ï»¿S16

Supreme Court of Ireland Decisions

Judgment

Title:	D.E -v- Minister for Justice & Equality & ors
Neutral Citation:	[2018] IESC 16
Supreme Court Record Number:	104/17
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Date of Delivery:	08/03/2018
Court:	Supreme Court
Composition of Court:	Clarke C.J., O'Donnell Donal J., McKechnie J., MacMenamin J., O'Malley Iseult J.
Judgment by:	Clarke C.J.
Status:	Approved
Result:	Appeal dismissed

Judgments by	Link to Judgment	Concurring
Clarke C.J.	Link	O'Donnell Donal J., McKechnie J., MacMenamin J., O'Malley Iseult J.

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THE SUPREME COURT

Appeal No: 104/17

Clarke C.J.
O'Donnell J.
McKechnie J.
MacMenamin J.
O'Malley J.

Between/

D.E. (An Infant suing by his mother and next friend A.E.)

Applicant/Appellant

and

Minister for Justice and Equality, the Commission of An Garda SÃochÃina, Ireland and the Attorney General

Respondents

Judgment of the Chief Justice delivered the 8th of March 2018

1. Introduction

1.1 Statutory decision making involving the rights and obligations of individuals takes on many forms. The power to make the decision in question can be conferred on a Minister, an official or on a statutory body. However, of particular relevance to one of the sets of issues which arise on this appeal is the fact that the criteria set out in the relevant statute, to be applied by the decision maker concerned, can be expressed in very different ways. Sometimes the decision maker is charged with a very specific task in determining whether particular facts or circumstances exist. Sometimes, as here, the decision maker is given a broad adjudicative role, often involving a significant measure of true discretion. One of the sets of issues which potentially arise on this appeal is as to the extent, if any, to which there may be a duty on a decision maker who is given such a broad role to inform interested parties of any policy or criteria which it is intended would be applied in the exercise of any discretion arising. There is also a question as to the extent to which any such duty, if it exists, may have been breached in the circumstances of this case.

1.2 The second set of issues is more particular to the specifics of this case. The applicant/appellant ('D.E.') was born in Ireland but is of Nigerian parentage. In circumstances which it will be necessary to address in a little more detail, a deportation order was made requiring D.E. to leave the country. Various further legal steps were taken but ultimately on the 28th July 2016 a final decision was made by the first named respondent ("the Minister") not to revoke that deportation order. Amongst the matters which had been advanced on behalf of D.E., in an attempt to persuade the Minister to revoke the relevant deportation order, was a serious medical condition from which D.E. is suffering.

1.3 Judicial review proceedings were commenced challenging the validity of the refusal to revoke the relevant deportation order. Ultimately, the High Court (Humphreys J.) refused leave to seek judicial review (*D.E. v. Minister for Justice and others* [2016] IEHC 650). Furthermore, the High Court refused the certificate necessary to enable an appeal to be brought to the Court of Appeal *(D.E. v. Minister for Justice (No. 2*) [2017] IEHC 276). There was also a third judgment of the High Court in relation to an injunction (D.E. v. *Minister for Justice (No. 3*) [2017] IEHC 409).

1.4 Thereafter, D.E. successfully applied to this Court for leapfrog leave to appeal directly from the High Court to this Court (*E v. Minister for Justice and Equality others* [2017] IESCDET 85).

1.5 It will be necessary to turn shortly to the issues and grounds which led this Court to grant leave to appeal and which therefore formed the subject of the issues for consideration by the Court. However, in order more easily to understand those grounds

and issues it is necessary to set out something of the facts and the course of these proceedings to date.

2. The facts

2.1 D.E.'s mother arrived in Ireland on the 23rd January 2009. D.E. was born on the 26th March 2009, and suffers from sickle cell disease. A deportation order was made against D.E. on the 1st July 2011, following an unsuccessful application for asylum. A judicial review application was brought challenging the validity of this order. Cross J. in the High Court (*D.O.E. v. Minister for Justice and Equality* [2012] IEHC 100) refused leave to apply for judicial review on the basis that there were no substantial grounds on which to challenge the deportation order in question.

2.2 Between the 14th June 2012 and the 22nd July 2014, D.E.'s mother, who was also the subject of a deportation order, evaded the Garda National Immigration Bureau ("GNIB"). In the High Court in this case, Humphreys J. expressed the view that by necessary extension D.E. also must be taken to have evaded the GNIB, although he was obviously not personally responsible for this.

2.3 Thereafter, an application was made seeking to revoke the deportation order. This application was refused on the 8th July 2014. A second set of proceedings was then brought challenging this refusal [2014 No. 526 J.R.]. These proceedings were struck out by Mac Eochaidh J. as moot on application by the Minister. The Minister had been furnished with medical evidence which was treated as a fresh application to revoke the deportation order under s. 3(11) of the Immigration Act 1999 ("the 1999 Act"). The Minister emphasises in written submissions filed in this appeal that this decision to treat the medical evidence as a fresh s. 3(11) application should not be taken to mean that the Minister had formed a view that the medical information represented or potentially represented a change of circumstances. Rather, the Minister submits, D.E.'s insistence on continuing with the judicial review proceedings, at a time when the Minister was considering the fresh s. 3(11) application, compelled the Minister to apply to have the proceedings struck out as moot. It will be necessary to return to that medical evidence in the context of one of the issues which arises on this appeal.

2.4 In any event, on the 2nd July 2015, in the context of the Minister's consideration of the fresh application to revoke, a case was made to the Minister by letter in which D.E. sought to avail of what was said to be a policy granting residency to applicants who had been in the State for 5 or more years. It should be noted that in written submissions the Minister disputes whether "policy" is the correct terminology to use in this context.

2.5 As already noted, the Minister issued a decision on the 28th July 2016 refusing the application under s. 3(11) of the 1999 Act to revoke the deportation order. It is this decision which is the subject of these proceedings.

3. Procedural history

3.1 D.E. sought leave to apply for judicial review of that decision of the 28th July 2016 refusing this last application to revoke the deportation order. Section 5(2) of the Illegal Immigrants (Trafficking) Act 2000 (as amended) ("the 2000 Act") provides that leave to apply for judicial review in relation to a decision under s. 3(11) of the 1999 Act "shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed."

3.2 The first and primary argument raised by D.E. in seeking leave to apply for judicial review related to what was described on behalf of D.E. as a "*de facto* policy" arising from the report of the Working Group on the Protection Process ("the Working Group"). The alleged policy was said essentially to be to the effect that persons subject to

deportation orders who have been in the State for a minimum of five years may be granted residency in the State, subject to certain conditions. D.E. argued that the existence of this policy is clear from the content of the decision of the 28th July 2016, which stated that, while denying that any alleged policy amounted to government policy, D.E. would nonetheless not be able to benefit from it as a consequence of his being classified as an evader of the GNIB. It was submitted that this reference indicated the operation of a *de facto* policy. In this regard, it was submitted on behalf of D.E. that, as he was unaware of the operation of this policy, he was unable to make submissions which might have affected the outcome of the decision. Therefore, D.E. submitted that, insofar as there are guidelines in existence, they should be published to allow applicants to make submissions in relation to them. In this regard, reference was made to the decision of the Supreme Court of the United Kingdom in *R (Lumba) v. Secretary of State for the Home Department* [2012] 1 AC 245, a case arising in the context of detention in immigration matters. Reference was also made to other miscellaneous authorities in support of this argument.

3.3 It was further submitted that there was a failure to give adequate, rational or *intra vires* consideration to the practicability of access by D.E. to medical services in Nigeria. Reference was made to the question of proportionality and it was submitted in that context that insufficient regard had been given to the evidence of the exceptionality of D.E.'s medical circumstances.

3.4 As has already been noted and for reasons which will be summarised later, the High Court refused the application for leave to apply for judicial review.

3.5 D.E. then sought a certificate from the High Court to appeal this refusal to the Court of Appeal, as is required by s. 5(6)(a) of the 2000 Act (as amended). The standard for the grant of a certificate under s. 5(6)(a) is that the High Court decision must involve a point of law of exceptional public importance and that it is desirable in the public interest that an appeal be taken to the Court of Appeal. It was submitted that the question of the application of the *Lumba* criteria in a deportation context amounted to issues of public importance which satisfied that statutory requirement. Furthermore, it was also submitted that the issue of whether, in light of the judgment of the European Court of Human Rights ("ECtHR") in *Paposhvili v. Belgium* (41738/10) (European Court of Human Rights, 13th December 2016), adequate, rational and *intra vires* consideration had been given to the practicability of D.E. being able to access medical care in Nigeria and the availability and adequacy of such care met the statutory criteria. As already mentioned, the High Court refused to certify that the issues raised met the necessary standard.

3.6 As noted above, a third High Court judgment was issued in relation to the refusal of an application for an injunction sought pending an intended application for leave to appeal to this Court.

4. The judgment of the High Court

4.1 It is important to start by noting that what was before the High Court was an application for leave to seek judicial review which, in accordance with s. 5(2) of the 2000 Act, required substantial grounds to be established.

4.2 In its judgment, the High Court (Humphreys J.) first turned to what might be referred to as the *Lumba* issue i.e. the argument that there was a *de facto* policy in operation and that D.E. was entitled to be informed as to the content of this policy so as to be able to make submissions in relation to its application to his case. Humphreys J. held that it was not apparent that there were substantial grounds for contending that this approach applies in a deportation context. Furthermore, it was held that the issue did not properly arise in this case as there was sufficient notice of the relevant

exception, being an exclusion in the case of persons who were considered to have evaded GNIB, such that D.E. was not handicapped in making submissions in that regard.

4.3 Humphreys J. went on to consider the reliance placed by D.E. on the Working Group report's statement that the "best interests of the child should be a primary consideration", which was said to be drawn from *Okunade v. Minister for Justice Equality & Law Reform* [2012] 3 I.R. 152. It was held that reliance on *Okunade* for the proposition that best interests should be a primary consideration in the deportation context was a fundamental misunderstanding of the law by the Working Group. Humphreys J. stated:

> "[*Okunade*] was a decision purely on the question of the balance of justice for the purposes of an interlocutory injunction. It did not lay down the principle that the best interests of the child were to be a primary consideration in substantive immigration decisions."

4.4 Humphreys J. added that this contention has been rejected by the Court of Appeal in *C.I. v. Minister for Justice* [2015] IECA 192 and in *Dos Santos v. Minister for Justice* [2015] 2 I.L.R.M. 483.

4.5 With regard to the question of the failure to give adequate, rational or *intra vires* consideration to the practicability of access by the applicant to medical services in Nigeria, Humphreys J. noted the requirement of "exceptional circumstances" which must be met in order that the expulsion of a person to a territory with an inferior health system would be contrary to the European Convention on Human Rights ("ECHR"). He noted that such a requirement was set out by the ECtHR in *D. v. UK* [1997] 24 EHRR 423 and *N. v. UK* [2008] 47 EHRR 39. Humphreys J. then referred to the report of Dr. Corrina McMahon dated 26th August 2014, to the effect that D.E.'s condition is "really quite severe", and requires more than basic care. However, Humphreys J. concluded:-

> "It is not apparent that a report pitched at that level can be said to represent a substantial ground for contending that the exceptionally high threshold set in *D*. and *N*. has been met."

4.6 Humphreys J. also rejected the applicability of Article 8 of the ECHR to D.E.'s case.

4.7 Accordingly, Humphreys J. refused D.E.'s application for leave to seek judicial review.

5. Leave to appeal

5.1 The basis on which this Court granted leave to appeal was the following:-

"Whether the High Court was incorrect to conclude that substantial grounds justifying a grant of leave to seek judicial review had not been made out in the circumstances of this case having regard to the following issues:-

> (a) Whether Irish law recognises the same or an appropriately adapted principle such as that identified by the Supreme Court of the United Kingdom in *Lumba* such that there is an obligation on public authorities enjoying a broad discretion to publish any policy or criteria by reference to which such discretion is likely to be exercised whether that policy has been formally adopted or represents an established practice;
>
> (b) Having regard to any propositions determined to arguably represent the law under (a), it is sufficiently arguable that such principles have application in the case of E so as to justify a grant of leave to seek judicial

review on a substantial grounds basis; and

(c) Whether it is sufficiently arguable, on a substantial grounds basis, that E's medical condition and requirement for treatment meets the high threshold which requires to be met in order to make it unlawful to deport."

5.2 It must be emphasised, therefore, that what is before this Court is an appeal against the refusal of leave to seek judicial review albeit one where substantial grounds were required to be established. Therefore, this Court is not called on to make a definitive determination of any of the issues which are advanced on behalf of D.E. but rather is required to determine whether there is a sufficient basis for all or any of those grounds for challenging the Minister's refusal to revoke the deportation order in question, in order to justify the granting of leave to seek judicial review on a substantial grounds basis.

5.3 It is also important to emphasis that, both at the leave to appeal stage, and in the course of the written and oral procedure, the Minister has argued that the so-called *Lumba* issue does not really arise in the circumstances of this case. In those circumstances it seems to me to be necessary to address that question first. In other words even if it is sufficiently arguable, for the purposes of an application for leave to seek judicial review on a substantial grounds basis, that Irish law recognises an obligation on decision makers which is the same or similar to that identified in *Lumba*, could such a finding avail D.E. in the circumstances of this case. I therefore turn to that question.

6. Does the *Lumba* Question Arise on the Facts?

6.1 For the purposes of the argument on this point I am prepared to assume that Irish law recognises a principle similar to that identified in *Lumba*. It should, of course, immediately be noted that the issue which arose in *Lumba* was quite stark. The allegation was that the relevant authorities had published criteria but then had not followed them. There is no such allegation in this case.

6.2 There may well be merit in the publication of criteria by reference to which general statutory discretions or adjudications are likely to be exercised or made. The more that a relevant discretion may come, in practice, to be exercised by a number of different persons or groups of persons the more important it will be, in the interests of consistency, that there be some guidance as to how the power concerned should be exercised in practical terms. While it will never be possible to achieve absolute consistency, achieving an even handed approach to the exercise of a statutory power is undoubtedly consistent with good administration.

6.3 On the other hand, it must be acknowledged that it will almost invariably be the case that, where the Oireachtas has decided to confer a broad discretion or adjudicatory power on a relevant person or body, it will have done so precisely because it was not considered either possible or perhaps appropriate to attempt to define the circumstances in which the power in question should be exercised with any greater level of precision. It must be assumed that the Oireachtas confers a broad general power rather than requiring the decision maker to apply specific criteria precisely because the Oireachtas considers that conferring the power in that way is appropriate.

6.4 In addition, it must also be recognised that there is a long established jurisprudence under which it is clear that a decision maker exercising a statutory power cannot improperly fetter their discretion as to how to exercise the power in question (see, for example, *Carrigaline Community Television Broadcasting Company Ltd v. Minister for Transport, Energy and Communications (No. 2*) [1997] I.L.R.M. 241; *Mishra v. Minister*

for Justice [1996] 1 I.R. 189 and *McCarron v. Kearney* [2010] IESC 28). Elevating guidance or criteria to the level of secondary legislation which needs to be strictly followed in all cases is equally impermissible (see *Bernard Crawford, Inspector of Taxes v. Centime Limited* [2005] IEHC 328)

6.5 On the other hand, there can be little doubt that, where a policy or criteria have been developed for the exercise of a particular power, transparency would require that persons who may be engaged by the power concerned should be able to familiarise themselves with the relevant guidance or criteria so as to be able to make a case for the exercise of the power concerned in a manner favourable to their interests. In circumstances where there actually is guidance or criteria and where the law would require that a person who might be affected by the exercise of the power concerned would have a right to make representations, it would greatly devalue the benefit of that entitlement if the person concerned had no means of finding out the guidance or criteria by reference to which the decision affecting their interests might be made.

6.6 However, in the particular context of the issues which arise in this case, it is important to analyse the nature of the residual power which is conferred on the Minister in circumstances where the Minister is called on to consider whether to revoke a deportation order. In such a case it is unlikely that legal rights or entitlements will arise as such. If the person concerned is entitled, as of law, to asylum status then it is highly probable that a decision in that regard will have already been made prior to any question of deportation arising. Similarly, if a person is entitled to subsidiary protection like considerations will apply. Furthermore, persons who may not be entitled to recognition as refugees and who may not qualify for subsidiary protection may nonetheless have a legal entitlement to avoid deportation because of the obligation placed on the Minister to exercise his powers in a manner consistent with the ECHR under s. 3(1) of the European Convention on Human Rights Act 2003. Thus, a person may, as a matter of law, be entitled to avoid deportation because the act of deportation might infringe the Convention and it would, in those circumstances, be unlawful for the Minister to exercise the power to deport in a way which would breach those rights.

6.7 But there is a residual issue for the Minister to consider on an application to revoke a deportation order which is not concerned with whether there is a legal right to remain in the State but rather with whether the Minister should exercise the more general humanitarian jurisdiction which is conferred on the Minister.

6.8 In the context of that analysis it is important to recall that any decision made by the Minister (or by other bodies within the relevant process) which involves a determination in respect of legal rights and entitlements will be subject to review by the courts on the usual judicial review basis applicable to any decision affecting such rights and entitlements. If, applying traditional judicial review concepts, the Minister or any other of those bodies has made a decision concerning legal rights and entitlements which is not sustainable in law then the decision concerned will be quashed by the courts. That would be so even if proper procedures are followed but where the substantive legality of the decision is flawed for any of the reasons which are amenable to judicial review such as an error of law or a mistaken view as to the factors which can properly be taken into account in the context of the decision in question.

6.9 However, it is inevitable that somewhat different considerations must apply in practice where a very general question such as the appropriateness or otherwise of the Minister granting humanitarian leave to remain arises. Such an issue is not, strictly speaking, concerned with legal rights and entitlements but rather is subject only to the entitlement of a relevant person to make representations to the Minister as to the basis on which it is said that the Minister might be persuaded to grant humanitarian leave and to the entitlement to have the Minister consider those representations. But the criteria,

under the legislation, to be applied in respect of such an application is very much at the open-ended end of the spectrum. In such an application the Minister is not concerned with whether a legal entitlement exists, but rather whether general humanitarian considerations ought to lead to the person concerned not being deported. In passing it should be noted, of course, that it may be that a party also puts forward, in the course of the same representations, an argument which does touch on a legal entitlement. For example, the issue which arises in this case and which concerns the contention that it would be in breach of D.E.'s Convention rights to deport him having regard to the health issues raised, does give rise to a contention that a legal entitlement exists. Different considerations apply to that question. However, on the assumption that no legal entitlement arises, then the decision of the Minister can, in my view, be properly described as one involving the exercise of a very broad discretion.

6.10 While it may be at least arguable that there could be circumstances in which a decision maker such as the Minister might be required to set out the criteria by reference to which decisions of a particular type were intended to be made, I do not consider that it is arguable that a decision involving the very general type of residual discretion with which the Minister is concerned on an application such as this (in the absence of a contention that a legal entitlement arises) can place an obligation on the Minister to, as it were, narrow down the field by defining criteria. On the other hand, I am prepared to accept that it is arguable that the Minister must make details available of any criteria or guidance which are actually adopted.

6.11 But the question which squarely arises in the circumstances of this case, therefore, is as to whether, even if such an obligation exists, there are substantial grounds for arguing that there has been a breach by the Minister of any obligation which may arise.

6.12 It must be recalled that the policy which, it is said, the Minister had adopted (but not published) was the policy identified in the Report of the Working Group. The evidence put forward concerned the fact that, to the knowledge of the solicitor representing D.E., many applications for what might be described as humanitarian leave appeared to have been dealt with by the Minister on the basis of utilising the criteria recommended by the Working Group or similar criteria being that leave to remain would be given in cases where persons had been in Ireland for more than five years.

6.13 Indeed, the representations made by the solicitor concerned on behalf of D.E. to the Minister in the context of the decision which is under challenge in these proceedings made specific reference to the Report of the Working Group and urged that D.E.'s application ought to be considered on that basis.

6.14 It is true that the evidence put forward on behalf of the Minister suggests that the relevant recommendations of the Working Group were never adopted as formal Government policy. On the other hand, there is at least some evidence to suggest that something along the lines of the relevant recommendation of the Working Group was being applied in practice in at least many similar cases. But in that context it is impossible to ignore the fact that the recommendations of the Working Group itself contain the exception relied on by the Minister in this case. The recommendations of the Working Group were well known to the extent that D.E.'s solicitor was able to rely on them in the representations which he made in this case. How then can it be said that the solicitor concerned was at any disadvantage in being able to make whatever representations were considered appropriate on D.E.'s behalf.

6.15 To the extent, therefore, that it might be established that the Minister had adopted a practice of approaching applications for leave to remain in accordance with the general recommendations of the Working Group (even if those recommendations had not been formally accepted as Government policy) how can it be said that such a practice or

policy was not known or that persons who wished to avail of that policy did not have an appropriate opportunity to make their representations by reference to it.

6.16 It is important, in the context of the circumstances of this case, to emphasise that the Court is not here dealing with a practice or policy whose existence only came into the public domain after a particular decision under challenge had been made.

6.17 As noted earlier, I am not satisfied that there are substantial grounds for arguing that the Minister was obliged to adopt a policy or practice in relation to the exercise of the very broad residual discretion which the Minister is given to allow persons to remain in the State for humanitarian reasons. It follows that leave to seek judicial review on these grounds could only be required to be given if it could be demonstrated that there were substantial grounds for believing that there was an actual policy or practice in place which had not been disclosed or made available to interested parties so that prejudice might be said to have arisen.

6.18 In the circumstances, I am not satisfied that the evidence supports the contention that any practice which existed was not sufficiently known to the solicitor acting for D.E. so as to enable that solicitor to make any representations which were considered appropriate by reference to that practice. For those reasons, I am satisfied that the trial judge was correct to hold that substantial grounds had not been made out in respect of that aspect of the case sought to be made on D.E.'s part which relied on the *Lumba* grounds. It is therefore necessary to turn to the other aspect of the case made being that which places reliance on D.E.'s medical condition.

7. The Medical Condition

7.1 It must be emphasised that the legal basis on which it is necessary to consider this aspect of the case made on behalf of D.E. is quite different to that which required to be applied in the context of the *Lumba* issues. The case made on behalf of D.E. under this heading does concern a potential legal entitlement to avoid deportation having regard to his medical condition. If there are substantial grounds for suggesting that the Minister was legally incorrect in the way in which the medical aspect of the case was assessed, then leave to appeal would necessarily have to be given.

7.2 Against that backdrop, it is necessary to return to the question of the medical evidence put before the High Court in that regard.

7.3 The primary medical evidence regarding D.E.'s condition, which was before the High Court and previously before the Minister when the decision under challenge was made, was a report produced by Dr. Corrina McMahon ("Dr. McMahon"), dated the 26th August 2014. Dr. McMahon states in this report that she had previously provided information regarding D.E.'s condition in a letter dated the 18th June 2014. However, she states that she did not realise the level of detail required and therefore elaborated on his condition in the August 2014 report.

7.4 As noted above, prior to the High Court proceedings which resulted in this appeal, there was a previous set of proceedings seeking to challenge an earlier refusal on the part of the Minister to revoke the deportation order against D.E. As was stated previously, these proceedings were struck out as moot by the High Court (Mac Eochaidh J.) on the 24th November 2014, on the basis that the Minister had been furnished with fresh medical evidence which was treated as a new s. 3(11) application. The new evidence in question was the 26th August 2014 report of Dr. McMahon.

7.5 In her report, Dr. McMahon notes that D.E. was diagnosed with sickle cell disease at 4 weeks of age. She notes that he was treated per best international practice and was scheduled to be seen on a three monthly basis. Dr. McMahon states that D.E. required

unscheduled admittance to hospital on four occasions as of the date of writing being in May 2010, October 2010, May 2011 and finally, in what Dr. McMahon states was his next "life-threatening admission", in April 2012.

7.6 In the August 2014 report, Dr. McMahon states that D.E. "has shown evidence that he has quite severe sickle cell disease". She notes that on two occasions when he was admitted to hospital he required life-saving blood transfusion. She states that he has evidence of hyperhaemolytic sickle cell disease, which she describes as a severe form of sickle cell anaemia.

7.7 Dr. McMahon further notes the risks associated with sickle cell disease including an increased incidence of stroke in children with the disease. She notes that the recommended approach regarding preventing stroke and other such risks is to carry out various regular assessments and where certain risks are identified Dr. McMahon states that the course of action recommended to be adopted is to commence a blood transfusion programme.

7.8 Dr. McMahon states in her report that D.E. at the time of writing was receiving the best care available to people with sickle cell disease, as per international best practice. In particular, she cites the availability of treatment for his hyperhaemolytic sickle cell disease and also the availability of blood transfusion programmes.

7.9 Dr. McMahon then turns to the level of care available in Nigeria in relation to sickle cell disease. She cites the fact that children with sickle cell disease in Nigeria do not receive penicillin and further notes that D.E. has required blood transfusions on two occasions. In relation to the availability of blood transfusion, Dr. McMahon states that "… in this country [blood transfusion] is a safe procedure as the blood supply is robust. The same cannot be said of Nigeria." In relation to the exceptional circumstances requirement under Article 3 of the Convention, she states:-

> "I would suggest that the need for this boy to have Hydroxyurea therapy and also his demonstrated requirement for blood transfusion, does indeed suggest exceptional circumstances."

7.10 Further medical information was provided in the form of a letter from Dr. McMahon dated the 20th April 2015, which provided details of D.E.'s ongoing treatment. In that letter it was noted that D.E. was admitted to hospital on the 16th January 2015 and was discharged after 24 hours.

7.11 Also before the High Court was a letter from Dr. McMahon of the 25th April 2016. This letter noted that on the 18th June 2015, D.E. was commenced on Hydroxyurea for management of his sickle cell anaemia.

7.12 In both the letter April 2015 letter and the April 2016 letter, Dr. McMahon states that she considers it ill advised that D.E. be deported to Nigeria due to the nature of the treatment available there for sickle cell disease.

7.13 All of the above referenced medical evidence was before the Minister in relation to the s. 3(11) application which is at the root of these proceedings.

8. Paposhvili

8.1 As noted earlier, the case law of the ECtHR in this area originally derived from the cases of *D. v. The United Kingdom and N. v. The United Kingdom* to which I have already referred. The backdrop to that case law is, in substance, a recognition that the countries which subscribe to the ECHR have, by and large, better health systems than can be found in at least many of the countries to which persons might be deported or returned. If it were to be the case that returning a person to a country which had a less

advantageous health system having regard to their medical condition would amount to a breach of Convention rights without more then it would follow that deportation would be precluded in very many cases. The jurisprudence to be found in the *D*. and *N*. cases identified a risk of "imminent death" as providing an exceptional circumstance in which the Convention might nonetheless preclude deportation. That case law also referred to "other very exceptional cases" which were not defined at that time.

8.2 The comments in the medical reports of Dr. McMahon about the circumstances of D.E. being exceptional were clearly directed towards the case sought to be made on D.E.'s behalf that he came within that "very exceptional" category of case identified in the jurisprudence.

8.3 However, subsequent to the decision of the Minister in this case and, indeed, to the decision of the High Court refusing leave, a Grand Chamber of the ECtHR gave judgment in *Paposhvili*. That judgment sought to give greater clarity to the category of "other very exceptional cases" which could give rise to an issue under Article 3 of the Convention in the context of deportation. The Grand Chamber indicated that the "other very exceptional cases" were intended to refer to:-

> "situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness."

8.4 So far as the assessment as to whether the "other very exceptional criteria" are met the Court indicated that:-

> "In the context of these procedures, it is for the applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *Saadi*, cited above, Â§ 129, and *F.G. v. Sweden*, cited above, Â§ 120). In this connection it should be observed that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment…
>
> Where such evidence is adduced, it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it (see Saadi, cited above, Â§ 129, and F.G. v. Sweden, cited above, Â§ 120)."

8.5 The impact of removal on the persons concerned was, the Court held, to be assessed by comparing his or her state of health prior to removal and how it would evolve after removal.

8.6 In this respect, the Court further indicated that the State had to consider *inter alia* (a) whether the care generally available in the receiving State "is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3", the Grand Chamber specifying that the benchmark is not the level of care existing in the returning State; and (b) the

extent to which the individual would actually have access to such care in the receiving State (the associated costs, the existence of a social and family network, and the distance to be travelled to access the required care, all being relevant in this respect).

8.7 If "serious doubts" persisted as to the impact of removal on the person concerned, the authorities had to obtain "individual and sufficient assurances" from the receiving State, as a precondition to removal, that appropriate treatment will be available and accessible to the person concerned (*Tarakhel v. Switzerland* (2015) 60 EHRR 28)

8.8 While *Paposhvili* had not been referred to in the argument before the High Court on the application for leave to seek judicial review in this case (because it had not been decided at that time) it was referred to in the application to the High Court for a certificate in the context of a possible appeal to the Court of Appeal and was also the subject of significant submissions before this Court. In essence, it is argued that the Minister did not properly consider the matters specified in the passages from *Paposhvili* to which I have referred.

8.9 Reference should also be made to a recent decision of the United Kingdom Upper Tribunal in *E.A. and Others* (Article 3 Medical Cases – *Paposhvili* not applicable) [2017] UKUT 445. However, that case was principally focused on whether, in the light of binding precedent from the United Kingdom Supreme Court, the Tribunals charged with dealing with immigration cases were required to depart from what might be said to be the jurisprudence of the United Kingdom Supreme Court in favour of the approach of the ECtHR in *Paposhvili*. That case does not really assist this Court on this application.

8.10 However, it is important to identify the sequence of events which the ECtHR suggest requires to be followed in order that the question of whether deportation might give rise to a breach of Article 3 rights can properly be assessed. The first obligation is on the relevant applicant to adduce evidence capable of demonstrating that there are substantial grounds for believing that, in substance, there was a real risk that they would be "exposed to a serious, rapid and irreversible decline in their state of health resulting in intense suffering or a significant reduction in life expectancy". It is only when that evidence (sufficient to establish a real risk) is presented that the obligation shifts to the authorities to dispel any doubts thereby raised. It is also clear that the appropriate benchmark is not the level of care existing in the returning State.

8.11 It is entirely understandable that the evidence presented to the Minister in this case was not directed towards the precise criteria identified in *Paposhvili* for the very simple reason that *Paposhvili* had not itself been decided at the time when that evidence was presented to the Minister. There can be little doubt but that evidence was presented to the effect that the medical treatment available to D.E. should he be returned to Nigeria would have fallen well short of best international practice and short of the treatment that would have been available to him should he remain in Ireland. However, as the ECtHR points out, that is not the benchmark.

8.12 It is equally clear that the evidence presented did not address itself to the crucial question of whether there was a real risk of a serious, rapid and irreversible decline in health or a significant reduction in life expectancy. It must again be recalled that the relevant assessment does not relate to the medical treatment generally available in the country concerned but rather to the medical treatment that is likely to be available to the applicant in question. That issue can, of course, cut both ways. It may be, as the ECtHR points out, that access to medical treatment, while available to certain persons in a country, may not be available, or at least available on the same basis, to all, so that the practical situation likely to prevail in respect of a particular applicant, should that applicant be returned, must be assessed. While general conditions may well, of course, form part of that assessment it is necessary to include in the proper analysis a

consideration of the extent to which those general considerations are likely to apply to the applicant in question. At the initial stage the applicant must produce evidence sufficient to establish a real risk on that basis. If that real risk is established then the State must also allay such fears, in the manner contemplated in *Paposhvili*, again on the same basis.

8.13 On the other hand, there may be features of the circumstances of a particular applicant which suggest that the very exceptional circumstances identified in *Paposhvili* will not apply to them even though they might apply to others in the country in question. For example, general figures concerning the life expectancy at birth of persons suffering from a particular disease may or may not be of any great relevance to the case of someone who may be returned at a particular age, because life expectancy figures calculated at birth may be significantly influenced by the mortality rates at an early age. A broad statement that persons suffering from a particular disease suffer, in general, from a significantly lower life expectancy than might prevail were they to remain in the returning country is not sufficient, without more, to establish a relevant real risk without specifying how applicable those figures may be to a person in the circumstances of the applicant.

8.14 Against that backdrop it does not seem to me that the case made to the Minister was presented in a way which established a real risk of the sort of matters identified in *Paposhvili* so as to preclude deportation for Article 3 reasons. I would emphasise that this is not to say that D.E. may not nonetheless have rights which would be sufficiently impaired by his return to Nigeria so as to require the Minister, as a matter of law, to revoke the deportation order. The problem is that the case in that regard was, for entirely understandable reasons, not made to the Minister in the way that it is now clear it can and should be made in the light of the decision in *Paposhvili*. There is, however, no reason in principle why, in the light of the clarity brought to this area by *Paposhvili*, evidence might not now be presented with a view to attempting to persuade the Minister that the criteria identified in that case are met in D.E.'s circumstances.

8.15 However, to ask the courts, in these proceedings which relate to a decision which pre-dated *Paposhvili* and to evidence which was presented to the Minister, and at least initially to the High Court, on a basis which could have made no reference to the *Paposhvili* criteria, to re-invent this case having regard to *Paposhvili,* would be wholly unrealistic and procedurally incorrect.

8.16 This case must be considered on the basis of the materials which were before the Minister at the time when the Minister made the decision under challenge. In my view the case made on that occasion, through no fault of anyone, was not directed towards the refined criteria identified in *Paposhvili*. On that basis it cannot be said that there are substantial grounds for considering that the Minister's decision was unlawful under this heading. However, as I have already suggested, that finding does not mean that the Minister might not be obliged, should sufficient evidence now be placed before the Minister directed specifically to the criteria identified in *Paposhvili*, to come to a different conclusion. In my view, the result of this case should simply be to the effect that, at the time the original decision was made, insufficient evidence directed specifically to the appropriate criteria had been presented to the Minister.

8.17 Finally, I should say that I agree with the observations about the *Paposhvili* jurisprudence made by O'Donnell J. in his judgment in this case.

9. Some General Observations

9.1 In case there might be further applications in this case and indeed as a means of giving guidance for any other applications of this type which might be made to the Minister, it is worth noting that the purpose of expert opinion in Irish law is to assist a

decision maker (including, where appropriate, a court) to determine factual issues which must be considered in the context of reaching a legal conclusion. The criteria for exceptionality, which must be established or determined in order to create a legal entitlement not to be deported or returned in an Article 3 case such as this, are a matter of law rather than a matter of expert medical opinion. However, expert medical opinion may be important and will normally be essential in order to allow the decision maker, the Minister in this case, to reach a proper lawful conclusion. It is again no criticism of Dr. McMahon but it is important to emphasise that it is not for a medical expert to determine that a case is "exceptional" as a matter of law. That is a legal issue. It is indeed for the medical experts to put forward evidence, including matters of expert medical opinion, which establish the facts which form a component of that decision. Thus, for example, in a case like this, expert medical opinion may be highly relevant to the question of whether there is a real risk of the sort of consequences identified in *Paposhvili*. But, it is important to reiterate that the medical evidence should be directed towards those questions rather than to expressing an overall conclusion as to whether, as a matter of law, the facts justify a particular legal conclusion.

9.2 Finally, it is worth noting that the Minister retains an important discretion under the relevant legislation to grant leave to remain on general humanitarian grounds. That discretion exists above and beyond cases where a legal entitlement can be established. In circumstances where it may well be the case that, in the light of *Paposhvili*, a further application to revoke the deportation order in this case will be made, where the evidence put forward in such an application would be likely to address specifically the issues identified in *Paposhvili* and where the general circumstances applying to D.E. in this case are that he has spent all of his life in Ireland, is now almost 9 years of age and has at least a significant medical reason for not being returned, the Minister might well wish to consider whether it would be appropriate, in the exercise of his general discretion, to grant humanitarian leave to remain without having to engage in the kind of assessment which is mandated by *Paposhvili*. However, that decision is one entirely for the Minister and is not one which the courts can either make or require the Minister to make.

10. Conclusions

10.1 It is important to emphasise that the issue before this Court is as to whether the High Court was incorrect not to grant leave to seek judicial review of the decision of the Minister which decision was not to revoke the deportation order in question. The assessment of whether the High Court was correct must be carried out on the basis of the evidence before the High Court relating to the issues and materials which were before the Minister when the relevant decision not to revoke was made.

10.2 Insofar as it is suggested that the decision of the Minister is not legally sound because of an alleged failure to disclose guidance or criteria by reference to which the Minister's general discretion under s. 3(11) of the 1999 Act is to be exercised, I have concluded that, to the extent that it is arguable that any such obligation exists and to the extent that it is arguable that a relevant practice existed in the circumstances of this case, D.E. and his advisers were sufficiently aware of the alleged practice in question so as to be able to structure their submissions to the Minister by reference to that asserted practice. This is so not least because there was specific reference to the contended form of practice (being that recommended by the Working Group) in the submissions which were actually made. For those reasons I am not satisfied that there are arguable grounds, sufficient for an application for leave to seek judicial review on a substantial grounds basis, under that heading.

10.3 The central contention put forward on behalf of D.E. under the second leg of this appeal was that the Minister had failed to carry out an assessment of D.E.'s case in accordance with the ECHR in the manner and by reference to the criteria which have

since been clarified by the decision of the ECtHR in *Paposhvili*. In that context I have concluded that the evidence and materials which were presented to the Minister were not, for understandable reasons having regard to the fact that *Paposhvili* had not been decided at the time, sufficiently directed to the questions which the ECtHR has indicated must be assessed. On that basis I am not satisfied that there are arguable grounds for suggesting that D.E. complied with the initial obligation which rests on an applicant to put forward evidence of a real risk that Article 3 rights will be interfered with if deported or returned. On that basis I have consequently concluded that substantial grounds have not been made out for a judicial review challenge to the decision of the Minister.

10.4 However, as I have indicated earlier in this judgment, it may well be that medical evidence focused on those criteria can now be presented to the Minister in a fresh application. In that context I make some brief observations on the proper role of expert evidence in proceedings such as this and also make some observations on the humanitarian issues which arise although, in the latter case, I make it clear that the ultimate decision in relation to such purely humanitarian matters rests with the Minister.

10.5 However, for the reasons set out in this judgment, it seems to me that the High Court was correct to refuse leave to seek judicial review and I would, in those circumstances, dismiss the appeal.