Neutral Citation [2012] IEHC 457

THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF THE IMMIGRATION ACT 199, AND IN THE MATTER OF THE CONSTITUTION AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3(1)

[2012 No. 564 J.R.]

BETWEEN

R.O.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Paul McDermott delivered the 12th of October, 2012

1. The applicant seeks leave to apply for judicial review of the decision of the respondent to refuse the applicant a declaration of refugee status under s. 17 of the Refugee Act 1996, as amended, notice of which was given to the applicant by letter dated the 18th November, 2009. Leave is also sought to challenge the deportation order made by the first named respondent on the 23rd September, 2011, and a further decision refusing to revoke that order also made by the first named respondent, notice of which was given to the applicant on the 20th June, 2012. The latter order was made following an application by the appellant pursuant to s. 3(11) of the Immigration Act 1999. In addition, a decision by the first named respondent to give priority to the processing of applications for asylum from persons who are nationals of Nigeria is challenged. The applicant also complains that the decision not to revoke the deportation order failed to respect her rights pursuant to Article 8 of the European Convention on Human Rights and/or did not adequately consider those rights in the context of the poor state of her health. The case was brought before the High Court by way of an application for an interim injunction restraining the first named respondent from deporting the applicant pending the determination of these proceedings. At that time the applicant was awaiting deportation at Dublin Airport. An interim injunction was granted on the 20th June, 2012, and there followed an application for leave to apply for judicial review in respect of the above orders on notice to the respondents. Pending determination of that application the injunction was continued.

Reliefs Sought

2. The applicant seeks orders of certiorari quashing the decisions of the first named respondent already outlined.

3. A declaration is sought that the respondents have failed to provide the applicant with an opportunity to seek asylum consistent with the procedures provided by Council Directive 2005/85/EC, such procedures to include an effective remedy before a court or Tribunal within the meaning of Article 39 of the Council Directive. It is claimed that if the applicant is successful in obtaining such a declaration that it follows that an order must be made quashing the decision of the first named respondent to refuse a declaration of refugee status to the applicant under s. 17(1) of the Refugee Act 1996, because the procedures followed in making that decision were unlawful. Further, it is claimed that any decision made on the basis of the validity of the Minister's decision under s. 17, including the decision to deport the applicant and to revoke that decision were also unlawful.

4. A declaration is also sought that ss. 3(1) and/or 3(11) of the Immigration Act 1999, as amended are invalid having regard to the provisions of the Constitution. It is further claimed that the same provisions are incompatible with the State's obligations under the European Convention on Human Rights and Fundamental Freedoms. If successful in obtaining these declarations, the applicant claims to be entitled to orders of *certiorari* quashing the decision of the first named respondent to deport the applicant and the subsequent decision refusing to revoke the deportation order.

5. In addition, it is claimed that the direction made by the first named respondent pursuant to s. 12(1) of the Refugee Act 1996, as amended to give priority to applications for asylum from persons who are nationals of Nigeria is unlawful and that the entire process followed as a result is tainted by illegality which entitles the applicant to the relief claimed.

6. These proceedings are by way of application for leave to apply for judicial review. Section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, provides that such applications be brought within fourteen days of being notified of the relevant order or decision. This time limit applies to the first named respondent's decision not to grant the applicant a declaration of refugee status under s. 17(1) of the Refugee Act 1996, the Minister's decision to make a deportation order under s. 3(1) of the Immigration Act 1999 and the Minister's order to grant priority to certain classes of asylum applications pursuant to s. 12(1) of the Refugee Act 1996. Section 5(2)(b) of the Illegal Immigrants (Trafficking) Act 2000, stipulates that "leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed". The Supreme Court in *Re. Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 stated in respect of "substantial grounds" that:-

> "This is not an unduly onerous requirement since the High Court must decline leave only where it is satisfied that the application could not succeed or where the grounds relied on are not reasonable or are 'trivial or tenuous'. This follows from a number of authorities where a similar requirement, as regards the Planning Acts, has been judicially considered."

7. The application for leave to apply for judicial review in respect of the first named respondent's refusal to revoke the deportation order made pursuant to s. 3(11) of the Immigration Act 1999, is not subject to that time restriction. It is subject to the normal time limits pursuant to O.84 of the Rules of the Superior Courts as they applied at the time of the making of the decision. The decision to refuse to revoke the deportation order was made on the 20th June, 2012. The notification of this decision was given to the applicant on the same day as application was made to the High Court. In accordance with *G. v. D.P.P.* [1994] 1 I.R. 374, the application for leave to apply for judicial review of this order must demonstrate that the facts averred support a "stateable ground" and support an arguable case for the relief sought.

8. The applicant seeks a declaration that the time limits imposed by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and O. 84 of the Rules of the Superior Courts are not in compliance with the principles of law of the European Union of equivalence and effectiveness in circumstances in which rights vested in the applicant pursuant to the law of the European Union are asserted.

Factual Background

9. The applicant is a Nigerian National and was born on the 10th June, 1955. She was married and has four children living. The applicant arrived in Ireland on the 20th July, 2008, and made an application for asylum. She claims that her husband and son were murdered by hired assassins following a gubernatorial election in 2007 because her husband had been involved in a political campaign during which it was alleged that he had misappropriated campaign funds. She stated that she fled her home immediately. She travelled by bus to Lagos and met a man at a bus stop who arranged for payment for her passage to Ireland. Following her arrival, she made an application for asylum. That application was dealt with in accordance with a decision by the first named respondent to give priority to her case as one of a number of applications from Nigerian nationals for asylum under s. 12 of the Refugee Act 1996. This decision was notified to the applicant on the 23rd July, 2008. On the same date the applicant completed a questionnaire. She attended for a s. 11 interview on the 6th August, 2008. On the 18th August, 2008, the applicant was notified by letter that the Refugee Applications Commissioner had recommended that she not be declared a refugee. It was concluded that she had not established a well founded fear of persecution on the basis that her account was seriously lacking in credibility.

10. This decision was appealed to the Refugee Appeals Tribunal by notice dated the 8th September, 2008. The applicant attended for an oral hearing of this appeal on the 13th July, 2009. She was at all material times legally advised and represented. In a detailed decision, dated the 21st October, 2009, the Refugee Appeals Tribunal affirmed the recommendation of the Refugee Applications Commissioner. The Tribunal also concluded that the applicant's account of events in Nigeria prior to her departure was not credible. It was found to be "internally inconsistent and contradictory and ... not capable of being believed".

11. In the course of the appeal a document was submitted stating that the applicant suffered from HIV. It was noted in the appeal decision that:-

> "No issue was made regarding an inability to receive treatment for same at hearing were the applicant to return to Nigeria. While this is an unfortunate state of affairs for the applicant no reference was made to it having a bearing on why she came here and in that regard it has no bearing on the credibility findings made above regarding her core claim.
>
> In that regard the applicant deposed that she was diagnosed with HIV shortly after coming to Ireland and consequently her medical condition could not have had any relevance to the application for refugee status."

12. The decision of the Refugee Appeals Tribunal was conveyed to the applicant by letter dated the 30th October, 2009 and a copy was furnished to her solicitors by letter of the same date. A decision was made by the first named respondent refusing the applicant's claim for asylum on the 17th November, 2009. Notification of this decision was furnished to the applicant at her registered address by letter dated the 18th November, 2009. This was in the form of the normal three options letter. She was informed of the proposal of the Minster to make a deportation order against her under s. 3 of the Immigration Act 1999. The letter set out her options which were to leave the State before a deportation order was made, to consent to the deportation order, or to apply for subsidiary protection or make representations to remain temporarily in the State. If no reply was received within fifteen days, it was to be assumed that the applicant did not wish to return home voluntarily and did not wish to apply for either subsidiary protection or to make representations to remain temporarily within the State. In that event, the Minister would then consider the making of a deportation order against the applicant. A copy of this letter was furnished to the applicant's solicitors also. She was also requested to confirm her address and notify the Repatriation Unit of the Department if she changed her address. No change of address was ever notified to the authorities.

13. The applicant's solicitors did not have any objections to the procedure followed, up to and including the making of the decision to refuse refugee status on the 17th November, 2009. No submission was made that the applicant's ability to present any evidence or make any submission related to her application was in any way compromised or prejudiced by the fact that her claim had been dealt with on an accelerated basis under s. 12 of the Refugee Act 1996. No submission was made at that stage that the procedures followed by the authorities were unlawful in any sense or inadequate by reason of a failure to transpose Council Directive 2005/85/EC or as an effective remedy within the meaning of Article 39 of that Directive. No such claim was made before the Commissioner, the Tribunal or to the Minister in respect of any of these matters or any real or potential prejudice to the applicant caused as a result of any perceived deficiency.

14. In an affidavit of the 25th June, 2012, the applicant states that she met a Nigerian family, the B. family in June, 2009. She said that she received the letter from the Department of Justice and Equality in or about December 2009 which she showed to members of the family. They informed her that the Minister wished to deport her and that they wanted to protect her (presumably from the lawful deportation process) by allowing her to live with them. She left her address. She did not inform the authorities of her new address. She did not respond to the correspondence of the 18th November, 2009. She had legal advice available to her at that time. She made a deliberate choice to disengage from the process when she was informed that the Minister proposed to consider her deportation.

15. The applicant claims that she was not well treated by the B. family who took her in. She maintains that she was bullied and exploited by them as a childminder. She complained that she was promised assistance in getting a work permit by Mr. B. who threatened to inform the gardai of her location if she left. She claims this situation continued until she became unwell. She was then assisted by a fellow national in Cavan to obtain treatment. At this stage the B. family did not want her to deal with their children because of her medical condition. In early 2012, she stated that she became extremely ill and attended hospital. She is currently receiving treatment and daily medication in respect of her condition.

16. On the 15th March, 2012, the applicant instructed new solicitors who wrote to the Repatriation Unit of the Department of Justice and Equality on the 6th April, 2012. By this stage the first named respondent had made a deportation order against the applicant on the 23rd September, 2011. Notice of the making of this order was furnished to the applicant by letter dated the 23rd September, 2011 to her registered address. The order was made following a recommendation furnished by an officer of the Department who carried out a review of the applicant's file which was completed on the 26th July, 2011. The applicant was informed that she had until

the 10th October, 2011, to leave the State. The official who reviewed her file took into account the submissions which had previously been made by the applicant and her solicitor during the course of the asylum application. These factors were now considered in the context of the criteria and matters set out under s. 3 of the Immigration Act 1999, as amenqed. This included her medical condition as it was known to the authorities which was considered under s. 3(6)(h) as a humanitarian consideration. The issue relating to the prohibition on *refoulement* under s. 5 of the Refugee Act 1996, was also considered. Her medical condition was again considered in respect of the effect of deportation on the applicant's private life under Article 8 of the European Convention on Human Rights and Fundamental Freedoms. The relevant case law in that regard was also considered by the examining officer.

17. No application was made by the applicant or on her behalf for leave to challenge any aspect of the asylum process up to an including the deportation order even though she instructed new solicitors on the 15th March, 2012. Clearly, some time for reflection was taken before her solicitors took the next step on her behalf by letter dated the 6th April, 2012. A decision was made to seek information from the authorities and if a decision to deport the applicant had been made, her solicitors were "instructed to apply to revoke it". They sought fifteen days to do so from the date of any clarification furnished by the first named respondent. By way of preliminary submissions, they included a report from the Mater Hospital dated the 15th March, 2012, as to the applicant's then state of health which contended that she was vulnerable to potentially life threatening infections. It was contended that it was crucial that she continue with her medical treatment in order to avoid serious health consequences and that she would not able to afford any access to medication in Nigeria. It was submitted that without the medication, her immune system would be overwhelmed. The letter submitted that the case fell within the provisions of Article 3 of the European Convention on Human Rights and Fundamental Freedoms and that "exceptional circumstances arise".

18. Further submissions were made seeking the revocation of the deportation order by letters dated the 1st, 5th and 11th June 2012. The application to revoke the deportation order was considered and refused. Notice of that decision was given to the applicant's solicitor by facsimile dated the 20th June, 2012. The applicant was detained on the morning of the 20th June, 2012. Her solicitor was notified shortly before 10.00 am of that decision and at 10.24 am on the 20th received the facsimile notifying the decision to refuse revocation of the deportation order. That prompted these proceedings and led to the granting of the interim injunction.

Limitation Period

19. The limitation period within which application for leave to apply for judicial review must be made to the High Court is prescribed by s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000. The application must be made within fourteen days of the notification of the relevant decision to the applicant. This period applies in respect of each of the decisions sought to be challenged in these proceedings except for that relating to the revocation of the deportation order following the application made under s. 3(11) of the Immigration Act 1999. The applicant is clearly out of time in respect of the fourteen day period insofar as it applies to the decision of the first named respondent to refuse to grant the applicant refugee status under s. 17(1) of the Refugee Act 1996, which was notified to the applicant on the 18th November, 2009, and the deportation order against the applicant under s. 3 of the Immigration Act 1999, notified to the applicant on the 23rd September, 2011.

20. The applicant has made no application to this Court to extend the time for the making of the application for leave to apply for judicial review in respect of these decisions, but submits that the time limit prescribed by s. 5 in circumstances in which European law rights are asserted is not in compliance with European law and in particular the principles of equivalence and effectiveness. If correct in that submission, the applicant further contends that O. 84 of the Rules of the Superior Courts does not apply to this application. Of course, O 84 applies generally to applications for leave to apply for judicial review and at the time provided for a period of six months within which to apply for relief by way of *certiorari* and three months in respect of other reliefs and would also have required the applicant to bring the proceeding "promptly". The applicant contends that since the period of two weeks was specifically provided for by the Oireachtas in respect of applications for leave to apply for judicial review in asylum matters, the Oireachtas clearly intended that these provisions would replace the provisions of O. 84. As a result, the appellant contends that there is no time limit to the application for leave to apply for judicial review in respect of these decisions. If incorrect in this submission, there is no application before the court to extend the time and the application for leave to apply for judicial review in respect of these decisions must fail.

21. There is a complete absence of evidence as to how or why the fourteen day period in this case was not availed of by the applicant following the making of the relevant decisions. The applicant was legally aided and represented and she and her solicitors were at all material times notified of the making of the relevant decisions. She had the right to make application for leave to apply for judicial review within fourteen days of the making of each of the decisions challenged. She also had the right to seek an extension of that time which is a continuing right. The applicant had a means of applying to the courts in order to vindicate any of her rights under domestic or European law. It is clear from the applicant's affidavit, that she chose to disengage from the asylum process when she received notification that her application for asylum had been refused under s. 17(1) of the Refugee Act 1996, and that the Minister proposed to consider her deportation. She left her accommodation and disappeared. She wished to avoid the consequences of any adverse decision against her and frustrate the authorities in the implementation of any lawfully made order. She reengaged with the authorities at a time when she was obliged to seek medical treatment. The only evidence as to why a period of fourteen days was in any way inadequate in this case is that the applicant chose not to avail of it.

22. The applicant now seeks to take advantage of subsequent decisions of this Court in *T.D. and Others v. Minister for Justice Equality and Law Reform and Others* (Unreported, High Court, Hogan J. 25th January, 2011) and *P.M and Minister for Justice and Law Reform and Others* (Unreported, High Court, Hogan J. 28th October, 2011). In both of these decisions it was claimed by the applicants that key aspects of the asylum legislation were incompatible with the Procedures Directive, Council Directive 2005/85/EC. It was claimed that the respondents could not rely upon the provisions of s. 5 of the 2000 Act, in circumstances where it was contended that the Procedures Directive had not been properly transposed into domestic law, i.e., in cases in which an applicant sought to initiate proceedings to protect rights vested in him/her under European Union law.

23. Hogan J. determined in *T.D.* that it was not the law that time could never run against a litigant when the State had failed to transpose a Directive into domestic law. He stated that even it were ultimately found that the Procedures Directive had not been properly transposed into domestic law, this could not prevent the application of the time limit ins. 5 so as to bar the claim of the applicant. This was subject to one important caveat. The case law of the European Court of Justice made it clear that a Member State was entitled to apply a limitation period even in respect of a claim concerning which the Member State had failed to transpose a Directive, provided the limitation period itself complied with the principles of equivalence and effectiveness. In terms of "equivalence" the national court must consider the applicable limitation periods "as regards their purpose, cause of action and essential characteristics" (case C-63/08 *Pontin* [2009] ECR-1000 para. 55). Hogan J. found that the fourteen day period failed the test of "equivalence" because of the likelihood that applicants in the asylum process were likely to be on public welfare, unfamiliar with the Irish legal system, and suffer from potential linguistic and other difficulties in preparing for litigation. He noted that the period allowed was considerably shorter than the period of eight weeks that applied in respect of planning and development matters under s. 50(2) of the Planning and Development Act 2000. In respect of "effectiveness" Hogan J. noted that the European Court of Justice in *Pontin* had also concluded that a limitation period of fifteen days applicable to the case of females dismissed by reason of pregnancy

made the assertion of their rights excessively difficult. He concluded that both types of litigants were unlikely to find it easy to obtain appropriate advice and, where so advised, to prepare and commence proceedings within the time provided. Hogan J. concluded that s. 5 of the 2000 Act failed the test of equivalence and effectiveness and that the limitation provision could not be relied upon insofar as the claim was based on the Procedures Directive.

24. In *P.M v. Minister for Justice and Law Reform*, Hogan J. considered the effect of his decision in *T.D.* upon the application of the provisions of O. 84, r. 21(1). It was submitted by the respondents in P.M. that even if the provisions of s. 5 were inapplicable in respect of a claim based on the Procedures Directive, nevertheless the provisions as to the time limits contained generally in O. 84, r. 21(1) applied. He rejected this argument on the basis that s. 5 of the 2000 Act must be regarded as the governing time limit and if it were inapplicable it would not be legitimate to resort to other more general time limits. He held that the Oireachtas clearly intended to replace the general time limit for judicial review applications contained in O. 84, r. 21(1) with a special time limit set out ins. 5. The general time limit was not revived simply because the special time limit was rendered inapplicable by its non compatibility with general principles of European law, because the Oireachtas never intended that the general time limit would ever apply to such cases.

25. In *B.M, JL. & Drs v. Minister for Justice and Equality, Attorney General and Ireland* (Unreported, High Court, 14th February, 2012), Cross J. considered the decision of Hogan J. in D. and decided to follow it and, therefore, accepted that the fourteen day period of limitation did not comply with the principles of equivalence and effectiveness in relation to a challenge based on an alleged failure to transpose the Procedures Directive adequately into Irish law. He did so relying upon the decision of Clarke J. in *Re World Port Limited* [2005] IEHC 189, in which the well known rule of judicial comity was applied to the effect that a judge at first instance ought usually to follow a decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. However, he declined to accept the subsequent conclusion of Hogan J. in the *P.M* case to the effect that O. 84, r. 21(1) could not apply if the s. 5 limitation period was held not to apply. He noted that no authorities were relied upon by Hogan J. in *P.M* to that effect. Cross J. cited the decision of the Supreme Court in *Jerry Beads Construction Limited v. Dublin Corporation* [2005] IEHC 406. In that case a two month limitation period had been declared invalid having regard to the provisions of the Constitution but nevertheless, the Supreme Court concluded that this did not affect the issue of the time limitation imposed by O. 84, r. 21(1) of the Rules of the Superior Courts. Cross J. noted that s. 5(1) of the 2000 Act required all applications for judicial review to be made "under" O. 84 and did not amend the provisions of O.84, r. 21(1). He concluded that the legislature required challenges to decisions to be brought by judicial review in accordance with O. 84 but imposed additional requirements "to the disadvantage of the prospective applicant". In addition, he noted the obligation under O. 84 of the Rules of the Superior Courts that an application must be made "promptly" and he concluded that the applicants in *B.M,J.L.* having delayed two years were in gross breach of the six month period and also the general provisions whereby such applications must be brought "promptly".

26. I am faced with the existence of these two conflicting High Court judgments in relation to this matter. I am satisfied to adopt the reasoning of Cross J. in the application of the decision of the Supreme Court in *Jerry Beads Construction Limited* and the decisions in *White v. Dublin City Council* [2004] 1 I.R. 545 *and Lennon v. Cork City Council* [2006] IEHC 348 as considered by Cross J.. These authorities support the view that the time limits in O. 84, r. 21(1) remain extant notwithstanding the enactment of s. 5 of the 2000 Act. Therefore, I must respectfully disagree with Hogan J. and accept the reasoning of Cross J. as to the applicability of O. 84 to this application for leave to apply for judicial review in respect of the Minister's decision under s. 17 of the Refugee Act 1996, and the deportation order made under s. 3(1) of the Immigration Act 1999. In particular, I am persuaded that this is the correct approach for the reasons set out in paras. 3.4 to 3.19 of the judgment of Cross J. in *B.M-J.L.*

27. As already noted the applicant has made no application for an extension of time within which to bring this application and accordingly, I am satisfied that I do not have to consider further the relief claimed based on the ground that there was a failure on the part of the State to transpose Council Directive 2005/85/EC (the Procedures Directive) of the 1st December, 2005.

28. I am also satisfied that the same considerations apply to the application for leave to apply for judicial review to quash the direction made pursuant to s. 12(1) of the Refugee Act 1996, to give priority to applications for asylum from persons who are nationals of Nigeria for the same reasons.

29. The applicants also claim that s. 3(1) and/or s. 3(11) of the Immigration Act 1999, as amended, are invalid having regard to the provisions of the Constitution and further, they seek a declaration that the same provisions are incompatible with the State's obligations under the European Convention on Human Rights. I am also satisfied, that a limitation period of fourteen days applied to this part of the application for leave to apply for judicial review from the date of the notification of the challenged deportation order insofar as the challenge is made to section 3(1). The order was notified to the applicant on the 23rd September, 2011, and this application was brought on the 20th June, 2012. Each of these applications is brought well outside the period of fourteen days. The application is also well outside the period of six months that would otherwise have applied under O. 84. Since no application has been made to extend the time in respect of this aspect of the application, I do not have to consider the applicant's challenge on this matter any further. The application in respect of section 3(11) is within time but for the reasons which follow I am satisfied that the Applicant has failed to establish a stateable ground upon which to obtain leave on the constitutional point.

30. The applicant is also obliged to initiate an application for leave to apply for judicial review "promptly" under O. 84. I am satisfied that the applicant is clearly in breach of this requirement in respect of each of these matters except the refusal to revoke the deportation order.

Behaviour of the Applicant

31. I have already noted the applicant's deliberate disengagement from the asylum process following the notification to her of the first named respondent's decision to refuse to grant refugee status under s. 17(1). She ignored the correspondence offering her various options, left her address and hid herself from the authorities until she emerged from hiding in March, 2012. She retained different solicitors in March, 2012 and then sought the revocation of the deportation order by making an application under s.3 (11) of the 1999 Act. The applicant thereby elected to treat the order made and the process up to that point as lawful and valid: otherwise a lawful revocation could not occur. No application for leave to apply for judicial review was moved at that time. Further, material which the applicant contended was new regarding her medical condition and country of origin information was submitted to the first named respondent for consideration under that process. I am satisfied that the applicant has acted in an entirely inconsistent manner in relation to the validity of the asylum process to date. She has precluded herself by her conduct from impugning the Minister's decisions in this case. *O.D.D & F.A.O. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clark J., 25th June, 2009) and BM-JL. already cited at para. 3.19.

Prioritisation and Transposition of the Procedures Directive

32. The court has determined that by reason of the failure to apply for an extension of time it is not necessary to determine the substantive claim as made by the applicant insofar as a challenge is made to the acceleration or prioritisation of the applicant's asylum application along with other applications from Nigerian nationals pursuant to a decision made under s. 12 of the Refugee Act

1996, on the 15th December, 2003. It is also unnecessary to further consider the claim that Article 39 of Council Directive 2005/85/EC of 1st December, 2005, has been inadequately transposed in domestic law or that the state has failed to afford an adequate remedy by way of appeal to the applicant in the course of the asylum process. Both of these issues are the subject of a reference for a preliminary ruling from this Court to the European Court of Justice on the 13th April, 2011, in *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General Case* C-175111.

33. This reference was made by Cooke J., having delivered judgment in both cases on the 9th February, 2011, [2011] IEHC 33 in which both issues were fully considered.

34. Cooke J. concluded that Article 23 of the Procedures Directive was wholly inconsistent with an intention to impose upon member states an obligation to refrain from according priority to any case other than those specifically listed. Article 23.3. of the Directive allowed member states to prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter 2 of the Directive, including where the application is likely to be well founded or where the applicant has special needs. A further fifteen set of circumstances were set out in Article 23.4 in which member states could also provide that an examination procedure could be prioritised or accelerated. Cooke J. held that the permissive language used in Article 23 contained no express restraint or limitation on the type of application that could be prioritised. The list of circumstances in which a decision to prioritise or accelerate could be made was not exhaustive:-

> "Article 23 neither requires Member States to accord priority to such cases nor does it either expressly or by implication preclude priority being granted in other cases. The legislative objective is to ensure compliance with the basic principles and guarantees for examining and determining applications and, subject to compliance with that obligation, the Member States remain unfettered in the administrative management of their asylum systems in accordance with their particular national needs and experience." (paras. 22-32)

He also stated that:-

> "Although there was undoubtedly an organisational difference in the processing of Nigerian applications, this had its own objective or justification in the particular needs of the state as outlined in the evidence ..... on behalf of the Minister. The difference between the treatment of applications from Nigerian nationals was one which related to the administrative processing only and not one which alters the application of the substantive provisions of either the 1996 Act or the Qualifications Directive. Those applications are dealt with earlier and more quickly, but they are still treated in full compliance with the criteria, principles and guarantees applicable to all applications including those of Chapter 2 of the Procedures Directive." (paras. 36-38)

He accordingly found that the challenge to the legality of the acceleration decision was unfounded.

35. Cooke J. also considered whether the appeal provided for in the 1996 Act to the Refugee Appeals Tribunal against the decision of the Refugee Appeals Commissioner failed to comply with the requirement of Article 39 of the Procedures Directive because the Tribunal was not "a court or tribunal". Its decisions were not binding but were subject to the discretionary powers of the Minister under s. 17 in respect of failed applicants. It was submitted that the Tribunal did not satisfy the criteria of independence because of the organisational function and links that existed between the two bodies and the Minister. It was claimed that the Tribunal was not protected against external intervention or pressure because of the rules governing the appointment, remuneration, terms of service and dismissal of decision makers and were not such as to guarantee the independent judgment of the members. It was also claimed that powers given to the Minister over the constitution and organisation of the Tribunal were such that the chairperson and members of the Tribunal were not independent of the Minister because the Minister had power to intervene in a manner which materially affected the procedures of the Tribunal by virtue of various provisions of the Act.

36. Cooke J. noted that the Minister had no discretion to deprive an applicant of the benefit of a positive recommendation either at first instance or on appeal. He held that the case law of the European Court of Justice provided that a body will be regarded as a court or tribunal when it is shown to be established by law, have permanent and independent existence, have the function of determining disputes with binding jurisdiction, applies the rule of law and (though not necessarily exclusively) operates an *inter partes* procedure similar to that of a court of law. He had no doubt that the Tribunal was a court or tribunal for the purposes of Article 267 of TFEU, having been established on a permanent statutory basis in the Refugee Act 1996, as amended. He held that its jurisdiction was compulsory and its decision on appeal was binding. Its positive rulings were binding on the Minister as well as on the ORAC and the appellant. An effective remedy was only needed to rectify a complaint of infringement of any right or entitlement: that could only arise following a negative recommendation or conclusion. The Minister had no discretion to deprive an applicant of the benefit of a positive recommendation either at first instance or at appeal. He held that the submissions as to the lack of independence on the part of the Tribunal were unfounded and misconceived. The court rejected the submissions that the Tribunal failed to comply with the requirements of Article 39 of the Procedures Directive.

37. I respectfully adopt the reasoning of Cooke J. on all of these matters as set out in his judgment based upon the comity of courts principle referred to earlier in this judgment. I am also otherwise satisfied to do so.

38. Since hearing the submissions of the parties in this case I note that the Advocate General of the European Court of Justice delivered his opinion in this matter on the 6th September, 2012, in which he proposed that the European Court of Justice should answer the questions raised by Cooke J. as follows:-

> (1) Article 23(3) and (4) of Council Directive 2005/85/EC of 1 December, 2005, on minimum standards on procedures in member states for granting and withdrawing refugee status must be interpreted as meaning that it does not preclude a member state from subjecting to an accelerated or prioritised procedure, the examination of certain categories of applications for asylum defined on the basis of the nationality or country of origin of the applicant.
>
> (2) Article 39 of Directive 2005/85 and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that they do not preclude national rules such as those at issue in the main proceedings, under which an appeal against the decision of the determining authority lies to the Refugee Appeals Tribunal and to the High Court." (para. 96)

39. This persuasive opinion is based on reasons which are broadly similar to those advanced by Cooke J. in the High Court decision as a result of which the reference was made.

40. I am satisfied that even if the applicant had applied for and been granted an extension of time for the purposes of making this application, she has not demonstrated any basis upon which she could establish any prejudice or failure in fundamental procedures such as to deny her an effective remedy under the Procedures Directive. The applicant's conduct to date in failing to make any complaint at any stage of the asylum process as to the inadequacy or otherwise of any aspect of that process and her other conduct already outlined, supports the conclusion that no substantial reasons exist on the facts of this case for granting leave to apply for judicial review. I am also satisfied having regard to the decision of Cooke J. in *H.I.D. and D.A.* and the opinion of the Advocate General already cited that, as a matter of law there are no substantial grounds on which to grant leave in this case. I am satisfied in the circumstances of this case that the application could not succeed or be regarded as reasonable in fact and/or in law.

The Constitutional Challenge

41. Section 3(1) of the Immigration Act 1999, provides that (*inter alia*) the Minister for Justice may order the deportation of any non-national. Section 3(2)(f) provides that a deportation may be made in respect of a person whose application for asylum has been refused by the Minister. Section 3(6) provides that in determining whether to make a deportation order in relation to a person, the Minister shall have regard to (*inter alia*) (g) the family and domestic circumstances of the person, and (h) humanitarian considerations "so far as they appear or are known to the Minister". Section 3(11) provides that the Minister may by order amend or revoke an order made under s. 3 including an order under subs (11). There is no limitation on the period of time for which a person who is deported from the State is thereby excluded from the State. The reliefs claimed by the applicant in this case coincide with those claimed in the case of *S. & Ors v. Minister for Justice and Equality, Attorney General and Ireland the Human Rights Commission* (Unreported, High Court, Kearns P., 21st June, 2012). That decision was delivered the day after the interim injunction was granted in this case and it was brought to the attention of the court at that time that the decision in *S.* was imminent. The reliefs sought in that case were primarily:-

> (a) A declaration that s. 3(1) and/or s. 3(11) of the Immigration Act 1999, as amended, were invalid having regard to the provisions of the Constitution; and
>
> (b) If necessary, a declaration that s. 3(1) or s. 3(11) were incompatible with the State's obligations under the European Convention on Human Rights (ECHR).

The basis of the applicant's claim in *S.* was similar to that advanced in this case. It was claimed that the indefinite, potentially lifelong duration of expulsion provided for under s. 3 of the 1999 Act was disproportionate and the legislature had failed to establish any principles and policies regarding the exercise of the power to revoke a deportation order under s. 3(11) of the Act. The challenge in that case failed after a full hearing in respect of all of the issues that are now raised in this case by the applicant. This court was not offered any arguments that are additional to any of those canvassed before the learned President in relation to his decision. In effect, the applicant in this case sought to take advantage of any benefit that may have flowed from the decision in *S.* which was expected to be delivered the day following the application for the interim injunction.

42. The applicant was given notice of the making of the deportation order on the 23rd September, 2011. She had, by that time, unknown to the authorities absented herself from her registered address and gone into hiding. The applicant also had full notice that it was proposed by the Minister to consider her deportation following the refusal to grant her asylum under s. 17(1) of the Act. No submissions were made to the Minister in relation to her deportation, but this is a matter which is entirely the responsibility of the applicant who chose to disengage from the process. Nevertheless, in considering the deportation, regard was had to all of the submissions made on behalf of the applicant on the basis of all of the facts then known and submitted in the course of the asylum process. It was open to the applicant to challenge the constitutionality of s. 3(1) and s 3(11) at any stage from the time she had notice of the proposal of the Minister to consider her deportation on the 18th November, 2009. As already indicated, the court has not been invited to grant an extension of time to initiate an application for leave to apply for judicial review on the section 3(1) aspect of the case. On the substantive point, the presumption of constitutionality applies to s. 3 of the Act and I respectfully adopt the reasoning and conclusion of the learned President in the S. case. I am offered no new grounds upon which to deviate from it. In those circumstances, I am satisfied that there are no substantial grounds for contending that s3(1) and no stateable grounds for contending that section 3(11) are invalid having regard to the provisions of the Constitution or that, in the light of the law as it now stands, this application could succeed. I would, therefore, have refused leave to apply for judicial review in respect of these grounds also.

43. Similar considerations apply in relation to the declaration sought that s. 3(1) and (11) are incompatible with the state's obligations under the provisions of the European Convention on Human Rights.

Deportation and the Carltona Doctrine

44. Objection is also taken by the applicant to the fact that in making the deportation order the first named respondent did not personally consider the issue of non-refoulement. Factually, that is correct; the decision was taken by a civil servant to whom the function had been devolved by the Minister. In processing this case named civil servants acted in the name of the Minister. This is in accordance with the well established principle that the Minister may devolve the making of decisions to his/her civil servants who may take decisions in the name of the Minister save where the principle is negatived in the relevant legislation. This principle is set out in *Carltona Limited v. Commissioners of Works* [1943] 2 All. E.R. 560 which has been approved and applied by the Supreme Court in *Devanney v. Sheils* [1998] 1 I.R. 230 and *Tang v. Minister for Justice* [1996] 2 ILRM 46. The applicant submits that the issue of non-refoulement is a matter to be decided personally by the Minister. Reliance is placed upon the decision of the Supreme Court in Meadows v. Minister for Justice [2010] 2 I.R. 701 and, in particular, upon the judgment of Murray C.J. who stated:-

> "In cases where there is no claim or factual material put forward to suggest that a deportation order would expose the deportee to any of the risks referred to ins. 5, then no issue as regards refoulement arises and the decision of the Minister with regard to s. 5 considerations is a mere formality and the rationale of the decision will be self evident.
>
> On the other hand if such material has been presented to him by or on behalf of the proposed deportee, as the case here, the Minister must specifically address that issue and form an opinion. Views or conclusions on such issues may have already been arrived at by officers who considered a proposed deportee's application for asylum, at the initial or appeal stages, and their conclusions or views may be before the Minister but it remains at this stage for the Minister and the Minister alone in the light of all the materials before him to form an opinion in accordance with s. 5 as to the nature and extent of the risk, if any, to which a proposed deportee might be exposed. This position is underscored by the fact that s. 3 envisages that a proposed deportee be given an opportunity to make submissions directly to the Minister on his proposal to make a deportation order at that stage. The fact that certain decisions have been made by officers at an earlier stage in the course of the application for refugee status does not absolve him from making that decision himself."

45. This judgment was delivered before a change in administrative practice occurred. Previously the Minister personally made the

decision under s. 5 but that practice changed to the extent that in the order presently challenged, the Minister did not sign the order and did not personally consider the decision to deport.

46. More recently the matter was considered by Hogan J. in *L.A.T v. Minister for Justice and Equality & Ors* [2011] IEHC 404. He acknowledged the change in administrative practice in respect of the making of deportation orders and concluded that it was entirely open to the present Minister to change existing practice assuming that there was a legal basis for doing so. He concluded:-

> "15. While I accept that the decision to deport is often a complex one which has significant implications for the individual who is the subject matter of the order, I am not satisfied that it is of such intrinsic importance to the community at large that the decision can be made only by the Minister personally. It must also be recalled that the Minister for Justice has many onerous obligations. It cannot be suggested that the Oireachtas must have intended that he alone should personally take the decision to deport a given individual in every single case, as this would mean that he had responsibility for potentially hundreds of such decisions in any given year.
>
> 16. It follows, therefore, that this is also a case governed by Carltona principles and that the nominated civil servant remains free to make the decision in question..."

47. I am satisfied that *Meadows* is of no assistance in the application of the *Carltona* principles and was dealing with a case that had been personally considered by the Minister prior to the change in administrative practice. I, therefore, respectfully adopt the conclusions of Hogan J. in this regard. I am satisfied that no substantial ground arises on this submission in respect of the deportation order; neither does it afford any stateable ground in respect of the refusal to revoke the order. Indeed the applicant never made any submission in respect of the proposal to deport her: she decided to take no part in the process. She also chose to invoke her right to seek the revocation of this order by the Minister under s. 3(11) of the Act, thereby approbating the deportation order made. Apart from being out of time to challenge the deportation decision, the applicant is by her conduct precluded from seeking relief in respect of the deportation order. Further, I am satisfied to follow the decision of Hogan J. in *L.A.T* (a post leave decision delivered after full legal argument) notwithstanding the decision of Cooke J. in *Afolabi v. Minister for Justice and Equality & Ors* (Unreported, High Court, 17th May, 2012) in which he granted leave to apply for judicial review in respect of the first named respondent's failure in that case to personally consider whether the State's non-refoulement obligations would be breached by the deportation of the applicants.

Deportation, the Application to Revoke and Article 8

48. It is submitted that it is not reasonable to expect the applicant to return to Nigeria given that she suffers from a serious illness and will not have available to her adequate medical treatment which she can afford. It is submitted that Article 8 of the European Convention on Human Rights (ECHR) requires the State to have respect for the applicant's private life which includes her health, in the consideration of the application under s. 3(11). Following the receipt of the applicant's submissions seeking the revocation of the deportation order, an examination of her file took place. In the course of that examination a medical report was considered dated the 15th March, 2012, which set out the following details, namely that:-

> (1) The applicant was diagnosed with HIV shortly after her arrival in Ireland, was originally treated in St. James's Hospital, Dublin, but was a poor attendee for follow up appointments;
>
> (2) The applicant will need to continue to take daily medication for the rest of her life in order to control her HIV infection;
>
> (3) Recent viral load tests and CD4 count confirm an improvement on her previous results and that her immune system was gaining strength; and
>
> (4) The applicant continued to be vulnerable to potentially life threatening infections and it was crucial that she continue with her medical regime in order to avoid serious health consequences;
>
> (5) It was pointed out that without the necessary medications, HIV would overwhelm her immune system and she would become highly vulnerable to life threatening infections.

It was submitted that the applicant would be unable to afford or access necessary medications in Nigeria. Her application was considered under Articles 3 and 8 of the ECHR.

49. The existence of inferior medical treatment in Nigeria however, even such as may lead to a reduction of life expectancy will not normally be sufficient to preclude a deportation as a matter of law. The ECHR stated in *N v. United Kingdom* [2008] 47 E.H.R.R. 38 at para. 42 that:-

> "Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling state. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced ifhe were to be removed from the contracting state is not sufficient in itself to give rise to a breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the contracting state may raise an issue under Article 3 but only in a very exceptional case, where the humanitarian grounds against the removal are compelling."

50. This approach applicable to cases in which Article 3 rights are asserted is also applicable in this jurisdiction in respect of cases involving rights under Article 8. In *A. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 166, Feeney J. considered the case of an application to revoke a deportation order in respect of a Nigerian child with mental health issues giving rise to behavioural disorder and whether the decision not to revoke the order amounted to a violation of his Article 8 rights. Feeney J. stated that the above approach to Article 3 rights applied equally to Article 8 guarantees.

51. He quoted Lord Hope of Craig Head who stated in the N case [2005] 2 A.C. 296 at 305:-

> "A comparison between the health benefits and other forms of assistance which are available in the expelling state and those in the receiving country does not of itself give rise to an entitlement to remain in the territory of the expelling state...aliens cannot in principle claim any entitlement to remain on the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state."

Unless there were exceptional circumstances such as those that arose in *D. v. United Kingdom* 24 E.H.R.R. 423, as would result in the

likely death of an applicant which were held not to exist in the A. case, a disparity of services available was not a basis for relief under Article 8. This approach was also applied in *B.J.N v. Minister for Justice, Equality and Law Reform* [2008] IEHC 8.

52. It is clear that the correct legal approach was adopted by the first named respondent in considering the application under s.3(11). It was not accepted that the deportation of the applicant would have consequences of such exceptional gravity as to engage rights under Article 8(1), notwithstanding the fact that the treatment available to her in Nigeria would be less favourable than that available in Ireland. There are no exceptional circumstances such as were present in the D. case present in this case.

53. I am satisfied that no stateable ground has been demonstrated to challenge the refusal to revoke the deportation order in this case. This is another case in which sadly the applicant suffers from HIV. Her condition was set out in the medical report of 15th March, 2012, already quoted and was fully and properly considered. The treatment available to the patient in this country is of a higher standard than that available in Nigeria. The unfortunate reality is that the applicant may have to live under the medical regime in Nigeria which is not as good, supportive and available as the medical treatment available to her in this jurisdiction. The consequences for the applicant's medical treatment arising from her removal from the State are an indirect result of her removal in pursuance of the lawful immigration policy applicable in this jurisdiction. The Convention does not impose an obligation on the contracting state to provide applicants with medical treatment for an indefinite period which was unavailable in their home countries even if the absence of such medical treatment would tend to shorten their lives. I am satisfied that the first named respondent's decision in this case took into account all the relevant facts and the relevant case law concerning the rights of the applicant under Article 8. The case law is clear and the facts of this case do not support a stateable ground or provide the basis for an arguable one. Accordingly, I refuse leave to apply for judicial review in respect of the decision refusing to revoke the deportation order.

Conclusion
54. For all of the foregoing reasons I therefore refuse the applicant's application seeking leave to apply for judicial review on all grounds and discharge the injunction made in this case.