THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 660 J.R.]

BETWEEN

T.A. (NIGERIA) AND L.A.P. (AN INFANT SUING BY HER FATHER AND NEXT FRIEND T.A.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 16th day of January, 2018

1. On the 24th February, 2010, the first named applicant, who was a 34 year old taxi driver, picked up a nineteen year old student in the early hours of the morning in his taxi. She was alone in the taxi when he sexually assaulted her at traffic lights. He then drove past her house, pulled in and sexually assaulted her a second time in the front seat before she managed to escape and run to her accommodation (see Court Report, *Connacht Tribune*, 25th May, 2011). He was tried for and convicted of sexual assault by a jury in March, 2011.

2. On the 25th May, 2011 at the sentencing hearing, the probation report stated that "*he remains unrepentant and blames the victim for the fact he is now in custody*". The injured party stated "*he took my freedom away from me, the child within*". In sentencing the first named applicant to four years imprisonment, Groarke J. said that *"while this was not the worst case of sexual assault to come before the court, it was a serious offence in that [Mr. A.] had abused his position of trust as a taxi driver to commit the offence. He used his occupation in order to feed his appetite for violence and degrading acts on young females. He used it to prey on his victims. He was made welcome in this country for eight years and he repays that welcome by committing this crime"*. Groarke J. noted from the probation report that the first named applicant "*felt no remorse for his victim and had no insight into the harm his actions has caused. 'He blames the victim and it's all about himself'*" (see *Irish Times*, Court Report, 26th May, 2011). He placed the first named applicant on the sex offenders register for life and recommended that he be deported immediately on his release. Coming up to seven years on from that recommendation, the first named applicant is at large in the State. The question perhaps arises as to whether there is something wrong with a legal system that so far seems unable to put that recommendation in place.

Facts

3. The first named applicant is a Nigerian national who arrived in the State on 23rd September, 2000. On 26th October, 2000, he applied for a declaration of refugee status. That was refused by the Refugee Applications Commissioner on 20th November, 2001, on the grounds of his lack of credibility and contradictions in the accounts provided. He had the opportunity to appeal that decision but did not do so.

4. On 21st September, 2001, he married a Danish national and was given permission to reside in the State on that basis. On the 30th May, 2003, the Minister formally notified the first named applicant of the refusal of the declaration of refugee status. When subsequently making a decision withdrawing the applicant's permission to be in the State, the Minister made the finding that in February, 2004, the applicant's wife returned to Denmark. Neither the withdrawal decision nor that finding of fact have been challenged.

5. On the 30th April, 2004, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States was published and required to be transposed by 30th April, 2006 (see art. 40.1, fn. 17).

6. On 3rd March, 2007, the applicant's wife died in Denmark. The first named applicant subsequently sent an undated letter to the Minister informing the Minister of the death of his wife. The applicant says this was sent in October, 2008. The respondent says March, 2009, but either way it was a long time after the event. In that letter, the first named applicant said "*we got married on 21st September, 2001 and live (sic) in Ireland since then. Now I wish to apply for a permanent residence card*." That letter was of course a fraud on the immigration system, given the fact that the first named applicant's wife had not been living in Ireland at all times since 2001, having returned to Denmark in February, 2004.

7. On 28th August, 2009, the Minister gave a permission to the first named applicant. As noted above, on 24th February, 2010, the applicant committed an offence of sexual assault. On 15th March, 2010, the applicant's public service vehicle licence as a taxi driver was revoked. On 2nd March, 2011, the applicant was convicted of the offence of sexual assault and, as noted above, was sentenced in May, 2011.

8. An appeal to the Court of Criminal Appeal was brought in relation to the conviction [2011 No. 129 CCA]. A motion seeking to add additional grounds to the appeal, which appear to relate to a (clearly procedurally misconceived) challenge to the constitutionality of the Juries Act 1976, was refused on 9th March, 2015, and the appeal was withdrawn on that date. Shortly prior to that date, the applicant had lodged written submissions signed by Ronan Lavery Q.C. and Conan Fegan B.L., so he appears to have been legally represented at the point in time at which the appeal was withdrawn. It is not immediately possible to reconcile this with para. 5 of his affidavit, to the effect that the appeal fell into abeyance because he was not able to afford lawyers.

9. On 5th August, 2011, the Minister issued a letter advising the first named applicant of the intention to revoke the applicant's permission. On 6th October, 2011, submissions were made by the applicant's then solicitors, James Watters & Co., which referred to a son born with a British national. The applicant was not cited as the father on the birth certificate, although his surname was used. No meaningful evidence was submitted of a relationship with the child and no reference was made to this child in the subsequent s. 3 submissions in relation to the proposed deportation order.

10. On 7th January, 2014, the Minister wrote to the first named applicant proposing to revoke the permission to remain in the State. On 14th January, 2014, he replied to that letter stating that his application for permanent residence was not fraudulent or misleading.

That in itself was also a further falsehood in that it is clear that he had made a previous false statement.

11. He was released from custody on 28th February, 2014. On 31st March, 2014, submissions were made in relation to the permission issue by his solicitors. His permission to be in the State was revoked on 25th June, 2014, and he has been illegally present in the State ever since then. A review of that decision was sought on 9th July, 2014, was duly carried out, and the original decision was affirmed.

12. On 15th January, 2015, the second named applicant was born in the State to the first named applicant and a Polish national. The second named applicant is an Irish citizen and her birth certificate shows separate addresses of each of the parents.

13. On 18th March, 2015, the first named applicant applied for permission to be in the State on the basis of his parentage of the second named applicant and pursuant to case C-34/09 *Ruiz Zambrano*. That application was refused on 13th September, 2016.

14. In the meantime, on 1st September, 2016, the Minister made a proposal to deport the first named applicant. Submissions were made under s. 3 of the Immigration Act 1999 on 28th September, 2016. In due course, a deportation order was made on 30th June, 2017, and notified to the first named applicant by letter dated 13th July, 2017.

15. On 8th August, 2017, the present proceedings were issued. A statement of opposition was filed dated 8th December, 2017, para. 2 of which pleads that "*the proceedings should be dismissed on the grounds of criminal and wrongful conduct and lack of candour on the part of the first named applicant during his time in the State.*"

16. I have heard very helpful submissions from Mr. Ian Whelan B.L. (with Mr. Conor Power S.C.) for the applicants, and from Mr. Anthony Moore B.L. for the respondents, and while I am very grateful to both counsel I must particularly commend Mr. Whelan, who in this particular case had to live through the adage of Megarry J. (as he then was) that "*argued law is tough law": Cordell v. Second Clanfield Properties* Ltd. [1969] 2 Ch. 9, at 16.

Failure to particularise the relationship with the child

17. A notable fact in this case is the extremely vague information given as to the nature of the relationship between the first and second named applicants. Insofar as information is provided by the mother, she limits herself to loose generalities. The father, in para. 15 of his affidavit, makes a passing reference to a strong relationship but no details or quantification whatsoever is given of this. The mother's main interest appears from the papers to be that the father will stay in the State in order to be able to work and pay child support. It is clear there is no relationship whatsoever between her and the first named applicant. While her correspondence uses certain superlatives in relation to the first named applicant and her affidavit avers that he is "*fully involved*" in the "*day to day life*" of the child, no particulars whatsoever are given of these generalities. A letter is submitted from the child's doctors saying that both parents attended an appointment in March, 2016, and that the father "*has also attended several appointments with her and her mother in the past*", but that does not take us very far.

The nature of the Minister's decision

18. It seems to me to be important, particularly in an area of significant executive discretion such as in immigration system, that the court not engage in a process of "*sending the fool further*" whereby decision-makers are required to make ever more elaborate decisions with a consequential possibility of ever more ample scope for infelicity and error, resulting in a one-way ratchet system of criticism and review and of spiralling overall complexity. The court must stand back and look at the decision overall.

19. Firstly, while one should not read too much into the mere length of a decision, the fact is, in this particular case, that the decision is very detailed and runs to 24 pages. It cites a wealth of case law as follows:

(i). *R. v. Bouchereu* [1978] 66 Cr. App. Reports 202.

(ii). *R. v. Kruas* [1982] 4 Cr. App. Reports (S.) 113.

(iii). *R. v. Compassi* [1987] 9 Cr. App. Reports (S.) 270.

(iv). *R. v. Escauriaza* [1988-87] Cr. App. Reports 344.

(v). *R. v. Spura* [1988] 10 Cr. App. Reports (S.) 376, dealing with the requirement of a threat to public policy or public security for the purposes of removal under EU law.

(vi). *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 [2016] 6 JIC 2409 (Unreported, High Court, 24th June, 2016).

(vii). *Troci v. Minister for Justice* [2012] IEHC 542 (Unreported, O'Keeffe J., 7th December, 2012), regarding the fact that non-nationals are not passive participants in the immigration process but must put all relevant information before the Minister.

(viii). In *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19 [2000] 2 I.R. 360.

(ix). *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795 [2008] IESC 25.

(x). *R (Razgar) v. Secretary of State for the Home Department* [2004] 2 AC 368, regarding art. 8 of the ECHR.

(xi). *Üner v. The Netherlands* (Application No. 46410/99, European Court of Human Rights, 18 October 2006).

(xii). *Boultif v. Switzerland* (Application No. 54273/00, European Court of Human Rights, 2 August 2001), regarding art. 8.

(xiii). *R. v. Bensbbas* [2006] 1 Crim. App. Report (S.) 94, concerning deportation on public policy and public security grounds.

(xiv). *P.R. v. Minister for Justice and Equality* [2015] IEHC 201 (Unreported, McDermott J., 24th March, 2015), regarding the effect of prior convictions.

(xv). *A.A. v. the United Kingdom* (Application No. 8000/08, European Court of Human Rights, 20 September 2011) in

relation to art. 8 in a conviction context.

(xvi). *Jeunesse v. the Netherlands* (Application No. 12738/10, European Court of Human Rights, 3 October 2014), in relation to the best interest of the child.

(xvii). *P.H. v. The Child and Family Agency* [2016] IEHC 106 [2016] 2 JIC 2501 (Unreported, High Court, 25th February, 2016) in relation to the best interest of the child.

(xviii). *N. v. Health Service Executive* [2006] IESC 60 [2006] 4 I.R. 374.

(xix). *Z.H. (Tanzania) v. Secretary of State for the Home Department* [2011] UKSC 4.

(xx). *Wan v. Minister for Immigration and Multicultural Affairs* [2001] 107 FCO 133 in relation to best interests.

(xxi). *Folawiyo v. Minister for Justice Equality and Law Reform* (Unreported, Cooke J., 2nd November, 2010), in relation to best interests.

(xxii). Case C-133/15 *Chavez-Vilchez*, judgment of the Grand Chamber.

(xxiii). *Gorry v. Minister for Justice Equality and Law Reform* [2014] IEHC 29 (Unreported, Mac Eochaidh J., 30th January 2014).

(xxiv). *Nunez v. Norway* (Application No. 55597/09, European Court of Human Rights, 28 June 2011) to the effect that art. 8 does not entail a general obligation for a State to respect immigrants' choice of their country residence.

(xxv). *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840, regarding art. 8.

(xxvi). *Dimbo v. Minister for Justice Equality and Law Reform* [2008] IESC 26 (Unreported, Supreme Court, 1st May, 2008) (Denham J.) to the effect that "*save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the department".*

(xxvii). *A.O. and D.L. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 (Unreported, Supreme Court, 23rd January 2003) (Keane C.J.) in relation to balancing constitutional rights.

20. It seems to me that the analysis of the Minister is longer and more detailed than many judgments of the High Court. It should not be condemned as legally invalid simply because certain aspects could have been phrased differently. The principal questions are whether any substantive breach of the applicants' rights arises and if so whether discretion should lean against granting relief.

Claim of *audi alteram partem* and contradiction or irrationality

21. It seems to me the applicant's claim of a breach of *audi alteram partem* is not made out, as appears from the factual narrative above. The first named applicant has had multiple opportunities to make submissions. The point is made that in refusing the applicant's right of residence, the Minister proceeded from the basis that there was no question of the minor being forced to leave the State. In making the deportation order, the decision was justified *inter alia* on the basis that family life could be maintained in Nigeria. However, the context here is that the refusal of permission was not challenged. The submissions made under s. 3 said that it would be disproportionate to relocate the mother. It was therefore permissible for the Minister to consider that point. The decision also notes that the choice was made to remain in the State. It seems to me there is no contradiction involved for the Minister to have considered both scenarios.

Insurmountable obstacles

22. Complaint is made as to the reference to insurmountable obstacles to relocation in considering the constitutional rights of the applicants. Mr. Whelan accepts that insurmountable obstacles is a valid criterion for the purposes of art. 8 but submits that it should not be used for the purposes of considering constitutional rights (see *Gorry v. Minister for Justice and Equality* [2017] IECA 282 (Unreported, Court of Appeal, 27th October, 2017), as summarised by Finlay Geoghegan J. at para. 105, and by Hogan J. at para. 31).

23. It seems to me this complaint is irrelevant because the mother has no intention of leaving the State, so even if the Minister's consideration of insurmountable obstacles was flawed it does not go to the actual decision made. Furthermore, *Gorry* was in the context of much clearer constitutional rights as between an Irish citizen and his or her spouse. Relying on *Gorry*, Mr. Whelan criticises the discussion of constitutional rights and the Minister's analysis by saying that the Minister assumes that art. 8 is directly effective and is the primary source of rights. He complains that the Minister first considers art. 8 over sixteen pages and then considers constitutional rights only subsequently and in a shorter discussion. The constitutional analysis is therefore, he says, something of an add-on. In particular, he complains of the reference to insurmountable obstacles in the constitutional discussion. However, the Minister does not say that art. 8 is directly effective and there is no reason in this case to assume that the Minister made a fundamental error of law. I prefer to assume that where the Minister refers to art. 8, which is shorthand for art. 8 as applied by the European Convention on Human Rights Act 2003. It seems to me that there is no necessary read-across from the judgment in *Gorry* on this point, which may have turned on the full wording of the decision and analysis in that case. Nor does the analysis say that the ECHR is the primary source of the applicants' rights. The length of the discussion is not decisive, if for no other reason than that there can be no general obligation to engage in narrative discussion. The obligation is to give consideration to the applicant's submissions and rights, which is a very different thing to a narrative discussion of that.

24. The order in which the points are discussed is hardly decisive. It is not for the court to dictate the format of ministerial decisions. Mr. Whelan, naturally enough, relies on para. 54 of the judgment of Finlay Geoghegan J. in *Gorry* that "*the first and more detailed consideration given in the decisions under review is to Article 8 ECHR, and then the more limited consideration of constitutional rights, implies a misunderstanding of this position*". That seems to me to be a comment in relation to the specific decision in that case and in the context of the very clear constitutional rights between an Irish citizen and his or her spouse. It does not seem to me to be possible to generalise from that comment to say that any decision in any legal context whatever that discusses the ECHR first and then the Constitution, or discusses the ECHR without reference to the 2003 Act, or discusses the Convention at greater length than the Constitution, is a misunderstanding and unlawful and must be quashed. It seems to me that it would be overly prescriptive to make such a finding unless it expressly follows from *Gorry*, which to my mind it does not. Having said that, it would seem to be better practice in the light of *Gorry* to put matters beyond doubt and to deal with constitutional rights first and then the ECHR, and to refer to the 2003 Act when referring to the ECHR, and I will certainly recommend that the Department do that going forward. But that is a

counsel of perfection, not a rule of law.

25. At the same time I do not think one can be too critical of the way this decision is phrased, and I certainly cannot say that every time I mention the ECHR in a judgment, I also mention the 2003 Act. Rather I take that as obviously implicit. Failure to mention the 2003 Act should not be assumed to mean that one's interlocutor has misunderstood the position, either fundamentally or at all. The fundamental answer to the complaint in relation to insurmountable obstacles is that the Minister does not hinge the analysis of the Constitution on the absence of such obstacles. That is just one point made amongst a number of points. Whether it is reasonable to expect family members to relocate was noted by the Supreme Court as a factor in the proportionality of balancing constitutional rights in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795 [2008] 2 I.L.R.M. 481 at 822 para. 85(12) per Denham J. (see also: *Alli v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595 [2010] 4 I.R. 45 *per* Clark J. at para. 63). In any event, the point made by the Minister seems to be reasonable. There are no insurmountable obstacles to the mother relocating to Nigeria with the child if she wishes to do so, which of course she does not. The point is not presented as a complete answer to the constitutional rights issue.

Failure to identify and evaluate constitutional rights
26. Mr. Whelan's submission that there was a failure to identify and evaluate constitutional rights is related to the previous point. There seems to me to be an over-emphasis on the question of whether constitutional rights are *identified*, rather than the more important question for the court as to whether they are *infringed* by the decision under challenge. The subject of constitutional rights of unmarried parents is possibly a more evolving area than well-settled rights such as between an Irish citizen and his or her spouse. So in the latter context there is a greater need for the clear identification of the right, as held by the Court of Appeal in *Gorry*. I do not think that it is reasonable to require the Minister to produce an academically perfect analysis, and even judges may disagree about the scope of such rights. Rather than some form of legal bingo, where key phrases or formulae have to be ticked off for the decision to be valid, the main thing is that the substance of family rights and relationships are considered. That was done, and the Minister placed weight on the applicant's offending as contrary to the public interest and as a counter-balancing factor. That was a lawful position to adopt. It is also important to note that minimal submissions on constitutional rights were made by the applicant, and in that regard I would apply the decision of O'Regan J. in *I.D. v. Minister for Justice and Equality* [2017] IEHC 15 (Unreported, High Court, 17th January, 2017) at paras. 30 and 31. The gaping hole in the applicant's case is the complete failure to particularise what exactly are the family related rights that he is actually exercising. They seem to amount to having had some past relationship with the mother, now long over it appears, which certainly cannot be a basis for remaining in the State, and having some unparticularised relationship with the child. That is particularly within the knowledge of the applicants but no attempt is made to specify it. Threadbare submissions warrant a threadbare response, and there is no basis to say that this decision is unlawful in the circumstances.

Failure to treat the child's best interest as a primary consideration
27. It is clear from *Dos Santos v. Minister for Justice and Equality* [2015] IECA 210 [2015] 3 I.R. 411 (Finlay Geoghegan J.) that the requirement under art. 42A.2 in this regard does not apply to deportation decisions. Applying best interests under art. 8 (see *O.O.A. v. Minister for Justice and Equality* [2016] IEHC 468 (Unreported, High Court, 29th July, 2016)), the effective position in this case is that the child's interests were considered and held to be outweighed. That is an approach that is reasonably open to the Minister.

Disproportionality
28. It is claimed that deportation of the first named applicant would be disproportionate as it would permanently deprive the child of the care of her father. The Minister analysed this submission on the basis of the minimal information provided. An assessment of proportionality is a matter generally for the *Minister (see Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 [2010] IESC 3 [2011] 2 I.L.R.M. 157 and *S.O. and O.O. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 343 (Unreported, Cooke J., 1st October, 2010) at paras. 63 to 66, to the effect that only exceptionally will proportionality have application in immigration decisions). It seems to me no illegality has been demonstrated in relation to the Minister's assessment.

Removal order *versus* deportation order
29. Relying on *Igunma v. The Governor of Wheatfield Prison* [2014] IEHC 218 (Unreported, Hogan J., 29th April, 2014) and *Chenchooliah v. Minister for Justice and Equality* [2016 937 J.R.] (Keane J.), where related issues were referred to the CJEU, Mr. Whelan relies on Chapter VI of directive 2004/38/EC, to the effect that the removal of the first named applicant should have been processed under that directive and not pursuant to a deportation order under the 1999 Act. However, the first named applicant never had any rights under the 2004 directive because he was never accompanying a spouse in the State after the entry into force of that directive. She had left the State prior to the effective date of the 2004 directive. That directive was not directly effective until the transposition date which was set at 30th April, 2006. That conclusion is reinforced by the fact that the repeal of directive 64/221/EEC and arts. 10 and 11 of regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community was not effective until two years from the entering into force of the 2004 directive (see art. 38). Mr. Whelan relies on the six month grace period for temporary absence under art. 11(2) of the 2004 directive, but that provision was not directly effective until 2006, and furthermore it never applied because it presupposes the prior existence of a residence card under the directive having been granted in the first place. It does not apply to an EU national who is outside the State when the directive came into force. Thus, the only rights of the first named applicant at the material times were under art. 10.1 of regulation EEC No. 1612/68, where such rights are dependant on being the spouse of a worker "*who is employed in the territory of another member state*", and under directive 64/221/EEC, art. 1(1) of which applies to a national of a member state who resides in or travels to another member state, as well as his or her spouse and family members "*who come within the provisions of the Regulations and Directives adopted in this field in pursuance of the Treaty*". That must be read as a reference to the 1968 regulations. It is clear, therefore, that any rights under directive 64/221 or regulation 1612/68 fell away when the first named applicant's wife ceased to live and work in the State. In any event, no rights under the 1964 directive or the 1968 regulations are pleaded. The only rights pleaded are under the 2004 directive, which did not apply to the applicant.

Discretion
30. The application therefore fails on the merits, but if I am wrong about any aspect of the foregoing I should consider the question of discretion. Mr. Whelan suggested that discretion should not be applied in relation to EU law rights but that is misconceived. It applies in the same way as limitation periods can apply to such rights. On that latter issue, the point I made in *K.P. v. Minister for Justice and Equality* [2017] IEHC 95 [2017] 2 JIC 2006 (Unreported, High Court, 20th February, 2017) was that, respectfully, Hogan J. in *Igunma v. The Governor of Wheatfield Prison* [2014] IEHC 218 (Unreported, High Court, 29th April, 2014) was, in my view, incorrect to ignore the time limits in s. 5 of the Illegal Immigrants (Trafficking) Act 2000 (see para. 36 of *K.P.*) in setting aside the deportation order on the grounds that the Minister should have proceeded by removal order, time limits which the Supreme Court had previously emphasised and applied on similar facts in *Rachki v. The Governor of Cloverhill Prison* (Unreported, Supreme Court, 5th December, 2011) (Fennelly J.). The broader point that emerges is that national rules of a general character can apply to EU law rights subject to the principles of equivalence and effectiveness (see paras. 34 and 35 of *K.P. v. Minister for Justice*). It seems to me that Mr. Whelan misunderstands the principle of effectiveness in his submission. It does not mean that every applicant has to succeed, or that a

procedural rule cannot be applied against any particular applicant so as to defeat their point. What it means is that as a result of the national rule, applicants generally should not, in principle, be precluded from succeeding by making it impossible or unduly difficult to assert their EU law rights. But if a rule of national law means that a particular application must be dismissed that is a lawful option and should not be precluded because of any argument that it defeats the very substance of that particular applicant's rights or the like. That is the point of a national rule, that it is potentially decisive in a particular case. An entitlement to the "*very substance*" of one's rights is not an entitlement to win one's case, or even to have such rights assessed on the merits. In this context it is an entitlement to a route to court subject to compliance with procedural rules that are in principle capable of being complied with by a law-abiding applicant, even if a particular individual's failure to comply with such rules disqualifies them from an assessment of the substance of the alleged rights in a particular case.

31. In the discretionary context, Mr. Whelan relies on *K.R.A. and B.M.A v. Minister for Justice and Equality* [2017] IECA 284 (Unreported, Court of Appeal, 27th October, 2017) to the effect that the wrongdoing of a parent should not be attributed to the child, but that analysis was expressly in the interlocutory context and not in the context of substantive rights of children, as to which see *P.O. v. Minister for Justice and Equality* [2015] IESC 64 [2015] 3 I.R. 164, the judgment of Charleton J. in particular. It is clear that judicial review is a discretionary matter (see *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 *per* Lord Carnwath at para. 61 "*judicial review is a discretionary remedy. The court is not required to ignore the appellant's own conduct, or the extent to which he is the author of his own misfortunes*". See also the reference to discretion by Finlay C.J. in *G. v. DPP* [1994] 1 I.R. 374 at 378 and my own judgments in *Mirga v. Garda National Immigration Bureau* [2016] IEHC 545 [2016] 10 JIC 0308 (Unreported, High Court, 3rd October, 2016) and *Li v. Minister for Justice and Equality* [2015] IEHC 638 [2015] 10 JIC 2102 (Unreported, High Court, 21st October, 2015)).

32. It seems to me here there are a number of important discretionary factors. First of all, the fact that the first named applicant attempted to defraud the immigration process, which Mr. Whelan effectively accepts. In *T.T. (Zimbabwe) v. Refugee Appeals Tribunal* [2017] IEHC 750 [2017] 10 JIC 3105 (Unreported, High Court, 31st October, 2017), I referred to the judgment of Kozinski C.J. in *Angov v. Holder* (Case No. 0774963, 9th Circuit, December 4, 2013) to the effect that the way in which the immigration laws are implemented, at least in the U.S., is such that applicants do not consider that consequences flow from fraudulent behaviour. However, it seems to me there must be consequences for fraud on the immigration system and the well-established jurisdiction to decline relief on the basis of discretion seems to me to be a vehicle for such consequences to be imposed.

33. Secondly, there is the applicant's serious offending, which I have referred to above. That is further compounded by the contempt shown for his victim and for the criminal process by his rejection of the jury verdict. I referred in *P.S.M. v. Minister for Justice and Equality* [2016] IEHC 474, at para. 52 to the concept that a person who accepts responsibility is more likely to rehabilitate themselves, and that it is therefore permissible, rational and lawful for the Minister to have regard to a continued denial of guilt as a factor adverse to an applicant in the deportation context. Likewise, it seems to me it must be permissible for the court to have regard to such a factor in the exercise of discretion.

34. The next factor is the recommendation of Groarke J. that the applicant be deported, which is something to which I can legitimately have regard under the heading of discretion.

35. A further fact is that the offence was committed in the course of the breach and abuse of a statutory licence given personally to the applicant under the Taxi Regulation Act 2013. Thus, the first named applicant has abused not only the immigration system but also the public service vehicle licensing system.

36. Furthermore, whether a removal order is required or not, the applicant has no permission to be in the State and is unlawfully present in the State for all purposes under s. 5(2) of the Immigration Act 2004. That illegal presence creates an implied obligation to leave the State, whether or not the Minister makes an order to that effect. Thus, I reject Mr. Whelan's submission that there is no mandatory duty for an illegal immigrant to exit the State. Immigrants, like anyone in the State, are obliged to conduct themselves in a lawful manner. Even if there is a procedure which has not yet been availed of for removal, exclusion, deportation or transfer there is an inherent obligation on an individual to act in a lawful manner which can only be done by leaving the State in those circumstances.

37. Illegal presence in the State is not necessarily something to be used as a discretionary factor against every immigration applicant, and not normally against persons challenging protection decisions or who have overcome the burden of showing a *prima facie* art. 3 issue under the ECHR. In other immigration cases, Mr. Whelan submits that this could defeat any applicant and, therefore, s. 3 of the 1999 Act would become defunct. However, the position is not as simple as that. The length of illegal presence, and the degree of compliance with obligations could be relevant. For example, living or working illegally for a long period is to be distinguished from immediately challenging any adverse decision in a timely manner in circumstances where the applicant otherwise complies with the law of the State.

38. A person who does not challenge a refusal of a permission to be in the State and simply cocks a snook at the system and invites the Minister to "*come and get me*" is also impliedly inviting the court to consider exercising discretion adversely. Having resided in the State for over three years from 2014 to date without the permission of the Minister or without having taken proceedings against various adverse decisions other than the final one is certainly a factor I can have regard to.

39. The final factor is the fact that the applicant arrived in the State on a manifestly false basis, namely a groundless asylum claim and made blatantly contradictory statements in the course of that application which was ultimately rejected for lack of credibility.

40. Mac Eochaidh J. in *Gorry v. Minister for Justice and Equality* [2014] IEHC 29 (Unreported, High Court, 30th January, 2014), indicated that he was not proposing to exercise discretion against the applicants in that case because there was "*no question of non-immigration related criminality*" (para. 53) and that the unlawful behaviour of the first named applicant was not "*of the order which would attract the exercise of discretion"* (para. 54) and in addition, "*the unlawful entry to the State might never have happened had her* bona fide *revocation application been assessed lawfully*" (para. 55). It seems to me that those are certainly not factors that could be said to apply here in favour of the first named applicant.

41. In *Smith v. Minister for Justice and Equality* [2013] IESC 4 [2013] 1 I.R. 294, Clarke J. emphasised that in exercising discretion the court was not at large, but noted a number of factors in that case which militated in favour of exercising discretion against the applicant, namely a significant sentence for serious criminality, poor immigration history having been in the State illegally and having shown scant regard for the family while asserting family rights.

42. It seems to me that the present case is a lot closer to *Smith* than it is to *Gorry* and, in my view, having regard to all of the factors I have referred to above, the application should be dismissed on discretionary grounds irrespective of my views on the merits, as set out above.

Order
43. For the foregoing reasons, the order will be as follows:

(i) that the proceedings be dismissed; and

(ii) that if the applicants take any further steps in the matter they should, for the convenience of any other forum, formally put on affidavit all additional material that was handed into the court by consent.

Postscript – the injunction
44. In relation to the injunction, having heard the parties, and considering and applying *Okunade v. Minister for Justice and Equality* [2012] IESC 49 [2012] 3 I.R. 152, *per* Clarke J., para. 104, the first issue is "*whether the applicant has established an arguable case".* It seems to me that in a context where proceedings have been dismissed, Mr. Moore submits that that must be read as referring to an arguable point of appeal, and it seems to me that that is the more appropriate interpretation, so in a sense a judgment post-dismissal of proceedings puts some onus on an applicant to identify an arguable point of appeal, but I am prepared to assume without deciding that the applicants can get over that hurdle.

45. The next issue is to "*give all appropriate weight to the orderly implementation of measures which are* prima facie *valid*", and that obviously leans in favour of refusing to extend the injunction.

46. Mr. Moore points out that Irvine J. in *K.R.A. and B.M.A v. Minister for Justice and Equality* [2017] IECA 284 (Unreported, Court of Appeal, 27th October, 2017) at para. 68 said that where measures were not only *prima facie* valid but where "*they were never challenged by the applicants*" this factor should "*carry much greater weight in the court's assessment of where the balance of justice lies, than might otherwise be the case".*

47. He submits that that can be extended to a situation where proceedings have been dismissed and that it can be said that the measures are again something more than *prima facie* valid. That may or may not be a correct interpretation, but it seems to me that it is not necessary to go that far for present purposes. It is sufficient to note that giving all appropriate weight to the deportation order is certainly a significant factor in relation to the present case.

48. The next issue is to *"give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made."* While that phrasing may envisage a particular form of scheme, it seems to me to be wide enough to encompass factors such as the present case where the deportation of the applicant was specifically recommended by the sentencing judge in this case nearly seven years ago, and the need to give effect to that is certainly a factor that must weigh heavily.

49. The next issue is to "*give appropriate weight (if any) to additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending the resolution of the proceedings.*" Again, the Minister was of the view that the public interest warranted the deportation of the applicant for very clearly identified reasons and it seems to me that this factor also weighs against an injunction.

50. The next issue is to "*give all due weight to the consequences for the applicant being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.*" It seems to me the onus has to be on the applicant to specify what those consequences are and I have noted that there is something of a gaping hole in the evidence offered by the applicant as to what precisely the relationship with the second named applicant is. It seems to the first named applicant has not made out his case to the appropriate level of detail, specificity and particularity, to the effect that significant weight should be attached to the disruption involved.

51. The first named applicant will, of course, be able to pursue any further proceedings from outside the State. Furthermore, being outside the State does not preclude any or all communications with the child and the mother, and ultimately the court would retain power to direct that the first named applicant be readmitted if that was, at some future point, held to be required by law, noting, of course, that at the moment the first named applicant is a person without any right or title to be in the State, irrespective of whether the deportation order is quashed or not.

52. The next factor of relevance is "*subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case".* It seems to me, having rejected the applicant's case and certainly prior to the formulation of any proposed questions for the purpose of an appeal it is very hard to regard this factor as favouring the continuation of an injunction.

53. The next element is that significant weight needed to be attached to the implementation of decisions made in the immigration process which were *prima facie* valid. There was importance to the exercise by the State of the right to control its borders and implement an orderly immigration policy and that default position certainly favours to decline to continue the injunction at this particular point in time.

54. Having regard to all of the factors, and even acknowledging that an element of disruption to the applicants is inevitable, it seems to me that as matters stand at the moment, the injunction should not be continued. Accordingly I will discharge the injunction restraining deportation of the first named applicant.