High Court of Ireland Decisions

Judgment Title: J.S. & ors -v- Minister for Justice and Equality & anor

Neutral Citation: [2014] IEHC 195

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Judgment by: McDermott J.

Status of Judgment: Approved

Neutral Citation: [2014] IEHC 195

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 249 J.R.]

BETWEEN

J.S., M.A., A.B.S. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND J.S.),

J.S.A. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND J.S.), R.B.S.A. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND J.S.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

THE ATTTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Mr. Justice McDermott delivered on 28th day of March, 2014

1. This is an application for judicial review whereby the applicant seeks to quash the decision of the respondent to affirm a deportation order made against the second named applicant, M.A., on 7th March, 2012, following a grant of leave on 16th April, 2012 (Cooke J.). Leave was granted on the following grounds:-

"The decision of the respondent of 7th March, 2012, refusing the second named applicant's application for revocation of the order dated 2nd April, 2009, is unlawful and ought to be quashed in that:-

> (a) The respondent erred in law in applying the principles enunciated by the Court of Justice of the European Union in its judgment in Case C-34/09 *Ruiz Zambrano* to the personal and family circumstances of the applicants as given in their application of 6th April, 2011.
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> (b) The respondent erred in law in construing and applying to the said personal and family circumstances of the applicants the protections afforded to them (and particularly to the minor applicants as Irish and European Union citizens) by Articles 40.3, 41 and 42 of the Constitution and by Articles 3 and 8 of the European Convention on Human Rights.
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> (c) The conclusions reached and the reasons given for them in refusing to revoke the deportation order are unreasonable and disproportionate to the permanent impact of the order on the personal and family circumstances of the applicants having regard particularly to the changed facts and circumstances presented to the respondent in the application of 6th April, 2011, and to the fact that the minor applicants are Irish and European Union citizens."

Background

2. M.A. is a Nigerian national who entered the state lawfully on 17th December, 2002, having been given permission to do so in accordance with the terms of a visa and work permit on 30th October, 2002, the validity of which extended to 30th October, 2004. Thereafter, he failed to comply with the "stamp 4 conditions" of his permission to work. He did not work fulltime as an I.T. professional. He claimed social welfare. He also committed a series of criminal offences, mostly concerning theft and dishonesty and was a drug addict using heroin and "crack cocaine". His application for renewal of his visa was refused on 27th October, 2004.

3. While in the state the applicant formed a relationship with H.P., an Irish citizen and

they had one child, B.P.. M.A. sought residency under the IBC05 Scheme based on his parentage of B.P.. This application was refused on 18th November, 2005, on the basis that he failed to provide evidence of playing an active parenting role in B.P.'s life. This decision was not challenged and this aspect of M.A.'s life is not the subject of these proceedings.

4. In or about April, 2004 M.A. met J.S., the second named applicant, and formed a relationship. They had three children, namely A.B.S. (the third named applicant) born on 10th February, 2005, J.S.A. (the fourth named applicant) born on 16th January, 2007, and R.B.S.A. (the fifth named applicant) born on 27th January, 2008. M.A. and J.S. have joint guardianship of the children in accordance with an order of the District Court "with primary care and control to the mother", as recorded in an order of 18th May, 2009. J.S., and the children are Irish and European Union citizens.

5. M.A. was convicted of numerous offences between 2000 and 2008, including theft and dishonesty offences in respect of which he received and served sentences as follows:-

1. 12th April, 2005 - conviction of theft contrary to s. 4 of the Theft Act 2001, a sentence of one month imprisonment from that date.

2. 5th July, 2007

(1) – conviction of an offence contrary to s. 4 of the Theft Act 2001, a sentence of four months imprisonment from that date.

(2) – conviction of handling stolen property contrary to s. 17 of the Criminal Justice (Theft and Fraud Offences) Act 2001, a sentence of one month imprisonment from that date.

3. 30th October, 2007

(1) – conviction under s. 4 of the Theft Act 2001, a sentence of six months imprisonment from that date.

(2) - conviction for handling stolen property contrary to s. 17 of the Criminal Justice (Theft and Fraud Offences) Act 2001, a sentence of seven months imprisonment from that date.

(3) - conviction of theft contrary to s. 4 of the Theft Act 2001, a sentence of eight months imprisonment from that date.

(4) - conviction of possession of stolen property, a sentence of eight months imprisonment from that date.

(5) - conviction of possession of stolen property, a sentence of nine months imprisonment from that date.

(6) - conviction for failing to appear contrary to s. 13 of the Criminal Justice Act 1984, ten months imprisonment from that date.

(7) - conviction under s. 4 of the Theft Act 2001, a sentence of ten months imprisonment from that date.

(8) - conviction of theft contrary to s. 4 of the Theft Act 2001, a sentence of ten months imprisonment from that date.

(9) - conviction of theft contrary to s. 4 of the Theft Act 2001, a sentence of ten months imprisonment from that date.

(10) - conviction of theft contrary to s. 4 of the Theft Act 2001, a sentence of eleven months imprisonment from that date.

(11) - conviction for handling stolen property, a sentence of eleven months imprisonment from that date.

(12) - four counts of possession of stolen property, ten months imprisonment from that date.

(13) - handling stolen property, taken into consideration.

(14) - conviction of theft contrary to s. 4, a sentence of ten months imprisonment from that date.

(15) - conviction of theft contrary to s. 4, a sentence of eleven months imprisonment from that date.

(16) - conviction for failure to appear s. 13 of the Criminal Justice 1984, a sentence of eleven months imprisonment from that date.

All of the sentences passed on 30th October, 2007, were to run concurrently.

4. 12th February, 2008 – conviction for possession of drugs for sale or supply contrary to ss. 15 and 27 (as amended) of the Misuse of Drugs Act 1977, a sentence of three years imprisonment, one year suspended to date from 11th November, 2007. That conviction arose from a charge laid on 3rd December, 2005.

6. A deportation order was made in respect of M.A. on 2nd April, 2009, following an extensive consideration or "examination of file" carried out under s. 3 of the Immigration Act 1999. Representations had been received from the applicant's solicitors and notification of the deportation order was given on 12th May, 2009.

7. By letter of 21st May, the applicant's solicitors sought the revocation of the deportation order pursuant to s. 3(11) of the Act. Further representations were made and the deportation was affirmed by the respondent on 27th January, 2010. On 6th April, 2011, a second application for revocation was made to the respondent based primarily on the *Zambrano* decision and enclosing further documentation concerning the suggested progress made by M.A. and J.S. in dealing with his drug addiction, their respective medical conditions and the welfare of the children. The request to revoke the deportation order was refused and the order affirmed on 7th March, 2012.

8. The deportation order and the first refusal to revoke it have not been subjected to legal challenge and this case is solely concerned with a challenge to the second refusal of 7th March, 2012.

Section 3(11) of the Immigration Act 1999

9. 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."

10. Section 5 of the Immigration Act 2004, provides that no non-national shall be in the state other than in accordance with permission given by or on behalf of the Minister.

11. There is no doubt that an exclusion from the state under s. 3(1) is unlimited in time. Section 3(11) confers a wide discretion on the Minister to revoke or amend a deportation order and the circumstances in which that may occur are not expressly limited by the terms of the section, though its reasonable operation will be constrained by the reality of the facts of a particular case. An application must be based on new circumstances which did not exist or, if they did exist, could not have been advanced at an earlier stage. For the latter circumstances to be considered the applicant must establish a special reason or offer a compelling explanation as to why the new facts were not advanced at an earlier stage (*Smith & Smith v. Minister for Justice and Equality & Ors* [2012] IESC 4). In that regard, it must be recalled that the making of the order itself requires an extensive inquiry into the facts, circumstances and rights of the proposed deportee and members of his/her family. As Fennelly J. stated in *T.C. v. Minister for Justice, Equality and Law Reform* [2005] 4 I.R. 109 (para. 26):-

> "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. Otherwise, the respondent is at large."

12. In *Efe & Ors v. Minister for Justice, Equality and Law Reform, Attorney General and Ireland* [2011] IEHC 214, Hogan J. in considering the adequacy of the procedure under s. 3(11) as a mechanism whereby new facts could be assessed, particularly in relation to the right to family life under Article 8 of the European Convention on Human Rights, stated:-

> "42. The need for a mechanism whereby new facts can be assessed might be especially true in the general sphere of family rights under Article 41, where fresh developments such as marriage, the birth of children and the increasing extent to which Irish born children had integrated into the school system might all be intensely relevant to the Minister's decision in any given case.
>
> 43. But, as it happens, there is such a mechanism. In the immigration sphere, the applicants have a tailor-made remedy which can address new post-decision facts, namely, the power to revoke the deportation order under s. 3(11) of the 1999 Act. Should, for example, the Minister fail to revoke the deportation order in the light of new material facts, then this Court could quash that decision in an appropriate case…
>
> 44. For these reasons I cannot accept that the remedy of judicial review must be regarded as an inadequate method of vindicating constitutional rights by reason of the fact that new evidence is not admissible in judicial review proceedings once regard is had to the fact these applicants can avail in appropriate cases of the protections contained in s. 3(11) of the 1999 Act so that new, material evidence can be considered by the Minister."

13. The application of s. 3(11) was further considered in the case of *Smith & Smith v. Minister for Justice and Equality* (cited above) in which Clarke J. delivering the judgment

of the court stated:-

> "5.4 … there can be little doubt but that permitting persons to make repeated applications for revocation of deportation orders in the absence of significant new materials or circumstances would contribute to…delays and have an adverse affect on the orderly implementation of the Irish immigration system. It seems to me to follow that it is only where a relevant applicant can point to some significant feature, not present when the original deportation order was made, that there can be any obligation on the Minister to give detailed reconsideration to the question of deportation. It likewise follows that a similar situation arises where, as here, there is a second or subsequent application for revocation of a deportation order. Where, as here, neither the original deportation order nor the first or earlier application for revocation was challenged in the courts by judicial review (or where any such challenge failed), it must be assumed that the analysis of the Minister, on the basis of the facts, materials and considerations then before the Minister, was correct. It follows that the only basis on which a challenge to a second or subsequent refusal on the part of the Minister to revoke a deportation order can be brought is where reliance is placed on a suggestion that there were new circumstances not before the Minister when the deportation order or any previous decision not to revoke same was determined and where the challenge is directed to the consideration by the Minister of the application in the light of such new circumstances.
>
> 5.5 To that general principle, I would add two observations. First, it seems to me that the overall approach which I have identified applies, at least in the vast majority of cases, notwithstanding the fact that some of the persons whose rights may be affected are persons who are not subject to the deportation order in the first place. It is, of course, the case here that the rights of the other members of the Smith family, who are not subject to the same deportation order as Mr. Smith is, are engaged. However, in the vast majority of cases, and in the absence of some special or unusual factors, it is reasonable to assume that any person seeking the revocation of a deportation order on the basis, amongst other things, of the rights of other family members, will address, in their relevant application to the Minister, any points which can be made in favour of the revocation sought which derived from the rights of those other family members. There is nothing, on the facts of this case, to suggest that there was any difficulty encountered by, or indeed failure of, Mr. Smith in putting forward the rights of relevant family members to the Minister at all material times. On that basis, it does not seem to me that counsel for the Smiths was correct when she suggested that the jurisprudence relied upon by the trial judge as to the test to be applied was incorrect on the basis that the rights of persons not subject to the deportation order are engaged on the facts of this case whereas the cases from which the jurisprudence derived involves cases where that was not so. The rights of each relevant member of the Smith family, at least as far as they stood at the time when the original deportation order was made or when the original application for revocation was advanced, were asserted and considered. The need to bring finality and certainty to the immigration process in a timely fashion applies just as much to cases involving the rights of the other family members, not the subject of a deportation order, as it does to cases involving only those sought to be deported. I would leave to a case in which there was a factual basis for the consideration of the proper approach where there was some serious failure to advance the rights of family members.
>
> 5.6 The second observation is that there is an obligation on persons seeking to invoke their right to invite the Minister to revoke a deportation order to

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

5.8 …I should start by indicating that it is in my view, sufficiently arguable for the purposes of a leave application that a change in circumstances such as obliges the Minister to reconsider the merits of a deportation order can include material changes in relevant and applicable legal frameworks including developments in both domestic and European Union jurisprudence. It follows that, again for the purposes of a leave application there is no reason in principle why a material change in relevant jurisprudence may not amount to a sufficient change in circumstances to require the question of deportation to be reconsidered (although it does not, obviously, follow that any such reconsideration would necessarily lead to a different result). Furthermore, any asserted change in the legal framework would have to be demonstrated to be of real materiality to the facts of the case concerned."

14. Clarke J. affirmed the view of the High Court Judge (Cooke J.) as to how the courts should approach any challenge to a refusal or second refusal under s. 3(11) and stated:-

"5.10 In that regard, I should express my agreement with the views expressed by the trial judge when he indicated that a party cannot artificially create a new point by the simple expedient of making multiple applications for revocation of a deportation order. It is, of course, the case that a party is entitled to invite the Minister to revoke a deportation order at any time. Where, however, there has already been an application to revoke which has been refused and where the refusal either has not been challenged or where any challenge to such refusal has failed in the courts, then legal certainty requires that such refusal must be taken to represent a correct determination based on the facts and materials as they stood at the time of that refusal. Those facts and materials must be taken to include matters actually before the Minister together with any matters not before the Minister which the applicant ought to have placed before the Minister. It follows that a second or subsequent application to revoke must put forward some new facts, materials or circumstances beyond those which existed at the time of the first refusal to revoke (or which, while existing at that time, could not with reasonable diligence have been expected to have been placed before the Minister by the relevant applicant). It is only such new facts, materials or circumstances that the Minister is required to consider save to the extent that the Minister must, of course, if there truly are new facts, materials or circumstances which could be material to an overall assessment of the position, take an overall view of all the circumstances including those new matters addressed."

The Grounds

15. This Court is obliged to apply these principles in considering the challenge to the refusal in this case. Leave to apply for judicial review was confined to the grounds set out above based on what Cooke J. considered to be "the only obviously new events or circumstances capable of being considered in the context of a further application under s. 3(11)", namely:-

> (i) the pronouncement of the judgment in the *Zambrano* case and the publication of the Minister's statement of policy as to how applications on behalf of non-national parents of Irish citizen children would be dealt with; and
>
> (ii) the related disclosure of M.A.'s health condition and need for treatment.

Although the latter might have been described at an earlier stage, Cooke J. noted that the Minister had taken account of the representations made in respect of M.A.'s health and addressed them in the decision. He, therefore, considered that they formed part of the consideration of the refusal.

***Zambrano* Decision – Ground (a)**

16. The main element of the second application for revocation of the deportation order made on behalf of M.A. was based on the decision of the CJEU in *Zambrano v. Office National de l'emploi Case* C-34/09 [2011] ECR 1-1449. The judgment was delivered on 8th March, 2011. Following the decision, the first named respondent indicated that the Department of Justice's repatriation division would be examining all cases linked to the *Zambrano* judgment to see if they met the *Zambrano* criteria. It was indicated that as a matter of public policy the department would not be applying the terms of the judgment to any third country parent of an Irish born citizen child who had been convicted of serious offences or was a persistent criminal offender. The impact of the judgment on the applicant's case was considered following his second s. 3(11) application as follows:-

> "The circumstances of this family have not changed since the Minister made a deportation order against the applicant on 2nd April, 2009. At that time the Minister was aware that M.A. was the partner of an Irish national and the father of four Irish citizen children…The applicant's legal representatives now submit that as the father of Irish citizen children, M.A. should be granted permission to remain in the state in light of the European Court of Justice judgment in *Zambrano*…However, M.A.'s Irish citizen children are residing in the state with their Irish mother J.S.. Therefore, it is considered that these children are not going to be forced to leave this jurisdiction and are not going to be deprived of the genuine enjoyment of the substance of their rights as European Union citizens if the applicant is deported. The European Court of Justice in *Dereci* goes on to clarify when such denial will arise…If the refusal of residence and ultimate removal of the parent means the EU citizen child will inevitably have to leave the EU and move to a third country then the child's rights as a EU citizen are denied. Crucially, however, it is not inevitable that this would happen in this case as the children's mother is an Irish citizen."

17. In *Zambrano* a Colombian married couple applied for refugee status in Belgium. Their applications were refused and a deportation order was made in both cases but contained a non-refoulement clause that they should not be sent back to Colombia because of an ongoing civil war. Their second and third children were born in Belgium and acquired Belgian nationality and accordingly, were citizens of the European Union. The parents applied for rights to reside and the father sought a work permit. It was claimed by the father that he had derived a right of residence as the father of children who were European Union citizens and had a right to reside and hold a work permit in Belgium.

18. The claim was based, *inter alia*, on the provisions of Article 20 of the Treaty on the

Functioning of the European Union (TFEU) which states:-

> "1. Citizenship of the Union is hereby established. Every person holding the nationality of a member state shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the treaties. They shall have, *inter alia*:-
>
> > (a) the right to move and reside freely within the territory of the member states;
> >
> > ….
> >
> > These rights shall be exercised in accordance with the conditions and limits defined by the treaties and by the measures adopted thereunder."

19. The CJEU ruled that:-

> "Article 20 TFEU is to be interpreted as meaning that it precludes a member state from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the member state of residence and nationality of those children, and from refusing to grant a work permit to that third country national, insofar as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

The court reiterated that citizenship of the Union was intended to be a fundamental status for nationals of member states. Article 20 precluded national measures which had the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of that status and a refusal to grant a right of residence to a third country national with dependent minor children in the member state where those children were nationals and reside and also the refusal to grant such a person a work permit, was deemed to have that effect. It continued:-

> "44. It must be assumed that such a refusal would lead to a situation where those children citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union."

20. In *Dereci & Ors v. Bundes Ministerium für Inneres* Case C-256/11 [2011] ECR 1-0000, the CJEU considered the position of non-EU nationals who had been refused residence permits in Austria and were the subject of expulsion orders. Each of the applicants had a European Union citizen family member with whom they resided. Mr. Dereci was a Turkish national who had entered Austria illegally and married an Austrian national by whom he had three children who were also Austrian nationals, and who were still minors. He resided with them in Austria. Another applicant, Mr. Maduike, a Nigerian national, entered Austria illegally and married an Austrian national with whom he resided in Austria. Mrs. Heiml, a Sri Lankan national, married an Austrian national before entering Austria legally where she currently resided with her husband, despite the subsequent expiry of her residence permit. A Mr. Kokollari entered Austria legally at the age of two with his parents who possessed Yugoslav nationality at that time. He was at the time of the application 29 years old and maintained by his mother who had become an Austrian national. A Mrs. Stevic, a Serbian national, had applied for family reunification with her father who had

resided in Austria for many years and obtained Austrian nationality in 2007. She had received monthly support from her father and maintained that he would continue to support her if she resided in Austria. She, at the time, was living in Serbia with her husband and three adult children.

21. The court noted that the applicants' family members in the proceedings enjoyed the status of Union citizens under Article 20(1) TFEU and could, therefore, rely on the right pertaining to that status against the member state of origin. The *Zambrano* decision precluded national measures which had the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status. It was noted that the court in *Zambrano* considered, in particular, that refusal of a right of residence or work permit to the applicant would lead to a situation where the children, as citizens of the Union, would have to leave the territory of the Union "in order to accompany their parents". However, the court noted that:-

> "66. It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the member state of which he is a national but also the territory of the Union as a whole.
>
> …
>
> 68. Consequently, the mere fact that it might appear desirable to a national of a member state for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a member state to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.
>
> 69. That finding is, admittedly, without prejudice to the question whether on the basis of other criteria, *inter alia*, by virtue of the right to the protection of family life, a right of residence cannot be refused. However, that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case."

The court, therefore, concluded that:-

> "Provisions on citizenship of European Union law must be interpreted as meaning that it does not preclude a member state from refusing to allow a third country national to reside on its territory, where that national wishes to reside with a member of his family who is a citizen of the Union residing in the member state of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify."

22. In *O, S & L v. Maahanmuuttovirasto* C-356, 357/11, two complicated family relationships gave rise to further issues arising from the *Zambrano* decision. S., a national of Ghana, lived in Finland under a permanent residence permit. She married a Finnish national with whom she had a child in 2003 who had Finnish nationality and resided there. The couple divorced in 2005 but she retained sole custody of the child. The father continued to live in Finland. She married *O.*, a national of Cote D'Ivoire in 2008. *O.* applied for a residence permit on the basis of marriage. There was a child of the second marriage who had Ghanaian nationality and remained in the joint custody of both parents. *O.* and *S.* lived together with their two children. The application for a residence permit was refused.

23. *L*., an Algerian national, lawfully resided in Finland where she obtained a permanent residence permit following marriage to a Finnish national. They had a child in 2004 who had dual Algerian and Finnish nationality and always lived in Finland. The couple divorced in 2004, and *L*. was granted sole custody. The child's father lived in Finland. *L.* then married *M*., an Algerian national, who arrived lawfully in Finland in 2006 and sought asylum. He lived with *L*. from April but was returned to his country of origin late in 2006. A child of the marriage was born in Finland in 2007, who has Algerian nationality and of whom they have joint custody. It was not clear if *M*. had any contact with this child. *M*. was refused an application for a residence permit.

24. The question arose as to whether European citizenship law precluded member states from refusing to grant to third country nationals a residence permit on the basis of family reunification where that national continued to reside with his spouse, also a third country national who lawfully resided in the state and is the mother of a child from a previous marriage, who is a Union citizen and a child of their own marriage who is also a third country national. The reference also raised the issue as to whether on an application for residence the fact that the applicant was not the biological father of a child who was a Union citizen and did not have custody of the child, may affect the interpretation of citizenship law. The court restated the principles set out in *Zambrano* and *Dereci* and noted that it was important for the national decision-maker to establish whether the Union citizen had, in fact, to leave not only the territory of the member state but also the European Union as a whole.

25. The court considered the factors to be taken into account when determining whether the refusal of the applications for permits submitted on the basis of family unification in such circumstances constituted a denial of the genuine enjoyment of the substance of the European Union right conferred by citizenship status. It stated:-

> "50. When making that assessment, it must be taken into account that the mothers of the Union citizens hold permanent residence permits in the member state in question, so that, in law, there is no obligation either for them or for the Union citizens dependent on them to leave the territory of that member state or of the European Union as a whole.
>
> 51. For the purpose of examining whether the Union citizens concerned would be unable, in fact, to exercise the substance of the rights conferred by their status, the question of the custody of the sponsors' children and the fact that the children are part of reconstituted families are also relevant. First, since Ms. S and Ms. L. have sole custody of the Union citizens concerned who are minors, a decision by them to leave the territory of the member state of which those children are nationals, in order to preserve the family unit, would have the effect of depriving those Union citizens of all contact with their biological fathers, should such contact have been maintained up to the present. Secondly, any decision to stay in the territory of that member state in order to preserve the relationship, if any, of the Union citizens who are minors with their biological fathers, would have the effect of harming the relationship of the other children, who are third country nationals, with their biological fathers.
>
> 52. However, the mere fact that it might appear desirable, for economic reasons or in order to preserve the family unit in the territory of the Union, for members of a family consisting of third country nationals and a Union citizen who is a minor to be able to reside with that citizen in the territory of the Union in the member state of which he is a national is not sufficient in itself to support the view that the Union citizen would be forced to leave the territory of the Union if such a right of residence were not guaranteed (see,

to that effect, *Dereci & Ors*, para. 68).

> 53. In connection with the assessment mentioned…which it is for the referring court to carry out, that court must examine all the circumstances of the case in order to determine whether, in fact, the decision refusing residence permits at issue in the main proceedings are liable to undermine the effectiveness of the Union citizenship enjoyed by the Union citizens concerned."

26. The court also noted:-

> "56. On the other hand, both the permanent right of residence of the mothers of the Union citizens concerned who are minors and the fact that the third country nationals for whom a right of residence is sought are not persons on whom those citizens are legally, financially or emotionally dependent must be taken into consideration when examining the question whether, as a result of the refusal of a right of residence, those citizens would be unable to exercise the substance of the rights conferred by their status. As the Advocate General observes in Point 44 of his opinion, it is the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in fact, to leave not only the territory of the member state of which he is a national but also that of the European Union as a whole as a consequence of such a refusal (see *Ruiz Zambrano*, paras. 43 & 35 and *Dereci & Ors* paras. 65 – 67).
>
> 57. Subject to the verification which it is for the referring court to carry out, the information available to the court appears to suggest that there might be no such dependency in the cases in the main proceedings."

27. In the case of *Iida* Case C-40/11 [2012] ECR 1-0000, the CJEU confirmed that Article 20 of the TFEU did not confer any autonomous rights on third party nationals, but rights derived from the exercise of free movement by a Union citizen. The purpose or justification of those derived rights was based on the fact that a refusal would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and remaining or residing in the host member state. It is clear that even though secondary law on the right of residence of third country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, nevertheless a right of residence cannot, exceptionally, without undermining the effectiveness of the Union citizenship that is enjoyed, be refused to a third country national who is a family member of the citizen if, as a consequence of refusal the citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred.

28. These principles were again applied in the case of *Ymeraga & Ors v. Ministre du Travail de l'emploi et de l'immgration* Case 87/12. The applicants were from Kosovo. K.Y. arrived in Luxembourg at the age of 15 to live with his uncle, a Luxembourg national who became his legal guardian. Although his application for asylum was rejected by the Luxembourg authorities, his situation was regularised and he went on to study and find regular employment. His mother and father and two brothers arrived in Luxembourg between 2006 and 2008. In 2009 K.Y. acquired Luxembourg nationality and in August, 2009 his mother and father applied for a residence permit as family members of a citizen of the Union. Residence permits were also sought for his two brothers. The court found:-

> "38. …that the mere fact that it might appear desirable to a national of a member state for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have

> nationality of a member state to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen would be forced to leave Union territory if such a right is not granted (*Dereci & Ors* para. 68).
>
> 39. In the main proceedings, according to the referring court, the only factor which could justify a right of residence being conferred on the family members of the citizen concerned is Mr. … Ymeraga's intention to bring about, in the member state in which he resides and of which he holds the nationality, reunification with those family members, which is not sufficient to support the view that a refusal to grant such a right of residence may have the affect of denying Mr. Kreshnik Ymeraga the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union."

Thus, the refusal to confer a right of residence on members of his family did not have the effect of denying him the genuine enjoyment of the substances of the rights conferred: the resultant separation of the family is not determinative.

29. The applicants accept that following the decisions in *Dereci* and *Iida*, the derivation of a right of residence for a third country national and the rights of child European Union citizens who have not exercised a right of free movement will be the exception rather than the rule. However, it is submitted that the illness of the mother, J.S., gave rise to the basis for the application of an exception in this case. It was submitted that where, as here, the deportee's spouse is unlikely to bring the children to Nigeria and a substantial factor in that decision is her own precarious health, a matter of an exceptional nature relevant to the issue of dependency and whether the rights of the children have been breached under *Zambrano* was established. However, it is clear that the children will not be obliged for any reason to leave the state or the territory of the European Union. The health issue in those circumstances falls to be determined in accordance with the provisions of Article 40.3 of the Constitution and Articles 3 and 8 of the European Convention on Human Rights (see *Dereci*, *O.S. & l* and *Ymerega*). Therefore, the court is satisfied that the respondent did not err in law in applying the principles enunciated by the Court of Justice in the *Zambrano* and *Dereci* decisions to the facts of this case. It is clear that the decision did not cause J.S. or the children to leave the state or the territory of the European Union with their father or since his departure on 7th March, 2012, and it is not realistically suggested that this is likely to occur in the future.

The Charter of Fundamental Rights

30. The applicants contend that Articles 7 and 24 of the Charter were not appropriately considered in making this decision which concerned children who are European Union citizens.

31. Article 7 of the Charter of Fundamental Rights of the European Union provides:-

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

Article 24 of the Charter provides in respect of the rights of the child that:-

> "2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
>
> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

Article 51 of the Charter provides that its provisions are addressed to the institutions,

bodies, office and agencies of the Union with due regard for subsidiarity and "to the member states only when they are implementing Union law". Article 52(3) provides that:-

> "3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

32. It is claimed that the respondent was obliged to examine whether M.A.'s deportation failed to respect the applicant's rights to family life under Article 7 of the Charter of Fundamental Rights.

33. The provisions of s. 3(1) and 3(11) of the Immigration Act 1999, are part of domestic legislation concerned with the implementation of immigration policy. Having regard to the fact that the state is not precluded from deporting a third party national even though that person is a parent of a European citizen child, when that child is not dependent upon the applicant and will not be deprived of the genuine enjoyment and substance of his/her rights as a European Union citizen by reason of that deportation, I am satisfied that Article 7 has no application.

34. As stated by the CJEU in *Dereci*:-

> "70. As a preliminary point, it must be observed that insofar as Article 7 of the Charter of Fundamental Rights of the European Union ("the Charter"), concerning respect for private and family life, contains rights which correspond to rights guaranteed by Article 8(1) of the European Convention on Human Rights, the meaning and scope of Article 7 of the Charter are to be the same as those laid by Article 8(1) of the ECHR as interpreted by the case law of the European Court of Human Rights (Case C-400/10 PPU *McB* [2010] ECR 1-0000, para. 53).
>
> 71. However, it must be borne in mind that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the member states only when they are implementing European Union law. Under Article 51(2) the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks defined in the treaties. Accordingly, the court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it…
>
> 72. Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.
>
> 73. All the member states are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8."

35. In the *Ymeraga* case, in which the applicants relied upon Article 20 of the TFEU and Articles 20, 21, 24, 33 and 34 of the Charter in respect of an asserted right to family reunification, the court concluded, *inter alia*, that the refusal to confer a right of residence on Mr. Ymeraga's family members did not have the affect of denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of

the Union. It added:-

> "43. In those circumstances, the Luxembourg authorities refusal to grant Mr. Kreshnik Ymeraga's family members a right of residence as family members of a Union citizen is not a situation involving the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined in the light of the rights established by the Charter.
>
> 44. Such a finding does not prejudge the question whether, on the basis of an examination in the light of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all member states are parties, to the third country nationals in the main proceedings may not be refused a right of residence."

36. I am satisfied that Article 7 of the Charter has no application in this case having regard to the determination that the applicants have not been denied the substantive enjoyment of their European Union citizen rights because of M.A.'s deportation. The right to family life falls to be considered under Article 8 of the European Convention on Human Rights in the light of the findings made and involves the same considerations as those applicable under Article 7. The court is, therefore, satisfied that the principles of European Union law were properly considered and applied to the personal family circumstances of the applicants.

The Health of the Parents - Grounds (b) and (c)

37. These grounds relate primarily to the additional evidence said to have been presented in the application of 6th April, 2011, concerning new facts and circumstances based on medical evidence furnished at that time. It is important to isolate the new evidence relied upon having regard to the principles applicable to the determination of a s. 3(11) application and any challenge resulting from any refusal as set out in the *Smith* case discussed earlier in the judgment.

38. The original application for leave to remain on humanitarian grounds under s. 3 was based on the submission that M.A. was an active parent within the family and played a very important role in the life of his children and partner. It was supported by reports from the Probation Service of 28th February, 2007, and 10th April, 2008. A letter from J.S. of 9th April, 2008, outlined their four year relationship and plan to marry. The application also outlined M.A.'s third level education and his desire and intention to abstain from crime in the future and support his family.

39. The examination of file noted that he had been convicted of more than 40 offences and was serving a sentence of three years imprisonment with one suspended. It noted his immigration history. Although he had a working visa valid until 30th October, 2004, following his arrival in the state, he did not obtain fulltime employment and had claimed social welfare benefits. He was described as an habitual criminal who had come to the attention of the Gardaí over the years on a regular basis in respect of a wide range of criminal offences. A garda report recommended that deportation be considered before his release from prison. The various reports and his intention to up-skill and lead an honest life were considered. It was noted that he spent a considerable period of the relationship with his partner since 2004 in prison. The sentence he was serving commenced in November, 2007 and was due to expire in May, 2009. There was an extensive consideration of the constitutional and Article 8 rights of the applicants. Following a detailed consideration of all the submissions made, the reports submitted and the various rights attaching to each of the parties (including the best interests of the children), deportation was recommended and an order was made on 2nd April, 2009. At this stage, no submissions concerning the medical condition of either J.S. or M.A. had been submitted, nor had concerns been expressed about health issues relating to the children that required monitoring, though it later emerged that the parents respective conditions

were first diagnosed in 2004.

40. An application was made within a matter of weeks of the making of the order on 21st May, 2009, under s. 3(11) for the revocation of the deportation order. It was submitted that the reference to 40 previous convictions was in error and, in fact, M.A. had only been convicted of 31 matters, none of which related to road traffic or public order offences. It was accepted that he had incurred 29 previous convictions at his sentencing in respect of the three year sentence in the Circuit Court relating to theft and fraud. It was also submitted that the relationship with his partner and children had been maintained during the course of his imprisonment by regular visits. M.A.'s convictions largely related to his drug addiction which involved the misuse of cocaine and heroin, and it was claimed that the offences were largely committed to assist in the funding of his drug habit. Two reports dated 4th November and 21st December, 2009, were submitted in that regard.

41. A letter was submitted from St. James's Hospital dated 20th May, 2009, from a medical social worker concerning M.A. and J.S. It outlined that J.S. attended the hospital on an out-patient basis "for medical monitoring of a long term illness". J.S. submitted a letter in which she outlined that she had a "life time medical issue and that I can only get proper treatment in Ireland for my illness. I am registered with St. James's Hospital and I attend there every three months". She also stated that their three children "attended Temple Street Hospital and also have to attend there every three months". Their doctors' names were furnished and their next appointment dates, which were in July, 2009. No medical reports were submitted in support of any aspect of these submissions.

42. A consideration of the file was completed on 13th January, 2010, and a recommendation against revocation of the deportation order was made and affirmed. All additional documentation was considered. It was acknowledged that there was a discrepancy between the number of convictions said to have been incurred (in excess of 40) in the examination of file prior to deportation and the factual position that the applicant had been convicted of, on his own admission, 29 offences prior to his sentencing for the drugs offences which his solicitors said had been acknowledged in the Circuit Court. However, the consideration of file opted for a more conservative figure of 22 convictions, notwithstanding his solicitor's submission. The reports concerning his drug rehabilitation previously considered were reconsidered. The following was noted in respect of the medical history of the family:-

> "A personal statement on file from the applicant's partner and from the solicitors state that A.B.S., J.SA. and R.B.S. have a medical illness that requires attendance at Temple Street Hospital. It has also been stated that (the other child) attends hospital for treatment. No further information has been submitted in regard to these children beyond birth certificates/court orders, and a personal statement from Ms. S. stating that M.A. helps her with the children especially on the days that she is sick and that she is cohabiting in her family home with their three children. There is a letter on file from St. James's Hospital stating that Ms. S. attends St. James's Hospital on an out-patient basis for medical monitoring of a long term illness. However, no further information or medical reports have been submitted. It has also been submitted on the applicant's behalf that when the applicant was in prison for "approximately three years in total" his children visited him regularly, however, it is submitted that the disruption to their family life would not have the same impact as it would had they been living as a family unit for a much longer time. No further submissions have been received regarding these children's lives in the state."

43. It was noted that J.S. and the children were all Irish citizens and could never be the subject of a deportation order. They were free to remain in the state and continue to receive medical treatment here. It is clear that the only additional feature advanced on this application related to a very limited description of a long term illness suffered by J.S.

and an even more general reference to the attendance of the three children at Temple Street Hospital. No medical reports of any nature were submitted to support the application and nothing was said in relation to M.A.'s medical condition. The refusal to revoke the deportation order was not challenged by way of judicial review. M.A. was given notice of this refusal by letter dated 22nd January, 2010.

44. In the absence of any legal challenge to the deportation order and the refusal to set it aside, this Court must consider the two decisions to be correct in fact and law on the basis of the evidence and materials before the decision makers at the time the decisions were made.

45. The first notice given to the first named respondent that M.A. had any medical condition was received by letter dated 2nd February, 2011, from Dr. Dominic Rowley in St. James's Hospital. The letter presumed an awareness that M.A. had a long term illness and was under treatment. He was said to be doing "extremely well" and to be very compliant with his medication. The letter confirmed that he had a history of drug abuse but had been progressing through rehabilitation on a reducing dose of methadone under the care of his general practitioner, Dr. Mullen. The doctor expressed concern about M.A.'s ability to continue his medication and the long term consequences if he were to be deported to Nigeria. The letter also stated that he was "for consideration" for hepatitis C treatment which would continue over the course of a year and be very intensive. It was indicated that his health would suffer greatly if he were not treated for these two matters. A further letter had also been sent by Professor Fiona Mulcahy to the Minister dated 11th May, 2010, confirming that M.A. had a long term illness that would require monitoring and treatment. An application under s. 3(11) was not made at this time.

46. The second s. 3(11) application was made on 6th April, 2011, on the basis of the *Zambrano* decision which had been delivered on 8th March (already discussed). A submission was also made on the basis of health matters regarding M.A. and his family. At this stage the Minister was informed that M.A. had been diagnosed with the same long term illness as J.S. and had hepatitis C since 2004. This was linked to his drug taking. A report from Dr. Mullen dated 11th January, 2011, and the same report of Dr. Rowley dated 2nd February, 2011, accompanied the submission.

47. In Dr. Mullen's report of 11th January it was noted that M.A. had failed, following his diagnosis in 2004, to follow up with the services in St. James's at that time. He first attended the practice in November, 2009 to start a methadone maintenance programme and re-engaged with St. James's from in or about April, 2010 when he was commenced on medication. He attended regularly every three months since that time and his condition was significantly improving.

48. It was stated in the submission that at the time of the original s. 3(11) application the applicant and his family were reluctant to disclose the extent of their health problems as they felt the matter was a personal one. Their problems were known only to family and the Minister was asked not to prejudice M.A. on the basis that the information would be regarded as a form of "drip feeding" in order to take advantage of s. 3(11). However, J.S. had already made reference to her health issues and the children's attendance at Temple Street Hospital in the initial s. 3(11) application. It is difficult to understand why medical reports were not furnished at a much earlier stage but were sent in the aftermath of the initial refusal of the s. 3(11) application and why silence was maintained for a period in excess of twelve months following the decision before the further s. 3(11) application was submitted. Clearly, the inhibition no longer existed as far as M.A. was concerned having regard to the letter from Professor Mulcahy in May, 2010. It would appear that M.A. did nothing about his illness from 2004 to 2010. It is difficult to resist the conclusion that this is a "drip feeding" case. However, even though it is possible to draw that inference, the first named respondent did not refuse to consider the second s. 3(11) application based

on this additional material.

49. A further more detailed medical report in respect of M.A. was submitted from Professor Colm Bergin of St. James's Hospital on 14th March, 2011. It was noted that on presentation in September, 2004 M.A. was asymptomatic at time of first attendance. He failed to attend follow up appointments throughout 2006 and 2007. He presented in April, 2010 having been referred by his general practitioner. Medication was prescribed. He reported that he resided with J.S. who was not at that time on therapy for her condition. A further review was to take place in May, 2011. Professor Bergin stated that M.A. would require indefinite treatment for his condition and further treatment might be required in respect of hepatitis C.

50. A similar report was obtained from Professor Bergin in respect of J.S. She had also attended since September, 2004. She was treated appropriately during this period, especially in relation to issues concerning the risk of transmission during her pregnancies. She failed to attend for clinical appointments in October, 2010 and February, 2011 despite recalls. It was thought inevitable that over the coming years further intensive medication would be required.

51. On 6th March, 2012, a further examination of file was completed by Mr. Mark Carleton which was subsequently reviewed and it was recommended that the Minister affirm the deportation order in respect of M.A. It was noted that no medical reports were ever submitted in respect of the three children from Temple Street Hospital or the general practitioner.

The Right to Medical Treatment

52. The medical factors were considered on the basis of the new representations and medical reports received in respect of M.A. and J.S. It was noted that the circumstances of the family had not changed since the deportation order was made on 2nd April, 2009. It was submitted that M.A.'s life and health would be endangered without the standard of care and treatment that he received in Ireland which would not be available to him in Nigeria. The following conclusion was reached in respect of an alleged threat to the applicant's right under Article 3 of the European Convention on Human Rights not to be subjected to torture or inhuman and degrading treatment:-

> "The applicant's legal representatives submit that he was diagnosed…in 2004. They state that these conditions came about due to his drug taking and that neither were present when he lived in Nigeria. They further assert that M.A. is currently taking….medication and attends his doctor regularly. It is contended that the applicant has a genuine fear that he will die if he is returned to Nigeria without his medical team, and it is stated that he would be treated as an outcast while in that state.
>
> The country of origin information excerpted below indicates that the applicant would be able to avail of healthcare in Nigeria. This information indicates that, despite the limitations of Nigeria's healthcare system, a large number of diseases and conditions can be treated including (the diseases from which the applicant suffers)…Moreover, treatment for (his condition) is free at almost all public hospitals in Nigeria and 41 new…treatment centres (catering for this disease) were opened in Nigeria in 2006 and started handing out free (drugs) to those in need of them. According to a report released in March, 2010, one of the government's main priorities for 2010 and 2011 is better treatment of (the disease) and related conditions. It is hoped that at least 60% of eligible adults and 60% of children will receive (appropriate drug medication) and it is hoped to provide at least 60% of…patients with quality management…in 2010 and 2011. The government stated that it provides an adequate system to manage (the disease)…and

this involves over 200,000 patients on (the treatment programme).

Although those with (the disease) do face discrimination in Nigeria, the authorities and NGO's have implemented public education campaigns to reduce the stigma and change perceptions. Policies have been put in place to reduce discrimination and stigmatisation of people living with (the disease). The key objective of the Nigerian government is to create an enabling social, legal and policy environment by a 50% increase in the number of reviewed and operational gender sensitive and human rights friendly policies, legislation and enforcement of laws that protect the right of the general population, particularly those with (the disease)."

53. Having set out the country of origin information, the examination of file continued as follows:-

"Based on the most recent country of origin information on… treatment (of the disease) in Nigeria, it is clear that the applicant would be able to avail of treatment there. It is also clear that the applicant would be able to avail of treatment for hepatitis in Nigeria.

In the case of *D. v. the United Kingdom*, the European Court of Human Rights found that Article 3 does not require contracting states to undertake the obligation of providing aliens indefinitely with medical treatment. It is only where there are exceptional circumstances that the return of an applicant to their country may amount to a breach of Article 3. From the information on file, it cannot be said that M.A.'s particular circumstances come within the range of "exceptional circumstances".

Furthermore, it is still the case that case law has set out clearly that a state is not under any general obligation to permit an individual to remain in their state solely for the purpose of obtaining medical treatment of a level which would not be available to them in their country of origin. In relation to the issue of medical care obligations and contracting states in the case of *N (F.C) (appellant) v. Secretary of State for the Home Department* [2005] UKHL 31, the court held that:-

> 'The Strasbourg Court has constantly reiterated that in principle aliens subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social and other forms of assistance provided by the expelling state. Article 3 imposes no such "medical care" obligation on contracting states. This is so even where, in the absence of medical treatment, the life of the would be immigrant would be significantly shortened.'

It was also held in this case that:-

> 'The expulsion of a failed immigrant to a country which could not provide medical treatment equivalent to that which she had received in the United Kingdom was not a breach of the obligation to ensure, under Article 3 of the European Convention on Human Rights that no one was subject to inhuman or degrading treatment.'

The court went on to find that:-

> 'For an exception to be made where expulsion is resisted on medical grounds, the circumstances must be exceptional.'

> The above excerpts make it clear that Article 3 of the European Convention on Human Rights does not impose any obligation to provide medical care on contracting states. Having considered all of the above factors, it is not accepted that there are any exceptional circumstances in this case such that there is a sufficiently real risk that deporting M.A. to Nigeria would be a breach of Article 3. the fact that the circumstances of the applicant in Nigeria may be less favourable than those enjoyed by the applicant in Ireland does not in itself exist as exceptional circumstances."

54. I am satisfied that the finding that there are no such exceptional circumstances is one which was reasonable and rational on the basis of the evidence available from the medical reports submitted and considered by the decision maker. The reports do not indicate a threat to the life of M.A. or anything remotely close to the exceptional circumstances required to establish a threat to Article 3 rights.

55. In *M.E.O. (Nigeria) v. The Minister for Justice, Equality and Law Reform* [2012] IEHC 394 Cooke J. considered the constitutional and Article 3 rights of a person afflicted with a similar potentially life threatening disease to that of the applicant and the extent of the state's duty to provide medical care in these circumstances. He considered whether the duty of the state to protect and vindicate the personal rights of life extended to the provision of particular medical care to a non-citizen present in the state without permission. The learned judge concluded that the Constitution did not impose a positive obligation on the state to provide any particular type of medical treatment to an individual under Article 40.3.2 of the Constitution, and stated:-

> "35. …Article 40.3.2 obliges the State to protect the life and person of citizens from unjust attack in the sense of wrongful conduct at the hands of third parties. It does not oblige the State to undertake the positive task of protecting citizens, and, a *fortiori* non-citizens, from the natural consequences of illness or disease. In the absence of some circumstance of direct or vicarious responsibility on the part of the State for such a condition or person, Article 40.3.2 does not impose upon the State a positive obligation to ensure a particular level of health treatment to individuals (whether citizens or not,) who suffer from a life threatening condition. As held by the Supreme Court in *T.D. v. Minister for Education* [2001] 4 I.R. 259, the extent to which the State accepts responsibility for the provision of curative health services is a matter of legislative and political choice for the Oireachtas and the Executive."

He concluded that the central issue in the case was a humanitarian one under the Immigration Acts 1999 – 2004, and that it was not for the court to decide whether in the particular circumstances of a case an applicant's request for continuing access to a particular form of treatment within the state should be accepted. He stated that the only function of the court was to determine whether the decision made in that regard in a particular case has been lawfully made.

56. Cooke J. also considered the application of *D. v. United Kingdom* [1997] 24 EHRR 423. He noted that the applicant in that case was on the verge of certain death and that his condition was already terminal. He had become dependent for palliative treatment on the care he had received while in prison in the United Kingdom. The absence of such care facilities in his country of origin and the fact that the very transfer of the applicant to that country would have exposed him unjustifiably to a more distressing death than he would have inevitably faced in the United Kingdom, was determinative of the European Courts finding that his deportation would contravene his rights under Article 3. It was noted that withdrawal of treatment would have had dramatic consequences and hastened his death. The court viewed the circumstances as exceptional. It acknowledged, however, that aliens who has served prison sentences and are subject to expulsion could not in principle claim any entitlement to remain in order to continue to benefit from medical, social or other

forms of assistance provided by the expelling state while in prison. Cooke J. outlined the essential elements which determined whether or not a violation of Article 3 is potentially raised by a proposal to deport a person who has been receiving treatment for a life threatening condition as follows:-

> "(i) First and foremost, the current state and seriousness of the person's medical condition; the prognosis as to its future evolution with and without the continuation of that treatment;
>
> (ii) Secondly, the practical consequence for the person's health of removal to the country of origin including consequences of interruption of the treatment and the limited availability or non-availability of adequate treatment in the country of origin;
>
> (iii) the personal circumstances of the individual including age, sex, family and the conditions likely to be faced in the country of origin;
>
> (iv) the particular context in which the person has received treatment in the host State including the length of time and whether the person's presence in the State was originally lawful, or for the purpose of claiming asylum;
>
> (v) whether the diagnosis of the medical condition predated the person's arrival in the host State;
>
> (vi) whether the individual is physically fit to be deported and not likely to suffer a material worsening of the condition as a result of the transportation itself; and
>
> (vii) whether any anticipated deterioration in the condition is likely to occur whether or not a deportation takes place."

57. The medical reports submitted outlined the courses of treatment and review which had been given to M.A. and the fact that his condition had and was continuing to improve significantly. He was attending at three monthly intervals for review and was on continuing medication. The reports also supported the conclusion reached in the examination of file that it could not be said that M.A.'a particular circumstances fell within the range of "exceptional circumstances" contemplated in the *D*. case. An extensive review was carried out of country of origin information related to the availability of adequate treatment in Nigeria. This included a United Kingdom Home Office Report of 6th January, 2012, concerning the availability of treatment and drugs in Nigeria and a United Nations General Assembly Special Session (UNGASS) Country Progress Report on Nigeria dated March, 2010 concerning various programmes underway in Nigeria for the treatment of the disease. The conclusion was reached that M.A. could avail of treatment in Nigeria and that it would be available to him in respect of both of his conditions. I am satisfied having considered all of this material and the medical reports submitted on behalf of the applicant, that there was ample evidence which enabled the reasonable and rational conclusion to be reached that M.A.'s condition was not of such a critical nature that his removal to Nigeria would result in a threat to his life or his Article 3 rights. The applicant has failed to establish any fundamental flaw in the procedure by which that conclusion was reached or in the conclusion itself. I am satisfied that all of the relevant matters referred to by Cooke J. were properly considered in the examination of file.

58. M.A.'s application was also considered under Article 8(1) of the European Convention on Human Rights as part of his right to private life. It is submitted that the deportation of the applicant and the refusal to revoke the order give rise to serious concern for his health should he be returned to Nigeria and that he should be entitled to remain in the state in order to continue to benefit from the treatment which he is receiving here. In the

examination of file it was concluded that appropriate medical treatment was available to him in Nigeria. It was not accepted that the applicant's deportation would have consequences of such gravity as to constitute an interference with his right to respect for private life because the treatment available to him in Nigeria would be less favourable to that available in Ireland. M.A.'s medical condition was considered in the context of whether his expulsion could be shown to be in accordance with law and necessary in the interests of a democratic society as set out in Article 8(2) taking account of the assessment of the risk of damage to his health caused by interruption of his medical treatment if returned to Nigeria. As already stated, it was clearly established that any interference with the applicant's treatment or health was not such as to give rise to a risk of violation of Article 3. Consequently, it was entirely appropriate to consider whether M.A.'s deportation was warranted under Article 8(2) taking account of his right to private life and other issues related to immigration policy and his previous convictions.

59. In *Agbonlahor & Ors v. The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* (Unreported, High Court, Feeney J., 18th April, 2007) it was concluded that a similar approach should be adopted to Article 3 and Article 8 rights and, in particular, that aliens who were subject to an expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state unless exceptional circumstances are demonstrated. Otherwise, large numbers of people who had no entitlement to be or remain in the country would be entitled to remain indefinitely so that they could take the benefit of medical resources available in this country.

60. The court is satisfied that the conclusion reached that the decision to deport M.A. in pursuant of lawful immigration control did not constitute a breach of the right of respect for his private life under Article 8 was reasonable and rational. It was noted that further information had also been submitted from M.A.'s solicitor that he had committed a further six theft offences between August and September, 2009. It was concluded that he had demonstrated that he had a propensity to re-offend which gave rise to a compelling public interest in his deportation. The court is satisfied that the applicant has failed to establish a breach of his right to private life by the first named respondent.

Family Life

61. The applicants contend that the introduction of new evidence of M.A.'s medical condition should have resulted in an overall reassessment of the rights of the family members under Article 40.3 of the Constitution and Article 8 of the Convention. The history of the deportation process to date involved detailed assessment of the rights of J.S. as a mother and partner and the rights of the children, including their best interests. There was a complete failure on the part of the applicants to submit any medical report in respect of the children. There is a complete failure on the part of the parents to provide anything more than minimal evidence in support of any alleged affect upon the children of the family disruption caused to them by the departure of their father over and above the difficulties that will normally arise in such cases. It is clear that disruption to family life is something that was considered and contemplated in the making of the deportation order and in the previous examinations of file. The only new evidence relates to M.A.'s medical condition. The medical condition of J.S. was made known in a most general way that she had a long term medical condition at the time of the first application to revoke. There was minimal reference to the attendance by the children at Temple Street Hospital and no evidence to suggest that they had any medical condition. The submissions made on behalf of the applicant in respect of the second s. 3(11) application added nothing to the facts that were already addressed in the earlier deportation decision and s. 3(11) refusal. The main proposition advanced was that it would not be proportionate to expect J.S. and the children to return to Nigeria, which they clearly never intended to do. It is clear that the submission of evidence concerning M.A.'s illness and more detailed evidence concerning J.S.'s illness was known within the family since 2004, and at the time the decision was taken that J.S. and the children would remain in the state whatever the outcome of the deportation process for M.A.. It is difficult to understand how these family facts changed,

or could be viewed as having changed, by supplying this new information to the Minister. In any event, it is clear that the first named respondent received the new medical evidence and considered it in the s. 3(11) application in the proper legal context of Article 3 and Article 8 as already set out above. The applicants never challenged the previous decisions of the first named respondent in respect of the assessment of the applicants' family rights by way of judicial review which in accordance with the *Smith* case the court must presume to be correct in fact and law on the basis of the evidence then available. The appropriate legal tests were applied to a consideration of family rights in those determinations. The examination of file on the second s. 3(11) application states the following in respect of the issue:-

> "The issue of family life was considered as recently as 13th January, 2010. Following a lengthy analysis, it was found that the factors relating to the rights of the state were weightier than those factors relating to the rights of the individual family. In weighing the rights of the applicant and his family against the rights of the state, it was submitted that the deportation of the applicant was not disproportionate as the state had the right to uphold the integrity of the state; to control the entry, presence and exit of foreign nationals, subject to international agreements; to ensure the economic wellbeing of the state; and to prevent disorder and crime. It was asserted that these were substantial reasons associated with the common good that required the deportation of M.A. As no new facts have arisen since this analysis was conducted, it is not proposed to revisit these issues in this report."

62. I am not satisfied that the additional medical reports adduced necessitated a reconsideration of the entire case on an overall basis. It is correct to say that no new facts had arisen since the previous consideration relevant to the applicant's family life. The major part of the submission made on their behalf concentrates on the disruption of family life likely to be caused by deportation which has already been considered. I am not satisfied that the failure to consider aspects of the applicants' family life rights afresh was wrong in law having regard to the extensive consideration of family rights in previous decisions and the absence of any additional evidence relevant to the consideration and balancing of those rights with the rights and interest of the state and the proportionality of the decision.

Conclusion

63. For all of the foregoing reasons, I am not satisfied that the refusal to revoke the deportation order challenged in this case was fundamentally flawed on any of the three grounds advanced. In reaching this decision I have considered all of the submissions of counsel and the materials submitted to the court, including the detailed examinations of files in each of the three decisions. I am satisfied that the Minister in considering the additional material submitted on behalf of the applicants adopted a fair approach, having regard to the failure of the applicants to put forward their complete case at the earliest opportunity and to, in effect, furnish evidence incrementally in the course of their applications which could have been adduced at a much earlier stage.