THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 154 J.R.]

IN THE MATTER OF THE IMMIGRATION ACT 1999, THE TREATY ON FUNCTIONING OF THE EUROPEAN UNION, THE CHARTER OF FUNDAMENTAL RIGHTS, THE CONSTITUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

BETWEEN

E. B. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND A. B.), J. B. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND A. B.), W. B. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND A. B.), A. B. AND F. B. K.

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered the 30th day of April, 2013

1. This is a ruling in respect of an ex-parte application brought by the applicants on the 4th March, 2013, seeking leave to apply for judicial review by way of an order of *certiorari* quashing the decision of the respondent dated the 31st January, 2013, refusing to revoke the deportation order which is in force against the fifth named applicant F.B.K. made the 18th November, 2009. The application was grounded on the affidavit of A. B..

Background

2. F. B. K. (the fifth named applicant) was born on the 24th May, 1962, and is a national of the Democratic Republic of the Congo. He married the fourth named respondent A. B. in Kinshasa in 1984. They resided in Kinshasa until 1998 when he travelled to Ireland where he arrived on 19th May, 1998. His wife followed in 1999. Both applied for asylum but were refused. However, both were granted a right to reside in Ireland on the 19th June, 2002, by reason of their parentage of an Irish citizen child, E.B., who was born on 16th April, 2001. It is a condition of a grant of residence that the grantee undertakes to observe the laws of the state. There were two further children of the marriage, J.B., born on the 7th December, 2006, and W.B., born on the 30th April, 2008. The three children are Irish citizens and citizens of the European Union. Their mother's permission to reside in the State has been renewed and is the basis upon which she has applied for a certificate of naturalisation.

The Deportation Order

3. By letter dated 23rd April, 2010, Mr. B. was informed that the respondent had made a deportation order against him. Copies of the deportation order signed by the respondent on 18th November, 2009, together with a copy of the examination of file carried out under s. 3 of the Immigration Act 1999, were enclosed with the letter. The deportation was never challenged by way of judicial review nor is it the subject of a challenge in this application.

4. The examination of file submitted to the Minister on the basis of which the decision to deport was made is a detailed thirty nine page consideration of the factors relevant to the making of the order. In particular, the Minister had regard to the character and conduct of the fifth named applicant as he was obliged to do under s. 3(6)(g) of the Act including any criminal convictions recorded against him. A garda report on file indicated that thirty four convictions had been recorded against Mr. B. A number of these were recorded against him on the same date. The convictions were as follows:-

> (a) 3rd December, 2002 (within six months of being granted a right to reside) – convictions for fraudulent use of a tax disc, non- display of a tax disc, no driving licence, no insurance, failure to produce an insurance certificate and failure to produce a driving license, together with an offence of dangerous driving. Various fines were imposed and in respect of dangerous driving he was disqualified from driving for one year;
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> (b) 14th October, 2003 – convictions for failure to produce a driving licence, having no driving licence, failing to produce an insurance certificate, having no insurance, in respect of which further fines were imposed and again in respect of having no insurance a consequential disqualification order from driving for twelve months was imposed;
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> (c) 8th December, 2005 – convictions for no insurance, having bald tyres on his vehicle, failing to stop at the scene of an accident or to report its occurrence or to remain at the scene and failing to give appropriate information in respect of that accident in respect of which fines were once again imposed: a further disqualification order for one year from driving was imposed in respect of the failure to have insurance;
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> (d) 3rd July, 2008 – convictions for theft and handling stolen property in respect of which an eighteen month prison sentence was imposed;
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> (e) 29th July, 2008 – convictions for entering a building with intent to commit an offence and failing to produce on demand a valid passport (which was taken into consideration). A sentence of three months imprisonment was imposed;
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> (f) 20th August, 2008 – conviction for theft contrary to s. 4 of the Theft Act, 2001 in respect of which a six month prison sentence was imposed: the offences of making a gain or causing loss by deception were also taken into consideration;
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> (g) 17th November, 2008 – convictions for failure to produce a driving licence, failure to produce an insurance certificate, having no insurance, giving a false name contrary to s. 107 of the Road Traffic Act in respect of which a two month

prison sentence was imposed. A five month prison sentence, together with a driving disqualification of twenty four months was imposed in respect of the conviction of having no insurance and other matters were taken into consideration;

(h) 18th November, 2008 – convictions for custody of a false instrument, contrary to s. 29 of the Theft Act 2001, in respect of which a three month suspended sentence was imposed. Three month suspended sentences were also imposed in respect of charges of using a false instrument, handling stolen property and making a gain or causing loss by deception. He was also bound over to keep the peace and be of good behaviour for a period of two years.

5. These convictions were an important element in the consideration of the decision to deport the fifth named applicant. The examination of file was dealt with by Mr. Eamon Foley of the Repatriation Unit on the 4th November, 2009, and subsequently reviewed by Ms. Claire Sperin, HEO, on the 16th November, 2009, and Mr. Ben Ryan, an Assistant Principal Officer, on the same date before submission to the Minister for his consideration. It was claimed that because of these convictions the deportation of F.B.K. would constitute a disproportionate interference in his private and family life under Article 8(1) of the European Convention on Human Rights and his constitutional rights. It was stated in respect of his convictions that:-

> "Brophy Solicitors submitted that Mr. B. had shown remorse and is deeply regretful of the pain that he caused through his acts. The solicitors further submitted that the applicant has changed his ways and is not a threat to the common good. While it is acknowledged that Mr. B.'s convictions individually are not at the most serious end of the spectrum of criminal activity, looked at as a whole, the nature, number and time span of the offences, which include, *inter alia*, dangerous driving, hit and run, (failing to remain at the scene), theft, handling stolen property, no insurance, custody of a false instrument, using a false instrument, making gain or causing loss by deception, demonstrated that the applicant has shown a prolonged and flagrant disregard for the criminal laws of Ireland, giving rise to a compelling public interest in his deportation."

It was also highlighted that the Irish economy was experiencing a severe recession and an assessment was made of the applicant's chances of obtaining employment in the current economic climate. It was concluded that his chances of doing so were poor, thereby giving rise to a compelling public interest based on economic factors that he be deported. It was stated:-

"... Mr. B.'s employment prospects, which have been adversely effected, not only due to the current economic climate, but also by his numerous criminal convictions, may inhibit his reintegration into society and in turn perpetuate the cycle of offending. In this regard it is noted that Mr. B. has already demonstrated a high propensity to re-offend, as he has been convicted of a substantial number of offences over a number of years, which has resulted in his imprisonment in the state.

In addition, it is noted that Mr. B. has had several prison sentences imposed on him during the course of his time spent in the state and that at the time of writing this submission he is currently serving a prison sentence in the state, at a substantial cost to the state...giving rise to a compelling public interest to protect the economic wellbeing of the country".

It was concluded that the deportation of the fifth named applicant was not disproportionate as the state had the right to prevent disorder and crime and to protect the economic wellbeing of the country which constituted a substantial reason associated with the common good requiring his deportation.

6. In respect of his right to family life it was noted that his mother and sister had already been granted refugee status in the state. His mother had been granted citizenship in Ireland on 5th March, 2007, and a second sister also resides in the state. In that regard no information had been submitted which suggested that there were further elements of dependency involving more than normal emotional ties between the fifth named applicant and his mother and sisters and, therefore, it was concluded that a deportation order would not inhibit his family rights with them. In respect of his wife and children it was accepted that if the Minister decided to deport the fifth named applicant this would constitute an interference with his right to respect for family life within the meaning of Article 8(1). In that regard it was concluded that a deportation order was in accordance with law and the legitimate aims of the state to prevent disorder and crime and to ensure the economic wellbeing of the country. It was also concluded that there was no less restrictive process available which would achieve those legitimate aims in this case.

7. It was noted that the fifth named applicant had served several prison sentences during the course of his time in the state and at the time of the writing of the submission he was serving a prison sentence. It was stated that the fifth named applicant had not been involved actively in the up-bringing of his children for a notable period of time in their lives due to his incarceration as a result of which there had already been some disruption to his family life. It was also noted that Mrs. B. had the choice to continue to reside in the state with the children, thereby enabling the citizen children to continue to enjoy the benefits of their Irish citizenship. The eight criteria set out in *Uner v. The Netherlands* (Application No. 4641/99) and *Boultif v. Switzerland* (Application No. 54273/00) were considered and applied to the case. The rights of each of the children were considered in the course of balancing the rights in issue as were the best interests of the children.

8. The constitutional rights of the Irish born children were also considered in detail in the examination of file, particularly in the context of the importance of their having the care and company of both parents. Having considered all the factors in respect of the position of the family and the children under the Constitution and the rights of the state, it was concluded that the deportation of the applicant was not disproportionate having regard to the state's right to prevent disorder and crime and to protect the economic wellbeing of the country, and that these matters constituted a substantial reason associated with the common good requiring the deportation of the fifth named applicant.

9. The court has made extensive reference to the contents of the examination of file in order to place in context the history of the case to date. It is clear evidence of the extensive and careful consideration given by the Minister and his officials in the course of the deportation process to the factors which he was obliged to consider under s. 3 of the Immigration Act 1999, and the applicants' rights under Article 8 of the European Convention on Human Rights and their rights under Articles 40, 41 and 42 of the Constitution. It is clear that the applicants' rights were carefully balanced with those of the state and the issue of the proportionality of the deportation of the fifth named applicant was carefully considered by reference to each of the applicants and the family.

10. The deportation order was notified to the fifth named applicant on the 23rd April, 2010, and he was removed from the state in accordance with its terms on 16th February, 2011.

11. Meanwhile, by letters dated 23rd and 25th September, 2009, application was made by solicitors on behalf of the fifth named applicant for a renewal of his previous permission to reside in the state and under s. 3 of the Immigration Act 1999. The letters contained extensive submissions and the second letter relied upon two decisions of the European Courts of Human Rights namely, *Boultif v. Switzerland* (as cited above) and *Maslov v. Austria* [2008] ECHR (Application No. 1638/03) in support of the application.

Subsidiary Protection
12. On 25th September, 2009, an application for subsidiary protection was made to the respondent, again based on extensive submissions and country of origin information. This application was refused on 17th November, 2009, the day before the signing of the deportation order. That decision has not been the subject of any challenge by way of judicial review and is not the subject of this application.

The First Application under s. 3(11)
13. By letter dated 18th April, 2011, the fifth named applicant's solicitors applied to the respondent for the revocation of the deportation order approximately two months after his deportation. In that application the solicitors relied upon the decision of the Court of Justice of the European Union in the case of *Zambrano v. Office National de l'emploi* (Case C-34/09 judgment of 8th March, 2011). By letter dated 19th April, 2011, the solicitors were informed by the respondent that the *Zambrano* judgment was being studied by the Department of Justice and Equality, following which its potential impact on the case would be examined.

14. By letter dated 13th June, 2011, the respondent wrote to the fifth named applicant's solicitors stating:-

> "The position is that any visa required for a national who is outside the state and wishes to rely on the *Zambrano* judgment to enter and reside in the state, must first apply to the relevant Irish embassy or consulate in their country of residence for a visa which, if granted, will enable them to enter the state."

The solicitors replied by letter dated 4th November, 2011, claiming that their client's case came within the category of cases to which the *Zambrano* judgment applied. It was contended that having regard to his rights, with particular reference to the rights of his daughter, E.B., as an Irish and EU citizen, their client should be permitted to return to his family in the state as a matter of urgency.

15. An application was made by the fifth named applicant for a visa in Kenya, to which he had moved from the Democratic Republic of Congo to which he had been deported from Ireland. This online application was made on 26th October, 2011. No supporting documentation was recorded as having been received at the Irish embassy in Kenya and the applicant was notified of this on 1st December, 2011. By letter dated 14th December, 2011, his solicitors wrote to the respondent stating that the Irish Embassy in Dar Es Salaam had informed them that their client's visa application had been referred to Dublin some three weeks earlier, but that the Irish Embassy could not issue a visa to the fifth named applicant when there was an outstanding deportation order in existence. They called upon the respondent to revoke the deportation order. A further request to process the visa application and/or the application for revocation of the deportation order was made by the solicitors on 8th February, 2012.

16. By letter dated 28th February, 2012, the respondent informed the solicitors for the fifth named applicant that the application for the revocation of the deportation order had been considered under s. 3(11) of the Immigration Act 1999, and the decision to make the deportation order "remains unchanged". Enclosed with that letter was a document entitled "Consideration of Application for Revocation of Deportation Order Pursuant to s. 3(11) of the Immigration Act 1999" in respect of the fifth named applicant. It was completed by Mr. Mark Carleton, Executive Officer of the Repatriation Unit on 17th February, 2012. It was in turn reviewed by Ms. Maura Hynes, Principal Officer. Representations on behalf of the fifth named applicant in respect of the effect of the *Zambrano* decision on his case were fully considered in the determination. Having cited and quoted part of the *Zambrano* judgment it was stated that the effect of Article 20 of the TFEU was that:-

> "It precludes a member state from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the member state of residence and nationality of those children, and from refusing to grant a work permit to that third country national, insofar as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

It was noted that the fifth named applicant's children were currently residing in the state with their mother and that she had permission to remain in the state until March, 2016. She had not communicated any intention of leaving the state. Therefore, it was assumed that the children would continue to reside in the state in her care and company. In addition, it was noted that the fifth named applicant had failed to submit satisfactory evidence to show that he was playing an ongoing and active parental role in his children's lives. It was noted that his wife had stated that he had been unwell since returning to the Democratic Republic of Congo and that he suffered from high blood pressure and rheumatism and that she wished him to have medical treatment in Ireland. He had also submitted a personal statement asserting that he was alone in Africa and that it was very important to him to be with his family. It was noted also, however, that no further details were submitted and that "it cannot be accepted that Mr. B. is playing an active parental role in his children's lives. Consequently, it cannot be accepted that the applicant's Irish citizen children are dependent on him, as is stipulated in the *Zambrano* judgment".

17. In addition, the effect of the decision of the European Court of Justice in *Dereci* (C-256/11; 15th November, 2011) was also said to be of relevance in this case and para. 66 of the judgment was quoted as part of the consideration:-

> "It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the member state of which he is a national but also the territory of the Union as a whole."

The consideration concluded by finding that the further information furnished with the *Zambrano* and *Dereci* decisions did not warrant a reconsideration of the deportation order by the Minister. The application to revoke the order was refused.

18. It was clear from the facts of the case that the fifth named applicant's wife and children remained in the state and that it was unlikely that they would be required to leave the state because of his absence.

Refusal of the Visa Application
19. By letter dated 29th February, 2012, a copy of a reasoned decision refusing the fifth named applicant's application for a visa was furnished to his solicitors. A number of reasons were furnished for this refusal namely:-

> (a) The applicant's name differed to that on previous passport applications.
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> (b) The applicant did not divulge his previous UK immigration history.
>
> (c) UK immigration history.
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> (d) The fact that there was an Irish deportation order in effect.

(e) The granting of the visa might result in a cost to public funds and resources.

(f) It would not be in accordance with the common good to grant the visa to the applicant as he had not been in compliance with Irish law.

It was stated that the fifth named applicant's rights under Article 8 of the European Convention on Human Rights had been considered. A full statement of the consideration given to the application was enclosed. It had been completed by Mr. Gerard Wogan on 29th February, 2012, in a thirteen page document which was in very similar terms to the examination of file prepared prior to the deportation order in this case, with some minor variations. This decision was not challenged by way of judicial review.

The Second Application under s. 3(11)

20. By letter dated 25th June, 2012, some four months after the refusal of the visa and the first refusal to revoke the deportation order, solicitors on behalf of the fifth named applicant submitted a second application to revoke the order. It consisted of an extensive fourteen page submission, a personal letter from the applicant's daughter, a letter from his wife, a letter from his brother, a note on his daughter's progress at school, medical notes on his condition and some country of origin information.

21. In this second application the following issues were addressed:-

His parental role:

22. It was submitted that apart from approximately twelve months spent in custody the fifth named applicant lived with his children in Ireland from their birth until he was deported in February, 2011. Whilst in prison, he had almost daily telephone contact with his children. The children also visited him in prison on a number of occasions. Since being deported, he claimed to have been in daily telephone contact with the children. It was also claimed that he played a central role in their upbringing and continued to be a central part of their lives. He claimed that there was an ongoing dependency by the children on their father. It was also submitted that any limitations on his parental role were caused by the deportation. It was submitted that it would be wholly unreasonable or disproportionate to expect the fifth named applicant's children to attempt to relocate to the Democratic Republic of Congo in order to enjoy his company. However, the court is satisfied that the reality of this case is that the mother and children remain in this State and there is no intention to remove them from the state by their parents. The court is satisfied that these facts were not new. They were facts already considered by the respondent at the deportation stage and on the first application to revoke the deportation order, or they were facts which were readily available to the fifth named applicant that could have been put forward as part of his earlier submissions.

The Applicant's Criminal Convictions:

23. Two submissions were made in respect of the fifth named applicant's previous convictions:-

(a) It was submitted that the *Zambrano* judgment did not provide for any limitation on the rights of the fifth named applicant's children as Irish and European Union citizens by reason of his criminal convictions or public policy. It was, therefore, submitted that on that basis alone any refusal to him of permission to reside and work in the state would be in breach of the rights of his children as Irish and European Union citizens and would be unlawful.

(b) It was submitted that even if the respondent had the power in certain circumstances to refuse a right of residency to the non-EU parent of an Irish citizen child, the fifth named applicant's criminal convictions were not of such seriousness as to warrant the exercise of that power in this case. It was submitted that the same standard of assessment in that regard should apply as that applicable under EU Directive 2004/38 – Article 27(2) which provides that measures taken on grounds of public policy or public security should comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned. It provides that previous criminal convictions shall not in themselves constitute grounds for taking such measures and that the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It also provides that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted. It was further submitted that the fifth named applicant could not reasonably be said to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society such as to warrant permanently depriving his wife and children of his care and company in the state and that such a decision would be wholly disproportionate.

The court is satisfied that these matters could also have been advanced in the earlier application for revocation. They related to the interpretation and application of the *Zambrano* decision which had already been the subject of submissions at an earlier stage.

The Right of the Fourth Named Applicant's Daughter to be heard in the Application:

24. A submission was made that pursuant to Article 12 of the UN Convention on the Rights of the Child and his daughter's ability to form her own views, the Minister was obliged to have a meeting with her and directly hear from her before he could have proper regard to her best interests as a primary consideration in the decision making process. This is also a matter which, regardless of its merit, could have been advanced in the earlier stages when making submissions or by way of application for judicial review.

Entitlement to an Independent Appeal

25. It was submitted that the applicant's Irish citizen children were entitled to an independent appeal mechanism under which a decision under s. 3 of the Immigration Act interfering with their rights to have their father reside in the state and their rights under Article 8 of the European Convention on Human Rights might be appealed. The absence of an independent appeal mechanism against a decision that infringes fundamental rights under Article 8 of the Convention was said to be incompatible with the European Convention on Human Rights. This again is a matter which, irrespective of its merits, could have been advanced by way of submission or application for judicial review in respect of the first refusal.

26. Additional correspondence followed and on 27th November, 2012, the respondent wrote to the fourth named applicant's solicitor requesting "evidence that your client is in regular contact with his children in the form of telephone records, receipts of money transfers, email records or any similar correspondence". Under cover of letter dated 20th December, 2012, an affidavit of Mrs. A. B. was submitted providing some evidence to that effect.

27. The court is satisfied that each of these matters could have been raised in the first application to revoke the deportation order.

Indeed, the fifth named applicant's parental role and previous convictions were clearly the subject of detailed consideration in the examination of file prior to deportation and the consideration of his application to revoke the deportation order on the first occasion which was refused. The court is further satisfied that any additional factors relied upon in the second application to revoke were matters which could and should have been addressed in the first application.

The Decision on the Second Application
28. By letter dated 28th January, 2013, the respondent notified the fifth named applicant's solicitors that the application to revoke the deportation order under s. 3(11) of the Act had been refused. Enclosed was a consideration of the case prepared, once again, by Mr. Mark Carleton, dated 15th January, 2013. It is this decision which the applicants seek to challenge on grounds 5(1) to (6) of the application. The consideration contained a further review of the submissions made in respect of the *Zambrano* decision as follows:-

> "In their submissions, the applicant's legal representatives assert that the judgment of the Court of Justice of the European Union in *Zambrano v. Office National de l'emploi* is applicable to the circumstances of the applicant. They state that this judgment does not provide for any limitations on the rights of the applicant's children because of the applicant's criminal convictions. An examination of the applicant's case *vis-à-vis* the *Zambrano* judgment, is conducted below, but it is important to note here that the *Zambrano* judgment is silent on the issue of criminality. Moreover, the applicant's deportation from the state took place after a thorough consideration under domestic legislation – s. 3 of the Immigration Act 1999 – and this submission is prepared under the same domestic legislation.
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> The applicant's legal representatives also maintain that the applicant's criminal convictions were not of such seriousness as to warrant the deportation of the application (*sic*) and, as set out in EU Directive 2004/38, previous criminal convictions should not in themselves constitute grounds for taking such measures. Although it is acknowledged that Mr. B.'s convictions individually were not at the most serious end of the spectrum of criminal activity, it is submitted that, when considered as a whole, the nature, number and time span of the offences demonstrates that the applicant showed a prolonged and flagrant disregard for the criminal laws of Ireland, giving rise to a compelling public interest in the affirmation of his deportation order.
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> It is submitted that the applicant's chances of obtaining employment are poor, given his record of criminal convictions and the current economic climate. In addition, it is noted that Mr. B. had several prison sentences imposed upon him while he was in Ireland, each of which was served at a substantial cost to the state. These issues give rise to a compelling public interest to protect the economic wellbeing of the country and are substantial reasons that reasons that the deportation order made in respect of F.B.K. be affirmed."

29. The consideration contains an examination of the status of the applicants within the European Union. The court is satisfied that the consideration addressed the further submissions made in this application in detail, including the applicants' family rights and the children's rights as European Union citizens. It is clear that full acknowledgement was given to the fact that the children are European Union citizens. At all times, the court is satisfied, that due regard was had by the decision makers to that status and the following facts. The mother, the fifth applicant's spouse, has a right to reside in Ireland. The children's father was deported on 16th November, 2011. He, like his wife, is not a European Union national. The mother and children remain in the state and the European Union and there is no evidence that they will be obliged by reason of the deportation of the father to leave the European Union. There is no legal compulsion on them to do so, nor is there any evidence to suggest that they are so dependent economically or emotionally upon the applicant that they would be obliged to leave the European Union. The court is satisfied that the evidence is to the contrary. The decision has clearly been made in this case from an early stage that the European Union children will remain in Ireland in the physical care and control of their mother though both parents, as a matter of law, have joint custody of the children. There is no reality to the proposition that they will be obliged to leave the European Union by reason of the nature of their dependence upon their father. Nothing has changed in this regard since the making of the deportation order.

The Challenge to the Second Refusal to Revoke the Deportation Order
30. The applicants seek leave to challenge the second revocation decision based on grounds 5(1) to (6) of the statement of grounds. In summary, the applicants claim based on grounds 5(1) to 5(3) that the Refusal to revoke the deportation order against the fifth named applicant "prohibits" the Irish citizen children from cohabiting with and being brought up by their father in the state and is in breach of what is claimed to be their right "to grow up in the European Union in the company of their parents" as guaranteed by Articles 20 and 21 of the TFEU and Articles 7 and 24 of the Charter of Fundamental Rights. This is related to the issue in ground 5(3) that the decision failed to have any sufficient regard to the rights of the Irish citizen children to "cohabit with and be brought up by their father in the state and/or failed to give those rights adequate weight and/or failed to weigh adequately the fourth named applicant's right to the company of her husband in the state". There is a related complaint that the respondent erred in law in holding that the applicants legal rights "under European Union law were not engaged…and in refusing to assess the applicants case under the Charter of Fundamental Rights" as set out in ground 5(2). Ground 5(4) contends that the European Union rights of the children and the family under Articles 20 and 21 of the TFEU and Article 7 of the Charter of Fundamental Rights were not properly considered and applied.

31. Grounds 5(1) to (4) contain a mixture of propositions concerning the operation of s. 3(11) of the Immigration Act 1999 in respect of the applicants' family rights under Articles 40 and 41 of the Constitution, Articles 8 and 14 of the European Convention on Human Rights and Article 18, 20 and 21 of the Treaty on the Functioning of the European Union (TFEU) and Articles 7, 21, 24 and 45 of the Charter of Fundamental Rights of the European Union (the Charter).

32. Ground 5(5) is a challenge to the alleged unfairness of the decision in that it was asserted in the determination that there was "no verifiable evidence" adduced to support the contention that Mr. B had been actively involved in his children's upbringing over a substantial period which led to a reasonable conclusion that the best interests of the children would not be "adversely affected" by a decision to affirm the deportation order. It was contended that this aspect of the decision was unreasonable because the evidence established that the fifth named applicant had resided with his family for most of the children's lives and affidavit evidence had been adduced to demonstrate continuing contact between him and the family over the period since his deportation. Ground 6 argues for a right of appeal against the refusal to revoke the deportation order.

General Principles and Repeated Applications under S. 3(11)
33. As already noted the contested decision in this case is in respect of a second application under s. 3(11) of the Immigration Act 1999, made shortly after the refusal of the first. As such it is subject to the considerations set out by the Supreme Court in *Smith and Smith & Ors v. the Minister for Justice & Equality & Ors* [2013] IESC 4 (1st February, 2013). Clarke J., delivering the judgment of the court, stated:-

> "(1) The only question in respect of the grounds advanced on a leave application was whether "a sufficiently arguable

case" has been made out to seek leave under existing jurisprudence and whether the applicant has demonstrated that if the facts alleged are proved, the applicant has an arguable case in law to obtain the relief he seeks (*G. v. Director of Public Prosecutions* [1999] 1 I.R. 374 at 377-8 and *Gordon v. Director of Public Prosecutions* [2002] 2 I.R. 369, 372).

(2) It is only where an applicant can point to some significant feature not present when the original deportation order was made that there can be any obligation on the Minister to give detailed reconsideration to the question of deportation and this applies also to any second or subsequent application for revocation of a deportation order.

(3) The principle of legal certainty requires that if the original deportation order was not challenged or if a first or earlier application for revocation was not challenged in the courts by way of judicial review, it must be assumed that the analysis of the Minister, on the basis of the facts, materials and considerations then before the Minister was correct.

(4) The only basis upon which a challenge to a second or subsequent refusal by the Minister to revoke a deportation order can be brought is where reliance is placed on a proposition that there were new circumstances not before the Minister when the deportation order or previous decision not to revoke it was determined and where the challenge is directed to the consideration by the Minister of those new circumstances.

(5) It is reasonable to assume that any person who is seeking revocation of a deportation order will include in their application all points which can be made in favour of the application which derived from their own rights and those of other family members.

(6) There is an obligation on an applicant for revocation to place before the Minister all relevant materials and circumstances on which reliance is sought to be placed and the question of the existence of new and significantly material considerations such as might justify a reconsideration of a previous deportation decision (including a previous refusal to revoke) must be judged against that obligation.

> '5.6 If what is asserted to be a significant and material new consideration was actually available to the applicant at the time of the previous application, but was not advanced or brought to the Minister's attention, then, in the absence of special circumstances, it is difficult to see how the existence of such a consideration can properly be advanced as a new consideration requiring an active reassessment by the Minister of the substantive merits of the case. For a new circumstance to require such a reassessment it must either have arisen after the earlier decision of the Minister or there must be a compelling explanation as to why, notwithstanding its existence at the relevant time, it was not then advanced.'

(7) A change in circumstances that may oblige the Minister to reconsider the making of a deportation order may include material changes in relevant and applicable legal frameworks including developments in both domestic and European Union jurisprudence if that is demonstrated to be of "real materiality to the facts of the case".

34. In this case as in the *Smith* case, the scope for a challenge to a second refusal is considerably limited by what was advanced or could have been advanced during the course of the deportation process and the first application to revoke the order, the history of which has already been recited. Any challenge must be addressed to the consideration by the Minister on the second application of clearly defined new circumstances.

Grounds 5(1) to (3)

35. It is well established that the rights of the family including the rights of the children under the provisions of Article 40 and 41 of the Constitution are not absolute. There is no constitutional right vested in a non-national family member to reside in Ireland and a married non-national couple does not have a constitutional right to elect to reside in Ireland. The state has a right to maintain and enforce effective immigration controls in a fair manner. However, in considering whether to make a deportation order in the case of a non-national parent of an Irish citizen child, the Minister is obliged to consider the rights of Irish citizen children and the family rights of the parents and children as set out in *A.O. & D.L. v. the Minister for Justice* [2003] 3 I.R. 1. In addition, the applicants' rights to private and family life under Article 8 of the European Convention on Human Rights must be fully considered in accordance with the case law of the European Court of Justice as they were in this case by the application of the *Boultif* and *Uner* cases, to which reference has already been made. The Supreme Court has set out guidelines as to how all of the issues relevant to the making of a deportation order in respect of the non-national parent of an Irish citizen child should be considered (*Oguekwe v. Minister for Justice* [2008] 3 I.R. 795). No challenge by way of judicial review was made to the deportation order or the first refusal to revoke the deportation order in this case and consequently, the court must regard the decisions made by the respondent as correctly made as a matter of law and on the basis of the materials and submissions before him at the time.

36. The matters considered by the Minister were subjected to a detailed assessment in accordance with the *Oguekwe* guidelines. The court is satisfied that no additional materials and issues, legal or factual, that could not have been brought forward at the time those decisions were made have been advanced by the applicant in the course of this application. Therefore, insofar as the applicant seeks leave to apply for judicial review on the basis of Articles 40 and 41 of the Constitution and/or Articles 8 and 14 of the European Convention on Human Rights in respect of the second decision refusing to revoke the deportation order, no stateable ground upon which to grant such relief exists.

37. These grounds also concern the effect of the principles established in the *Zambrano* decision in respect of the deportation of non-national parents of European citizen children. A number of propositions were advanced by the applicant:-

(a) the respondent erred in law in holding that the applicants legal rights were not engaged within the scope of the decision and refused to assess the case under the provisions of the Charter of Fundamental Rights of the European Union; and

(b) the respondent was in breach of the children's rights and the applicants' rights as a family under the provisions of Articles 18, 20 and 21 of the TFEU and Articles 7, 21, 24 and 25 of the Charter because:-

(i) that children had a right to cohabit and be brought up by their father in the state;

(ii) the fifth named applicant's spouse had a right to the company of her husband in the state;

(iii) the contested decision refusing to revoke the deportation order was disproportionate as three years and three months had passed since the order was made;

(iv) the contested decision discriminated against the children because they were denied the company of their father on the basis of a socioeconomic reason, namely his poor employment prospects.

38. The court is satisfied that each of the matters set out above was considered in the context of the *Zambrano* decision in the first application to revoke the deportation order and that all of these issues could have been canvassed in the first application to revoke the order.

The Effect of the Smith Case

39. This must be considered in the light of the decision of the Supreme Court in *Smith* in which a submission was considered that the Minister was obliged to reconsider an application for revocation of a deportation order, not only when a new fact post the making of the order emerges, but when a previously unknown fact arises or where there is a material change in the law relevant to a reconsideration of the deportation order. The relevant principles have already been quoted, but further extracts from the judgment are relevant to this case. Clarke J. in delivering the judgment of the court approved the test applied by Cooke J. in the High Court in respect of the consideration of an application for revocation in that he had stated:-

> "It is well settled that the Minister is not obliged to entertain an application for revocation under s. 3(11) unless it is based upon some new fact or information or some change of circumstance which has come about since the deportation order was made and which, if established, would render the implementation of the deportation order unlawful. (See *C.R.A. v. Minister for Justice* [2007] 3 I.R. 603 at [78] to [87] and *Irfan v. Minister for Justice* [2010] IEHC 422 at paras. 7 and 8 and the cases there cited)"

40. Clarke J. stated:-

> "It seems to me to follow that it is only where a relevant applicant can point to some significant feature, not present when the original deportation order was made, that there can be any obligation on the Minister to give detailed reconsideration to the question of deportation. It likewise follows that a similar situation arises where, as here, there is a second or subsequent application for revocation of a deportation order. Where, as here, neither the original deportation order nor the first or earlier application for revocation was challenged in the courts by judicial review (or where any such challenge failed), it must be assumed that the analysis of the Minister, on the basis of the facts, materials and considerations then before the Minister, was correct. It follows that the only basis on which a challenge to a second or subsequent refusal on the part of the Minister to revoke a deportation order can be brought is where reliance is placed on a suggestion that there were new circumstances not before the Minister when the deportation order or any previous decision not to revoke same was determined and where the challenge is directed to the consideration by the Minister of the application in the light of such new circumstances."

The court also held that in the absence of some special or unusual factors, it was reasonable to assume that any person seeking the revocation of a deportation order on the basis of the rights of other family members must address any points which can be made in favour of the revocation sought which derive from the rights of those other family members in the application to the Minister. It also reaffirmed the obligation on persons seeking to revoke a deportation order to put before the Minister all relevant materials and circumstances on which reliance is sought to be placed. In that regard, Clarke J. stated:-

> "The question of the presence of new and significantly material considerations such as might affect a reconsideration of a previous deportation decision (including a previous refusal to revoke) must be judged against that obligation. The mere fact that what is said to be a new consideration was not before the Minister when an earlier decision was made does not of itself render it a sort of consideration which requires the Minister to actively reconsider. If what is asserted to be a significant and material new consideration was actually available to the applicant at the time of the previous application, but was not advanced or brought to the Minister's attention, then, in the absence of special circumstances, it is difficult to see how the existence of such a consideration can properly be advanced as a new consideration requiring an active reassessment by the Minister of the substantive merits of the case. For new circumstances to require such a reassessment it must either have arisen after the earlier decision of the Minister or there must be a compelling explanation as to why, notwithstanding its existence at the relevant time, it was not then advanced."

The court determined that the initial question that must be asked in respect of any challenge to a second or subsequent refusal to revoke a deportation order is whether the applicant in question has actually put forward new facts, materials or circumstances such as would require the Minister to enter into a full reconsideration.

41. The first decision which refused revocation contained a detailed consideration of the extent to which the fifth named applicant participated in family life and contact and found in that regard that there had been a failure to submit satisfactory evidence to show that he was playing an ongoing and active parental role in his children's lives. The additional information supplied in the second application which related to telephone contact between the fifth named applicant and the family, was clearly material that would have been available on the first application, but was not submitted. In addition, a further letter was submitted from the fifth named applicant's daughter on the second application to revoke dated 30th March, 2012. This was a letter of a type which could have been submitted as part of the initial application. Extensive submissions containing the sentiments expressed in that letter were clearly made to and understood by the officials in the case in the first application. The second application was to a large degree, an effort to address evidential shortcomings perceived in the first application but not in respect of evidence that could not have been made available at the time of the first application. The court is satisfied that the matters of fact sought to be addressed in the second application were, therefore, substantially the same as those sought to be addressed in the first application and the subject of that decision.

42. These considerations also apply to the applicant's claim that the respondent erred in law in holding that the applicants' legal rights were not engaged in respect of the Charter of Fundamental Rights of the European Union. In the first decision to revoke the application the "consideration" of the applicants' case specifically addressed whether the children would be forced to leave the European Union and be deprived of "the genuine enjoyment of the substance of their rights as European Union citizens" as already discussed. While the *Zambrano* decision was the subject of submissions at that time and the *Zambrano* and *Dereci* decisions were considered specifically in the "consideration", no specific submissions were made in relation to how precisely the determination failed to have regard to the rights of the European Union citizen children in the circumstances of this case. A determination was reached in the first consideration that the refusal to revoke the deportation order would not force the children to leave the European Union or deprive them of the genuine enjoyment of the rights of European Union citizens. Clearly, this was a determination in relation to rights

which the European Union children had under the TFEU or under the Charter. No challenge was mounted to this decision by way of judicial review or to the application of the principles set out in *Zambrano* and *Dereci* in that determination. Thus, that analysis of the application of legal principles must be viewed as correct in respect of the facts advanced at that time.

43. The court is satisfied that no new factual or legal issues beyond those that might have been raised in respect of the applicants' rights under the TFEU and the Charter in respect of the first application to revoke the deportation order by way of an application for judicial review, arise in this application. In this case the points arising from the *Zambrano* and *Dereci* decisions were considered by the Minister at the time of the first application for revocation of the deportation order. If the applicants had any concern that the application of those legal principles was fundamentally flawed or in error, the appropriate relief was to make application for leave to apply for judicial review on that ground at that time.

44. The court is satisfied that the applicants in this case have failed to put forward any new facts, materials or legal issues such as would have required the Minister to enter into a full reconsideration of the case. Having reviewed the materials, evidence and submissions placed before the Minister in respect of both applications under s. 3(11), the court is not satisfied that the applicants have any arguable grounds to contend that they have put forward any new facts, materials or circumstances that arose between the application in respect of which the first refusal was made and the application that led to the decision, which is the subject of this challenge. It follows that this challenge is not directed to the consideration by the Minister of any new circumstances advanced by the applicants' second application and consequently, there is no basis upon which to seek judicial review of the second refusal.

Principles of European Law: Zambrano, the TFEU and the Charter of Fundamental Rights
45. The applicants' claim that the second refusal to revoke the deportation order constitutes a breach of the applicants' rights under Articles 18, 20 and 21 of the TFEU and Articles 7, 21, 24 and 25 of the Charter of Fundamental Rights. Article 18 of the TFEU states, *inter alia*:-

> "Within the scope of application of the Treaties, and without prejudice to any special provision contained therein, any discrimination on grounds of nationality shall be prohibited…"

Article 20 provides that every person holding the nationality of a member state shall be a citizen of the European Union and, Article 20(2) provides that:-

> "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have *inter alia*:-
>
> (a) the right to move and reside freely within the territory of the member states."

It also provides that these rights and other rights under Article 20 shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

46. Article 21(1) provides that:-

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

47. Article 7 of the Charter provides for respect for private and family life:-

> "Everyone has the right to respect for his or her private and family life, home and communications."

Article 21 contains a prohibition against discrimination on the grounds of nationality. Article 24 provides in respect of the rights of the child that:-

> "(1) Children shall have the right to such protection and care as is necessary for their wellbeing. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
>
> (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
>
> (3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

Article 45 of the Charter provides that every citizen of the Union has the right to move and reside freely within the territory of the member states. It also provides that nationals of third countries legally resident in the territory of the member states shall have the same freedom of movement. Article 51 of the Charter importantly provides that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and "to the member states only when they are implementing Union law". Article 52(3) provides that:-

> "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same and those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

48. The grounds advanced in respect of alleged breaches of the rights of the European Union citizen children are in the courts view not stateable. As already stated there never was any question of the children in this case being forced to leave Ireland or the European Union. The mother has applied for naturalisation and has been granted residency until 2016. The factual basis for the application, therefore, does not exist.

49. The applicants contend that they have an arguable ground that the application of the *Zambrano* and *Dereci* decisions and the further decisions in *McCarthy v. Secretary of State for the Home Department* (Case – 434/09 – 5th May, 2011) and *O., S & L v. Maahanmuuttovirasо* (Cases – C356/11 and C257/11 – 6th December, 2012) support the proposition that the Minister erred in law in finding that the applicants legal rights were not engaged and in declining to assess the case under the provisions of the Charter of Fundamental Rights of the European Union. Further, it was submitted that the respondent was somehow in breach of the applicants' rights as a family under the provisions of the Article 7 of the Charter of Fundamental Rights.

50. In this case the European Union citizen children have never made use of their right of freedom of movement and have always lived in Ireland. In *O.S. & L* the European Courts of Justice reaffirmed the principles set out in *Zambrano, McCarthy & Dereci*, that European Union children, who have not made use of the right of freedom of movement, cannot for that reason alone "be assimilated to a purely internal situation, that is, a situation which has no factor linking it with any of the situations governed by European Union law". The court stated that it has been held on a number of occasions that Article 20 TFEU precludes national measures, including refusals to grant rights of residence to family members of a Union citizen, which have the effect of denying Union citizens the genuine enjoyment of the substance of the rights conferred by their status. Further, the court has held that the refusal to grant a right of residence to a third country national in the member state of residence of his European Union children, if it had the consequence that those children would have to leave the territory of the Union in order to accompany their parents, would mean that the children would in fact be unable to exercise the substance of the rights conferred by their status. In addition, it was for a referring court to establish whether the refusal of the applications for residence submitted on a basis of family reunification in such circumstances concerned a denial of the genuine enjoyment of the substance of the rights conferred by their status. When making that assessment, the court also found that the fact that the mothers of European Union citizens hold permanent residence in a member state so that in law there is no obligation for them or their European Union citizen children who are dependent upon them to leave the territory of the member state, must be taken into account. In that regard also, the question of the custody of the children, in this case joint custody between the parents, must be considered and also whether any decision made would have the effect of harming a relationship between the children and their biological fathers. The national court must examine all of the circumstances of the case in order to determine whether in fact the decisions in such cases are liable to undermine the effectiveness of the Union citizenship enjoyed by the children concerned.

51. The fact that the third country national for whom a right of residence is sought is not a person on whom the children are legally, financially or emotionally dependent must be taken into consideration when examining the question whether the children would be unable to exercise the substance of the rights conferred. The court also held that a finding that the refusal to grant a right of residence to a third party national parent of a European Union child would result in the children being forced to leave the European Union, would be without prejudice to the question of whether on the basis of other criteria the right to reside could not be refused, for example, by reference to the right to the protection of family life.

52. Apart from the fact that the question of whether the children would be forced to leave the jurisdiction has already been considered on a number of occasions by the Minister and that nothing new has been adduced in relation to that matter, the court is satisfied having reviewed the papers and the various decisions made in this case by a number of officials, that the principles of European law set out above were properly considered in the challenged decision and that the applicants have no stateable case upon which the refusal to revoke the deportation order could be challenged.

Ground 5(4)
53. A further submission was made that the second revocation decision failed to respect the applicants' private and family life under Article 7 of the Charter of Fundamental Rights of the European Union which provides that:-

> "Everyone has the right to respect for his or her private and family life, home and communications."

It was also submitted that the best interests of the child were a primary consideration which should have been taken into account in the making of the decision pursuant to Article 24 of the Charter, and that every child had the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents unless that is contrary to his or her interests.

54. In interpreting Article 7 and Article 24 of the Charter, Article 52(3) provides that insofar as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be "the same as those laid down by the said Convention". This does not prevent European Union law providing more extensive protection for children but it is a tool of interpretation. There is an extensive body of jurisprudence in relation to the application of Article 8 of the European Convention on Human Rights in respect of deportation orders and applications to revoke them under s. 3 of the Immigration Act 1999. The jurisprudence of the European Court of Human Rights is, as a matter of course, applied in such cases (as indeed it was in this case) to considerations of the applicants' rights to private and family life under Article 8. This assessment was carried out prior to the making of the deportation order and in the course of the consideration of both applications to revoke the deportation order, as is evident from a reading of the examination of file and the considerations of the file carried out by the officials in this case. That process has never been the subject of challenge by way of leave to apply for judicial review or otherwise by the applicants. Though the applicants contend that a different test should have been applied in the application of Article 7 of the Charter in respect of the private and family lives of the applicants on the application to revoke, the applicants have not advanced to the court any test different to that which was applied in respect of Article 8 of the European Convention throughout this process. The court is satisfied having regard to Article 52(3) of the Charter that the meaning and scope of Article 7 is the same as the meaning and scope of Article 8. The court is not satisfied that there is any stateable ground upon which it can be argued that Article 7 of the Charter of Fundamental Rights was in any respect misconstrued or breached. The best interests of the child were considered both in relation to the children's constitutional rights and Convention rights in accordance with the principles laid down in *Boultif* and *Uner*.

55. There is nothing to suggest that the best interests of the children in this case were not a primary consideration in the decision made, nor is there any evidence to suggest that the state has denied direct contact or a personal relationship between the European Union children and their father. In that regard the maintenance of personal relationships and contact is not always dependent on the presence of the parent within the home or the state.

56. I am also satisfied that, having regard to the similarities of the matters to be considered under Articles 7 and 24 of the Charter and the TFEU respectively and the matters to be considered, both under the Constitution and the European Convention on Human Rights, there is no stateable ground upon which to seek leave to apply for judicial review in respect of ground 5(4).

The Duration of the Deportation Order
57. The lifelong nature of the application of a deportation order is also said to give rise to a stateable ground because it is said to constitute an unlawful interference with the rights of the applicants individually and collectively as a family under the Constitution, the European Convention on Human Rights and the TFEU and the Charter of Fundamental Rights. The constitutionality of the unlimited nature of the deportation order in time was challenged in *S. & Ors v. Minister for Justice, Equality & Ors* [2012] IEHC 244. Kearns P. held that s. 3(1) and s. 3(11) of the Immigration Act 1999, were not invalid having regard to the provisions of the Constitution. It was held that the unlimited nature of the deportation order was not in itself disproportionate. It was noted that a very elaborate and detailed process and a careful balancing of rights had to be carried out before a deportation order could be made. Further, under s. 3(11) if new circumstances arose an application could be made to revoke the deportation order. Similarly, the provisions were held not to offend the provisions of the European Convention on Human Rights. Further, no challenge by way of judicial review on this basis

was made in respect of the deportation order, the validity of which was implicitly accepted by the applicants in making two separate applications to revoke the order.

Unfair Findings: Ground 5(5)
58. Ground 5(5) complains that a finding by the Minister that there was no verifiable evidence to support the contention that the fifth named applicant had been actively involved in the upbringing of his children over a substantial period of time, and that as a result it was reasonable to conclude that he had not established that his children's best interests would be adversely affected by a decision to affirm the deportation order was unfair. It was also contended that it was unfair to hold that no evidence had been submitted to support the father's claim in that regard and that it was unreasonable to conclude that if a deportation order were to be affirmed, this would not have the same impact on the couple as if there were evidence to suggest that there was significant contact between them. The applicant contended that the father had resided with the family throughout the children's lives and had been involved in their care and support. In addition, the applicant relied upon an affidavit that had been submitted from the children's mother which confirmed that she spoke to her husband frequently by telephone and a letter from his daughter about the role of her father in her life and how much she was missing him. The court notes that the affidavit submitted by the fourth named applicant to the Minister was considered in the course of the consideration, as were all of the matters set out above. The court is satisfied that the Minister was entitled to assess the evidence and that the conclusions reached were not irrational or so unreasonable having regard to the overall circumstances of the case as to give to a stateable ground for judicial review. To do so would be to isolate extracts from the consideration in a manner which fails to have due regard to the overall analysis of the case carried out in respect of the applicants. Accordingly, the court is satisfied that this is not a stateable ground.

Ground 5(6)
59. The court is also satisfied that the jurisdiction of this Court to review the decision of the respondent in respect of the second refusal to revoke the deportation order provides an extensive remedy to the applicants in this case to challenge any alleged breach of their statutory, constitutional, European Convention or European Union law rights. It is a jurisdiction and remedy which they conspicuously failed to invoke in relation to the original deportation order and the first decision. The court is satisfied that ground 6 does not afford a stateable ground.

Conclusion
60. The court is, therefore, satisfied that this application for leave to apply for judicial review should be refused.