Neutral Citation: [2013] IEHC 554

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 424 J.R.]

BETWEEN

F.B.A. AND D.A. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND F.B.A.) AND E.A. (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND F.B.A.) AND D.A.I. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND F.B.A.)

APPLICANTS

AND

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

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice McDermott delivered on the 3rd day of December, 2013

1. This is an application for leave to apply for judicial review of decisions whereby the Minister for Justice and Equality refused to grant the applicants subsidiary protection on 21st February, 2012, and made deportation orders in respect of each of them on 12th March, 2012. The applicants seek to quash the decision to refuse subsidiary protection and the deportation orders, and declarations that s. 3 of the Immigration Act 1999, insofar as it requires the respondent when making a deportation order to make one of indefinite duration was disproportionate and invalid having regard to the provisions of the Constitution and/or the European Convention on Human Rights. A declaration was also sought that the unavailability of an effective remedy by which the decision refusing subsidiary protection could be challenged was unlawful.

2. The first named applicant is the mother of the second, third and fourth named applicants who are all Nigerian nationals. She arrived in the state with the children on 24th April, 2009, and applied for asylum. D.A. was born on 14th July, 2001. E.A. was born on 16th April, 2003, and D.A.I. was born on 10th September, 2005.

3. The asylum application was based upon a claim that the first named applicant's life was threatened by the family into which she married. She claimed that her husband converted to Christianity from Deti (the worshipping of idols) a year before they married, and that he, as the eldest child, was under a lot of pressure from his family to maintain his Deti beliefs. The family blamed her for his conversion to Christianity. Initially she was verbally attacked by members of the family and subsequently, the children were physically attacked: hot water was poured on her daughter's legs, her older son received injuries to his head which required stitches and her younger son was burnt with an iron on his arm. The younger son, D.A.I., suffered from seizures due to epilepsy and her in-laws wished to take him away in order to carry out a sacrifice. The applicant claimed that if she refused to allow him to be taken, the other children would be taken. She claimed that she went to the police but because it was viewed as a domestic issue, they refused to intervene.

4. The Refugee Applications Commissioner recommended that the applicants should not be declared refugees under s. 13(1) of the Refugee Act 1996 (as amended), and this recommendation was affirmed by a decision of the Refugee Appeals Tribunal dated 20th May, 2010. The applicants were notified of this decision on 9th July, 2010, following which applications were submitted to the Minister for Justice and Equality for subsidiary protection and/or humanitarian leave to remain under s. 3 of the Immigration Act 1999. The application for subsidiary protection was made on 15th July, 2010, pursuant to Council Directive 2004/83/EC as transposed by the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518/2006). The application also included an application on behalf of the three children. Officials of the Department of Justice and Equality made a recommendation in their report that the subsidiary protection application be refused on 21st February, 2012. The first named applicant was advised by letter dated 22nd February, 2012, of the refusal of the application by the Minister.

5. A substantial part of the report focused upon the fact that the applicant was found to lack credibility by the Refugee Appeals Tribunal in the course of the asylum application. Extracts from that decision which elaborated upon significant doubts about the first named applicant's credibility were quoted extensively in the subsidiary protection determination. On the basis of the findings as to credibility made by the Refugee Appeals Tribunal, it was concluded that:-

> "It is reasonable to consider that the applicant's statements in relation to her claimed fear of returning to Nigeria are not credible. As a result, I am satisfied that the applicant's claim is not credible."

It was also concluded that:-

> "Due to the issues set out in the paragraph above examining the applicant's credibility under Regulation 5(3), I am not satisfied as to the credibility of the applicant's claim and notwithstanding the credibility issues that state protection is available in Nigeria should the applicant or her children require it."

It is a significant part of the applicants' challenge to the subsidiary protection refusal that they were not afforded fair procedures because the determination by the Refugee Appeals Tribunal concerning the mother's credibility was relied upon without a further hearing when determining the subsidiary protection application.

6. The applicants also applied for leave to remain in the state under s. 3 of the Immigration Act 1999. An important aspect of that

application was a submission pursuant to s. 3(6)(h) in respect of humanitarian considerations that the first named applicant was a lone parent of three children, one of whom, D.A.I., had a serious medical condition. It was submitted that he had a severe learning disability and that he had been diagnosed with epilepsy and suffered seizures regularly. It was claimed that if she and the other children, including D.A.I., were to be deported to Nigeria, he had "no chance of surviving his illness". It was submitted that there were no adequate medical, educational or social services in Nigeria to cater for his condition. Submissions were also made as to the family's integration in the local community in Tralee where they were living. The children were attending school and the mother submitted that she was qualified as an account technician and had secretarial work experience. A number of representations and references were submitted on behalf of the family to the Minister. In respect of the children it was submitted that the Minister should regard the welfare of the children as "the first and paramount consideration" in reaching his conclusion in accordance with the provisions of Article 3 of the United Nations Convention on the Rights of the Child ratified by Ireland on 21st September, 1992.

7. A short report from Dr. Akhtar Ali Khan, Consultant Paediatrician, dated 21st February, 2012, stated that D.A.I. was attending an out-patient clinic because of severe learning difficulties, Global Developmental Delay and recurrent seizures. As a result of the seizures he suffered numerous fractures. He was on appropriate medication. It was indicated that D.A.I. was seen by a Consultant Paediatric Neurologist in Crumlin Children's Hospital and was in need of regular follow up with a neurologist and paediatrician for his ongoing problems: he required a multi-disciplinary team to address his multiple medical problems.

8. Ms. Denise McCann, a social worker, also submitted an assessment from the Brothers of Charity Early Intervention Services dated 15th June, 2011. This indicated that D.A.I. attended the Intervention Service from 7th September, 2009 to 20th December, 2010. He was assessed as having a severe learning disability and epilepsy. As a result of his disability the child could not speak, was not toilet trained, had poor social skills, had no idea of danger and as a result had to be cared for and looked after at all times. He was hyperactive, constantly climbing and jumping as a result of which he sustained a number of injuries. He was a pupil in the Nano Nagle Special School in Listowel and in receipt of speech and language therapy, physiotherapy and occupational therapy. His mother had to carry out all of these programmes at home. Because of his hyperactivity it was concluded that he needed a lot of space for activity and that the family's present accommodation did not provide that environment. It was concluded that he will always have these problems and if the family were to return to Nigeria, he would not get the help he needs.

9. In a school report dated 2nd June, 2011, from the Nano Nagle School, Ms. Gabrielle Brown, Deputy Principal, confirmed that he was a pupil of the school enrolled on 2nd December, 2011, and that he needed constant one to one supervision in his care and educational needs.

10. Dr. Sharon Condon, a Consultant Community Paediatrician, in a report of 28th September, 2010, confirmed that D.A.I. had a history of seizures, developmental delay, Microcephaly and had dysmorphic features. He had underlying brain malformation. He suffered multiple seizures which were difficult to control. He had a moderate to severe learning disability and was non-verbal. He was not toilet trained and was not capable of ever managing his toileting needs himself given his level of intellectual disability. He was a young boy with multiple medical, physical and intellectual needs which would require extensive and intensive support over his lifetime.

11. A report was submitted from the office of Dr. Sinead Harty, Consultant Paediatrician, with a special interest in community child health at Our Lady's Children's Hospital Crumlin dated 28th July, 2009. A report was also received from Tahir Saeed, Senior Psychologist with the Brothers of Charity Southern Services Tralee, to whom he was referred in respect of his non-communication and speech delay, motor development delay, specific fine motor difficulties, social skills, lack of toilet training and epilepsy. He concluded in an extensive report that D.A.I. would need a very high level of support to help him move towards achieving his developmental milestones.

12. He was also assessed by Dr. Bláthnaid McCoy, Consultant Paediatric Neurologist, who furnished a report dated 7th December, 2011. She noted that the most predominant seizures from which he suffered were myoclonic seizures which occurred on multiple occasions per day:-

> "…described as shoulder jerks, sometimes with arm elevation individually occurring during wakefulness or more predominantly as he settles to sleep. In addition to that he will have other seizure types including tonic seizures which occur ongoing into sleep at times with vocalisation, at times associated with events of hypermotor activity and at times progressing to generalised tonic clonic seizures. In terms of his anti-epileptic medication he has previously been on Phenobarbital and Carbamazepine. Prior to commencing Lamotrigine he was having approximately forty seizures a month. Lamotrigine initially helped significantly to reduce this to about fifteen per month. However, since July he has been having twenty to twenty five events per month. Indeed, in the clinic he has had three to four myoclonic events and a tonic seizure".

Dr. McCoy noted that he was able to walk but was a little unsteady on his feet. He is able to grasp and transfer items. He did not feed himself with a spoon but could occasionally finger feed himself. He was non-verbal but "will have some occasional monosyllabic babbling". She arranged for a continuing review and medication. However, because the seizures were "refractory to medication" it was recommended that he be commenced on a specialised diet and further review at the seizure clinic was recommended.

13. Following an examination of file under s. 3 of the Immigration Act 1999, it was recommended that a deportation order be made in respect of the first named applicant and each of the children on 22nd February, 2012. The Minister for Justice and Equality made the orders on 12th March, 2012.

14. Following the making of the deportation orders, a report of Dr. Akhtar Ali Khan, Consultant Paediatrician, was received on 20th March, 2012, by the Minister and because the orders had been made but not yet notified to the applicants, the letter and report were considered pursuant to the provisions of s. 3(11) of the Immigration Act 1999, as an application to revoke the orders. The letters notifying the first named applicant of the decision and orders of the 23rd March, 2012, do not refer to that fact, though a subsequent letter did.

15. The examination of file when dealing with humanitarian considerations noted that the letter from Dr. Cliona Mulvihill from Crumlin Hospital dated 28th July, 2009, gave a history which stated that D.A.I. first presented on 24th April, 2009, following referral by his general practitioner with recurrent seizures. He had a background history of developmental delay, Microcephaly as well as dysmorphic features. It was noted that, at that stage, he was three years and seven months old and had been experiencing seizures since he was thirteen months of age, for which Tegretol had been prescribed. On his initial presentation he had just arrived from Nigeria. It was concluded, therefore, that he was getting the appropriate treatment for epilepsy in Nigeria prior to his arrival in the state on 24th April, 2009. The conclusion that the treatment was "appropriate" is disputed by the child's mother and there is no evidence as to the adequacy of the treatment received by him in Nigeria, other than the fact that he was taken off "Tegretol" when examined and treated in Ireland. It was also thought "incredible" that the applicant did not seek medical assistance for D.A.I. in Nigeria if he had

been experiencing an increased frequency of seizures or in Germany where it was said the family had been for two nights before their arrival in Dublin. It was considered that the country of origin information indicated that Lagos State University Teaching Hospital provided paediatric and neurological care, both in-patient and through out-patient clinics and that children under twelve had free treatment. It was, therefore, concluded that the first named applicant could access medical care for her son at that hospital. In that regard, it may be noted that the hospital which has 600 beds caters for a city with a population of eighteen and a half million people.

16. The first named applicant stated in an affidavit of 5th July, 2012, as follows:-

> "16. …the level of treatment which I was able to obtain for D.A.I. while he was in Nigeria did not meet his needs. The first eight days of my stay in Ireland were spent in Our Lady's Children's Hospital in Crumlin where he was weaned off the medication he had been taking in Nigeria which was deemed unsuitable. In Nigeria, I was merely informed that D.A.I.'s medical condition was due to "fits" or "seizures". In fact I attended Lagos University Teaching Hospital with D.A.I. over an approximately six month period. I was given prescriptions for medications which I had to pay for and which were expensive and which were ultimately found to be inappropriate medication. Initially, in Nigeria, Phenobarbitone was prescribed to be given to him only during the period he was having fits. But once the fits ceases medication was to be stopped. That was the only form of treatment he was getting for a while until the seizures got out of control. Then a new medication was introduced called Tegretol (Carbamazepine), which was prescribed in addition to Phenobarbitone and this time around I was to give him both medicines on a continuous basis. That was the only form of treatment D.A.I. received in Nigeria.
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> 17. D.A.I.'s first eight days in Ireland were spent in Our Lady's Children's Hospital, Crumlin. He was immediately taken off of Phenobarbitone in a gradual succession and a new medication was introduced. When he was totally off the Phenobarbitone, then the Tegretol was also taken off in a gradual succession. The reason for ceasing the two medications was that they were not helping D.A.I.. Ultimately, D.A.I. was not fully diagnosed until the result of his (MRI) brain scan came out some time in November, 2009. I knew something was seriously wrong with D.A.I. from about 2007 onwards but I did not know what it was. It was after the various tests and examinations conducted that I realised D.A.I. had very serious long term medical issues.
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> 18. The first three months we spent in Tralee, an ambulance was often called for D.A.I. because of his recurrent seizures and on each occasion he spent at least a week in the hospital until he was 24 hours seizure free. It was on one of the occasions when he had been admitted to the Kerry General Hospital, Tralee that he was referred to the Brothers of Charity where he started school and received a lot of help. I do not believe that the proper, comprehensive, holistic treatment would realistically be available to D.A.I. in Nigeria. Even if it was, I cannot see how I would be able to pay for same. I accept that there appears to be certain free treatment available for children under twelve at the Lagos University Teaching Hospital as pointed out in the examination of file. However, that was not my experience."

17. The rights of the infant, D.A.I., under Article 3 of the European Convention on Human Rights were considered on the basis that in *D. v. United Kingdom* [1997] 24 EHRR 423, the European Court of Human Rights held that Article 3 did not require contracting states to undertake the obligation of providing aliens indefinitely with medical treatment. It was only if exceptional circumstances existed that the return of an applicant to his or her country might amount to a breach of Article 3. It was considered that appropriate medical treatment was available to the applicant in Nigeria. It was noted that medical care obligations on contracting states did not extend to permitting an individual to remain in a state solely for the purpose of obtaining medical treatment of a level which would not be available to them in their own country. Particular reliance was placed on *N. (F.C.) v. Secretary of State for the Home Department* [2005] U.K.H.L. 31 in which the House of Lords held that aliens subject to expulsion could not claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical assistance provided by the expelling state. It was also held that "for an exception to be made where expulsion is resisted on medical grounds, the circumstances must be 'exceptional'". No exceptional circumstances were held to exist in D.A.I.'s case, and there was no sufficiently real risk that his deportation would be a breach of Article 3. It was concluded that the fact that the circumstances of the applicants in Nigeria might be less favourable than those enjoyed by them in Ireland did not, in itself, create exceptional circumstances.

18. It was also accepted in the examination of file that the proposed deportation of the family might constitute an interference with family and/or private life rights under Article 8 of the Convention. This required a consideration of the educational and other ties formed in the state by the family as well as "any matter relating to their personal development" since their arrival in the state. The fact that the children were attending school in Tralee and D.A.I.'s condition, including his learning disabilities and severe seizures, were considered in that context. A submission was made on D.A.I.'s behalf that he had no chance of surviving his illness if returned to Nigeria. It was concluded that the judgment of Feeney J. in *Agbonlahor v. Minister for Justice, Equality and Law Reform* [2006] IEHC 56, approved the *N(FC)* decision and determined that the principles set out in that case concerning medical treatment provided guidance as to the correct approach to be taken in relation to Article 8 rights. Feeney J. was satisfied that the Minister was entitled to have regard to the effect on the state's medical services of allowing persons not legally entitled to be in the state to remain for the purposes of availing of these services. It was concluded in the examination of file that the deportation of the applicants and, in particular, the fact that the conditions of treatment available in Nigeria would be less favourable than those available in Ireland, would not have consequences of such gravity as to potentially to engage the operation of Article 8. Therefore, it was concluded, that the deportation of the family would not constitute a breach of Article 8.

19. The family life aspect of Article 8 was also considered in a short passage. It was noted that the family had been together in the state and that the first named applicant's husband, the children's father, remained in Nigeria. Therefore, it was concluded that deportation would not constitute an interference with the right to respect for family life.

20. There must be some concern as to the nature of the consideration given in this case to the rights of the applicants since in the body of the examination of file there is a reference to the country of origin information considered indicating that treatment for D.A.I.'s condition "is available in South Africa". This error is repeated in the consideration under the Article 3 heading and also in the consideration of Article 8 rights. This opens the possibility that some of the material included in this examination of file was transposed from some other ruling without a proper consideration of the materials advanced in this case.

21. The most important and difficult feature of this family's circumstances is D.A.I.'s condition. The desperate circumstances in which the mother finds herself have been addressed by her with an enormous devotion, energy and love for her children calculated to serve their best interests and secure the best result for them but, especially for D.A.I.. It is his plight that dominates the consideration of this case at any level. He is entirely dependent on his mother to provide him with the necessities of life and the best quality of life that may be available to him. Minor advances in his development are obtained only after enormous effort and unceasing care from his mother and siblings and those who, from the reports furnished, engage with him on a daily basis to ensure that every opportunity is provided to attain small but significant goals and thereby improve his chances of living, and living a life of maximum quality with the

care and support of his family. It is clear that any disruption of that continuity of care has enormous potential consequences for D.A.I. and must be very carefully considered with a view to ensuring that the enormous progress that has been made with him is sustained, and that such further progress that might be made is not jeopardised: his difficulties are such that any small improvement is of enormous significance to his quality of life. On the evidence available it appears that there are significant issues in relation to the effect that a transfer to Nigeria might have on D.A.I.'s health, his life expectancy and quality of life. Therefore, there are live issues in the case in respect of his rights to life, health and bodily integrity under Article 40.3 of the Constitution and his rights under Articles 3 and 8 of the European Convention on Human Rights, particularly in relation to his private life and family rights. His rights as a child and the consideration of his best interests, whether with or without the ranking of such interests as a "primary consideration" also fall to be considered.

22. The cases of his mother and siblings are inexorably linked to D.A.I.'s because of the acute nature of his condition and the daily support required and given by them to him. His tender age and vulnerability necessarily mean that he requires the support of his family if he is to survive and to enjoy as full a life as possible. It is difficult to see how any result which would cause a rupture in the family would have anything but devastating consequences for D.A.I. and, it should be noted that his mother has never contemplated such a result. However, what causes her acute concern is what she regards as the inevitable shortening of his lifespan if returned to Nigeria where, she believes, he will not be afforded an appropriate or sufficient level of healthcare in order to enable him to survive, or if he survives, to maximise his quality of life. Though there is clearly, therefore, a dimension in which the first, second and third applicants' cases are directly linked to D.A.I.'s and the result in respect of his case, nevertheless, each of the applicants has also advanced other grounds which are independent of D.A.I.'s case.

Grounds
23. There are a number of legal issues raised in this application concerning the inadequacy of the procedures applied to the refusal of subsidiary protection and the issuing of the deportation orders. In particular, the extensive reliance upon the findings of fact made by the Refugee Applications Commissioner and the Refugee Appeals Commissioner in refusing subsidiary protection is challenged.

Grounds 1, 2, 3, 6 and 11
24. One element of Ground 1 challenges the decision refusing subsidiary protection based upon the previous findings in respect of the credibility of the first named applicant on whose evidence the children's application for asylum also depended. It is claimed that:-

> "…the first respondent was not entitled to rely on the conclusions of the RAT and ORAC but was obliged to reach a decision (particularly, but without prejudice to the generality of the foregoing on the credibility of the applicants') independent of the conclusion of those bodies."

25. Ground 2 complains that the first named respondent "failed to cooperate" with the applicants in assessing the relevant components of the claim and that this constituted a breach of the minimum standards mandated by the terms of the Qualification Directive, thus rendering the refusal to grant subsidiary protection ultra vires and unlawful. This ground was formally opened but adjourned to await the decision of the European Court of Justice on a reference in respect of that point.

26. In *M.M. v. Minister for Justice, Equality and Law Reform & Ors* , C-277/11 [2012] ECR 1-000, Hogan J. referred the following question to the Court of Justice for a preliminary ruling:-

> "In a case where an applicant seeks subsidiary protection status following a refusal to grant refugee status and it is proposed that such an application should be refused, does the requirement to cooperate with an applicant imposed on a member state in Article 4(1) of …Directive 2004/83…require the administrative authorities of the member state in question to supply such applicant with the results of such an assessment before a decision is finally made so as to enable him or her to address those aspects of the proposed decision which suggest a negative result?"

The Court (First Chamber) ruled that the requirement that the member state concerned cooperates with an applicant for asylum under Article 4(1) cannot be interpreted as meaning that where a foreign national requests subsidiary protection status after he has been refused refugee status and the competent national authority is minded to reject that second application as well, the authority is on that basis obliged, before adopting its decision to inform the applicant that it proposes to reject the application and notify him of the arguments on which it intends to base its rejection, so as to enable him to make known his views in that regard. Therefore, subject to any further submissions that might be made on this matter, it would appear that this ground is not open to the applicants following this ruling.

27. However, in a further development, the European Court of Justice in the same case also determined that because there are two separate procedures in Ireland, the one following the other, for examining applications for refugee status and applications for subsidiary protection respectively, it was for the national court to ensure observance in each of those procedures of the applicants' fundamental rights. The court held that this included:-

> "The right to be heard in the sense that the applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested. In such a system, the fact that the applicant has already been duly heard when his application for refugee status was examined does not mean that that procedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection."

28. This aspect of the ruling was subsequently considered by Hogan J. in *M.M. v. Minister for Justice* [2013] IEHC 9. In particular, Hogan J. determined that the Minister had failed to afford the applicant an effective hearing in subsidiary protection proceedings because he relied completely on the adverse credibility findings which had been made by the Tribunal in respect of the contention that the applicant would come to harm if returned to his country of origin because of his involvement in the office of the military prosecutor in that country, and because he made "no independent and separate adjudication on these claims". He continued:-

> "47. In order for the hearing before the Minister to be effective in the sense understood by the Court of Justice in such circumstances, such a hearing would, at a minimum, involve a procedure whereby (i) the applicant was invited to comment on any adverse credibility findings made by the Refugee Appeals Tribunal; (ii) the applicant was given a completely fresh opportunity to revisit all matters bearing on the claim for subsidiary protection and (iii) involve a completely fresh assessment of the applicant's credibility in circumstances where the mere fact that the Tribunal had ruled adversely to this question would not in itself suffice and would not even be directly relevant to this fresh credibility assessment."

Hogan J. did not find it necessary in that case to consider whether a separate oral hearing would "ever generally be required at subsidiary protection stage". He noted that there might well be many circumstances where such a hearing would be required if a

credibility finding adverse to the applicant were to be made which was separate and distinct from that made during the asylum process.

29. This is precisely the point raised in Ground 1 by the applicants in this case. It is also the subject of Ground 11:-

> "The conclusions related to subsidiary protection were arrived at in breach of the principle of *audi alteram partem*."

I am satisfied, subject to any further submission that the parties may wish to make in that regard, to grant leave to apply for judicial review on the basis that the applicants have established an arguable case in respect of the quoted extract from Ground 1 and Ground 11.

30. Ground 1 also contains the claim that:-

> "No regard was had to the best interests of the infant applicants in arriving at the decision to refuse subsidiary protection."

It was submitted that there was an obligation to have regard to the best interests of each of the children in refusing to grant subsidiary protection and/or making the orders for deportation. It was further submitted that since subsidiary protection and refoulement involve European law rights and obligations and involve the implementation of European law, that Article 24(2) of the Charter of Fundamental Rights of the European Union was directly applicable to the case and that it could not be said that the children's best interests were treated as a "primary consideration", nor were their best interests specifically identified in either decision. However, in respect of the deportation orders, it is not clear as to how Article 24(2) can be said to apply to purely domestic legislation.

31. The respondent submits that the issue of the best interests of the child in this case is related largely, if not exclusively, to D.A.I.'s medical condition. It is submitted that the authorities relied upon by the first named respondent in making the decisions clearly indicate that failed asylum seekers are not entitled to remain in the state because the medical treatment they might obtain here is better than that available in their country of origin. Thus, unless exceptional circumstances apply the fact that D.A.I. might have a shorter life expectancy or might not receive the high quality continuous assistance and treatment that he now receives in Ireland, are not factors which weigh heavily enough to justify a conclusion that D.A.I.'s Article 3 or Article 8 rights had been breached or not respected in making the decision to deport him. Furthermore, it is submitted that it is clear from the examination of file in respect of the children that their best interests were considered, though the phrase was not specifically mentioned, having regard to the consideration of D.A.I.'s medical condition, the assessment of the availability of child protection and education in Nigeria, the availability of healthcare for D.A.I. in Nigeria, and other factors relevant to child welfare cited in the body of the examination.

32. I am satisfied that issues concerning the best interests of these children and, in particular D.A.I.'s best interests, are of central importance in this case.

33. Article 3(1) of the United Nations Convention on the Rights of the Child was relied upon by the applicants and provides that:-

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities and legislative bodies, the best interests of the child should be a primary consideration."

This Convention has been ratified but not incorporated into law. It is submitted that Article 3(1) is relevant to the proper consideration of the private and family law rights of the children under Article 8 of the European Convention and Articles 40.3 and 41 of the Constitution, and that the following matters should have been specifically assessed and considered:-

> (i) the educational needs and stage of each child applicant;
>
> (ii) the social life of the children;
>
> (iii) the developmental stage of each child (including age);
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> (iv) the health of each child, particularly D.A.I.;
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> (v) the length of time the family have been in the state;
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> (vi) the effect of deportation on each of the children and their social, physical, and mental welfare including any potential difficulties of reintegration in Nigerian society.

34. It was also submitted that D.A.I.'s rights to life, health and bodily integrity must be carefully considered by the decision makers and that any decision in respect of subsidiary protection or deportation must be proportionate in the context of the end sought to be achieved by the state. These issues are, in the courts view, of particular relevance to the decision to deport the applicants. It is argued that the guiding principles set out in the judgment of Denham J., as she then was, in *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795, to the effect that the consideration to be given to the deportation of children should be fact specific to the individual child, his/her age, educational prospects, health and opportunities, the attachment of the child to the community (as in this case evident from the care provided by the community) are applicable to the applicants even though the children, unlike the children in *Oguekwe*, are not Irish citizens. Though the Minister is not obliged, even under *Oguekwe*, to carry out any more than a general review of the facilities that may be available to children in the country to which they may be deported whether educational or medical, that general approach did not, according to Denham J., exclude a more detailed assessment in an exceptional case. It is argued that D.A.I.'s case is exceptional and that medical and other facilities in Nigeria should, in his case, have been the subject of a more rigorous assessment having regard to the conditions from which he suffers and his continuing needs, than is evident from the examination of file which concentrated primarily on the facilities available in one hospital in Lagos.

35. I am, therefore, satisfied that the applicants have established substantial grounds upon which to contend that the Minister was obliged to treat the best interests of the children in this case as a primary consideration when making the deportation orders and that the best interests of each child should have been specifically identified and addressed. Furthermore, the applicants have also established as a substantial ground, that the children's best interests were not treated as a primary consideration in the deportation decisions, but ought to have been, insofar as this may be required by the interpretation of the relevant statutory and regulatory provisions in accordance with Article 3(1) of the United Nations Convention. In addition, the applicants have established as a substantial ground that the first named respondent failed to consider or adequately consider D.A.I.'s physical and mental disabilities as

an exceptional feature of the case. I note that the arguments advanced in this case are similar to those in respect of which leave was granted by MacEochaidh J. in *Dos Santos & Ors v. Minister for Justice and Equality and Ors* (Unreported, High Court, MacEochaidh J., 30th May, 2013). I am satisfied in respect of the deportation orders issued in this case that the applicant has established the following as a substantial ground based on an amended extract from Ground 1, namely that:-

> "The first named respondent failed to have any or any adequate regard for the best interests of the child applicants and/or failed to regard the best interests of the said children as a primary consideration when deciding to deport them and, in particular, failed to have due regard to the exceptional circumstances relating to the physical and mental disabilities of the fourth named applicant."

36. The argument before the court proceeded on the basis that the best interests issue applied in respect of the subsidiary protection and the deportation decisions. Though Ground 1 is expressed to be in respect of reliefs 1 and 2 which concern subsidiary protection and the deportation orders, the issue in respect of the best interests of the children is expressed to refer to the decision to refuse subsidiary protection. I am not satisfied that the applicant has established an arguable or stateable case in respect of the decision on subsidiary protection on that basis. However, in addition, reliefs are sought at Grounds 3 and 6 in respect of the deportation orders that:-

> "3. The decisions to make the deportation orders in respect of the applicants were not proportionate to the ends sought to be achieved and were unreasonable…
>
> (and)
>
> 6. The consideration of the private life rights pursuant to Article 8 of the European Convention on Human Rights was flawed. There was no valid basis to conclude that these rights would not be "engaged" by the proposed deportation of the applicants. There was a requirement on the first respondent to properly consider whether the said potential interference fell into one of the exceptions set out in Article 8(2) and the failure to do this renders the decisions to deport invalid."

I am satisfied that the framing of Grounds 3 and 6 is sufficiently broad to include the issue of the best interests of the children which is a necessary component of the decision to be made under Article 8 of the European Convention in respect of the deportation of children on the established jurisprudence of the European Court of Human Rights (*Boultif v. Switzerland* (Application No. 54273/00, August 2, 2001) and *Uner v. the Netherlands* (Application No. 46410/99, Grand Chamber, October 18 2006)). For that reason I have framed the ground set out above in respect of the best interests of the child to embrace the challenge to the deportation orders which reflects the reality of the arguments in that regard, and I am satisfied that substantial grounds have been established to grant leave in respect of Grounds 3 and 6.

37. As acknowledged in the course of argument many of the other reliefs claimed are already the subject of decisions of this Court. Having regard to the decision in *Cadri v. Governor of Wheatfield Prison* [2012] IESC 27, this Court should not lightly depart from a previous decision of the High Court unless there are strong reasons for doing so, for example, if the line of authority relied upon was obviously wrong or was arrived at without proper consideration of relevant case law. No such issue arises in this case and accordingly, I am not satisfied that there are arguable grounds in respect of the subsidiary protection refusal or substantial grounds in respect of the deportation decision to grant leave to apply for judicial review in respect of the remaining matters.

Ground 4
38. Ground 4 claims that the deportation orders are invalid because the question of refoulement was not considered personally and/or signed by the first named respondent, an argument rejected by this Court in *AAA & Ors v. Minister for Justice and Equality* [2013] IEHC 422 applying the principles in *LAT & Ors v. Minister for Justice and Equality & Ors* [2011] IEHC 404.

Ground 5
39. Ground 5 claims that the lifelong nature of the deportation order is such as to render the orders in this case disproportionate to the end sought to be achieved despite any mitigating effect of s. 3(11) of the Immigration Act 1999, and contends that s. 3 of the 1999 Act is, therefore, invalid because it is repugnant to the provisions of the Constitution and incompatible with the provisions of the European Convention on Human Rights, submissions rejected in *Sivsivadze v. Minister for Justice* [2012] IEHC 244.

Grounds 7, 10, 12 and 14
40. Grounds 7, 10, 12 and 14 contend that there is a failure to provide an effective remedy in accordance with the Constitution and under Article 13 of European Convention on Human Rights and/or Article 47 of the Charter of Fundamental Rights of the European Union in respect of subsidiary protection. It is also contended that there is no effective right of appeal and that common law rules governing the remedy of judicial review do not constitute such an effective remedy by reason of the inability of the applicants to furnish new material to the High Court.

41. These grounds have been advanced in the past and rejected in various judgments of the High Court including *Akhile v. Minister for Justice* (Unreported, High Court, 12th October, 2011), *S.L. (Nigeria) v. Minister for Justice* (Unreported, High Court, 6th October, 2011) and *Chigaru v. Minister for Justice* (Unreported, High Court, 19th April, 2012), and the decision in *AAA v. Minister for Justice and Equality & Ors* (Unreported, High Court, Cooke J., 19th June, 2012). In addition, there is no substance to the claim that the decisions in these cases are flawed by reason of the appearance of bias.

42. The court is, therefore, satisfied to grant leave to apply for judicial review in respect of the subsidiary protection refusal and the deportation orders claimed at paras. D1 and D2 of the statement of grounds. In respect of the relief claimed at D1, leave will be granted on the following grounds:-

> (i) The first named respondent in considering the application for subsidiary protection was not entitled to rely upon the conclusions of the Refugee Appeals Tribunal and the Office of the Refugee Applications Commissioner but was obliged to reach a decision in respect of the credibility of the first named applicant in a process which was independent of and not reliant upon the conclusions of those bodies as to the first named applicant's credibility.
>
> (ii) The conclusions related to subsidiary protection were made in breach of the principle of *audi alteram partem* in that:-
>
> (a) the applicant was not invited to comment on any adverse credibility finding made by the Refugee Appeals Tribunal or the Office of the Refugee Applications Commissioner,

(b) the applicant was not given a completely fresh opportunity to revisit all matters bearing on the claim for subsidiary protection, and

(c) the first named respondent failed to carry out a completely fresh assessment of the applicant's credibility, and/or

(d) an oral hearing was not afforded to the applicants.

The court will also grant leave to apply for judicial review in respect of the relief claimed at D2 on the following grounds:-

(iii) The first named respondent failed to have any or any adequate regard to the best interests of the child applicants and/or failed to regard the best interests of the said children as a primary consideration when deciding to deport them and, in particular, failed to have due regard for the exceptional circumstances relating to the physical and mental disabilities of the fourth named applicant."

(iv) The decisions to make the deportation orders in respect of the applicants were not proportionate to the end sought to be achieved and were unreasonable, and

(v) A consideration of the private life rights pursuant to Article 8 of the European Convention on Human Rights was flawed. There was no valid basis to conclude that these rights would not be "engaged" by the proposed deportation of the applicants. There was a requirement on the first respondent to properly consider whether the said potential interference fell into one of the exceptions set out in Article 8(2) and the failure to do this renders the decisions to deport invalid.

Delay

43. The respondents contend that the deportation orders in this case issued on 12th March, 2012, and that proceedings were commenced on 14th May, some five weeks outside the time limit set down by s. 5 of the Illegal Immigrants (Trafficking) Act 2000. It is submitted that the affidavit grounding the application for judicial review fails to set out a reason or explanation for the delay between 3rd and 10th April, 2012. It should be noted that the first named applicant was informed of the deportation orders by letter dated 26th March, 2012, which enclosed copies of the orders made 12th March and the examination of files dated 22nd February. On 26th March, 2012, the applicants former solicitors received a letter dated 23rd March enclosing a "consideration of application" under s. 3(11) of the Immigration Act 1999, relating to the letter received by them on 1st March, 2012. The applicant wished to challenge the deportation orders at the time, but her former solicitor would not act in the matter and papers were transferred to another solicitor and were received on or about 3rd April, 2012. Counsel was furnished with the papers on 10th April, 2012. Draft proceedings were furnished on 9th May, 2012, but there was a vacation period between those dates. I have considered the decision of the Supreme Court in *C.S. v. Minister for Justice, Equality and Law Reform* [2005] 1 I.R. 342. There is no element of blameworthiness on the part of the applicants in moving this application and having regard to the fact that the interests of children are at the core of this application, I am not satisfied that it would be fair or just to refuse an extension of time to enable the applicants to seek relief in this Court. I am also satisfied that the courts determination that grounds exist upon which leave to apply for judicial review may be granted provides a further basis upon which to grant the extension of time.

44. An interim injunction was originally granted in this case restraining the deportation of the applicants in accordance with the deportation orders. As stated in *Okunade v. Minister for Justice and Equality and the Attorney General [*2012] IESC 49, it may not be possible to overlook the fact that the applicants in a particular case are very young and that the deportation might cause enormous disruption to family life. In this case the children are also very young and D.A.I. lives with severe disabilities which are receiving ongoing treatment and care. Therefore, having regard to the enormous support given to D.A.I. by his mother and siblings and the young age of the children, I am satisfied that it is appropriate that the deportation orders in this case would not be acted upon pending the completion of these proceedings and that the present position should be maintained. I will discuss with counsel the nature of any order that may be required in that regard. The court invited counsel to make further submissions in relation to authorities cited in the judgment which were decided after the hearing of this case, but no further submissions were made.