Neutral Citation: [2012] IEHC 137

THE HIGH COURT

[2011 No. 1066 J.R]

BETWEEN/

LELA SIVSIVADZE, SOFIA ARABULI (A MINOR SUING BY HER MOTHER AND NEXT FRIEND LELA SIVSIVADZE) MARIAM TOIDZE (A MINOR SUING BY HER MOTHER AND NEXT FRIEND LELA SIVADZE) AND DAVIT ARABULI

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on 26th April, 2012

1. In these judicial review proceedings the applicants seek to challenge a decision made by the Minister on or about the 4th November, 2011, as refused to revoke a deportation order previously made in respect of the fourth named applicant, Davit Arabuli. It is fair to say the principal ground advanced in this leave application is that s. 3 of the Immigration Act 1999 ("the Act of 1999") is unconstitutional in that it imposed – in principle at least – a lifelong ban on the person to whom the deportation order was addressed. It is contended that a ban of this kind amounts to a disproportionate interference with the applicants' right to family life under Article 41 of the Constitution. For good measure the applicants further seek a declaration of incompatibility pursuant to s. 5(2) of the European Convention on Human Rights Act 2003, in respect of s. 3(1) of the Act of 1999, in that it is contended that this subsection by allowing for a deportation order of indefinite duration violates the applicant's right to family life under Article 8 of the European Convention on Human Rights.

2. These are obviously important and significant issues which I will consider presently. It is, however, first necessary to set out the rather complex facts of this case before proceedings to consider the major issues which the applicants now seek to raise.

3. The fourth named applicant, Mr. Arabuli, is a Georgian national who entered the State in early 2001. Mr. Arabuli made two applications for asylum using different aliases including the name, Datia Toidze. Mr. Arabuli did not turn up to a scheduled interview and his asylum application was refused. The Minister gave notice of his intention to deport pursuant to s. 3(9) of the Act of 1999, but no submissions were made in response in respect of the Minister's proposal. The Minister made a deportation order on the 5th December, 2001, and Mr. Arabuli was instructed to report to the Garda National Immigration Bureau on the 14th December, 2001, in respect of that order. He failed to do so and was thereafter classified as an evader.

4. Nothing further was heard from Mr. Arabuli until April, 2003 when Mr. Arabuli was transferred back from Iceland to Ireland pursuant to the terms of the Dublin Convention. Mr. Arabuli had travelled to Iceland using a forged Spanish passport, availing of another alias in the process.

5. Mr. Arabuli was thus returned to Ireland in April, 2003. Mr. Arabuli was required to present thereafter at regular intervals to Garda National Immigration Bureau. While the Bureau made many efforts to give effect to the earlier deportation order from December 2001, this all proved unavailing. Remarkable as it may seem, Mr. Arabuli was physically resident in the State from April, 2003 until November, 2011, while presenting at all times under the name of his alias, Datia Toidze. During this period Mr. Arabuli had been interviewed by immigration officers from the Georgian Embassy in London on three separate occasions, but it is clear that he endeavoured to frustrate their attempts to ascertain his true identity.

6. In 2003 following his transfer from Iceland, Mr. Arabuli met a fellow Georgian national, the first named applicant, Ms. Lela Sivsivadze. She was born in October 1986 and was seventeen on her arrival in Ireland. They became good friends and a romantic relationship followed. Their first child, Sofia, was born in the State on 16th April, 2005, and she is now seven years old. The couple's second child, Mariam, was born on the 13th August, 2009. The couple married on the 14th July, 2009. Although I shall return presently to say something further about the family members, it should be noted that the two children are not Irish citizens.

7. In October, 2008 Mr. Arabuli applied to the Minister to revoke his deportation order. This deportation order was affirmed by the Minister on the 17th June, 2009.

8. A further application pursuant to s. 3(11) was made on the 27th July, 2010. In this application Mr. Arabuli stated that he was Mr. Toidze and that he had married Ms. Sivsivadze on the 14th July, 2009. A copy of the marriage certificate was enclosed, albeit that his marriage certificate referred to him in his true name, that of Mr. Arabuli. Birth Certificates for Mariam and Sofia were enclosed. A number of references were supplied in support of the application all referring to Mr. Arabuli in the name of Mr. Toidze. Ms. Sivsivadze also wrote a personal letter to the Minister referring to her husband as Mr. Toidze requesting that he should be allowed to stay in the State. This s. 3(11) application was examined on the 11th October, 2011, and the deportation order was affirmed on the 18th October, 2011.

9. Matters came to a head in September/October, 2011. As explained in an earlier judgment of mine, *Toidze (otherwise Arabuli) v. Governor of Cloverhill Prison* [2011] IEHC 395, it would appear that the applicant and another Georgian national travelled through Northern Ireland to Donegal in order to buy a second-hand car. When returning back to Dublin from Donegal they again found themselves in Northern Ireland whereupon they were arrested by members of the Police Service of Northern Ireland. This state of affairs resulted in Mr. Arabuli being arrested and detained in Northern Ireland on the 26th September, 2011. The applicant was returned to the State on the 3rd October, 2011, where he was refused leave to land and detained in Cloverhill Prison. An application

for his release was made to me pursuant to Article 42.4.2 of the Constitution but in a judgment delivered on the 24th October, 2011, I held that he was in lawful custody.

10. Although that Article 40 application was made in the name of Mr. Toidze, it was only following cross examination in that regard by counsel for the respondent, that Mr. Arabuli admitted that the name Toidze was simply an alias and that his true name was Arabuli. It was now clear from the evidence which was tendered that the obstacle which stood in the way of giving effect to the 2001 deportation order – namely, the unwillingness of the Georgian Embassy to issue a *lassez passer* in the absence of appropriate evidence as to identity – has now been effectively resolved. It was clear that the applicant's true identity was that of Mr.Arabuli, that the applicant actually had a Georgian passport which had been issued to him in his real name – unbeknownst to GNIB – in March, 2009.

11. In the wake of that refusal, a further s. 3(11) application was filed by Mr. Arabuli on the 25th October, 2011, but this was refused in turn by the Minister on the 3rd November, 2011. The application sought an injunction seeking to restrain the fourth named applicant's deportation. I refused to grant that injunction and Mr. Arabuli was deported on the 4th November, 2011.

12. Completing the factual picture, it is necessary to say that Ms. Sivsivadze has been given humanitarian leave to remain here, even though her asylum application was formally refused by the Refugee Appeal Tribunal in its decision of 30th November, 2004. The Tribunal recognised that she had been grievously abused by a family member in Georgia in the past and it would appear that for that reason the Minister essentially granted her leave to remain for humanitarian reasons. At the same time, one cannot gainsay that Ms. Sivsivadze has to some extent been complicit in the deception practised by her husband, since, for example, as I have just noted, she wrote a letter to the Minister in support of her husband in which she referred to him as Mr. Toidze.

13. While Mr. Arabuli was prepared to deceive both the Minister and, indeed, this court as to his true identity, there seems little doubt but that this couple are very devoted to each other and to their children. The detention and deportation of Mr. Arabuli last Autumn clearly came as an enormous shock to Ms. Sivsivadze and the painful anguish which was evident in her visage as these - for her - deeply unpleasant events unfolded in court was all too plain to see. It may be accepted, therefore, that Ms. Sivsivadze has been personally devastated by the deportation of a person whom she loved and on whom she had come to depend.

14. It is against this factual background that the applicants now seek to challenge the decision of the Minister of 4th November, 2011, as refused to quash the deportation decision. They further seek leave to challenge the constitutionality (and ECHR compatibility) of s. 3(1) of the Act of 1999 insofar as it provides for a deportation order of indefinite duration. As I have hinted already, these grounds really merge into each other. It would be difficult to say that the Minister could not reasonably have decided to deport Mr. Arabuli in view of his decidedly chequered immigration history. Commenting on a submission that the deportation order should be affirmed, Mr. Ben Ryan, an Assistant Principal, noted on November 2nd, 2011 that:

> "…the applicant evaded his deportation, used false identities and refused to remove himself from the State, as required by the deportation order. As a result of this flagrant abuse of the asylum and immigration system, his deportation order should be affirmed."

15. Few could disagree with these pithy comments and, in truth, this was not seriously contested by the applicants. The real point here is whether the Minister is entitled to insist that the deportation order should have indefinite effect. It is to this central question that we can now turn.

The Deportation Power

16. The power to deport non-nationals is contained in s. 3(1) of the Immigration Act 1999 ("the Act of 1999"). This provides:-

> "Subject to the provisions of s. 5 (prohibition of refoulement) of 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."

17. It is clear from my own judgment in *U. v. Minister for Justice, Equality and Law Reform* (No.1) [2010] IEHC 492 that the power to deport is, in principle, an exclusion from the State of indefinite duration, subject only to the mitigating power vested in the Minister by s. 3(11) whereby the deportation order can be revoked. The phrase "requiring [a non-national] to leave to remain thereafter out of the State" has been hallowed by statutory usage, as a similar power was contained in Article 13(1) of the Aliens Order 1946 (S.I. No. 395 of 1946). Critically, however, as *U (No.1)* makes clear, the Minister does not enjoy a power to stipulate a shorter period of duration in any given case, even if he wanted to. If a deportation order is made, it must be for an indefinite duration, save that the Minister could revoke that order pursuant to s. 3(11) at any time.

18. I would here venture to repeat what I said on the topic in *U (No.1):-*

> "….*in JB v. Minister for Justice, Equality and Law Reform* [2010] IEHC 296…Cooke J. observed en passant that "once deported" the mother is "at least in principle…banned for life from re-entering the State." I respectfully agree. To my mind, it is clear beyond argument that the effect of s. 3(1) is that once the deportation order takes effect, the subject of that order must endure a life long exclusion from the State, subject only to the mitigating effects of s. 3(11)."

19. It is possible to discern from a perusal of the case-law of the European Court of Human Rights that other European countries have adopted a variety of different approaches to the question of the duration of a deportation order. Thus, for example, it appears from the judgment of the ECHR in the important case of *Emre v. Switzerland (No.1)*(2008) that Article 11 of a Swiss federal law of 26 March 1931 provided that:-

> "Deportation may be imposed for a set period of time, of not less than two years, of for an indefinite period."

20. The approach of Norwegian law is somewhat different, as *Omoregie v. Norway* [2008] ECHR 761 makes clear. The Norwegian Immigration Act 1988 appears to allow for a ban of either permanent or limited duration, albeit that as a general rule the expulsion order will normally be of two years' duration. Moreover, any such person must normally wait for at least two years before the expulsion order can be revoked.

21. At the level of European Union law, Article 11(2) of Directive 2008/115/EC ("the Returns Directive") dealing with expulsion from the Schengen Zone provides:-

> "The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may, however, exceed five years if the third country national represents a serious threat to public policy, public security or national security."

22. The fact that other countries or jurisdictions have adopted different rules regarding the duration of deportation or exclusion orders might be thought to be only of direct interest to the comparative lawyer, save perhaps for this: it provides at least some empirical evidence that other European countries who are at least as anxious as we are to preserve the integrity of the asylum system can (apparently) operate a more flexible regime without the need for a ban of indefinite duration. Of course, while it would be quite unreal to suppose that the mere fact that other jurisdictions have different or even more flexible systems would render s. 3(1) of the Act of 1999 unconstitutional on that account, yet the experience of other jurisdictions might perhaps be a factor to be taken into account in assessing the proportionality of the sub-section from the standpoint of empirical necessity.

23. Pausing at this point, it is clear beyond argument that a deportation order has an indefinite effect, subject only to the revocation power provided for by s. 3(11) of the Act of 1999. Because so many of the remaining arguments are inter-linked, I propose to commence by considering the constitutional challenge, before then considering the extensive ECHR case-law.

The constitutional challenge

24. It is worth noting to begin with that the constitutionality of s. 3(1) has never previously been challenged. Ms. Boyle's arguments were in truth based on first principles. In essence, the argument was that, judged from the standpoint of Ms. Sivsivadze and her two children, she would have to arrange her affairs on the basis that the deportation order was, in principle, at any rate, life long in nature. Given all that she had suffered in the past in Georgia, it would be impossible - or, at least, unrealistic – to expect her to return there to join her husband. Ms. Boyle stressed that the very fact that the Minister had given her humanitarian leave here to remain was, in essence, at least a tacit acknowledgement of this reality.

25. The protection of marriage and the family by Article 41 is a fundamental value which is critical to the functioning of the State and society created by the Constitution. Article 41 may thus be said to prescribe a set of normative principles by reference to which every State action must be measured. While not unqualified, the primacy of the autonomy of decision making by a married couple is plainly one such principle (see, *e.g., North Western Health Board v. HW* [2001] 3 I.R. 622), as is the principle (enshrined in Article 42.1 and Article 42.5) that children have the right to be cared, reared and educated by both parents (see, e.g., my own judgment in *AO v. Minister for Justice and Equality (No.2)* [2012] IEHC 79).

26. It is true that neither the fact of marriage to an Irish citizen (see, e.g., by analogy, *TC v. Minister for Justice* [2005] IESC 42, [2005] 4 I.R. 109) nor the birth of Irish citizen children (see*, e.g., Lobe and Osayande v. Minister for Justice, Equality and Law Reform* [2003] 2 I.R. 1) will in themselves preclude the deportation of a non-national. The Minister, when making the deportation order, must nonetheless respect the essence of these constitutional rights concerning the family and the rights of the children: see, *e.g., S. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 92 and *XA v. Minister for Justice, Equality and Law Reform* [2011] IEHC 397.

27. As I pointed out in *XA*:-

> "…..the Minister's decision must always respect the essence and substance of the right of the married couple under Article 41. A decision which, in practice, compels the couple to life more or less permanently apart is, by definition, a very significant interference by the State with a core principle valued and protected by Article 41. Such a decision is one which, quite obviously, requires compelling justification….While the necessity to uphold the common good and the integrity of the asylum system may well supply that justification, it is nonetheless imperative that the respective rights of the applicants and the interests of the State must be fairly weighed by the Minister."

28. If a key premise of Ms. Boyle's argument is correct - namely, that Ms. Sivsivadze cannot realistically be expected to return to Georgia – then the practical effect of an indefinite deportation order would be to sunder the nature of the marriage bond, in that this married couple cannot live together as husband and wife. Such a far reaching interference by State action requires compelling justification.

29. There can be no doubt at all but that the sanction of deportation is essential to any functioning democracy which wishes to control its own borders and to deter illegal immigration. If the State could not deport illegal immigrants, the risks and threat posed to vital State interests - perhaps even social stability – might well be considerable. Maintaining the integrity of the asylum is a vital State interest, since the manipulation of that system through deceit and subterfuge undermines public confidence in its fair and transparent operation and enhances the opportunities for those who are prepared to fabricate false claims, to the disadvantage of the deserving asylum seeker. So far Mr. Arabuli is concerned, the extent of his deceit is such that, as we have already noted, no objection could be taken to the fact that he was, as such, deported. This is why one cannot say that the deportation of a spouse will in itself amount to a violation of Article 41 (or, that matter, Article 8 ECHR) rights - even where the remaining spouse is effectively compelled to remain behind and rear young children – given that the State had and has a vital interest in the proper and effective operation of a fair immigration system.

30. The real question, however, is whether the existence of a sanction which is potentially life long in duration is demonstrably so essential in circumstances where the applicants here have real and substantial ties (including an established family life) with this State. While counsel acknowledged that this issue had never previously been determined, Ms. Moorehead SC invited me to consider authorities which, she submitted, were by implication, at least, ruled out a challenge on this ground. Let us now turn to a consideration of these authorities.

The Decisions in Pok Sun Shum and Osheku

31. Ms. Morehead SC relied heavily on two decisions of this court, both decided in the 1980s, in support of her proposition that the constitutionality of the sub-section (or its predecessor) had never previously been put in doubt. The first of these cases, *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593 is an ex tempore decision of Costello J. in which he rejected challenges to the constitutionality of the former Aliens Act 1935 and the Aliens Order 1975 brought by a Chinese national who was married to an Irish citizen and who had three Irish citizen children. The second of these cases, *Osheku v. Ireland* [1986] I.R. 733, was a not dissimilar case where Gannon J. held that Article 41 did not preclude the deportation of a Nigerian national who was married to an Irish citizen.

32. These authorities can be regarded as (relatively) early decisions so far as the immigration law of the State is concerned. They establish propositions which are largely unexceptionable - namely, principally that the rights of the family under Article 41 are not absolute and must yield where appropriate to the interests of the State in controlling immigration and in regulating the presence in the State of non-nationals. The statement of principle to this effect contained in the judgment of Gannon J. in *Osheku* has, in particular,

been frequently cited with approval: see, *e.g., Laurentiu v. Minister for Justice* [1999] 4 I.R. 42, 90 per Keane J. and *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 260, 383, per Keane C.J.

33. Yet it is possible for even a respectful and admiring eye to detect aspects of this jurisprudence which have not weathered the intervening twenty-five years or so quite so well. This is not altogether surprising, given that these judgments were delivered before the development of the proportionality doctrine and its inter-action with Article 41 and Article 42, never mind the continuing influence of the Article 8 ECHR jurisprudence.

34. The statement, for example, by Costello J. in *Pok Sun Shum* ([1986] I.L.R.M. 593 at 600) to the effect the Minister was not obliged to give reasons in respect of his refusal to grant the plaintiff to permission to remain in the State cannot stand in view of the very clear statement to the contrary contained in, e.g., the judgment of Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3.

35. Nor can the statement by Gannon J. in *Osheku* to the effect that neither the Aliens Act 1935 nor the statutory orders made thereunder were unconstitutional and that the Aliens Order 1946 was not *ultra vires* be regarded as good law, at least without significant qualifications First, this Court does not enjoy an Article 26-style jurisdiction to conduct a roving review of the constitutionality of a legislative measure or *vires* of a statutory instrument over and above those which actually arise from the facts of a given case: see, *e.g.*, the comments of Kearns J. in *Collooney Pharmacy Ltd. v. North Western Health Board* [2005] IESC 44, [2005] 4 I.R. 124. Second, some key sections of the Aliens Act 1935 and the Aliens Order 1946 were, in fact, found to be unconstitutional and ultra vires respectively: see the judgments of the Supreme Court in *Laurentiu and Leontjava v. Minister for Justice* [2004] 1 I.R. 591, thus underscoring the difficulties in making sweeping pronouncements about matters that were not argued or which did not actually arise on their facts.

36. Accordingly, while I would be prepared to accept that cases such as *Pok Sun Shum* and *Osheku* (and, indeed, subsequent case-law) all proceed on the implicit premise that a person may lawfully be deported for an indefinite period, yet this precise issue has never previously been examined or considered from a constitutional point of view. Since, in the words of O Dálaigh C.J. in *The State (Quinn) v. Ryan* [1965] I.R. 70, 120, a "point not argued is a point not decided", it follows that the issue presented here must be regarded as *res integra*. I cannot, accordingly, regard either *Pok Sun Shum* or *Osheku* as being dispositive of this issue.

The power to revoke under s. 3(11) of the 1999 Act

37. There is absolutely no doubt that, as counsel for the Minister, Ms. Moorehead SC, was - quite correctly - at pains to stress, s. 3(1) cannot be viewed in isolation from the power to revoke the deportation order under s. 3(11):-

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

Subject only to the power of judicial review, it is, however, difficult to escape the conclusion that the Minister is more or less at large so far as the power to revoke is concerned. It is true that the Minister must give full and proper consideration to the application to revoke and that there are many instances of where revocations decisions have been quashed by this Court for this very reason.

38. It is also true that s. 22(1) of the Interpretation Act 2005 provides generally that a power "conferred by an enactment may be exercised from time to time as occasion requires". This provision is, however, a purely general one designed to ensure that any doctrine of *functus officio* does not prevent the holder of the power in question from exercising that power from time to time. It nevertheless provides little guidance as to the circumstances in which the holder should exercise that power, since the Oireachtas may be taken to have assumed that this would be contained in the specific provisions of the relevant statute conferring the power in the first place, in this case, the Act of 1999.

The plain fact remains, however, that the Act of 1999 gives almost no guidance as to when and by reference to what criteria the Minister would be obliged to revoke the deportation order. In the context of a leave application, there is perhaps no necessity here to traverse the complex case-law concerning the proper scope and application of the non-delegation case-law. One could not, in any event, improve upon the admirably comprehensive treatment of this difficult subject contained in the judgment of Feeney J. in *John Grace Fried Chicken Ltd. v. Joint Labour Committee* [2011] IEHC 277. The key point, however, is that, as Feeney J. pointed out in *John Grace Fried Chicken*, to satisfy the requirements of Article 15.2.1 the relevant legislation must generally articulate the appropriate "standards, goals, factors and purposes".

39. At first blush it might be difficult to say that s. 3(11) satisfies these criteria. It is, of course, true to say that s. 3(11) is ameliorative and, when the power is exercised affirmatively, this is in aid of the person affected by the order. In other words, the exercise of the s. 3(11) power can only assist – and never disadvantage – the person served with the deportation order. It may also be observed that there are doubtless countless instances of where the Oireachtas has conferred a power to revoke a statutory order without necessarily specifying the criteria by reference to which this is to be done. In such instances, however, it may be taken as understood that the power is essentially supplementary and exceptional, reserved for unusual cases of a kind not readily foreseen or anticipated. That can hardly be said of s. 3(11), since its application is not a standard feature of the entire immigration process, but is rather central to that system. We are thus left with an immigration system in which the deportation order is in theory life long, but which may be revoked by the Minister by reference to criteria not articulated by that sub-section and which cannot easily be divined by an examination of the Act of 1999 itself. This squarely raises the question - which must await full argument – of whether s. 3(11) satisfies the requirements of Article 15.2.1.

40. I appreciate that this point was not pleaded nor even fully argued before me. It is, at best, a point which was raised in passing during the course of the argument. Given, however, that this is a leave application, it seems to me nevertheless that I cannot shut out this point, not least given its potential importance to the resolution of the proceedings. I propose, therefore, to exercise my power under O. 84, r. 23(2) RSC to grant leave on this specific constitutional point, even though, so to speak, it is a ground which has been formulated by me and not, as such, directly raised – saving in passing - during the course of the proceedings. Any potential unfairness to the respondents will be ameliorated given that they will have a full opportunity of defending this point at a full hearing which is likely to be several months hence.

The ECHR and deportation orders with indefinite duration

41. A further consideration is that the European Court of Human Rights appears to regard deportation orders which are of unlimited duration as *prima facie* raising serious and profound Article 8 ECHR issues. This is clear from two relatively recent judgments of the European Court of Human Rights in *Emre v. Switzerland (No. 1)(*2008) and *Emre v. Switzerland (No.2)* (2011) that life long expulsion orders of this kind will be subjected to a particularly rigorous examination for compliance with the right to family life in Article 8: see, e.g., para. 85 of *Emre (No.1).*

42. In *Emre*, a Turkish national who arrived in Switzerland when he was aged 6 in 1980 was subjected to an expulsion order following conviction for a range of serious offences including theft, firearms offences and assault. The Court had earlier noted (at para. 79) that the applicant had completed his education and spent the best part of his life in Switzerland and had resided with his parents and brothers, one of whom possessed Swiss nationality.

43. The Court continued (at para. 80):

> "In comparison with these elements - which, despite his criminal conduct, demonstrates a certain integration of the applicant in Switzerland - the social, cultural and family ties which he maintains with Turkey seem very slender."

44. In conducting the necessary proportionality analysis, the Court stressed (at para. 84) that it must examine whether the deportation order had a temporary or permanent character. It then noted (at para. 85) that the deportation order which actually was imposed was for an indeterminate period ["une durée indetéerminée"], which it considered to be "particularly rigorous" ["particuliérement rigoureuese"], whereas more limited periods of expulsion had been held by the Court to be proportional: see, e.g., *Radovanovic v. Austria* [2004] ECHR 169, (2005) 41 EHRR 6. As for the possibility of a temporary or permanent waiver of the expulsion order ["une levée temporaire ou définitive"], the Court considered that this possibility remained at present purely speculative.

45. The Court proceeded to hold that the imposition of a life long expulsion order in that case was a breach of Article 8 in that it did not strike a fair balance between the interests of family life on the one hand and effective immigration control on the other. The Court ultimately concluded (at para. 86) that:-

> "In view of the foregoing and especially the relative seriousness of the applicant's convictions, the weakness of his ties with his country of origin and the final character of the deportation order ["du caractère definitive de la mesure d'éloignement….."], the Court finds that the respondent State cannot be said to have struck a fair balance between the interests of the applicant and his family on the one hand and its own interests in immigration control on the other."

46. Following that judgment, Mr. Emre applied to the Swiss Federal Court in July, 2009 seeking revision of its original judgment. On this occasion, the Federal Court limited his exclusion from Swiss territory to ten years. In September, 2009 Mr. Emre married a German national and obtained a German residence permit. He then applied unsuccessfully to have the deportation order lifted so that he could settle in Switzerland. Mr. Emre then made a further application to Strasbourg.

47. In its most recent judgment delivered on 11th October, 2011, the European Court held that the Swiss courts had violated Article 8(2) by imposing a ten year prohibition. This was "a considerable period in an individual's life" which "could not be said to have been necessary in a democratic society".

48. Ms. Moorehead SC submitted that *Emre* (and other similar decisions) were really examples of where the court was dealing with the phenomenon of second-generation immigrants. That might well be so – although the Court does not appears to say so in express terms – but the principles enunciated would seem to be nonetheless of general application, or at least potentially so. Besides, it must be recalled that Mr. Emre's deportation had been recommended following a series of convictions for serious offences, a feature which is not present in Mr. Sivsivadze's case.

Antwi v. Norway

49. In some ways, however, the judgment which is most relevant to the present case is that of *Antwi v. Norway* [2012] ECHR 259, a case with some striking resemblances to the present one. The issue in that case was whether the deportation of the first applicant husband for a period of five years would amount to a violation of Article 8 ECHR. The husband was a Ghanaian national who arrived in Germany in 1998 where he obtained a forged passport and a birth certificate stating false identity indicating that he was a Portuguese national. (One of the intriguing similarities between these two cases – albeit, of course, of no legal significance other than the fact of the alias - is that both applicants used the surname "Pinto" as an alias).

50. The second applicant was his wife, who was also of Ghanaian origin. She had arrived in Norway in 1997 at the age of seventeen and was reunited with the rest of her family who still live in Norway. The first and second applicants met while she was travelling in Germany. The second applicant invited the first applicant to Norway and soon thereafter they formed a romantic relationship. The first applicant husband obtained a work and residence permit in Norway on the basis of his forged Portuguese passport and false identity documents.

51. The couple had a daughter, the third applicant, who was born in September 2001. The family spoke Norwegian at home and the daughter had had little contact with Ghana. The majority of the Norwegian High Court upheld the validity of the deportation order for this five year period, holding that her mother would be able to provide her with satisfactory care on her own. That court added that since the child's mother originated from the same country as the father and had been on visits there with the daughter on three occasions, the situation was favourable for regular contact or, in the alternative, the family settling in Ghana. Consequently the expulsion of her father with prohibition on re-entry for a limited period would not be a disproportionate measure.

52. So far as the duration of the deportation order is concerned, a majority concluded that five years was not inconsistent with current Norwegian practice or disproportionate. The minority judges took the view that the imposition of a five year re-entry ban would be too severe and disproportionate a measure and that a two year ban would be appropriate. The Norwegian Supreme Court refused leave to appeal.

53. The European Court of Human Rights observed, applying its established case-law (including its important decisions in two other Norwegian cases, *Omoregie v. Norway* [2008] IEHC 761 and *Nunez v. Norway* [2011] ECHR 1047), that the deportation of the first applicant could not *per se* be regarded as a breach of Article 8:-

> "90…..the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act ….A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention….. In the Court's view, the public interest in favour of ordering the applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention….."

54. The Court then proceeded to examine the position of individual family members:-

> "Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.
>
> Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country.
>
> Like the first applicant, the second applicant had grown up in Ghana. There she had lived until the age of seventeen when she was reunited with her father and siblings in Norway. Although she had become a Norwegian citizen and had family ties and employment links to Norway and probably would experience some difficulties in resettling in Ghana, there does not seem to be any particular obstacle preventing her from accompanying the first applicant to their country of origin. The Court has also taken note of her claim that, although aware that the first applicant originally had a Ghanaian background and had obtained a Ghanaian passport in connection with their marriage in Ghana on 11 February 2005, she should only have become aware of his true identity in this context. However, the above mentioned factors cannot in the Court's view outweigh the public interest in sanctioning the first applicant's aggravated offences against the immigration rules with the impugned measure."

55. Pausing at this point, it is sufficient to observe that there are obvious similarities between the position of the married couple in *Antwi* and that of Mr. and Ms. Sivsivadze in the present case, save that – as I have already noted – the grant of humanitarian leave amounts to a tacit acceptance by the Minister that it would be unrealistic or unfair to expect her to go back there. After all, if Ms. Sivsivadze could readily go back to Georgia, there would be no basis for grant such humanitarian leave. That, therefore, is a definite point of distinction between the present case and Antwi, or, at least, it is arguably so.

56. The Court then turned to the position of the couple's daughter:-

> "As to the *third* applicant, the Court notes that she is a Norwegian national who since birth has spent her entire life in Norway, is fully integrated into Norwegian society and, according to the material submitted to the Court, speaks Norwegian with her parents at home. In comparison, her direct links to Ghana are very limited, having visited the country three times ….and having little knowledge of the languages practiced there. Furthermore, as a result of the first applicant no longer holding a work permit and staying full-time at home and of the second applicant's being particularly occupied by her work, the first applicant assumes an important role in the third applicant's daily care and up-bringing. He is the parent who follows up her home-work and parental contacts with her school and who facilitates her participation in sport activities. She is also at an age, ten years, when this kind of support would be valuable and she is strongly attached to her father as she is to her mother. It would most probably be difficult for her to adapt to life in Ghana, were she and her mother to accompany the father to Ghana, and to readapt to Norwegian life later. Against this background, the Court shares the High Court's view that the implementation of the expulsion order would not be beneficial to her."

57. So far as the present case is concerned, Ms. Moorehead S.C. did not demur from acknowledging that the implementation of the deportation order would not be in the best interests of Sofia and Mariam. When I pointed out that this fact was not expressly acknowledged in the s. 3(11) revocation decisions, Ms. Moorehead S.C. submitted that I should treat this as being implicit in these decisions. Since it is so obvious that the deprivation of the children of the care and company of their father would be contrary to their best interests, I am prepared to treat this as necessarily implicit in the Minister's decision, although I think it would have been preferable had this been forthrightly acknowledged and expressly weighed in the balance.

58. So far as the children are concerned, if a deportation period of a parent of two years' duration is "a very long period for children of the ages in question" (*Nunez*, para. 81), then the prospect of an indefinite deportation order must seem like an eternity to two young innocent children who, where possible, must be safeguarded at all costs from the deceptions practised by their parents. It is perhaps all too easy for administrators, politicians, lawyers and judges to resort to stock observations to the effect that children are "adaptable", but the plain and uncomfortable truth is that Mariam and (especially) Sofia probably pine for their father and are bewildered by his absence. One must not overlook the fact that, as matters stand, both of these young girls are likely to grow up with minimal contact with their father.

59. Returning to *Antwi*, the Court then went on to deal with the duration of the deportation order:-

> "The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, *Darren Omoregie*….. it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.
>
> In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand."

60. This analysis can broadly be applied by analogy to the present case, with the caveat that the deportation order here is of potentially life long effect. While it is true that the applicants could at *any stage* apply to have the deportation order revoked and might be successful in their endeavours - unlike, for example, the situation in Norway where applicants must ordinarily wait two years – this prospect must, adopting the language of the Court in *Emre*, presently be regarded as speculative. It is necessary to approach the question, therefore, from the working assumption that the deportation order will have permanent effects.

Conclusions

61. How does all of this bear on the constitutionality and ECHR-compatibility of s. 3(11)? Starting with the ECHR, it seems impossible to avoid the conclusion that a potentially life long deportation order raises very significant Article 8 ECHR issues, not least in light of the two judgments in *Emre*. Nor am I convinced that the result in Antwi would have been the same had the deportation order in that case had permanent effects or if (by analogy with the present case) the wife had been humanitarian leave to remain in Norway, thus perhaps tacitly acknowledging that she could not return to Ghana. After all, the Court has previously noted – admittedly in the context of a case treated as a second generation immigrant case – that there are cases where "the imposition of a residence prohibition of unlimited duration was an overly rigorous measure" and where "a less intrusive measure, such as a residence permit of limited duration would have sufficed": see *Radovanovic*, para. 37.

62. A full treatment of the Article 8 ECHR issues - even solely in the context of the duration of deportation orders, immigration law and the family - would require a lengthy monograph. Perhaps the task of preparing such a detailed exposition of the recent case-law - I have merely attempted a quite inadequate survey of recent developments - will fall to the judge hearing the full action. But for all the reasons just advanced, I believe that the applicants have made out substantial grounds insofar as they say that the application of a deportation order of (at least) potentially indefinite duration would infringe Article 8 ECHR, especially, perhaps, having regard to the circumstances of the present case.

63. Turning now to the constitutional question, this must be approached from the standpoint of first principles, applying the three prong test of proportionality first propounded by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593, 606 and which has since become canonical. First, legislation providing for the deportation (even on a permanent basis) of persons found to have engaged in an abuse of the immigration laws through deception are rationally connected with important state interests (controlling immigration flows and upholding the integrity of the asylum system) and are not based on arbitrary, unfair or irrational considerations. Second, subject to the application of the third test, while the deportation of the first applicant did impair the Article 41 rights of the other family members by, *e.g.*, effectively depriving the children of their right to the care and company of their father, these rights were impaired as little as possible in that it is simply not possible to have effective control of immigration without the sanction of deportation. The third limb of the *Heaney* test requires the Court to consider whether the effect "on rights is proportional to the objective." This brings us squarely back to questions with which the European Court wrestled in cases such *as Radovanovic* and *Emre*, namely, whether the State's interests in effective immigration law requires that a deportation order has indefinite effect. To this must be added the question of whether the fact that s. 3(11) regarding revocation of deportation orders contains no firm criteria raises Article 15.2.1 issues. These questions are inextricably inter-woven.

64. It seems to me that in these respects, the applicants have raised substantial grounds in respect of both the constitutional and ECHR grounds in the manner indicated. I will accordingly grant the applicants leave, but will discuss the form of order with counsel.