Neutral Citation Number: [2007] IEHC 430

**THE HIGH COURT**

**[2006 No. 1370 J.R.]**

**BETWEEN**

**B.O.B., D.O.A. (A MINOR) AND P.O. (A MINOR)**
**SUING THROUGH THEIR MOTHER AND NEXT FRIEND B.O.B.**

**APPLICANTS**

**AND**
**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENT**

**Judgment of Mr. Justice Birmingham delivered 20th day of July, 2007**

1. The first named applicant is the mother of the second and third named applicants. All three are Nigerian nationals. The applicants seek a large number of reliefs set out in the notice of notion, in summary these reliefs are designed to quash the decision of the Refugee Applications Commissioner (ORAC) directing that their application for asylum be transferred to Britain, and quash a Transfer Order in respect of them, made by the Minister for Justice, Equality and Law Reform (the Minister) following the decision and the further refusal of the Minister to revoke or stay the Transfer Order. In essence the reliefs are sought so as to facilitate a consideration of their claim for asylum in this State.

**The facts**

2. The first named applicant travelled from Nigeria with her two children, her son D., the second named applicant who was born on the 24th June, 1997, and is now ten years old and her daughter P., the third applicant who was born on the 15th February, 2002, and is now five years of age. In Britain, the first named applicant sought asylum on her own behalf and on behalf of her two children. Her application was unsuccessful, as was an appeal. She sought on three occasions to re-enter the asylum system and have the case re-opened by presenting further information and on three occasions she was refused. However, ultimately, on the 16th day of August, 2006 the applicants were directed to attend at Glasgow airport on 23rd August to catch a flight to London Heathrow to board a flight to Lagos. The applicants did not present themselves at Glasgow airport as directed and instead the family travelled to Ireland arriving in the State on the 27th September, 2006. The following day she submitted an asylum application on behalf of herself and her children.

3. It is to the credit of the first named applicant that in these initial contacts she disclosed the fact that she and her children had sought asylum in Britain.

4. On the foot of this application which was made under s. 8 of the Refugee Act, 1996 the matter fell for consideration under Article 4 of the Refugee Act 1996 (Section 22) Order 2003 - S.I. No: 423 of 2003. This order insofar as material provides as follows:

> 4 - (1) Where an application is made under section 8 of the Act, the Commissioner shall determine whether, in accordance with the Council Regulation, the application should be examined in the State.
>
> (2) The Commissioner shall, before making a determination under this Article, take into consideration all relevant matters known to him or her, including any representations made by or on behalf of the applicant."

5. Following their arrival in the State the applicants consulted a solicitor, Mr. Conor Ó Briain who made detailed representations to the Commissioner on their behalf by letter dated 4th October, 2006. The representations at this stage focused in particular on the situation of the applicant D., who suffers from a very significant hearing disability, associated with which and consequent upon which he also experiences learning difficulties. The letter makes the point that over and above the considerations common to him, to his sister and to his mother he feared persecution arising from his disability. This fear was based firstly on the lack of services in Nigeria to meet his disability needs and secondly a fear of being subjected to stigma, ostracism and discrimination by reason of his disability. The letter was accompanied by an amount of supporting documentation.

6. On the 7th November, 2006 an official of ORAC recommended that the application should be transferred to the United Kingdom. The recommendation referred to the fact that a request referred to as "a take back request" had been made of the United Kingdom authorities and that the United Kingdom had agreed to "take back". This recommendation/submission also stated that the applicants file had been examined and all information contained within it had been considered, including all representations received on the 6th October, 2006 from Conor Ó Briain, solicitor. Mr. Saul Woolfson, counsel for the applicants is very critical of the ORAC procedures and I will return to this aspect.

7. By letter of the 8th November, 2006, the applicants were informed that the Refugee Applications Commissioner had determined that the United Kingdom was responsible for dealing with the applications for asylum. The letter went on to inform them that the decision could be appealed to the Refugee Appeals Tribunal (R.A.T.) within fifteen days, that the Minister had been notified of the determination with a view to making arrangements for their transfer to the United Kingdom and it was explained that the fact of an appeal would not suspend the transfer of the application or their removal to that country.

8. The statutory appeal procedure was not invoked by the applicants. It appears this decision was taken because of the restricted nature of the appeal. It would not halt the process and the role of the R.A.T. under the Order seems to be confined to identifying the correct country having responsibility to take charge of the application.

9. On 13th November, 2006, a transfer order was made by an official of the Department of Justice, Equality and Law Reform (the Department). The applicants were informed of this by letter of the same day. On the 15th November, 2006, Mr. Conor Ó Briain, solicitor for the applicants wrote to the Department requesting that the Transfer Order be revoked and not be implemented. As with the previous letter, this too, was a detailed letter, referring to and accompanied by an amount of supporting documentation. The lengthy letter dealt with the position of each of the applicants in turn. As far as D. is concerned the information in relation to his hearing difficulties was repeated and brought up to date by referring to updated medical information. The letter referred to the manner in which the issue of the hearing difficulties had been dealt with in Britain and in that regard was very critical indeed of how the issue was addressed.

10. So far as the applicant P. is concerned an issue was raised about her mother's fear that she would be subjected to Female Genital Mutilation (FGM) if returned to Nigeria. Again the issue of FGM had been canvassed in the course of the proceedings in Britain and again the letter is highly critical of the manner in which this aspect was dealt with in Britain.

11. So far as the first named applicant (Mrs. B.) is concerned the letter pointed out that there had been a significant and material

change in the circumstances of the family. Mrs. B. had been admitted to St. Loman's Hospital in Mullingar with mental health difficulties and her two children were in an emergency placement with the Health Service Executive. The letter asserted that in the light of the circumstances outlined that the transfer could not lawfully proceed. Reference was made to their rights under Article 40 of the Constitution, their rights under the United Nations Convention on the Rights of the Child and their rights under Article 8 of the European Convention on Human Rights. As an absolute minimum there was a requirement, it contended for full and detailed consideration of the children's situation. Further, the letter continues the mother's situation and particularly her situation in the context of the care of her children also demanded proper detailed consideration and analysis. Reference were made to the inadequacies of mental health treatment and facilities in Nigeria. I have referred to documentation accompanying the letter of the 15th November, 2006. The letter which is lengthy and comprehensive and refers to and quotes from the documentation was, in the first instance, sent by fax on the afternoon of the 15th November. However, because the supporting documentation was voluminous, this was not faxed but rather was hand delivered later that afternoon. The relevance of this is that the Department responded almost immediately to the receipt of the faxed letter, refusing the undertaking sought and insisting that the applicants should present themselves to the Garda National Immigration Bureau at a time they would not have sight of the supporting documentation. Significantly, in the context of this case the letter indicates the role of the Minister and that of the Dublin II Transfer Unit in Dublin II Procedures was to give effect to determination of the ORAC and to transfer applicants to other Member States to have their asylum cases examined there. This view of the Department was to be reiterated in subsequent correspondence. In the course of that reiteration it was stated that "medical reasons alone are not criteria for deferring the enforcement of Transfer Orders". This correspondence also referred to the adequacy of medical, welfare and social protection facilities in the United Kingdom to meet the needs of the family. For my part I find this last assertion, to be somewhat disingenuous. It is absolutely clear that the concerns being expressed do not relate to the situation in Britain but to the situation in Nigeria, to which the family was likely to be removed. It was of course for that reason that a volume of material had been put before the Minister and the department relating to facilities available in Nigeria for those with hearing handicaps and those with mental health problems.

12. Having failed to achieve the desired objective in correspondence the applicants moved for and obtained an interim injunction on the 20th November, 2006. Thereafter, leave was conceded and the grounds for relief were amended and expanded.

**Relevant legislation**

13. It is necessary to refer to relevant domestic and EU legislation most directly relevant. Council Regulation (EC) No. 343/2003 provides as follows:

> Article 3. 1. Member States shall examine the application of any third country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria sets out in Chapter III indicate is responsible.
>
> 2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant."

14. The Regulation goes on to establish what is described as a hierarchy of criteria for determining the Member State responsible. In the current case it is not in dispute that applying these criteria identifies the United Kingdom as the Member State responsible. In these circumstances it is not necessary to say any more about the hierarchy of criteria at this junction.

15. Section 22 of the Refugee Act, 1996 (as amended) empowers the Minister to make orders as appear to him necessary or expedient to give effect to Council Regulation (EC) No. 343/2003. The orders contemplated by s. 22 are contained in the Refugee Act 1996 (Section 22) Order 2003.

16. A number of provisions of the statutory instrument are relevant to the determination of this case. Those most in issue would seem to be the following:

**Determination under Council Regulation**

> Article 4 (1) "Where an application is made under section 8 of the Act, the Commissioner shall determine whether, in accordance with the Council Regulation, the application should be examined in the State.
>
> (2) The Commissioner shall, before making a determination under this Article, take into consideration all relevant matters known to him or her, including any representations by or on behalf of the applicant.

**Taking Charge and taking back under the Council Regulation**

> Article 5 (1) Where the State is the requested Member State for the purpose of the Council Regulation, the functions of the requested Member State under the Council Regulation should be carried out by the Commissioner.
>
> (2) The Commissioner shall not acceed to a request that the State should take charge of or take back an applicant in accordance with the Council Regulation without the prior consent of the Minister which shall not be unreasonably withheld.

**Notice of intention to transfer Applicant to another Council Regulation country**

> Article 6 (1) Where the Commissioner makes a determination under Article 4 that an applicant should be transferred to a Council Regulation country, he or she shall, as soon as may be, cause notice in writing of the determination and of the reasons for it to be given to the applicant and his or her solicitor (if known) and to the Minister.
>
> (2) A notice to the applicant under paragraph (1) shall be in the form set out in Schedule 1 or a form to the like effect and shall include statements-

a. that the applicant concerned may appeal to the Tribunal under Article 8 against the determination aforesaid not more than 15 workings days from the date of the determination;

b. that an appeal shall not, of itself, operate to suspend the transfer of the application and the applicant to the Council Regulation country concerned;

c. that if after the transfer to the Council Regulation country, the decision to transfer is set aside on appeal, arrangements will be made for the reception of the applicant into the State;

d. that the matter has been referred to the Minister with a view to making arrangements for the transfer of a person from the State to a Council Regulation country.

Article 7 (1) Subject to the subsequent provisions of this Article the Minister may by order (in this order refer to as a "Transfer Order" in the form set out in Schedule 2 or a form to the like effect, require an applicant, in respect of whom a determination under Article 4 that he or she should be transferred to a Council Regulation country has been made, to leave the State on or before such date and within such period as may be specified in the order and to go to the relevant Council Regulation country.

**Article 8. Appeals**

Article 8 (1) An applicant may appeal to the Tribunal against a decision of the Commissioner that he or she should be transferred to an Council Regulation country and, if he or she does so, the Tribunal shall, unless the appeal is withdrawn or deemed to be withdrawn, make a decision in writing in relation to the appeal affirming or setting aside the determination and shall send a copy of the decision, including the reasons for the decision, to the applicant and his or her solicitor (if known), the Commissioner and the Minister.

**The issues in the case**

**Determination of the Commissioner**
17. In his written submissions and in oral argument, counsel for the applicants has been extremely critical of the determination of the Commissioner. He draws attention to the fact that when the matter was before the Commissioner detailed submissions were made by his instructing solicitors directed in the main towards the applicant D's hearing situation, and the implications for him of a return to Nigeria. The submissions by his solicitor were, he suggested, grounded on authoritative country of origin information.

18. Given that the issues relating to D's fundamental human rights had been raised there was an obligation to consider the matter with anxious scrutiny. He points out a number of what he says are deficiencies in the approach of the Commissioner. So he says there is no direct reference to the Council Regulation. He says no reasonable decision-maker could have regarded the exercise engaged in as a proper exercise of discretion and what happened amounted to a closing of ears. The letter of the 8th November informing the applicants of the determination makes no reference to the fact that they face repatriation, this is particularly serious given that the available documentation made clear that the process in Britain was at an end, that the decisions there were final and unappealable, and the stage had been reached where arrangements for travel to Nigeria were being put in place. He was particularly critical of the paucity of reasoning.

There is no doubt the reasoning and the spelling out of the reasons for the decision is very terse indeed. It comprises, following recitals in relation to the request to the British authorities and their response of the following statement:

"I have examined the applicant's file and all information contained within it has been considered, including all representations received in this office on the 6th October, 2006 from Conor Ó Briain Solicitors."

19. So far as this statement is concerned counsel says that while conceivably that might have passed muster if the traditional *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, principles were involved, it falls woefully short of what is required if the decision-maker is to engage in anxious scrutiny. It should be condemned by this Court if this Court engages in an exercise of anxious scrutiny.

20. It seems to me the difficulty facing counsel is that the formula of words he criticises is very similar indeed to a form of wording approved by the Supreme Court in *P, L, and B, v. The Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164. The formula under consideration there was:

"The reasons for the Minister's decision are that you are a person whose refugee status has been refused, on having regard to the facts as set out in s. 3(6) of the Immigration Act, 1999 including the representations received on your behalf, the Minister is satisfied that the integrity of public policy and the common good in maintaining the integrity of the asylum and immigration system outweigh such features of your case as might tend to support your being granted leave to remain in this State."

It would seem this formula of words was something of a standard form. It made no specific reference to any particular representations that were received and considered. In contrast, the decision in the present case, refers specifically to the representations actually received.

The issue of the adequacy of a decision was also considered in *Laurentiu v. The Minister of Justice, Equality and Law Reform* [1999] 4 I.R. 26 where the decision was in the following form:

"I am directed by the Minister for Justice, Equality and Law Reform to refer to your request for permission to remain in Ireland on behalf of the above named and to inform you having taken all the circumstances of his case into consideration including the points raised in your submission, it has been decided not to grant your client permission to remain."

Considering this statement Geoghegan J. held at page 34:

> "I do not think there was any obligation constitutional or otherwise to set out specific or more elaborate reasons in that letter as to why the application on humanitarian grounds was being refused. The letter makes clear that all the points made on behalf of the applicant had been taken into account and of course they were set out in a very detailed manner. The letter is simply stating that the first respondent did not consider the detailed reasons sufficient to warrant granting the permission to remain in Ireland on humanitarian grounds. It was open to the first respondent to take that view and no court can interfere with a decision in these circumstances."

21. In this case the decision-maker states specifically that he has examined the file and everything contained in it making particular reference to the representations from Mr. Ó Briain, Solicitor. The decision-maker states specifically that he has considered material which he identifies and it would seem to me to require cogent evidence to displace that assertion and to establish a want of consideration. Such evidence is lacking in this case.

It also seems to me that the context in which the Commissioner came to make the determination was of some significance. The applicants at that stage had already had their application considered in a Member State. Any reading of the Council Regulation makes clear that it is envisaged that in general an application for asylum will be considered in a single Member State. The scope of the regulation is concerned with identifying the single Member State involved and putting in place procedures for processing the application following the identification of the State responsible. Insofar as the possibility of derogation arises this is a right vested in the Member State. In that regard I respectfully agree with a decision of Smyth J. in *Savin v. The Minister for Justice, Equality and Law Reform* delivered on the 7th May, 2002. In that case, Smyth J. held that the applicant had no right to require the State to exercise its discretion, at all, or in her favour.

**The making of the Transfer Order and the failure to revoke the Order**

22. While each of these two decisions is the subject of separate challenges, it is probably more convenient to deal with the issues raised together. There is no doubt that the detailed submissions made on behalf of the applicants were never considered by or indeed on behalf of the Minister. This is not a case where one is required to consider whether all relevant material was considered or whether irrelevant factors were considered. The Minister through his officials firmly and with determination declined to consider the matter at all. If the applicants were entitled to have their submissions and representations considered they must succeed, because manifestly that did not happen. The real question then is did they have such an entitlement.

23. Counsel for the applicants is firm in his submission that his clients do indeed have such a right, that the minister has a discretion to decide whether to make a transfer order and that he has discretion to revoke the transfer order. Having such a discretion it is submitted the Minister must exercise it and in doing so must apply the principles of natural and constitutional justice. He draws attention to the terms of the Council Regulation which as he is says is directly applicable, to the use of the word "may" in the statutory instrument which states that the Minister may make an transfer order. He places particular emphasis on a decision of Finlay Geoghegan J. in the case of *Makumbi v. the Minister of Justice, Equality and Law Reform*, 15th November, 2005.

For the authorities Ms. Farrell B.L. says that a consideration of the scheme of the regime set in place by the statutory instrument makes it clear that in relation to the transfer of applications and the identification of the country responsible the role is that of the Commissioner and that the role of the Minister under the scheme is to give effect to the decision of the Commissioner. She says that the *Makumbi* decision should not be followed and in any event she says it is clearly distinguishable.

24. It must be emphasised that counsel for the applicants puts his arguments very firmly in the context of the fundamental human rights of each one of his clients, in D's case his hearing situation, in P's case the exposure to F.G.M. and in Mrs. B.'s case her mental health.

25. It can, be said at once that the fact that counsel seeks to invoke a right to consideration in each case in such widely differing circumstances, establishes that the right, if it exists, is of wide and general application. Any individual facing transfer to another Member State, who contends that his fundamental human rights are engaged would be entitled as of right to have the matter considered by the Minister. Given that by definition almost all asylum seekers will contend that their human rights are under threat whether that be correct or incorrect, whether it be well-founded or ill-founded it would mean that anyone whose transfer is contemplated would be entitled to have their request for non implementation considered.

26. To make that observation is not to raise an appalling vista argument but to address the consequences as an aid to interpretation. If one interpretation appears to give effect to the objectives of the Council Regulation and the policies, principles and objectives underlying it and the other might seem to obstruct the effective operation of the scheme put in place by the Regulation then this would, assist in determining which is the correct interpretation.

27. So far as the Council Regulation is concerned, counsel for the applicants submits that the regulation specifically provides for a derogation and he says no domestic statute or statutory instrument can detract from that right as it was created by a directly applicable instrument.

There is no doubt whatever that the legislation permits a State to derogate in a particular case, though derogation is not mandated in any particular circumstance. However, for a State to derogate it is necessary for some particular individual or individuals to make a decision to that effect. The issue in this case is not the capacity of the State to derogate but rather, identifying who can make the decision to derogate.

28. Turning then to the transfer order, the issue is whether the Minister has an independent discretion to make or not to make an order in a particular case or whether the Minister's role is solely administrative, simply giving affect to and implementing the decision of the Commissioner.

29. The language of Article 7 of S.I. 423 of 2003 is that the Minister may make an order. (Emphasis added). The use of the word 'may' is suggestive of an absence of an obligation. However, Article 7 has to be seen in the context of the instrument as a whole. Article 4 provides that the Commissioner shall determine whether the application should be examined in the State. (Emphasis added). The language of the Article taken as a whole would suggest that subject to any right of appeal the entitlement and indeed obligation to determine the issue is vested in the Commissioner. Article 4 makes no reference to any role for the Minister approving or disapproving the determination. In contrast, Article 5, the Article which deals with the situation where the State is requested to "take back" does provide specifically for a Ministerial role. It seems to me that the fact that Article 5 deals specifically with the issue of Ministerial consent, where as no comparable provision is to be found in Article 4 is a strong indication that no active discretionary role is seen for the Minister.

30. I also attach some significance to the fact that the Article expressly provides for an appeal to the Refugee Appeals Tribunal, an

appeal that is restricted both in the scope, in that the role of the RAT is confined to considering whether the correct country has been identified and effect in that, the appeal does not, of itself suspend the transfer of an application and the applicant. It would seem strange if alongside the restricted statutory right to appeal there existed an independent freestanding discretion vested in the Minister to which applicants could turn as an alternative to exercising the statutory right of appeal.

31. Counsel for the respondent has relied on the case of the *Application of Thomas Dunne* [1968] I.R. 105, a Supreme Court judgment in a licensing case. In that case the provisions of the Intoxicating Liquor Act, 1960 were considered. Section 19(1) provided that the District Court "may order" the extinguishment of an appropriate seven-day licence if the applicant shows to the satisfaction of the court that he has procured the consent of the holder thereof to its extinguishment. The matter came before the Supreme Court by way of a case stated. The Court held:

> That where a statute employs the words "may order" to confer on a court jurisdiction, subject to the fulfilment by a defined applicant of certain statutory conditions precedent, to make an order which would result in the applicant acquiring a right or benefit by the provisions of the statute, the said words should be construed as imposing on the court an obligation to make such order once the court is satisfied that these conditions have been fulfilled by the applicant.

I have not found that case of great assistance. *Dunne's* case was concerned with a situation where an applicant had complied with statutory conditions and in consequence had an anticipation that the desired consequences would follow. Here, there will normally not be a disappointed party who will feel aggrieved if events do not follow their usual course. It is, I suppose, just possible to conceive of a situation where the State identified for the purposes of the Regulation might feel disappointed at being denied the opportunity to adjudicate on an asylum application. However any such case would be few and far between.

32. On balance, I am of the view that the section does not preclude a Minister who wished to do so from declining to make a transfer order in a particular case. However, that is not the end of the matter. It seems to me that it does not necessarily follow at all that an applicant in an individual case is entitled to insist on the Minister giving consideration to a request that an order not be made. Indeed, I am of the view that the scheme of the statutory instrument, which in this regard is entirely in harmony with the Council Regulation, is that the Commissioner having made a determination, the making of the transfer order will then follow as of course.

I believe my view that individuals do not have the right to insist on an adjudication by the Minister is consistent with the judgment of Smyth J. in *Savin v. Minister of Justice, Equality and Law Reform* 7th May, 2002 to which reference has already been made. It is my view that what is in issue is a right vested in the State to derogate that there is no duty whatever imposed on the State to do so in any particular case.

33. As we know on the 13th November, 2006 a letter was sent by the first named respondent informing the applicants of the making of the transfer order and enclosing the order and in response a letter was sent on the 15th November by the solicitor for the applicants seeking revocation/non-implementation of the transfer order.

34. It is necessary, therefore, to consider the circumstances surrounding the request for revocation and the response it solicited. The response on behalf of the Minister dated the 15th November, 2006 was so far as material "notwithstanding the contents of your letter, you may wish to note that the role of the Minister and that of Dublin II Transfer Unit in the Dublin II procedure is to give effect to determinations by the Office of the Refugee Applications Commissioner (ORAC) to transfer applicants to other Member States to have their asylum cases examined there".

35. The view was, it be recalled, reiterated in the course of a letter of the 20th November, 2006.

36. In the course of argument much attention has focused on the fact that it was suggested that the Minister believed he did not have any entitlement to revoke a transfer order properly made. Indeed, I think it is clear from arguments advanced by counsel on his behalf that is indeed his belief and I approach the case on that basis.

37. Counsel for the applicants has placed very considerable emphasis indeed on a decision of Finlay Geoghegan J. in *Makumbi v. The Minister for Justice, Equality and Law Reform*, 15th November, 2005. In that case the applicant for asylum was the subject of a transfer order to the United Kingdom. The uncontroverted evidence was that there was a real and substantial risk of the applicant committing suicide if she was transferred and that accordingly there was a real and substantial risk to life. Finlay Geoghegan J. on a number of occasions made clear that her judgment was grounded in the very specific facts of the case. So, at page 8 of her judgment she commented

> "I am satisfied that the medical evidence presented to the respondent on the 28th July and subsequently, prima facie indicates that there is a real and substantial risk of suicide if the Transfer Order is implemented and in that sense a real and substantial risk to the life of the applicant. It is the context of this finding of fact that the legal issues must be considered." (Emphasis added).

Again at page 17 she observed: "

> I am only considering the existence of such a discretion in the factual circumstances which pertain to this application." (Emphasis added). Essentially these are that subsequent to the making of the Transfer Order by the respondent both medical information, available and events occurred which prima facie indicate that there is a real and substantial risk of suicide and in that sense a real and substantial risk to the life of the applicant if the Transfer Order is implemented."

38. It seems to me that there are a number of significant differences between that case and the present case. The first and most fundamental difference is that in *Makumbi* the clear and uncontroverted evidence was that the risk was inherent in the transfer to the United Kingdom, here, the applicants concern is not in relation to the United Kingdom, a party to the European Convention on Human Rights but rather as to the situation that will face them if returned from there to Nigeria.

39. Further, I cannot shut my eyes to the significant difference that all the events and information which were found to require consideration in *Makumbi* occurred after the transfer order had been made and were of a truly dramatic and distressing nature. In contrast in the present case, the bulk of matters which it is suggested the Minister is obliged to consider were matters that were considered by the British authorities, even if the manner of the consideration and the outcome does not meet the approval now of the applicants and their legal advisors. So, the issues in relation to D's hearing impairment and the issues raised arising therefrom in the context of the adequacy of services in Nigeria are matters that were canvassed before the British authorities. Likewise, so far as P. is concerned the fears expressed in relation to FGM were raised in Britain, and canvassed there. I use that phrase out of deference to the criticisms by the applicant of how the issue was dealt with.

40. It is true that the issue in relation to the mental health difficulties of Mrs. B which gave rise to her children being taken into care were not considered in Britain for the obvious reason that these were issues that arose only in Ireland. However, the concerns expressed in that regard are not of the same order as the issues that faced Finlay Geoghegan J.

41. The applicants have also referred me to the case of *O.O. v. Minister for Justice, Equality and Law Reform* [2004] 4 I.R. 426 a decision of Gilligan J. Again, it seems to me that the case is distinguishable both because it is a right to life case and also because it was a deportation case and the fear was that the suicide could occur before deportation to Nigeria. There was no question there of an intervening transfer to a safe country that had responsibility for considering the case as is the situation here. I am of the view, that the applicants do not have a right to have the issues considered and adjudicated upon by the Minister.

42. There is one issue that has particularly troubled me. While the State were entitled to take the view that the role of the Minister and the Transfer Unit is to give effect to the determination of ORAC it seems that view was taken against a background of a belief that there was no power to revoke the order.

43. In my opinion that legal view is not correct. There is no specific prohibition anywhere on revocation. It can equally be said that there is no specific provision for revocation and that is so against a background that the Act does provide in some detail specific provisions for the amendment and revocation of other orders which the Minister can make including deportation orders, and orders cancelling refugee status. I find the analysis by Finlay Geoghegan J. in *Makumbi* that there exists an implied power to revoke highly persuasive. For my part I am content to say that it is possible to conceive of cases where a decision to proceed with a transfer in the light of changed information would outrage our sense of justice and be in flagrant breach of the Constitution and The European Convention on Human Rights.

If it is possible to conceive of such cases, then there must, it seems to me to be an implied power to revoke the transfer order or to halt the operation of the transfer.

44. As I believe that to be the case, it follows that the Minister and his officials are in error, what are the implications of this? Does the fact that an incorrect view of the law forms part of the backdrop to the approach taken invalidate that approach.

45. I have considered the case of *Glover v. B.L.N. Ltd* [1973] 1 I.R. 388 and in particular the comments of Walsh J. at p. 429:

> "Lastly, I come to deal with the defendants' contention that, if a hearing had been given to the plaintiff, there was nothing he could usefully have said and the result would have been the same. I think this proposition only has to be stated to be rejected."

46. It must be said that comment was made in a case where there was a right to a fair hearing, which hearing had never taken place at all and where the Supreme Court seemed to have been of the view that contrary to the submissions advanced, that the outcome of any hearing would be far from a foregone conclusion.

Here, I have already expressed the view that I do not believe the applicant has a right to insist on derogation or any right to enforce a consideration of the issue of derogation. That being so it does not seem to me, to at all follow that because an erroneous view of the law might lead the Minister into error in some limited and extreme circumstances that all such decisions are to be condemned. The essential difference between this case and *Glover v. B.L.N. Ltd* is that there the plaintiff had a right to a hearing, whereas the view I have taken is, that in the present case, the plaintiff has no such right.

The applicants through their counsel have place reliance on the well known case of *McDonagh v. Clare County Council* [2002] 2 I.R. 634.

It seems to me that the circumstances there are quite different. Clare County Council operated what was described as "an indigenous policy" when traveller housing needs were under consideration. It was accepted that they were entitled to adopt such a policy and to have regard to it. On the other hand the applicants had a right to have their situation considered, such consideration was not forthcoming. Here the issue is whether the applicants having had their situation considered in one Member State, are entitled to a fresh consideration in a second Member State. The Minister takes the view that the applicants were entitled to have a claim for asylum and associated humanitarian claims considered in a safe country, but once that had happened, that they were not entitled to engage in forum shopping by seeking a new hearing in a new venue in the hope of getting a different result. In my view the Minister and his Department were entitled to set their face against such a practice.

47. In these circumstances, I am of the view that the applicants have not made out a case for judicial review and I decline the reliefs sought.