsel for the applicants rejects the argument advanced by the respondent that Article 8 was not pleaded in the statement of grounds. Moreover, he emphasises that the applicants have not at any time and have not in the course of the hearing sought to apply to amend the statement of grounds.

60. The issue for determination therefore is whether the statement of grounds as presently formulated encompasses a challenge to the Deportation Orders on Article 8 grounds. As evidence that the Article 8 ground is adequately pleaded in the statement of grounds, counsel for the applicant refers the Court to grounds 4 and 5, albeit he concedes that these grounds "may not be the best pleadings of all times."

61. Ground 4 reads as follows:-

"The deportation decisions are unreasonable and disproportionate."

Counsel for the applicant submits that in making his decision to deport, the Minister did not consider proportionality.

62. Ground 5 is formulated thus:

"In making the deportation decisions, the first named respondent failed to give any, or adequate, consideration to: -

a. The strength of the applicants' attachment to this State given that the extensive length of time in the State. Further, the respondent failed to afford the applicants an opportunity to make further submissions in circumstances where significant delays occurred between the submission of the leave to remain applications and the making of the Deportation Orders;

b. The absence of any attachment on the applicants part to Nigeria;

c. The likely difficulties faced by the applicants if returned to Nigeria;

d. The likely consequences, for the applicants, in circumstances of their refoulement to Nigeria, including inter alia conseqeunces for their education, health, attachment to their country of residence and their general private life;

e. The representations submitted pursuant to Section 3 of the Immigration Act, 1999. In particular, the Respondent failed to consider representations of a significant nature submitted in advance of notification of the deportation orders. Further, the Respondent's statement that the said representations would be considered under section 3(11) of the Immigration Act, 1999 is unlawful particularly in circumstances where this Honourable Court has stated, and to the knowledge of the Respondent, that Section 3(11) decisions presume the existence of valid deportation orders already being in existence;

f The provisions of Section 5 of the Refugee Act, 1996, were not complied with in respect of each and all of the Applicants. Further, the prior decision of the Respondent to allow the third named Applicant an opportunity to submit an appeal to the Refugee Appeals Tribunal by means of permission under Section 17(7) ()of the Refugee Act, 1996, was wholly unconsidered by the Respondent. The failure to submit an appeal within the statutory period is a matter in which the said Applicant, or her mother, and [sic] blameless. "

63. Particular reliance is placed on the first three bullet points which, it is submitted, contain the "nuts and bolts" of private life under Article 8 to which the Minister failed to give any or any adequate consideration. The Court was reminded that the applicants original written submissions, furnished as they were to the respondent on 3rd July 2014, made the same arguments (at paras. 22-26 thereof) on the Article 8 issue as had been made in the *Irehovbude* proceedings. As of3rd July 2014, judgment in the I*rehovbude* case had not yet been delivered. The later revision of the applicants written submissions (November 2014) arose solely as a result of judgment in *Irehovbude* having been delivered by MacEochaidh J. on 31st July 2014. Accordingly, the applicants' written submissions, be it the July 2014 version or the November 2014 version, were not a consequence of the judgment of MacEochaidh J in *Irehovbude* since the Article 8 arguments had been canvassed by way of written submissions as early as 3rd July 2014.

64. With regard to the respondents' submissions on ground 4, I agree that a bare reference to "disproportionate" could not, of itself, be construed as a pleading referable to Article 8 of the ECHR and an argument made on that basis alone by the applicant's legal representative in support of Article 8 having been adequately pleaded may well fall into the realm of "*forensic hoopla*", as described by Cooke J in *Lofinmakin*.

65. I turn now to the ground 5 particulars relied on by counsel for the applicants which, I note, challenge the Deportation Orders on the basis that the Minister failed to give any or any adequate consideration to, inter alia,

"The strength of the Applicant's attachment to this State given that the extensive length of time in the State ....";

"*The absence of any attachment on the Applicants' part to Nigeria"; "The likely difficulties faced by the Applicants if returned to Nigeria*";

By way of comparison, I turn to what was pleaded in the statement of grounds in **Irehovbude**. Ground 4 thereof stated:-

> *"The decisions of the first named respondent making and/or affirming the Deportation Orders are ultra vires and unsustainable in law by reason of the failure to consider or make any assessment of the interference to the right to private life guaranteed to the applicants by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."*

66. Ground 6 alleged:-

> *"The reasons given for the decisions to make and/or affirm the deportation orders do not fall within Article 8(2) of the European Convention on Human Rights."*

67. I am not advised as to whether grounds 4 or 6 in *Irehovbude* were further particularised in the statement of grounds but it would appear not.

As regards the present case, the question is whether the Court should decline to embark upon a consideration of the applicants' Article 8 arguments in the absence of a specific reference to Article 8 of the ECHR in grounds 4 and 5 of the statement of grounds. I am satisfied that the Court should not decline to embark upon a consideration of the applicants' Article 8 arguments. It seems to me that this is a situation where some at least of the particulars (or in the applicants' counsel's words the "nuts and bolts") that one would expect to be itemised in an Article 8 private life challenge to the Minister's Deportation Order are pleaded in the statement of grounds in this case, absent the specific reference to the Convention and the relevant Article.

A reading of the introductory paragraph and the particulars in ground 5 harks back to some extent to the "examination of file" analyses carried out in respect of the first and second named applicants and the third named applicant. Those analyses contain, inter alia, "*Considerations under Article 8 of the European Convention on Human Rights (ECHR)."*

68. In light of the above I am satisfied that some components of an Article 8 challenge have been laid in the statement of grounds, albeit, as acknowledged by the applicant's counsel, the pleadings leave a lot to be desired. However, I find that there is sufficient in the statement of grounds for the respondents not to have been overly surprised when the applicants' written submissions of3 July 2014 set out arguments and case law with regard to Article 8 of the ECHR. I also take into consideration the fact that the applicants' submissions on the Article 8 ground were communicated to the respondents prior to the delivery of the judgment in *Irehovbude*. In all the circumstances, and since the respondents are on notice since July 2014 of the type of Convention arguments being made by the Applicants I do not find that the respondents are prejudiced by the paucity of the pleadings.

69. In the course of their oral submission the respondents intimated that if the Court were minded to find that an Article 8 challenge has been adequately pleaded, they required time to make submissions in response to the substantive arguments made on behalf of the applicants. Thus, at this juncture the Court will await such submissions before embarking on the substantive consideration of the Article 8 ground