**THE HIGH COURT**

**JUDUCIAL REVIEW**

**[2017 No. 873 J.R.]**

**BETWEEN**

**C.M., O.V.M., AND C.G.M. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND C.M.) (NIGERIA)**

**APPLICANTS**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of April, 2018**

1. The applicants arrived in the State from Nigeria and applied for asylum on 14th February, 2007. That application was rejected by the Refugee Applications Commissioner. The rejection was affirmed on appeal by the Refugee Appeals Tribunal. The Minister formally refused the applicants' refugee status on 30th September, 2008. A subsidiary protection application was then made and also refused. Deportation orders were made against the applicants in April, 2009.

2. The first named applicant was notified by letter dated 8th May, 2009 to her address on record and to her legal representatives on record, Conor Ó Briain Solicitors. She was required to present on 25th May, 2009 at 2 pm. Not only did she fail to so present but shortly afterwards on 5th June, 2009, the applicants left their accommodation centre with no forwarding address provided. They were quite properly classed as evaders. Very unhelpfully, the applicants' solicitor argumentatively disputed in correspondence that the applicants were evaders. An evader is someone who fails to present or register when required to do so. On that definition it is obvious that the mother evaded for a very lengthy period. The children were minors so their position was derivative, but they must be held also to be evaders although they are not personally at fault prior to their minority. This is not simply a question of not presenting at the appropriate time. The applicants actively obstructed enforcement of the deportation orders by leaving their accommodation without a forwarding address.

3. The second and third named applicants were seven and three when brought to the State and according to the applicants have assimilated here. On 4th March, 2013 the applicants' new solicitors Trayers & Co sought revocation of the deportation orders under s. 3(11) of the Immigration Act 1999. The Minister replied to the effect that the request would be considered when it had been confirmed that the applicants had presented or had alternatively left the State. This was not so confirmed. On 22nd July, 2015, a second s. 3(11) application was made by the applicants' present solicitors, John Gerard Cullen Solicitors. On 19th October, 2015 an application for readmission to the protection process under s. 17(7) of the Refugee Act 1996 was also made. On 23rd March, 2016 the applicants were notified that the s. 17(7) application had been refused.

4. Subsequently, further submissions were made regarding the s. 3(11) application. Reliance was placed on the second named applicant now being a student in the University of Limerick, and also on an alleged suicide risk in the case of that applicant. On 18th January, 2017 the current address of the applicants was furnished for the first time since the applicants left their accommodation in 2009. It is also suggested that in December, 2016 the first named applicant had interacted with Gardaí, although this was not a formal presentation pursuant to a notice in that regard under the Immigration Act 1999.

5. On 31st January, 2017 the applicants' solicitors wrote to the Minister argumentatively asserting that "*our clients had never been asked to present to the GNIB*". It is now accepted by counsel that this is not correct. On 13th April, 2017 the applicants first formally reported, after an almost eight-year evasion. On 11th June, 2017 the second named applicant turned eighteen years of age. On 20th October, 2017 the s. 3(11) application was refused. On 21st November, 2017 the statement of grounds in the present application was filed. Leave was duly granted. I have heard helpful submissions from Mr. Diarmuid Rossa Phelan S.C. (with Mr. Patrick Killian McMorrow B.L.) for the applicants and from Ms. Eilis Brennan B.L. for the respondent.

**Judicial review of a s. 3(11) decision is of a limited nature.**

6. It has been made clear on a number of occasions that the extent to which a court will overturn a s. 3(11) decision is very limited and indeed much more so than in the case of a deportation order: see *Kouaype v. The Minister for Justice Equality and Law Reform & Anor.* [2005] IEHC 380 [2011] 2 I.R. 1 *per* Clarke J, *P.O. v. Minister for Justice and Equality* [2015] IESC 64 [2015] 3 I.R. 164 at para. 16 *per* MacMenamin J. and *per* Charleton J. at para. 30, *M.A. v. Minister for Justice, Equality and Law Reform* (Unreported, Cooke J., 17th December, 2009). Such an approach precludes relief here absent very special circumstances such as a clear illegality or a matter that could not have been advanced at the time of the original deportation order. I can turn then to the specific grounds as pleaded.

**Ground 5A – failure to consider new and changed circumstances**

7. The Minister's obligation is to consider the submissions made and whether deportation would now be unlawful, in particular having regard to any changed circumstances. There is no obligation to narratively discuss the applicants' submissions. Where the Minister indicates that the submissions were considered the applicant has to show positively that this is not the case (see *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401 *per* Hardiman J.) This has not been shown here. The Minister found that there was no new information submitted that meant that there should be a departure from the original decision. In context, this means that the new information submitted was not deemed sufficient in the particular circumstances of this decision. The Minister's statement cannot read as a finding that no new information whatsoever was submitted for the simple reason that the information submitted is actually discussed. It is clear that the Minister considered that what was submitted was either not new or was alternatively of insufficient weight.

**Ground 5B – alleged irrationality of the decision that the collective deportation of the applicants will not result in their separation and accordingly raises no issue in respect of family life.**

8. Contrary to the applicants' submission, the approach taken by the Minister seems a valid one. The family unit is being kept together by their collective deportation and therefore there is a limited impact on their family life whether for the purposes of art. 8 of the ECHR (as applied by the European Convention on Human Rights Act 2003) or indeed for the purposes of the constitutional rights involved.

**Ground 5C – failure to consider the new situation whereby the applicants have made a home in the State and accordingly that removal would allegedly interfere with their rights under art. 8 of the ECHR.**
9. Well-established caselaw makes clear that in the case of unsettled migrants, deportation violates art. 8 only in exceptional circumstances. No such exceptional circumstances have been demonstrated. For example, the second named applicant's educational attainments were achieved while evading deportation. In the circumstances of this case, the applicants' situation was more than merely unsettled, it was unlawful, and in addition the applicants were evading the GNIB. In accordance with the well-established Strasbourg caselaw to which I have alluded, exceptional circumstances are required to hold that there has been any violation of art. 8 (see *Rodrigues de Silva and Hoogkamer v. The Netherlands* (Application No. 50435/99, European Court of Human Rights, 31st January, 2006, para. 39). Such exceptional circumstances have not been shown.

**Ground 5D – allegation that the finding that the second named applicant will be able to adapt to life in Nigeria is irrational given the alleged suicide risk**
10. Mr. Phelan submits that the general finding that the second named applicant could adapt to life in Nigeria is irrational. That finding is not necessarily the most favourable approach from the applicants' point of view but it cannot be said to be irrational. The second named applicant has already adapted to one major change so presumably can adapt to another.

11. As regards the alleged suicide risk, reliance is placed on a report of a psychologist who considers that the second named applicant is at a high risk of suicide and should be given permission to remain in the State. A number of factors must be noted. Firstly this is not a medical report; it is a report by a psychologist. The author of the report is not a treating professional and the report is based on a once-off appointment. The second named applicant was referred to the author of the report by his solicitor, not by his general practitioner. The report contains no scientific diagnosis and no detailed recommended treatment. It is in fact primarily based on subjective information conveyed by the second named applicant. The point arises yet again that merely because an applicant puts in a medical report does not mean that he or she has to succeed (see *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 [2016] 6 JIC 2409 (Unreported, High Court, 24th June, 2016)).

12. Furthermore, the psychologist suggests that permission to remain in Ireland should be granted. This is totally outside of his remit and absolutely not a matter for him (see comments of Clarke C.J. in *D.E. v. Minister for Justice and Equality* [2018] IESC 16 (Unreported, Supreme Court, 8th March, 2018, at para. 9.1). I am very uneasy about a process whereby the second named applicant has been sent to a psychologist willing to rubber stamp a subjective account of a suicide risk. Drumming up a report of this kind with suicide front and centre in a case like this involving a very young adult requires much more sensitivity and professionalism than the sort of exercise that has been engaged in. I have serious doubts about whether it is doing any favours to a very young adult to use suicide risk as a basis to get some legal benefit. The message here has to be that either threatening or attempting suicide is not an answer to anything and does not in any way whatsoever enhance or improve your legal position. Neither the State nor the court can be blackmailed by anyone threatening to kill themselves if they do not win their case. There is a serious risk of perverse incentives here. The court cannot get into a situation whereby some reward is impliedly being offered by way of favourable treatment to be made in return for anyone, particularly a very young person, asserting a suicide risk.

13. Insofar as those assisting him care about the welfare of the second named applicant there is a need to focus him away from this issue and not to create some situation where wittingly or unwittingly some misconceived idea is being promoted that there is some incentive for him in focusing on this issue. Hanna J. in *L.C. v. Minister for Justice Equality and Law Reform* [2006] IEHC 36 [2007] 2 I.R. 133, at 144 indicated that the court could only involve itself in such an issue if there was both a real and substantial threat but also that it could not be forestalled by any other means, such as medical intervention, and then only if the Minister had missed or disregarded the issue to the point of irrationality. It is the latter element that is really important here because it is a matter for the Minister as to how to evaluate the situation. Assuming that the Minister has lawfully evaluated how he wishes to respond to a suicide risk, that is the end of the court's remit, and it is not legitimate for the court to allow itself to be hustled into overturning such an executive assessment on the basis of threats from an applicant whether of suicide or anything else. For example, it would be lawful if the Minister considered that even a credible and compelling suicide risk should be faced down on the grounds that the State should not be blackmailed in this manner. As long as the Minister has taken the facts into account and made a reasoned judgment there is no unlawfulness and thus the court has no business getting involved. Even that approach assumes that the evidence in that regard is in fact compelling, which this evidence is not. The requirements referred to by Hanna J. are nowhere near established here. Consistent with what Hanna J. held at p. 150 of *L.C.* is the recent approach of the Court of Appeal in *R.B. v. Minister for Justice and Equality* [2017] IECA 26 (Unreported, Court of Appeal, 2nd October, 2017) where Peart J. noted that the Minister had considered the evidence of suicide risk and said that "*thereafter it is a matter for the Minister to decide what weight should be given to them and/or whether they raised some new issue of such gravity as to warrant a revocation of the deportation order*" at para. 68. The key message it seems to me is that even if the medical evidence is significant it is still ultimately a matter for the Minister to consider. No right to stay in the State as such can arise from a person threatening to kill themselves. The Minister cannot be compelled to grant a permission on that basis anymore than he can be compelled in a different context to pay a ransom to a kidnapper. The Minister is entitled to take a hard line, a soft line or whatever line he wishes in this regard as long as he gives reasoned consideration to the material submitted which was certainly done here. A number of inadequacies in the material have been highlighted in the respondent's submissions. The Minister considered the point and had regard to the lack of evidence of any follow-up counselling. That certainly suggests that the second named applicant's mental health is not being taken all that seriously by anybody concerned. The applicants appear happy to leave the risk factor out there, unaddressed, in the hope that it will be of some benefit to them. The inference is that if there was any reality to the suicidal ideation issue the applicants would have ensured that all appropriate counselling, psychotherapy or psychiatric services would have been made available to the second named applicant. I should say that if there is any reality to the second named applicant's suicidal ideation, which has certainly not been made out on the evidence, I would strongly urge all those concerned with his welfare to ensure that he receives all appropriate supports whether here or in Nigeria. But I very much doubt that it is in the second named applicant's interest for those assisting him to continue to press this particular issue or certainly to do so in the manner in which it has been pressed to date. The case illustrates the point I tried to make with limited success in *K.R.A. v. Minister for Justice and Equality (No. 4*) [2016] IEHC 703 [2016] 11 JIC 2804 (Unreported, High Court, 28th November, 2016) at para. 30 that one is not necessarily doing an applicant any favours by putting off deportation until an applicant is of an older and less adaptable age.

**Ground 5E – allegation that it is contrary to the best interests of the third named applicant to be deported**
14. I will assume for the sake of this argument that it is indeed contrary to the best interests of the third named applicant to be deported. Best interests pursuant to Article 42A.4 of the Constitution do not apply (see *per* Ryan P. in *K.R.A. and B.M.A. v. Minister for Justice and Equality* [2017] IECA 284 (Unreported, Court of Appeal, 27th October, 2017)). Best interests can however be imported via art. 8 of the ECHR as applied by the European Convention on Human Rights Act 2003; but as already indicated deportation of unsettled migrants only breaches art. 8 in exceptional circumstances: see *P.O., per* MacMenamin J. at para. 26, *per* Charleton J. at para. 35, *P.S.M. v. Minister for Justice and Equality* [2016] IEHC 474 (Unreported, High Court, 29th July, 2016), *C.I. v. Minister for Justice and Equality* [2015] IECA 192 [2015] 3 I.R. 385. As I said in *O.O.A. v. Minister for Justice and Equality* [2016] IEHC 468 (Unreported, High Court, 29th July, 2016) para. 37 and *Wang v. Minister for Justice and Equality* [2017] IEHC 652 [2017] 10 JIC 0608

(Unreported, High Court, 6th October, 2017) para. 22 such best interests can in any event be outweighed by other factors. No illegality has been demonstrated under this heading.

**Ground 5F – the respondent's reliance on the lack of presentation of the applicants for a lengthy period**
15. The applicants' evasion is unhelpfully and inaccurately denied in strenuous terms by the applicants' solicitors, and on the papers it is also unhelpfully minimised to suggest that the non-presentation is of a four-year duration. It is not. The evasion was between the failure to present on 25th May, 2009 and the eventual presentation on 13th April, 2017, a virtually eight-year period. There is a suggestion that the first named applicant showed up at the GNIB in December, 2016, at her own initiative but that does not amount to presentation in accordance with the notice. The GNIB are entitled to specify the time of presentation and to prepare accordingly. It is not open to an applicant to engage in some sort of DIY presentation. She failed to present at the next stated date after that alleged DIY presentation in any event. The evasion had the effect of preventing the Immigration Act 1999 from operating as intended. Of course the applicants lived openly to some extent and also it is true that the minors were not personally responsible but because the children's position is derivative in the sense that they are dependent on the parent to present and act generally on their behalf, the wrongs of the parent are ones that can be held to be factors in relation to the children. Indeed it has to be so because otherwise the immigration system would be fundamentally undermined, allowing parents to hide behind their children. The point has been made both in *P.O. v. Minister for Justice and Equality and in K.R.A. v. Minister for Justice and Equality*, *per* Irvine J. at para. 35 to the effect that in certain circumstances "*If a State were to do otherwise, parents might exploit the situation of their children in order to secure a residence permit for themselves.*" That position is not absolute and may depend on the circumstances but here that general principle applies. Thus it was lawful for the Minister to have regard to the evasion.

16. A related complaint is made that there was a failure to treat the second named applicant as an adult. That is not specifically pleaded, but in any event it is not clear how this made any difference even if somehow there was an error. The State was aware of the second named applicant's date of birth. Mr. Phelan suggests that because the second named applicant was an adult he should not be held liable for the mother's evasion. That misses the point because he is responsible for his own conduct as an adult and regard can be had to his mother's conduct on his behalf prior to that.

17. There are two further points that were not pleaded, which I should mention for completeness.

**Alleged failure to mention Article 42A of the Constitution.**
18. This matter is not pleaded so does not arise but in any event the Minister is not obliged to conduct some *de novo* consideration of whether to make a deportation order. This is a s. 3(11) process, which is considerably more limited. In any event, the Minister is not obliged to mention all constitutional rights. Furthermore and perhaps most fundamentally of all, Article 42A.1 of the Constitution is not being infringed by the decision in question.

**Alleged use of an incorrect test.**
19. This matter is also not pleaded nor is it addressed in any way in the statement of grounds or the written submissions and no amendment was sought. In accordance with the Rules of the Superior Courts I cannot therefore address it, but if I am wrong about that it seems to me that the law in relation to what Minister should consider in a s. 3(11) context is clear. I set this out in *I.R.M. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 478 [2016] 7 JIC 2932 (Unreported, High Court, 29th July, 2016) at para. 50 and that was not, on my reading, disagreed with in the Supreme Court - indeed Ms. Brennan indicates that the State agreed on appeal that this was a correct test. The Minister has to consider essentially (a) the submissions of the applicant and (b) any change of circumstances including new material that might render the deportation unlawful. In the decision in question the Minister phrases things in a somewhat more restrictive manner asking whether there are "*present matters that are materially different than prior to the signing of the deportation order that are unusual, special or changed*" that "*could not have been presented earlier*". Some adjustment of this wording might be required in the sense that the element that the material could not have been presented earlier does not apply to allegations of *refoulement*. *Refoulement* is still something to be considered even if an applicant could have presented the evidence earlier. Probably the formulation of the scope of the s. 3(11) process was expressed in an unduly restrictive way but on the face of the decision it does not seem that this hampered the applicants in any way whatsoever. All submissions are stated to have been considered. The Minister considered *refoulement* on the basis that the points raised were "*similar in nature and content*" to those previously raised. These points were not rejected on the basis that they were not raised earlier. It has not been shown that the actual consideration of the application that took place in this case was in fact unlawful.

**Discretion**
20. As noted above, the applicants failed to report for an almost eight-year period and thereby fundamentally frustrated the operation of the very immigration system which they are now seeking to challenge. The court cannot countenance a situation where a person frustrates the operation of a particular statutory system and then seeks judicial review as a discretionary remedy once the system has caught up with them. In such a case, discretion can legitimately be exercised against the person even if they are otherwise entitled to relief, which these applicants are not. Mr. Phelan suggests that discretion should not be exercised against the children but it seems to me that where they are depending on the parents to act on their behalf by presenting and the parent fails to do so on their behalf it is not unjust to hold that against the children, by analogy with the point discussed in *Butt v. Norway* (Application No. 47017/09, European Court of Human Rights, 4th December 2012), *P.O. v. Minister for Justice and Equality* and by the Court of Appeal in *K.R.A. v. Minister for Justice and Equality*. Such an exercise in discretion is not automatic but in this case the flagrant abuse of the system for the best part of a decade justifies the exercise of discretion against the applicants, so they would fail on this ground alone even if, counterfactually, they were otherwise entitled to relief.

**Order**
21. Accordingly the proceedings will be dismissed.