S53

Supreme Court of Ireland Decisions

Judgment

Title:	Sivsivadze & ors v Minister for Justice and Equality & ors
Neutral Citation:	[2015] IESC 53
Supreme Court Record Number:	402 & 403/2012
High Court Record Number:	2011 1066 JR
Date of Delivery:	23/06/2015
Court:	Supreme Court
Composition of Court:	Murray J., Hardiman J., O'Donnell Donal J., Clarke J., MacMenamin J.
Judgment by:	Murray J.
Status:	Approved

Judgments by	Link to Judgment	Result	Concurring
Murray J.	Link	Appeal dismissed - affirm High Court Order	Hardiman J., O'Donnell Donal J., Clarke J., MacMenamin J.

Outcome: Dismiss

THE SUPREME COURT

[Appeal No. 402 & 403/12]

Murray, J.
Hardiman J.
O'Donnell J.

Clarke J.
MacMenamin J.

BETWEEN:

LELA SIVSIVADZE, SOFIA ARABULI, MARIAM TOIDZE

(MINORS SUING BY THEIR MOTHER AND NEXT FRIEND,

LELA SIVSIVADZE) AND DAVIT ARABULI

PLAINTIFFS/APPELLANTS

AND

MINISTER FOR JUSTICE AND EQUALITY,

ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice John Murray delivered the 23rd day of June, 2015

1. This is an appeal by the appellants against the decision of the High Court (Kearns P) refusing their application for (a) a declaration that section 3(1) of the Immigration Act, 1999 is unconstitutional and (b) a declaration pursuant to section 3(1) of European Convention on Human Rights Act, 2003, as amended, that s.3(1) of the Act of 1999 is incompatible with Ireland's obligations under the Convention.

2. The first named appellant is the wife of the fourth named appellant and both are the parents of two children, the second and third named appellants. The fourth appellant arrived in this country in 2001 and having failed in an asylum application an order for his deportation was made in December, 2001. It was not until November, 2011 that effect was given to that order when he was returned to his country of origin, Georgia. The background facts and circumstances relating to the appellants are explained in greater detail below.

3. It is relevant to emphasise at this point that the appellant’s case is an attack generally on the constitutionality of section 3(1) itself or in conjunction with subsection 11 of the same section and not on any individual decision of the Minister. Although these proceedings started out as judicial review proceedings they were ultimately sent for plenary hearing on the constitutional issue. As is evidence from the agreed issue paper and the submissions of the parties the constitutionality of section 3(1) is put in issue because, what is alleged is the requirement of the section (set out in paragraph 5 below) that a deportation order have effect for an indefinite period of time without any specified limitation. Thereby every deportation order actually or potentially has a disproportionate and unconstitutional interference with the rights of the family and the right to a family life

as guaranteed by the Constitution. Although no particular order or decision of the Minister is in issue by way of judicial review the appellants do rely on their particular factual circumstances and the impact of the deportation on their family life in support of their contention that a deportation order made in accordance with section 3(1) will have adverse effects on deportees who have a family life in this country to an extent incompatible with the provisions of the Constitution. In addition, or alternatively, it is submitted on behalf of the appellants that section 3(1) of the Act is incompatible with Article 15 of the Constitution as constituting an unlawful delegation of legislative powers in the absence of a sufficient statement of principles and policies in the legislation governing how the Minister should exercise his power to make a deportation order. The claim for a declaration of incompatibility pursuant to s.5 of the European Convention on Human Rights Act, 2003 is an alternative one to the constitutional issues.

Other Issue

4. When this appeal first came on for hearing a serious discrepancy was noted between the date of birth and age which the first appellant claimed when she arrived in this country in 2003 from Georgia and what appeared to be her real dated of birth, as appeared from an affidavit sworn by her 10 days or so before the matter first came on for hearing on 26th January, 2015. That hearing was adjourned and the first appellant directed to file a further affidavit setting out in detail why she had falsely claimed to be an unaccompanied minor of 16 years when she first arrived in this country and applied for asylum. She was directed to file a further affidavit explaining this discrepancy and giving all relevant facts and circumstances. In the event she subsequently filed an affidavit which showed that the story which she had relied upon in the asylum process and in various proceedings before the courts was a concoction and a tissue of lies. This is referred to in more detail below. It is mentioned at this point in order to indicate that the respondents in the appeal have also submitted that the appellants should be denied any reliefs in these proceedings by reason of the first appellant's egregious abuse of the asylum system and in particular abuse of the processes of the Court in conjunction with the fourth appellant's abuse of the process of the Court as already found in the High Court proceedings by the learned President.

Relevant Statutory Provisions

5. Section 3(1) of the Immigration Act, 1999 provides:-

> *"Subject to the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996, and the subsequent provisions of this section, the Minister may by order (in this Act referred to as "a deportation order") require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State."*

Section 3(11) provides:-

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

Section 2 of the European Convention on Human Rights Act, 2003 provides that:-

> *"In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."*

Section 5 of the European Convention on Human Right Act, 2003 provides:-

> *"In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration… that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions."*

Section 5 of the Immigration Act, 2004 contains provisions concerning the presence of

non-nationals in the State and provides as follows:-

> *"(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister.*
>
> *(2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State."* [relevant provisions]

6. The respondent has submitted that in the circumstances which prevail in the present case, namely where a party, through deceit and making untruthful statements under oath, has abused the process of the court, this Court has a discretion to deny any relief to such applicants and to strike out the proceedings.

Locus Standi

7. Before going on to outline the essential background facts of the case, I think it would be useful at this point to refer to the *locus standi* of the parties in order to place the foregoing issues in context. Some discussion on this point occurred during the hearing, although the respondents did not assert that the appellants do not have *locus standi* to challenge the constitutionality of s.3 of the Act of 1999. I think this is a correct approach, all of the appellants being objectively affected by the application of s.3 by virtue on the deportation order which applies to the father in the family. In particular, there is a continuing interest in its application, if only because the fourth named appellant has the right to apply in the future under subs. (11) of s.3 for a revocation of the deportation order in question. The objective fact that all the appellants are affected by the deportation order and continue to be so affected, relates to facts that are not in controversy between the parties.

8. It would also be as well to state at this point, that in this appeal there is no issue concerning the validity of the deportation order as such, as made by the Minister in December, 2001 in respect of the fourth named appellant. The validity of that order had been challenged in judicial review proceedings brought in November 2011, on the grounds that his deportation disproportionately interfered with his family and private life. The application for such relief was dismissed in the judicial review proceedings and not appealed from. An issue concerning the constitutionality of s. 3 of the Act of 1999 had also been raised in the judicial review proceedings. As a matter of principle, parties are not permitted to use judicial review proceedings for the purposes of challenging the constitutional validity of an Act of the Oireachtas. Such a challenge must be initiated by way of plenary summons. What happened in this case is that the trial judge in the judicial review proceedings directed that the constitutional issue be pursued by way of a plenary hearing. That issue duly came on for hearing before the High Court including a hearing on the claim for a declaration of incompatibility with the European Convention on Human Rights. The High Court, Kearns J., delivered a judgment dismissing the appellants' claim in the plenary proceedings.

Background Facts Concerning the Asylum Application and Status of the First Named Appellant

9. The first appellant arrived in the State in May, 2003. She had no right of entry into the State as such, but presented herself as an asylum seeker and sought refugee status. She had come from, and is a citizen of, Georgia. For the purpose seeking refugee status she gave a detailed account of how, although only 16 years old, she had been driven to leave her native country, because of "*horrendous sexual abuse as a child*", the effects of which she continued to suffer. This was a tissue of lies which she maintained throughout the asylum process, including an appeal, and in all proceedings before the courts, until she filed an affidavit before this Court in February, 2015 admitting her lies and setting out what she said was her true age and the true circumstances in which she left Georgia and

came to this country.

10. For the purpose of placing the issues arising in this appeal in their proper context, it is necessary to refer, at least in summary form, to the false story which that appellant relied upon throughout the asylum process and throughout the subsequent proceedings before the High Court and, initially, in this Court.

11. Before doing so I set out the correct facts, at least as now admitted by her in her affidavit of February, 2015, concerning the circumstances of her life in Georgia and her arrival in the State. She was born on the 11th June, 1981, and was almost 22 years of age when she arrived in the State. Her parents are still alive and living in Georgia. Her father is 77 and her mother 55. She has an older sister living legally in the United Kingdom with her husband and her children. She left school in Georgia at the age of 17 and went to the State University where she obtained a diploma in international studies. Along with many young people in Georgia, she could find no employment. Her mother was afraid that she would get depressed, and decided that she should leave Georgia for a better future. Her parents put the money together and found a man who helped her leave the country. That is why she came to Ireland to seek work and a better life. This is what emerges from the affidavit filed in this Court in February, 2015. It appears that she obtained the assistance of others with regard to her plans to emigrate and they advised and assisted her in pretending to be a minor of 16 years with false papers, and to claim she was fleeing Georgia because of being sexually abused by her stepfather.

12. As appears from the material before the Court, and the affidavit of Mr. Pat Carey, filed on behalf of the respondent, the false story which that appellant has relied upon was supported by a false Georgian birth certificate, giving her date of birth as the 11th October, 1986. For the purpose of seeking refugee status she claimed that she left Georgia because of a fear of persecution and, in particular, that her stepfather was threatening her with death and beating her. She was subjected to horrendous sexual abuse by him. She claimed her father had died when she was 2 years old. Her mother had remarried and when she died in December, 2000, the main problems with her alleged stepfather commenced. She claimed he beat her and raped her. On one occasion he had a knife in his hand which "*he put on me and told me if I did not stop screaming he would kill me"*. She claimed that she had lost consciousness because of bleeding from a wound and when she came round she was in hospital. She alleged that her stepfather was beating her in front of his friends, and that he was verbally and physically abusing her. After a further attempt by her stepfather to rape her, she decided she could not stand it any further and she ended up sleeping rough. She was afraid to return to Georgia because of the threats of violence and rape from her stepfather. All of the foregoing was, she now admits, a fabrication.

13. It would appear that the Refugee Tribunal member who considered her application accepted that she may have been subject to some form of abuse, but that she could have availed of state protection, that is to say, reporting these matters to the police. As a result a recommendation for refugee status was not made. She appealed to the Refugee Appeals Tribunal, where she gave the same false story. Her account of repeated abuse by her stepfather was accepted, but again the conclusion was that she did not qualify for refugee status because she could avail of state protection in Georgia by reporting the matter to the police and allowing the law to take its course.

14. She subsequently relied on the same story when she later successfully applied to the Minister for leave to remain in the State on humanitarian grounds. For that purpose, she also relied on a report from a senior clinical psychologist to whom she had told essentially the same story. This story of physical and sexual abuse by her non-existent stepfather was also relied upon in successive applications for the revocation by the Minister of a deportation order which had been made in respect of her husband, and fourth appellant,

in 2001. Similarly, she and the fourth appellant relied on this background in unsuccessful proceedings brought to challenge the legality of the deportation order in respect of her husband. The decision of the High Court rejecting such an application has not been appealed.

15. Her current status is that she resides in this country by virtue of being granted leave by the Minister to remain, temporarily, on humanitarian grounds. It has been indicated to the Court that this may be reviewed in the light of the false story which she has relied upon throughout all those matters, but this is not something which has any bearing on the issues in this appeal.

16. As will be seen from the facts relating to the fourth appellant, her husband, she also fully and jointly engaged with him in deceiving the State authorities for the purposes of avoiding his deportation.

Background Facts Concerning the Fourth Named Appellant

17. The fourth named appellant, the husband of the first appellant and father of two appellant children arrived in the State in 2001. He applied for asylum under a false name, and also engaged in an orchestrated form of deception of the State authorities for the purposes of seeking asylum and for the purposes of evading the enforcement of a deportation order made by the Minister in December, 2001, long before he had established a relationship with the first appellant. The facts and circumstances in his case are summarised in the judgment of Kearns P., from whose decision this appeal is taken. They were summarised by him as follows:

> *"The fourth named applicant is a Georgian national who was born in either 1974 or 1977 (he has furnished different dates). He entered the State and applied for asylum in January 2001 under the name of Datia Toidze. One week later, on the 15th January 2001, he applied for asylum once more this time using the name of Dato Arabuli. He subsequently withdrew this latter application however, and stated that he wished to be known as Datia Toidze. He did not attend his scheduled interviews with the Refugee Applications Commissioner and his application for asylum was therefore refused. The Minister gave notice of his intention to deport the fourth applicant on 30th August, 2001. The fourth applicant made no submission in response to this notice and on 5th December 2001, a deportation order issued in respect of the fourth applicant. He was instructed to report to the Garda National Immigration Bureau (GNIB) on the 14th December, 2001 but failed to do so and was thereafter classified as an evader.*
>
> *It subsequently transpired that the fourth applicant had travelled to Iceland in 2002 on a forged Spanish passport in the name of Pinto Jose and applied for asylum in that jurisdiction under yet another identity. He was transferred to Ireland under the terms of the Dublin Convention on 25th April, 2003. He was required to present thereafter at regular intervals to GNIB. Immigration officers from the Georgian Embassy in London visited the fourth applicant on three occasions in an attempt to verify his identity. However, the fourth applicant did not co-operate and these attempts proved unsuccessful such that a travel document could not be issued in order to facilitate his deportation. The fourth applicant therefore, remained in the State until November 2011.*
>
> *……..*
>
> *In October 2008, the fourth applicant applied to the Minister to revoke his deportation order pursuant to s. 3(11) of the 1999 Act. This application*

was unsuccessful and the order was affirmed on the 17th June, 2009. He made a second application to revoke on 27th July, 2010. This application enclosed a copy of his marriage certificate, in which he was referred to as Mr. Arabuli; his children's birth certificates and a letter from his wife to the Minister requesting that her husband, whom she referred to as Mr. Toidze, should be allowed to stay in the State. This letter, in addition to the eldest child's birth certificate, makes it clear that the first applicant knowingly participated in the deception practised by her husband.

The second application to revoke was rejected and the deportation order was affirmed once more on the 18th October, 2011. On 26th September 2011, the fourth applicant was arrested and detained by members of the Police Service of Northern Ireland while he was travelling through Northern Ireland. He was returned to the State on 3rd October 2011, and was refused leave to land. He was arrested and detained in Cloverhill Prison as he was the subject of a deportation order and was unlawfully seeking to re-enter the State. He challenged his detention pursuant to Article 40.4.2 of the Constitution but it was upheld as lawful on 24th October, 2011. In the course of this Article 40 application, the fourth applicant finally admitted under cross-examination that the name he had been using, Mr. Toidze, was an alias and that his true identity was Mr. Davit Arabuli.

The fourth applicant filed a third application to revoke pursuant to s.3(11) on the 25th October, 2011 which was refused on 3rd November, 2011. He then sought an injunction restraining his deportation. This was also refused and, on 4th November 2011, the fourth applicant was deported to Georgia."

18. As can be seen, the fourth appellant brought proceedings before the High Court in which he challenged the lawfulness of his arrest and detention for the purpose of deporting him on foot of the deportation order made in 2011, and subsequently further High Court proceedings challenging his deportation following the third decision of the Minister not to amend or revoke the deportation order. He was unsuccessful in those proceedings related to those ministerial decisions, and did not appeal.

Circumstances of the Relationship of the First and Fourth Named Appellants

19. After the return of the fourth appellant from Iceland in 2003 he met the first appellant and they formed a relationship. They had two daughters, neither of whom is an Irish citizen. The first daughter, who is the eldest, was born in April, 2005. The fourth appellant was registered as her father under the false identity of Datia Toidze. That is the name which appears on the daughter's birth certificate, and it is evident that the first appellant was aware of the use of this false identity, given that her signature is also on the birth certificate. The second daughter, the second appellant, was born in August, 2009. On her birth certificate the father's name was recorded as Davit Arabuli. In July, 2009 the first and fourth appellants married. It would appear that in order to facilitate the marriage he obtained a Georgian passport in 2009 in that name. This was never disclosed to the Garda National Immigration Bureau.

Summary of Submissions of the Appellants

20. The appellants have submitted that the deportation order of the kind made in this case amounted to an administrative sanction in the fourth appellant's breach of the deportation order would be a criminal offence. Its submissions in relation to the constitutionality of s.3(1) and (11) have to be considered in that context. As regards s.3(1) the section is framed so as to require the Minister for Justice, when making a deportation order, to do so in a form which is indeterminate in time and prohibit the re-entry of the deportee to the State at any time. The fact that the deportation is indefinite

in time and potentially lifelong means that a deportation order will necessarily constitute a disproportionate interference with the rights of a family or the right to family life as guaranteed by the Constitution in cases where those rights are affected. This is necessarily the consequence of a deportation order in any case, like the position of the appellants, where the deportation order has the effect of seriously interfering with the family life of the deportee, his or her spouse or partner and children. No issue was taken with the power of the Minister to make a deportation order as such, it is the indefinite and potentially lifelong period of a deportation order which will have a disproportionate effect where the order interferes with rights guaranteed by the Constitution, such as family rights. Even though s.3(11) permits the Minister to subsequently amend or revoke a deportation order, particularly on the application of the deportee, that does not, it was submitted, affect the essential indefinite and potentially lifelong nature of a deportation order made under s.3(1). Since this is necessarily the consequence of a deportation order, where the family rights of a deportee are engaged, this section is incompatible with the provisions of the Constitution guaranteeing family rights. In short, s.3(11) does not affect the disproportionate impact of a deportation order under s.3(1).

21. The appellants also submit that s.3(11) cannot be relied upon as mitigating the effects of s.3(1) because it is in itself unconstitutional since it constitutes a delegation of legislative powers prohibited by Article 15.2.1 of the Constitution. The Act does not contain any statement of principles or policies governing the manner in which the Minister should consider whether or not to amend or revoke a deportation order as required by the principles set out by the courts in such cases as *Cityview Press v. An Chomhairle Oiliúna* (cited below). Therefore, s.3(11) constitutes an impermissible conferring on the Minister of legislative powers contrary to s.15.2.1 of the Constitution.

22. In the alternative, the appellants seek a declaration pursuant to s.5 of the European Convention Act, 2003 that s.3(1) and s.3(11) are incompatible with the State's obligations under the Convention. In this respect the appellants essentially deploy the same arguments concerning the necessarily disproportionate effect which an indefinite deportation order under s.3(1) will have on a deportee and his or her right to family life as guaranteed by Article 8 of the Convention. The case law of the European Court of Human Rights makes clear that any deportation order which interferes with the right to family life under Article 8 must be proportionate in its effect. It is submitted that the indefinite duration of a deportation order under s.3(1) offends against that principle and that it is not mitigated by the effect of s.3(11) concerning the amendment or revocation of a deportation order.

Summary of Submissions of the Respondents

23. The respondents submit that the kind of deportation order in issue here, that made under s.3(1) of the Act of 1999, applies to persons who, like the fourth appellant, had no right or entitlement to be or to remain in the State. Once the fourth appellant's asylum application was refused, the fourth appellant was then in the position of any non-national with no right to enter the State. They refer in particular to *GAG & Others v. Minister for Justice* [2003] IESC 49. That status was indeterminate in time since such a non-national does not acquire any right to enter the State. He can only do so if he receives permission from the Minister. Accordingly, it necessarily followed that a deportation order made in respect of a person who has no right to be and remain in the State is made without limitation because he or she cannot acquire the right to re-enter the State through the passage of time. That only concerns the form of the deportation order and s.3(1) cannot be considered in isolation from s.3(11), which provides for the amendment or revocation of a deportation order. As regards the exercise of ministerial powers under the section, it was submitted that the learned President was correct in holding that the Minister may only exercise his discretion in a manner which conforms to the Constitution and the Act, including making a decision in accordance with the principle of proportionality if particular fundamental rights, such as right to family life, are engaged. Since the Minister has the power to review and thereby revoke or amend a deportation order at any time, it cannot

be said that the absence of any specified limitation in time in a deportation order is in itself disproportionate. The respondents made essentially the same arguments regarding the application of the principle of proportionality under the European Convention on Human Rights for the purpose of having due regard to a deportee's right to family life under Article 8 of the Convention.

24. The respondents submitted that the learned president was correct in his judgment in the High Court in deciding that s.3(11) was not a power granted to the Minister in breach of Article 15 of the Constitution, which reserved the legislative power to the Oireachtas. It is submitted that the nature and function of the power granted by sub-section 11 is a discretionary power of the Minister to be exercised in accordance with constitutional justice and obligations under the Convention to the extent which they have been incorporated under the European Convention on Human Rights Act, 2003. It was also submitted that the learned president was correct in deciding that the absence of principles and policies does not indicate that the Minister is empowered to act unconstitutionally. The Minister must determine every application on its merits, and insofar as it may interfere with fundamental rights, has both the duty and capacity to make a decision which contains a proportionate balance between public interest and the rights of the individual. Therefore, it was submitted, the exercise of the power to amend or revoke a deportation order is not a power which can be said to be in breach of Article 15.

Decision

Dismiss for Abuse of Process of the Courts

25. Counsel for the respondents submitted that due to the egregious lack of candour, *mala fides* and gross misconduct of the first appellant, in conjunction with the deceiving misconduct of the fourth appellant referred to above, that these proceedings should be dismissed as an abuse of process. While the High Court had been aware of and pronounced on the lack of honesty of the fourth appellant, it had not been aware of the gross lack of honesty on the part of the first appellant. Counsel referred the Court to extensive judicial dicta establishing that a gross abuse of the immigration and asylum process, together with the abuse of the court process, would not be tolerated. In summary, it was submitted that the appeal should be dismissed for abuse of process. It was contended on behalf of the appellants that notwithstanding the admitted serious misconduct of the appellants, and in particular the first appellant, the Court should determine the issues in this appeal concerning the constitutionality of the sub-sections in issue on the grounds that objectively, on the basis of admitted or non-contested facts, the appellants were adversely affected or prejudiced by the application of these provisions, individually and in their family life generally. As such, they had the right to challenge the constitutionality of these provisions. Moreover, it was submitted, the second and third named appellants, who are minors, had an interest in the outcome of the proceedings and could not be blamed for the misconduct of the other two appellants.

26. I think this matter can be dealt with fairly succinctly. First of all, to state the obvious, the appellants could not pursue or obtain any relief based on facts that are now exposed as being false. Secondly, if these were judicial review proceedings simpliciter, in which the appellants sought the discretionary remedy of judicial review in respect of a discrete decision affecting them, there are ample grounds upon which the Court could consider dismissing an appeal in such matters on the grounds of the egregious abuse of process of the courts in this case.

27. However, this appeal concerns the constitutionality of s.3(1) and (11) generally and does not involve the judicial review of discrete decisions. It is true that these proceedings commenced in the form of a judicial review, which is anomalous, and this Court has pointed out on several occasions that proceedings challenging the constitutionality of an

Act of the Oireachtas should be in the form of plenary proceedings and not a remedy pursued by way of judicial review. However, in this case the High Court directed that these constitutional issues be sent for plenary hearing and they were duly heard and determined by the High Court. Those issues concerned the constitutionality of the relevant provisions generally and were summarised in the High Court as being:

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

28. Objectively, the appellants in this case are adversely affected by the operation of s.3 of the Act of 1999 as regards their family life, for the reasons referred to above when I addressed, *en passant*, the question of *locus standi*. The constitutionality of the provisions in question has been determined and upheld by the High Court. The appellants have a right of appeal to this Court pursuant to Article 34 of the Constitution. While Article 34 permits certain rights of appeal to be regulated by law, Article 34.5 contains the provision that "*No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution."* I do not think there is anything in that provision which would inhibit the jurisdiction of the Court to dismiss an appeal for want of jurisdiction or other grounds such as lack of *locus standi*.

29. On the other hand, the value which the Constitution attaches to a right of appeal in a case involving a challenge to the constitutionality of an Act must, at the very least, be taken into account in determining whether to dismiss an appeal on discretionary grounds because of an abuse of process. The rights of persons not to be prejudiced by laws which are incompatible with the Constitution is a fundamental principle. Whether Article 34.5 should be interpreted as going so far as to prohibit the dismissal of such an appeal on purely discretionary grounds is not necessary to decide. Account must also be had to the interests of the children which are of paramount importance, although I would not go so far as to say that the sole fact that a blameless minor has been included as one of the plaintiffs or applicants in a case would prevent a court exercising its discretion to dismiss an appeal on the grounds of abuse of process, particularly in judicial review proceedings.

30. In all the circumstances, I am satisfied that this appeal should not be dismissed in limine on the grounds of the egregious abuse of process on the part of the first and fourth appellants given that what is in issue is their claim to a right to family life under the Constitution and the European Convention on Human Rights when, objectively, it is not disputed that they have been adversely affected although, of course, the State claims, for entirely constitutional and legitimate purposes.

31. Moreover, I think the Court must have regard to Article 42(A) of the Constitution (the 31st Amendment) which provides, *inter alia*, "*The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."* This is an obligation placed on the branches of government, described as Organs of State in Article 6 of the Constitution, including the judicial branch of government. In the circumstances, I am satisfied that this appeal should not be dismissed by reason of the abuse of process by two of the appellant, having regard to the objective constitutional interests involved, including those of the minor children, and the fact that it involves a challenge to the constitutionality of a provision of an Act of the Oireachtas.

Whether Deportation Order is a 'Sanction'

32. One of the premises upon which the appellants ground their argument concerning the constitutionality of s.3(1), in conjunction with s.3(11), of the Act of 1999 is that the deportation order of the nature made in respect of the fourth named appellant constitutes an administrative sanction, in other words, a penalty or form of administrative punishment. The deportation was directed at the fourth named appellant personally, by reason of which he is required to leave the State and remain outside thereafter. Counsel pointed out that failure to comply with the order attracts a criminal sanction under s.5 of the Act of 1999, and/or a prosecution for a summary criminal offence under s.3(10) of the Act of 1999.

33. It is convenient when considering this submission to also address the status of the fourth appellant at the time when the deportation order was made (and which it has been since).

34. In this regard, the status of the fourth appellant when the deportation was first imposed in 2001 was that of an alien (a non-national or a person who is not a national of any E.U. or E.E.A. state) who had no right to be or remain in the State. It will be recalled that when he first arrived in the State in 2001 he applied for asylum under a false name. He then applied for asylum under another name, but subsequently withdrew that application. He did not attend for interviews with the Refugee Applications Commissioner, and his application for asylum was refused. Thereafter he ceased to have any status as an asylum seeker. Thereafter, whatever rights he may have had as an asylum seeker under E.U. law, and implementing national legislation, ceased to have any bearing on his situation. As this Court stated in *Goncescu & Others v. Minister for Justice Equality & Law Reform* [2003] IESC 49, at paragraph 113:

> *"… upon a refusal of refugee status the appellants had no entitlement to remain in the State for any purpose and the Minister was entitled to make a deportation order pursuant to section 3 of the Immigration Act, 1999. … Once an applicant's application for a declaration of refugee status has been refused even that persons limited authority to remain in the State ceases."*

35. That case also cited (at paragraph 116) the statement of Hardiman J. in *P.L. and B. -v- Minster for Justice Equality and Law Reform* [2002] 1 I.L.R.M. 163, that persons whose application for asylum had been rejected and who had made representations to the Minister after notification that he was proposing to deport them, were persons "*without title to remain in the State."*

In this particular case the fourth appellant had been notified by the Minister of his intention to make a deportation order, but he did not choose to make any submissions to the Minister before that order was made. In his judgment in A*.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1, at 24, Keane C.J. stated that the "*inherent power of Ireland as a sovereign State to expel or deport non-nationals (formerly described in our statute law as "aliens") is beyond argument."* He approved of the dictum of Costello J. in *Pok Sun Shun v. Ireland* [1986] I.L.R.M. 593 at p. 599, (and which has been also approved in successive judgments of this Court):

> *"the State … must have very wide powers in the interest of the common good to control aliens, their entry into the State, their departure and their activities within the State."*

36. The facts and circumstances relating to the fourth appellant's unlawful presence in the State, his departure to Iceland, and his forced return, and the refusal to give him leave to land in the State on his return from Northern Ireland in October, 2011, are outlined above. His arrest in October, 2011 for unlawfully seeking to re-enter the State while subject to a deportation order ultimately led to his deportation to Georgia in November, 2011 on foot of the 2001 deportation order. He was not prosecuted or punished for any

offence.

37. All of the foregoing demonstrates that the deportation order made in respect of the fourth appellant in December, 2001 was an executive decision within the powers of the State, exercised by the Minister, as authorised by statute, to deny to the fourth appellant permission to enter or remain in the State. The judicial authorities to which I have referred make it quite clear that no alien has a right to enter or to remain in the State without lawful permission. So an alien who presents himself or herself at a point of entry to the State may be refused leave to land, or if found unlawfully within the State may be deported by order of the Minister on foot of an existing deportation order or a new one. Deporting an alien, such as the fourth named appellant, in those circumstances, is no more than the application of the law and the exercise of sovereign powers to protect the integrity of the borders of the State by refusing permission to land or to stay. It is not in any sense a punishment or sanction, administrative or otherwise.

38. The fact that a person can be prosecuted for acting in breach of a deportation order is a separate matter and does not affect the nature or a deportation order pursuant to s.3(1). The deportation order was not made because he had been convicted of any offence.

39. In support of the contention that the deportation order should be treated as the imposition of a sanction on the fourth appellant, counsel referred, by analogy, to a number of cases of the European Court of Human Rights, in particular *Nunez v. Norway*, 28th June, 2011, *Emre (No.2) v. Switzerland*, October, 2011, and *Antwi v. Norway*, 14th February, 2012. In none of these cases was the Court of Human Rights concerned with the question as to whether a deportation order, as such, is a sanction or punishment when made in respect of an alien who has no right to enter or to remain in a State. However, the important distinction between this case and those cases is that they were all cases in which the deportees were deported under the respective national laws because they had committed criminal offences.

40. For example, in the *Emre v. Switzerland* case the complainant was the holder of a resident's permit, and lawfully resident in Switzerland, but it was withdrawn and he was deported because he was convicted of a series of offences involving wounding, grievous bodily harm, assault, robbery and a range of other offences. Thus, the deportation order could be said to be in the form of a sanction because it was made as a consequence of a criminal offence committed by a foreigner who was otherwise lawfully within the State concerned. There are other reasons, including the particular facts and circumstances of each case, and domestic practice in immigration cases, which also differentiate those cases in principle from the present one. I do not consider it necessary to consider in detail these cases since, for the specific reasons stated, they could not be said to lend support to the submission that deportation order of the kind made in respect of the fourth appellant was a sanction or punishment. In any event, any objective analysis of a deportation order such as that made in this case pursuant to s. 3(1) leads to the conclusion that it is not a punitive measure.

41. Accordingly, this premise or proposition advanced on behalf of the appellants is not sustainable.

42. In any event, it has to be said that there is no prohibition, as such, in law or the Constitution which prevents the deportation of an alien as a consequence of having committed a serious criminal offence. It is a common practice among states and as regards the third relief sought by the appellants concerning compatibility with the European Convention on Human Rights, it is also evident from the European Court's case law that deportation as a sanction in such circumstances does not, as such, contravene the Convention. What is always open to question, of course, as in deportation generally, is whether the decision taken is in conformity with the Constitution and the law both as to

the authority to make the decision and its proportionate interference, if any, with rights guaranteed by the Constitution. Indeed, the appellants did not submit that on this ground alone that the sub-sections in question stood to be impugned, but sought to characterise the kind of deportation order in this case as amounting to a sanction, as part of the context in which the constitutionality of the sub-sections should be examined. As I say, this would not be a correct context to examine the kind of deportation order referred to in the issues raised in this case.

The Constitutionality of Sections 3(1) and 3(11) of the Act of 1999

43. A primary submission of the appellants in this case is that s.3(1) and/or s.3(11) of the Immigration Act, 1999, as amended, is incompatible with the Constitution because it imposes "*a requirement that all deportation orders must entail an indefinite period of exclusion from the State*", and accordingly "*disproportionately interferes with the appellants' right to family life".*

44. The time limit within which to challenge the lawfulness of such an order had long since passed when he was arrested in October, 2011 for unlawfully entering the State. He was then detained with a view to implementing the deportation order. Following his arrest, and before he had been actually deported, he brought an application to the High Court pursuant to Article 40 of the Constitution in the false name he was using at the time, Datia Toidze, claiming that his detention for the purpose of giving effect to the deportation order of 2001 was unlawful. The application was dismissed by Hogan J. in a judgment delivered on the 24th November, 2011. There was no appeal from that decision.

45. The challenge to the Constitution is, although couched in general terms focused in the first place, on the potentially disproportionate impact which allegedly an indefinite and perhaps lifelong deportation order may have on the family life of a person who will, as a result of deportation, be separated from a spouse and children lawfully resident in this country.

46. Although the Court in this appeal is not concerned with a judicial review of the lawfulness or constitutionality of any particular decision of the Minister, what the appellants hope to achieve, if successful, by virtue of a declaration that s.3(1) and/or s.3(11) of the Act are unconstitutional, is that as a collateral consequence his deportation order may be deemed null and void.

47. However, even if one is to take fully into account the particular family circumstances of the four appellants, the argument that a deportation order made by the Minister pursuant to s.3(1) could or actually did have a disproportionate and thereby unconstitutional effect, is premised on the asserted interpretation of s.3(1) that an order made under that section is one which necessarily "*entails an indefinite period of exclusion from the State*". The essence of the complaint of the appellants is that the duration is not defined as it extends indefinitely and is potentially life long.

48. For convenience I repeat here the provisions of section 3(1):

> *"Subject to the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996, and the subsequent provisions of this section, the Minister may by order (in this Act referred to as 'a deportation order') require <u>any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State.</u>"* (emphasis added)

49. The constitutionality of a power of the Minister to make a deportation order

simpliciter, even when it impacts on the family life of the deportee, is not in issue. It would not be tenable if it were. What is claimed is that the Minister's order cannot adversely affect constitutional family rights in a manner which is disproportionate. Of course, in deciding whether or not to make a deportation order the Minister is bound to make such a decision in a manner consistent with the Constitution, including the rights of the family and the interests of any minor children affected (see, for example, *Fajujonu v. Minister for Justice* [1990] 2 I.R. 151 and *Lobe & Others v. Minister for Justice, Equality & Law Reform* [2003] IESC, where I concluded in my judgment "*In deciding whether there is such good and sufficient reason in the interests of the common good for deporting the non-national parents the Minister should ensure that his decision to deport, in the circumstances of the case, is not disproportionate to the ends sought to be achieved.*") Should persons adversely affected by such a deportation order feel aggrieved on the grounds that the Minister did not exercise his powers constitutionally and proportionately, they have a remedy to seek to set aside that particular order by way of judicial review?

50. It seems clear to me that the principle of proportionality cannot arise for the purposes of a general attack on the constitutionality of the section. It is true that a deportation order is not made for a particular duration, such as a specified number of years, and is indefinite in that sense. To say however that this gives rise to a constitutional frailty is to misconceive, in my view, the very nature of a deportation order made in respect of an alien, as understood in the context of these proceedings.

51. First, it should be said that a deportation order is not *necessarily* unlimited in time. It will not contain within itself a limitation, but the provisions of s.3(11) cannot be ignored. This provides:

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

52. As is evident from that provision, although a deportation order made pursuant to s.3 does not contain any limitation period on the duration of the effect of the order, its effect may be brought to an end at any time should the Minister in his discretion consider it appropriate to do so. The making of a decision to amend or revoke a deportation order by the Minister invariably arises on the application of the person the subject of the deportation order. In any event, the Minister, when the occasion arises for him to make a decision as to whether to amend or revoke such an order, is again bound to exercise his statutory power in a manner compatible with the Constitution. This means that he must take into account all relevant factors, including any fundamental rights concerning the family and any right to family life, where relevant, of those directly affected by such an order. As the learned President correctly pointed out in his judgment in the High Court in this case, s.3(11) is not to be confined to enabling the Minister to amend or revoke a deportation order only when there has been a change of circumstances arising between the time of "*the making of the deportation and the time of its implementation*" (although any such change in circumstances would, of course, be relevant factors). Similarly, there is nothing in sub-section 11 of s.3 to suggest that the Minister is confined to making an amendment or revocation of an order under s.3 subsequent to deportation only when there has been a change of circumstances in the situation of the deportee or those affected by the order, such as members of his family. Whenever an application to revoke a deportation order is made the Minister acts having regard to all the pertinent circumstances of the case and, again, a change of circumstances (or the fact of no change of circumstances) may be relevant, but the important point is that the decision is made having regard to all the relevant circumstances as they are at that time. Whether a decision to make a deportation order (or not to revoke one) interferes with a person's fundamental rights depends on the circumstances of the case. More important, whether any such interference is proportionate or disproportionate must depend on the particular circumstances of the case. Thus, in making any such decision, the Minister must take into account such factors as the statute or the Constitution require him to take into account and his decision pursuant to s.3(11) may be the subject of judicial review, brought by

those directly and adversely affected.

53. The foregoing principle according to which the Minister, in exercising a statutory discretion, is bound to act in accordance with the Constitution and the statute itself might at the present time be said to be trite law. The obligation to exercise a statutory discretion in a manner consistent with the Constitution and its principles stems of course from the decision of this Court in *East Donegal Co-Operative and others v. Attorney General* [1970] I.R. 317 where the Court considered a statutory discretion conferred on a minister pursuant to section 3 of the Livestock Marts Act, 1967. In that case it was stated:-

> *"All the powers granted to the Minister by s. 3 which are prefaced or followed by the words 'at his discretion' or 'as he shall think proper; or ;if he so thinks fit; are powers which may be exercised only within the boundaries of the stated objects of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse at his will."*

It was also stated, as regards the provisions concerning the revocation of a licence under the Act:-

> *"As already stated in an earlier portion of this judgment, the Minister must act in the way indicated and, so far as the revocation of a licence is concerned where it falls to be dealt with under sub-s. 6(a) of s. 3, the provisions of sub-s. 7 of s. 3 also require the Minister to cause the statement of his reasons for so doing to be laid before each House of the Oireachtas. The Act simply provides a particular formal structure of inquiry in respect of matters falling under sub-s. 6(b) of s. 3, and in the absence of an express provision in the Act to the contrary, or in the absence of provisions from which the only reasonable construction is that in all other cases the Minister is to act in an unconstitutional manner, the only valid inference is that the Oireachtas did not purport to vest any such power in the Minister. The other provisions of s.3 of the Act do not demonstrate or indicate, whether expressly or by necessary implication, any intention on the part of the Oireachtas to confer such power on the Minister. The provisions indicate different procedural requirements but they do not indicate that it is the clearly recognisable will of the Oireachtas that the Minister should be empowered to act in the manner contravening the provisions of the Constitution."*

54. Although that was an Act regulating citizens' rights and in particular their right to trade in a particular manner the same general principle of interpretation applies to the exercise by the Minister of his administrative discretion when making a decision under section 3(1) or section 3(11). This is so even though in that case what was in issue was the regulation of a citizen's rights, the right to trade, and in this case a deportation order does not deny the alien or non-national concerned any right vested in him or her since they have no right, as such, to enter or remain in the State. Of course, in a particular case the Minister may have to have regard to other rights such as the right to family life to the extent guaranteed by the Constitution.

55. This fundamental principle is again reflected and stated by Henchy J. in his judgment in *McMahon v. Leahy* [1984] I.R. 548. In that case he rejected the argument that once it had been shown that none of the statutory exceptions from extradition applied, the Court had no discretion but to make an extradition order in view of the seemingly mandatory language of the Extradition Act, 1965. In his judgment Henchy J. stated:-

> *"Where … a post-Constitution statute authorises the making of an order in stated circumstances, the legislative intent must be held to comprehend that the authorised order will not be made, even though the stated*

> *circumstances are shown to exist, if it is shown that the order would necessarily infringe the constitutional right of the party against whom it would operate. The [presumption of constitutionality] carries with it not only the normal presumption that laws enacted by the national parliament are not repugnant to the Constitution, but also the presumption that the provisions of such laws will not be administered or applied in a way that would infringe constitutional rights. The presumption of constitutionality extends to both the substance and the operation of a statute, it is a presumption that admits of rebuttal only by a contrary intention appearing in the terms of the statute itself."*

These principles also apply to the making of a discretionary statutory decision by a Minister, in that it must not be made or applied in a way that would infringe the Constitution.

56. In the High Court the learned President, having regard to these principles, concluded that the Minister must determine every application pursuant to s.3(11) on its merits and must act, *inter alia,* within the boundaries of the Act of 1999 and there is nothing in the provision to suggest that the Minister is empowered to act unconstitutionally. The learned President was, in my view, entirely correct in this interpretation of section 3(11). Self-evidently the same applied to s.3(1) itself where there is nothing in the provision or indeed the Act generally, which would empower the Minister to make a decision without regard to all matters which he is constitutionally bound to take into account and nothing which would authorise him to make a decision which disproportionately interfered with a right under the Constitution. He would also, of course, be bound to take a decision under any provision of s.3 with due regard to the provisions of the European Convention on Human Rights Act, 2003.

57. It is the case of course that the appellants have placed particular emphasis on the indefinite and potentially lifelong duration of a deportation order in the form which it is required to be made by virtue of section 3(1). The order must require the non-national concerned to leave the State and "*remain thereafter out of the State*". The learned President found that the making of such an order in that form placed the non-national or alien in the same position as any other non-national, restoring the deportee to the position he previously stood as a non-national under s.5 of the Act of 2004 (cited above). That is the section which prohibits any non-national entering the State without permission. I also think the President was correct in adopting that approach. A person who is being deported, because he is a non-national without any right to enter or remain in the State, once deported cannot re-enter the State unless the deportation order is amended or revoked by the Minister. A non-national, say for example from Georgia like the first and fourth appellants, who has not previously entered the State may not ever enter the State unless, pursuant to s.5 of the Act of 2004, he or she has obtained permission from the Minister to do so. They are in substance in the same position. The difference as to the manner in which a deportee must seek authorisation to enter the State is different but for objective reasons, namely that he was previously unlawfully present in the State, which resulted in a deportation order.

58. It would be incongruous to expect a deportation order of such a nature to have a defined or limited period within which the obligation to remain outside the State would end. Any such non-national never has or had a right to enter and remain in the State without first obtaining official authority. Such a non-national does not acquire a right to enter or re-enter the State with the passage of time alone. It would be potentially misleading to limit the obligation to remain outside the State to a specified number of years since that could be taken as wrongly implying that the deportee was permitted to return after the expiry of such a period.

59. It might be logical for a State, as some do, to make a deportation order for a specified time if it was made only because a person had committed a criminal offence and that person had otherwise enjoyed a right of residence in the State concerned. But that is

not the kind of situation being addressed here. In any event, it is a matter for each State to establish its own system for the regulation of immigration matters subject to its own Constitution and laws, and with due regard to its obligations under the European Convention on Human Rights.

60. There are of course differences between the position of a deportee who was deported because he or she was unlawfully present in the State and a non-national who has never entered the State but nonetheless requires permission to do so. Even though a deportee has to go through a different procedure, that of applying to have a deportation order revoked or amended (as opposed to a permission ordinarily sought in the case of a non-national) that is an administrative procedure again brought about by the deportee's previous unlawful presence in the State. Fundamentally he remains, in principle, as he always was as a non-national, that is to say a person who cannot enter the State without first getting a form of authorisation to do so.

61. In any event, as I have pointed out, the principle of proportionality does not really arise in this context since this falls to be applied in the circumstances of each individual case and there is nothing in the relevant sections or the Act preventing the Minister doing so. In the present context it is the status of the non-national which is definite and permanent, that is to say a person without an inherent right to enter the State but only a right to do so on permission. Section 3(11) in any event ensures that a deportee can apply at any time within reason to the Minister for a revocation or amendment of the deportation and it is incorrect to describe the deportation order as simply indefinite, and no more.

62. It has not been necessary to examine the nature and scope of the rights to family life under the Constitution in the context of the making of a deportation order of a non-national. It is sufficient to say that insofar as in the particular circumstances of a case a deportation order may interfere with constitutional family rights of those concerned, it is a matter for the Minister to decide whether a consideration of such rights means that a deportation order should not be made, or should be revoked. Any such decision adverse to the deportee or his family is subject to scrutiny as to its proportionality under the Constitution in the circumstances of each case.

63. Since, as explained above, there is nothing in s. 3(1), 3(11) or the Act itself restricting any constitutional obligation of the Minister to exercise his discretion proportionately in the circumstances of any individual case, it cannot be said that these provisions are unconstitutional because they would necessarily involve an adverse impact on family rights (or otherwise) as guaranteed by the Constitution.

Incompatibility with Article 15.2.1 of the Constitution

64. Article 15, s. 2.1 of the Constitution provides that:-

> *"The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."*

65. The appellants contend that the power and wide discretion conferred on the Minister pursuant to s. 3(11) to amend or revoke a deportation order is an unconstitutional delegation of a power to make laws because the Oireachtas failed to make provision in the statute for any principles or policies governing the circumstances in which a decision should be made to amend or revoke a deportation order.

66. The appellants relied, *inter alia*, on the leading case of *Cityview Press v. An Chomhairle Oiliúna* [1980] I.R. 381 at 398, where the test to be applied was described as follows:-

> *"In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principle and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand if it be within the permitted limits - if the law was laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power."*

67. One must bear in mind that, as the judicial authorities cited earlier in this judgment indicate, the power of the State to exclude non-nationals or aliens from the entering the territory of Ireland is a power inherent in a sovereign state. It is not statutory in origin. What the Act of 1999 does, in effect, is to designate the Minister as being the person who makes the decision whether to make or revoke a deportation order.

68. It seems to me that a decision by the Minister to deport in the first instance or to decide whether or not to amend or revoke such an order does not constitute a legislative act or the making of a regulation. It is an executive and administrative act. The Oireachtas has decided that non-nationals found unlawfully within the State may be deported pursuant to section 3(1), and may re-enter if and when the order is amended or revoked. In *T.C. v. Minister for Justice, Equality and Law Reform* [2005] 4 I.R. 109 at para. 26, Fennelly J. referred to the powers of the Minister under s. 3(11) in the following terms:-

> *"On its face, this provision confers a broad discretion, to be exercised in accordance with general principles of law, interpreted in the light of the Constitution and in accordance with fair procedures."*

That includes, Fennelly J. pointed out, a duty to act rationally and proportionally with regard to any rights including family rights of the individual deportee. In that case Fennelly J. referred to the balancing exercise which a Minister had to engage when dealing with each individual case, including the legitimate public interest of the State in giving effect to its immigration policy and respect for family interests "*whether by reference to the Constitution or the European Convention"*. As the learned President put it in this case, the exercise of the power under s. 3(11) involves the exercise of a margin of appreciation related to the facts of individual cases. That discretion was clearly left by the Oireachtas to the Minister.

69. Article 15 prohibits the delegation of legislative powers and since the Minister's function is not legislative it has no bearing, as such, on section 3(11). In any event, it can be said although it is not strictly necessary to do so, that the exercise of the powers under s. 3(11) is done so in accordance with the principles implicit in the exercise of a statutory discretionary power as outlined above and as explained in the judgment of the President of the High Court in this case. The Minister has to act in the interests of the common good in determining whether a deportation order should be revoked or amended on the one hand, and on the other balance this against the degree of any restriction on the fundamental rights, including family rights, of those affected. That is something to be decided in the circumstances of each case.

70. Having regard to the foregoing considerations, I am satisfied that s. 3(11) is not in conflict with Article 15 of the Constitution.

Compatibility with European Convention on Human Rights

71. The appellants have sought a declaration pursuant to s. 5 of the European Convention on Human Rights Act 2003, that s. 3(1) and s. 3(11) are incompatible with the State's obligations under the Convention provisions. Having held that the statutory provisions in question are not incompatible with the Constitution, it is necessary to consider this claim

by the appellants.

72. As regards the statutory provisions in question the appellants have essentially deployed the same arguments as to their import and effect as they did in arguing that they were incompatible with the provisions of the Constitution. This is that a deportation order under s. 3(1) is or may be potentially disproportionate in its effect on the fundamental rights of those affected, in particular in cases where there is an interference with the right to family life protected by Article 8 of the Convention. This arises by reason of deportation orders of indefinite duration, which may last for a lifetime.

73. As I have already explained it is wrong to consider the effect of an order under s. 3(1) in isolation from the power of the Minister to amend or revoke such an order at any time pursuant to section 3(11). Again, the question of compatibility with obligations under the Convention fall to be examined in the light of the duty of the Minister to, *inter alia*, ensure that a deportation order or a decision not to amend or revoke constitutes a proportionate balance between the State's interest in protecting the common good on the one hand, and limiting the exercise of a fundamental right, including a right to family life, by those directly affected.

74. Counsel for the appellants has referred to an extensive number of cases in which the European Court of Human Rights have found that states have been in breach of their obligations under the Convention to respect family life as guaranteed by Article 8 of the Convention because of the disproportionate effect of a deportation order, including its duration, on such a right.

75. In this case one is concerned with the compatibility generally of s. 3(1) and s. 3(11) with the obligations imposed on Ireland by the Convention and not the application of those particular sections in the circumstances of a particular case, including the particular circumstances of the appellants case, even though those circumstances are held up as an alleged example of a deportation order may have such a disproportionate effect.

76. It is not in issue that the case law of the European Court of Human Rights (hereafter "the European Court") recognises that the deportation of non-nationals, who do not have a right to enter or remain in a country, is a legitimate public policy objective as are other legitimate aims of the making of deportation orders such as the prevention of disorder and crime and the protection of public health or morals.

77. It also cannot be gainsaid that a deportation order may interfere with the right to family life of the deportee or the family members, including children. On the objective facts of the situation of the appellants, their family life is interfered with by reason of the fact that the fourth appellant has no authority to enter the State where his wife and children currently reside. As the European Court has consistently pointed out, even where a deportation order serves a legitimate public policy purpose:-

> *"It remains to be determined whether the interference was 'necessary in a democratic society', that is to say justified by a pressing social need and, in particular proportionate to the legitimate aim pursued. Therefore, the court's task consists in ascertaining whether the expulsion order in the circumstances of the present case struck a fair balance between the relevant interests, namely the applicant's right to respect for family life, on the one hand, and the interests of public safety and the prevention of disorder and crime, on the other".*

Uner v. Netherlands [2007] 45 E.H.R.R. 14. In that case the public interest relied on was public safety and the prevention of crime.

78. The constant practice of the European Court in the light of the foregoing approach is

to examine the circumstances of each particular case before determining whether the deportation was necessary in a democratic society, and in particular whether it was proportionate to the aim pursued. In doing so, it has set out a range of criteria in its case law. Most of the cases which the court has had to consider appear to involve deportation of persons who had been authorised to reside in the state in question but which were being deported because they had committed a serious criminal offence. That is obviously not the case here. Also in many cases the deportee and his family members may have lawfully lived for very many years or even many decades in the host state and some were what is described as second generation immigrants, namely, those who were in the host state from birth but had not acquired citizenship of that State. Accordingly, the criteria which the European Court has repeatedly recited in its case law reflect a myriad of circumstances which can arise in this type of case. Not all of the criteria will be relevant to every case. I would add in passing that the making of a deportation order as a form of sanction because a person committed a criminal offence in the host state has never, as such, been regarded as in any way incompatible with protections under the Convention. Once a legitimate public policy objective is being pursued what the court examines is whether the deportation order is proportionate to the circumstances of the particular case. One of these circumstances may be the duration of the effect of the deportation order. That is one factor among many to be taken into account in examining whether in all the related circumstances of a particular case, the principle of proportionality has been observed.

79. The European Court has set out in its jurisprudence a range of criteria to be considered in this kind of case. In *Kahn v. United Kingdom* [2010] 50 E.H.R.R. 47, the Court stated, at paragraph 39:

> *"The principal issue to be determined is whether the interference was "necessary in a democratic society". The relevant criteria that the Court uses to assess whether an expulsion measure is necessary in a democratic society have recently been summarised as follows [see Üner v. the Netherlands [2007] 45 E.H.R.R. 14 at 57 - 58]:"*

In the same paragraph of its judgment the court then went on to cite the following criteria from the *Uner* case:

> *"- the nature and seriousness of the offence committed by the applicant;*
>
> *- the length of the applicant's stay in the country from which he or she is to be expelled;*
>
> *- the time elapsed since the offence was committed and the applicant's conduct during that period;*
>
> *- the nationalities of the various persons concerned;*
>
> *- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;*
>
> *- whether the spouse knew about the offence at the time when he or she entered into a family relationship;*
>
> *- whether there are children of the marriage, and if so, their age; and*
>
> *- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled."*

80. In the *Khan* case the court added that implicit in the foregoing criteria was the

importance of ensuring that the best interests and wellbeing of the children of a family were protected. The court has also considered knowledge by one spouse, at the time of establishing a family relationship, of the other spouse's illegitimate status in the host country as a relevant factor when considering the proportionality of a deportation measure.

81. I think it is correct to say that in every case in which a deportation has been made for legitimate public policy objectives, the European Court has addressed the compatibility of a State's actions with its obligations under the Convention by taking into account all the relevant circumstances of the particular case and thereby determining whether the measure was proportionate. The duration of a deportation order is simply one factor that has been taken into account in applying the proportionality test particularly in cases where there has been a specified period of exclusion following a criminal conviction. In the *Uner* case for example there was a ten year exclusion period imposed on the claimant. That was because he had committed a serious criminal offence but was otherwise entitled to reside in the Netherlands. He had come there at the age of twelve with his parents and obtained a permanent resident permit. He had a partner and two sons, both of whom had Dutch nationality. However, there were other factors which the court took into account which led it to conclude that the respondent state, the Netherlands, had not failed to strike a fair balance between the right to family life of the applicant and the public interest. Again, in the *Khan* case referred to above, the deportation involved a Pakistani national who had moved to the United Kingdom when he was three years old and was granted indefinite leave to remain. He also was convicted of serious criminal offences and deported to Pakistan. So, as far as any period was involved, the court noted that it appeared "*the latest the applicant would be able to apply to have the deportation order revoked would be ten years after his deportation".* However, the court decided "*in the light of the above, having particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of continuing ties to Pakistan, the strength of his ties with the United Kingdom, and the fact that the applicant has not reoffended following his release from prison…the court finds that the applicants deportation…would not be proportionate…".*

82. These cases are simply illustrative of the issues which have arisen before the European Court concerning the proportionality of deportation orders and their effect. They demonstrate, however, that it is in the nature of a proportionality test that it can only be applied to the particular circumstances of each case. There is no case or principle enunciated by the European Court from which one could deduce that a deportation order which has the effect of removing an alien, who had and has no right to be in the host state, for an indefinite period but with the option of applying at any time for a revocation or amendment of the deportation order is, in principle, incompatible with Convention obligations. There may well be circumstances in which the making of such a deportation order or a refusal to amend or revoke could be so disproportionate as to be in breach of obligations under the Convention. That falls to be determined in a particular case concerning a discrete decision on its own facts.

83. The Minister in exercising his statutory functions under s. 3(1) or s. 3(11) is bound, as already explained, to exercise his discretion in accordance with the Constitution, including ensuring that insofar as any decision constitutes an interference with family rights as guaranteed by the Constitution that it is proportionate. Similarly, having regard to the provisions of the European Convention on Human Rights Act and, in particular s. 3, he is under an obligation to ensure that any such decision is proportionate having regard to the family rights of those affected, including the children, under Article 8 of the Convention.

84. Indeed, in *T.C. v. The Minister for Justice, Equality and Law Reform* (cited above), the Minister accepted, as noted by Fennelly J. in his judgment, that he was bound to respect family rights as guaranteed by the Convention when considering whether to amend or

revoke a deportation order pursuant to section 3(11). Fennelly J. himself stated:-

> *"…I believe that it is particularly relevant to bring to bear the considerations identified by the European Court of Human Rights. They show that the Member States are required to balance the competing considerations."*

This was a reference to the public interest and family rights.

85. Similar to my conclusions on the question of the constitutionality of these sections, it is also clear that there is nothing in the sections themselves nor in the Act which would restrict the Minister, when making a decision under either subsection, from fully taking into account the Article 8 rights of the family directly affected by a deportation order or a refusal to revoke one, in accordance with the principles laid down in the European Convention.

86. In these circumstances it cannot be said that s. 3(1) or s. 3(11) are incompatible with the obligations of the State under the Convention. Accordingly, this relief is also refused.

87. In the foregoing circumstances the appeal is dismissed.