

O. 58, r. 18(1)

11 JUL 2017

SUPREME COURT
Respondent's Notice

Supreme Court record number	104/17
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[Title and record number as per the High Court proceedings]

Record No.: 2016 No. 678 J.R.		
<div style="background-color: black; width: 150px; height: 1.2em; margin-bottom: 5px;"></div> (An Infant suing by his Mother and Next Friend, <div style="background-color: black; width: 100px; height: 1.2em; margin-top: 5px;"></div>	V	Minister for Justice and Equality, The Commissioner of An Garda Siochana, Ireland and the Attorney General

Date of filing	5 th July, 2017
Name of respondent	Minister for Justice and Equality, The Commissioner of An Garda Siochana, Ireland and the Attorney General
Respondent's solicitors	Maria Browne, The Chief State Solicitor, Osmond House, Little Ship Street, Dublin 8
Name of appellant	<div style="background-color: black; width: 100px; height: 1.2em; display: inline-block;"></div> (an infant)
Appellant's solicitors	Burns Kelly Corrigan, 252 Harold's Cross Road, Harold's Cross, Dublin 6W

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's name	full	Minister for Justice and Equality, The Commissioner of An Garda Siochana, Ireland and the Attorney General
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The respondent was served with the application for leave to appeal and notice of appeal on date

6th July, 2017

The respondent intends :

<input type="checkbox"/>	to oppose the application for an extension of time to apply for leave to appeal
<input type="checkbox"/>	not to oppose the application for an extension of time to apply for leave to appeal
<input checked="" type="checkbox"/>	to oppose the application for leave to appeal
<input type="checkbox"/>	not to oppose the application for leave to appeal
<input checked="" type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
<input type="checkbox"/>	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
<input checked="" type="checkbox"/>	Other (please specify) To ask the Supreme Court to affirm the Order and Judgment of the High Court

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	<input checked="" type="checkbox"/>
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Respondent's Representation

Solicitor	Mary Reynolds		
Name of firm	Chief State Solicitor's Office		
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Address	Osmond House Little Ship Street Dublin 8	Telephone no.	01 417 6171
		Document Exchange no.	186 001
Postcode	Dublin 8	Ref.	2016/04150

How would you prefer us to communicate with you?			
<input checked="" type="checkbox"/>	Document	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Exchange	<input type="checkbox"/>	
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Nuala Butler S.C.		
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Counsel			
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Postcode			

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

How would you prefer us to communicate with you?			
<input checked="" type="checkbox"/>	Document	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Exchange	<input type="checkbox"/>	
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

N/A

3. Information about the decision that it is sought to appeal

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

1. The Respondent does not dispute the contents of Section 4 of the Notice of Appeal but contends that same are incomplete by reason of the omission of the following matters.
2. The Respondent was put on notice of the application by the Appellant for a certificate for leave to appeal to the Court of Appeal. Both parties filed legal submissions. The application for a certificate was refused. Judgment was delivered on the 9th May, 2017 [2017] IEHC 276.
3. Thereafter the Appellant applied for an injunction pending an intended appeal to the Supreme Court pursuant to Article 34.5.4 of the Constitution. Both parties filed legal submissions. This application was refused. Judgment was delivered refusing the application for a stay/injunction on the 26th June, 2017 [2017] IEHC 409.
4. It should be noted that because the initial leave application was made to the High Court on an *ex parte* basis the Respondent has not filed a Replying Affidavit.
5. At page 6, para. 2 of the Appellant's Notice it is stated that the facts set out by the High Court "... are not contested except that we query the use of the term "evader" for the applicant in this case, who is a child." The High Court correctly noted at page 1, para. 4 of its Judgment that "Between 14th June, 2012 and 22nd July, 2014, the applicant's mother (and by necessary extension the applicant, albeit that he was not

responsible) evaded the GNIB."

Background Facts

- a) The Appellant's mother and Next Friend arrived in Ireland on the 23rd January, 2009, and gave birth to the Appellant on the [REDACTED]. The Appellant suffers from sickle cell disease. The Appellant and his Next Friend applied unsuccessfully for asylum and deportation Orders were made against them. The deportation order was made against the Appellant on the 1st July, 2011. The Appellant was refused leave to challenge the deportation order by Order of the High Court (Cross J.) on the 1st March, 2012, on the basis that there were no substantial grounds for the challenge due to a lack of evidence of exceptional circumstances which would permit the Appellant to remain in the State to avail of medical treatment. The Applicant's next friend then made a deliberate decision to refuse to comply with the laws of this State following the judgment of the High Court delivered on the 1st March, 2012, and was classified as an evader.
- b) Over two years later, having remained in the State without permission, an application to revoke the deportation order was received from the Applicant's solicitor in June, 2014, and by letter dated the 11th July 2014, the Applicant was advised that after a full consideration of the application it was refused ("the first revocation application decision").
- c) By letter dated the 2nd September 2014, the Applicant's solicitor submitted a further and more detailed medical report from Dr McMahon dated 26th August 2014, in respect of the Applicant. Almost simultaneously the Applicant instituted Judicial Review proceedings bearing Record No.: 2014/526JR on the 4th September, 2014, challenging the decision of the Respondent in respect of the first revocation application decision. Following correspondence between the parties the Respondent indicated that, as an exceptional measure, the Minister was prepared to give an undertaking not to enforce the deportation order pending the determination of a second application to revoke based on the submission of the new medical report dated the 26th August, 2014 ("the second revocation application" and requested that the judicial review be struck out with no further order. However, the Applicant insisted on proceeding with the judicial review of the first revocation application decision and the Respondent was compelled to bring an application to dismiss same on the grounds of mootness which was successful before the High Court (MacEochaidh J.) in October, 2014.

d) Thereafter, further "revocation" representations were received from the Applicant's Solicitor by letter dated the 2nd July, 2015, and same were also considered by the Respondent in the context of the second revocation application decision. The second revocation application was refused and the Applicant was notified by letter dated the 4th August, 2016. The Applicant instituted the within proceedings seeking an interim injunction and leave to apply for judicial review.

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)-

- * the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
- * it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court
- there are no exceptional circumstances warranting a direct appeal to the Supreme Court.

1. If leave to appeal is being contested, set out concisely here the respondent's reasons why:

2. In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)-

- a. the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
- b. it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court
- c. there are no exceptional circumstances warranting a direct appeal to the Supreme Court

3. It is noted that the Appellant's Application for Leave and Notice of Appeal does not comply with the requirements of the Rules, does not set out concisely the basis upon which it is contended that leave to appeal should be granted and is more in the nature of a general written submission on the issues of concern to the Appellant. Notwithstanding this, the Respondent will attempt to respond within the framework of a Respondent's Notice as prescribed by the Rules. Consequently any failure to engage with the detail of the Appellant's Notice should not be taken as a concession

of those matters.

4. The Appellant has identified at p. 6 of his Notice three sets of issues which he seeks to litigate namely (i) whether the Lumba criteria apply in the context of deportation in Irish law; (ii) whether proper regard was had to the exceptionality of the applicant's medical condition and whether adequate/rational/intra vires consideration was given to the applicant being able to access medical care in Nigeria and (iii) the role of the High Court in assessing the proportionality of the Respondent's decision.
5. The Appellant seeks leave to appeal to this Court in respect of the 5 questions in respect of which he was refused a certificate for leave to appeal to the Court of Appeal. The Appellant seeks to add two further grounds relating to exceptionality and proportionality as applied by the High Court in judicial review proceedings. The Appellant did not seek a certificate for leave to appeal to the Court of Appeal in respect of the issues of (a) exceptionality and (b) proportionality as applied by the High Court and it is difficult to see how he can now argue that the matters are of general public importance and/or it is in the interests of justice that there be an appeal to the Supreme Court and exceptional circumstances exist warranting a direct appeal in respect of those issues now when he did not seek a certificate then.
6. In order to be granted leave to appeal the Appellant has establish that there are exceptional circumstances warranting a direct appeal to the Supreme Court and either that the decision from which it is sought to appeal involves a matter of general public importance or that it is in the interests of justice that an appeal be brought. None of these criteria are satisfied in this case.
7. In the first place, the constitutional criteria are not met simply because the Appellant wishes to litigate certain issues further or wishes to challenge findings made by the High Court. The issues identified must be ones which arise out of or are involved in the decision from which it is sought to appeal and must be of general public importance. In this case the Lumba issue does not arise on the facts; the issue as to whether the Appellant can actually access appropriate medical case in Nigeria is sought to be argued on the basis of an ECtHR judgment, Paposhvili v Belgium (13 December 2016) which postdates the decision of the High Court and on a basis which was not pleaded or argued before the High Court at the leave stage (albeit the case was introduced and the pleaded case modified at the stage of the application for

a certificate of leave to appeal) and the proportionality/best interests of the child in the context of deportation arguments are ones which have already been the subject of much judicial scrutiny including by this Honourable Court and the Court of Appeal. It is proposed to look briefly at each category of issue which the Appellant advances and to explain why those issues cannot be said to be involved in the decision and/or are not of general public importance.

The Lumba Issue

8. The Lumba issue arises in circumstances where the Appellant contended that the Minister operated an informal policy or "scheme" regarding the revocation of deportation orders the details of which were not known to the Appellant or his mother and consequently he was unable to make submissions directed at the policy. In Lumba the UK Supreme Court found that the Secretary of State had operated a secret or unpublished policy in respect of the continued detention of foreign national prisoners in respect of whom a deportation order was in place (regardless of whether their removal could actually be achieved) which was contrary to the formal published policy in which there was a presumption in favour of release. In those circumstances and in the specific context of UK immigration practise (which is significantly different to that applicable here) the UK Supreme Court found that the rule of law required that there be formal policy statements as to the circumstances in which the broad statutory criteria would be operated.
9. Humphreys J found, firstly, that there were no substantial grounds for contending that the Minister was obliged to provide a full statement of the policy being applied in the making or revocation of deportation orders under section 3(11) of the Immigration Act 1999. The Judgment of the High Court reflected the case law of this Court that decisions under s. 3(1) and (11) of the Immigration Act are discretionary in nature. It is evident from the wording of s. 3(11) of the Immigration Act, 1999, that the decision on revocation must be an individual decision taken in respect of a particular applicant in all the circumstances of his or her case. It is a matter for the Minister, in the exercise of her statutory discretion, to determine whether the particular individual's circumstances oblige her to revoke a deportation order validly made. The Respondent exercises this discretion in accordance with the Constitution and the statute itself and in a manner compatible with the State's obligations under the European Convention on Human Rights. The Respondent relies on *Goncescu v. Minister for Justice* [20013] IESC 49, *P.L. and B. v. Minister for Justice* [2002] 1 ILRM 163, *AO and DL v. Minister for Justice* [2003] 1 IR 24.

Pok Sun Shun v. Ireland ILRM 593, P.O. v. the Minister for Justice [2015] IESC 64 and Sivsivadze v. Minister for Justice [2015] IESE 53.

10. The non-applicability of a Lumba-type obligation requiring the formulation and publication of a policy by reference to which the statutory power to make or revoke a deportation order would be exercised was reinforced by the decision of the Court of Appeal in Balchand v Minister for Justice [2016] IECA 383 and of the Supreme Court in P.O. v Minister for Justice [2016] IESC 543. There is no uncertainty as regards the manner in which the Minister is obliged to exercise her statutory discretion under s. 3(11) and consequently no general public interest in having the point litigated further in this case. The Lumba point sought to be argued here was already raised in P.O. and also aired in both Luximon and Balchand before the Court of Appeal and was rejected.
11. However, lest he were incorrect in this finding, Humphreys J. also made specific factual findings - most notably that there was in fact a significant degree of notice in this case - as a result of which the applicability or otherwise of the Lumba criteria is irrelevant to the position of the Appellant. Humphreys J. found that while the Minister denied the existence of any formal policy, it had been expressly stated that the Government was seeking to identify cases which might come within the scope of the recommendations made by the Working Group in its published report. The relevant recommendation was that persons who had remained in the State for 5 years post the making of a deportation order should be granted residency but this recommendation was subject to a number of exceptions including that it would not apply to persons who had taken steps to evade deportation. While the Appellant's mother claimed that she was not aware that this exception would be applied to a child evader, she was clearly on notice that evasion was a potential issue and could have made submissions thereon. The Appellant's solicitor had in fact made a submission (dated 2nd July, 2015) in which the benefit of the Working Group's recommendation was specifically sought to be extended to his client.
12. In circumstances where the contended-for policy was in the public domain (and without prejudice to the Respondent's contention that no formal policy had been adopted by the Government), no real issue arises as to the extent to which such "policy" must be published. In circumstances where the Appellant through his mother and/or solicitor had actual notice of the Working Group's recommendation the outcome of the case would not be different even if formal publication were

required. The Appellant's Counsel in the certificate application acknowledged the difficulty he faced because the question of law posed would not be determinative of the outcome of the case. Consequently there is no public interest in permitting this appeal to determine the extent to which formal publication is required.

Best Interests of the Child

13. It is noted that although the "best interests of the child" was the subject of one of the questions on which a certificate of leave to appeal was sought from the High Court and consequently is also the subject of this application for leave to appeal to this Court, no specific arguments are advanced as to how the constitutional criteria are met as regards this issue.
14. The very limited and specific basis on which this issue was raised in the High Court, and which is reflected in the reference to "policy" in the question on which leave is sought, should also be noted. The Appellant argued in the High Court that the best interests of the child as referred to in the Report of the Working Group had to be a primary consideration. However, the High Court in its Judgment dated 14th November, 2016, held that the Working Group Report had no binding legal status and had not been adopted as binding government policy. In refusing a certificate for leave to appeal (judgment of 9th May, 2017) Humphreys J, stated that the proposed question in respect of the best interests of the child was predicated on the false premise that the McMahon report was equal to a ministerial policy which was not the case and as such the factual premise of the question did not exist and the question was not a point of law arising from the decision. In circumstances where the issue is raised on a limited and specific basis which appears to be misconceived, there can be no general public importance in having it determined in this case.
15. In any event, the High Court correctly relied on the decisions of the Court of Appeal in *C.I. v. Minister for Justice* [2015] IECA 192 and *Dos Santos v. Minister for Justice* [2015] 2 ILRM 483, noting that having regard to those decisions the question of the best interests of the child had limited relevance to substantive immigration decision making by the Minister.
16. Thus there is no uncertainty in the law. The Appellant child in this case never had a permission to remain in the State other than to pursue his protection application. The "best interests" principle does not undermine the fundamental right of the State to regulate the entry and stay of non-nationals and this approach is in line with the

Article 8 case law of the European court of Human Rights. In *P.O. v. Minister for Justice* [2015] IESC 64, this Court accepted the principle in *Butt* that the status of children would generally be identified with the conduct of their parents, so as to avoid exploitation by the parents of the situation of their own children. The decision in this case related to an application to revoke the Appellant child's deportation order. As such the entire examination of the file by the Minister was focused on the Appellant child and his interests were fully considered therein.

Adequacy of Consideration of Accessibility of Medical Treatment

17. The claim originally made by the Appellant under this heading was "effectively an ordinary administrative law point", as set out in the Applicant's written submissions dated 25th October, 2016, on the leave application. It was dismissed on the basis that he had not met the high threshold of "exceptional circumstances" required to find that the expulsion of a person to a territory with inferior medical treatment would be contrary to the ECHR. In the Appellant's Notice it is accepted at p. 17 that "there was some reprogramming of the applicant's argument in the light of *Paposhvili*". This Judgment was issued by the ECtHR on the 13th December, 2016 after the determination of the leave application by the High Court.
18. *Paposhvili* entailed a clarification by the ECtHR of the approach adopted in its earlier jurisprudence in *D v UK* and *N v UK*. All of this jurisprudence establishes that in certain very exceptional cases there may be a breach of Article 3 in the removal of a seriously ill person in which substantial grounds are shown that he would face a real risk "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 ECtHR noted the high threshold for the applicability of Article 3 in the circumstances. Further, at para. 186 of its Judgment the ECtHR noted that it was for the applicants to adduce evidence capable of demonstrating that the substantial grounds existed and if evidence of a real risk was adduced then the returning State authorities should dispel any doubts raised by looking at whether sufficient and appropriate care was available in the country of origin and whether same could be accessed.
19. There was no case made by the Appellant to the Minister that he might be subjected to inhuman or degrading treatment on account of his medical condition if returned to Nigeria and Article 3 of the European Convention on Human Rights was simply

never mentioned in this submissions to the Minister. Whilst it was contended on the Appellant's behalf that his health would deteriorate rapidly if returned to Nigeria as the medical opportunities open to him would be significantly less than those available to him in this jurisdiction, no case was made to the Minister in reliance upon Article 3. The Appellant did not establish that his deportation would *prima facie* amount to torture or inhuman or degrading treatment. The Appellant did not make the case that he would be unable to access medical care but rather that the standard of care would not be as good.

20. The Minister fully considered the Appellant's current medical condition including the report of Dr. McMahon as well as all of the country of origin information in respect of the treatment of sickle cell disease including, *inter alia*, the availability of blood transfusions and concluded that treatment was available in Nigeria.
21. The High Court noted at p. 5, para. 14 of its Judgment in respect of the certificate [2017] IEHC 276, that the point that inadequate consideration of the practicability to access to medical care in Nigeria had been made only as a general administrative law point and not as an aspect of article 3 of the ECHR. The High Court in that Judgment stated that "The point that inadequate consideration of the practicability to access to medical care in Nigeria was made only as a general administrative law point (p. 4 of submissions), not as an aspect of art. 3 of the ECHR. Thus, the point now being made was not argued. Even if it had been argued, the applicant would not get over the hurdle of showing substantial grounds to contend that art. 3 would be infringed by the deportation or that a point of law of any substance is involved."
22. The High Court in its leave Judgment examined the decision of the Minister in light of the jurisprudence of the ECtHR noting that it was clear that "exceptional circumstances" were required. This remains the threshold post-clarification of the law in *Paposhvili*. The High Court noted in its Judgment that the report of Dr. McMahon dated 26th August, 2014, stated that the applicant's condition is really quite severe and that he needed more than basic care but that the report does not demonstrate substantial grounds for contending that the high threshold had been met on the facts of this case.
23. The question of whether the Appellant's medical condition is exceptional and whether he can access medical care in Nigeria is largely a factual one linked to the Appellant's personal circumstance and thus not a matter of general public

importance. The legal argument has been run on a basis (potential breach of Article 3) which had never been put forward in the submissions made to the Minister.

Proportionality and role of High Court

24. At para.D.iii of the Statement of Grounds one of the reliefs sought by the Applicant is "A declaration by way of application for judicial review that the Court is obliged to reassess and remake the decision on the basis of its own assessment of the proportionality involved."
25. The Appellant contends that there is a divergence in the jurisprudence of the High Court in respect to application of the decision of this Court in *Meadows v. Minister for Justice* [2010] 2 IR 701, relying upon a recently published academic article by Darragh Coffey, *Standards of scrutiny in Judicial Review of deportation decision involving Article 3 of the ECHR*, (57 Ir. Jurist 2017) to support same. In this regard the High Court noted in its Judgment refusing the stay/injunction application, delivered on the 26th June, 2017, [2017] IEHC 409, that the article only compared two cases, *PBN v. Minister for Justice* [2016] IEHC 316 and *XX v. Minister for Justice* [2016] IEHC 377 and noted further that in fact both judgments had regard to *Meadows* which rejected the concept of anxious or heightened scrutiny. The High Court at para. 42 did not accept that there was a conflict and noted that even if *arguendo* there was such it was evident as of the date of *XX* and did not arise simply because an article was subsequently written. This issue was not raised at all in the certificate application.
26. It is submitted that the correct approach to the scrutiny of decisions involving fundamental rights was set out by this Court in the *Meadows* case and as such there is no uncertainty in the law in respect of this issue. It is well established that judicial review guarantees an applicant an effective remedy. In *PM (Botswana)* [2012] IEHC 234, the High Court (Hogan J.) dealing with an application for a certificate for leave to appeal referred to the Court of Justice decision in *Diouf* and also to cases such as *ISO v. Minister for Justice* [2010] IEHC 457 and *Efe v. Minister for Justice* [2011] IEHC 214, which held that judicial review provides an effective remedy for the purposes of Article 39 of the Procedures Directive. The High Court stated further "It is equally clear from decision such as *Meadows* that the adequacy of the reasons for any such administrative decision can be scrutinized and examined in judicial review proceedings." The Court held that the law was clear beyond argument and that it would not be in the public interest to refer the point to the Supreme Court.

27. In *N.M. (DRC) v. Minister for Justice* [2016] IECA 217 the Court of Appeal reviewed the case law in considering whether judicial review provided an effective remedy for the purposes of Article 39, and then considered contemporary judicial review as an effective remedy. The seminal Supreme Court Judgment in *Meadows* was considered. At para. 49 it was noted that the current (i.e. post-*Meadows*) law was summed up in *ISOF* where the High Court (Cooke J.) held that a certificate of leave to appeal to the Supreme Court to clarify aspects of *Meadows* was unnecessary as the law had been settled with sufficient clarity by the *Meadows* decision.
28. In *ISOF* the High Court (Cooke J.) noted, applying *Meadows*, that judicial practice in the exercise of the judicial review function was capable of adapting to accommodate the need to examine the substantive content of a decision having impact on fundamental rights in order to evaluate the lawfulness of its encroachment on those rights without thereby supplanting the administrative decision with a new decision of its own.
29. In all the circumstances there is no issue of law / matter of general public importance and/or it is not in the interests of justice that there be an appeal to the Supreme Court. Further there are no exceptional circumstances warranting a direct appeal to the Supreme Court. The Appellant did not seek a certificate for leave to appeal to the Court of Appeal in respect of the issue of proportionality as applied by the High Court and it is difficult to see how he can now argue that the matter is of general public importance and/or it is in the interests of justice that there be an appeal to the Supreme Court and exceptional circumstances exist warranting a direct appeal in respect of the issue now when he did not seek a certificate then.
30. The above analysis is primarily directed at establishing that there is no matter of general public importance arising out of the decision of the High Court which warrants an appeal to this Court. Equally, the interests of justice do not require that the issues between the parties be further litigated before this Court. In this regard it is worth bearing in mind that this Appellant has already instituted three sets of judicial review proceedings, been the subject of four written judgments of the High Court and made two applications for the revocation of the deportation order to which he is subject. Needless to say he has been unsuccessful in each of these applications. While appreciating the natural instinct to keep litigating so long as the very existence of the litigation enables the Appellant to remain in the jurisdiction

without any lawful basis for his presence here and in defiance of the deportation order to which he is subject, it cannot be in the interests of justice that any individual, even a child, be permitted to litigate endlessly in this manner. The interests of justice require that the position of the Respondent also be taken into account and it is inimical that the Respondent should be required to meet and defend a seemingly endless series of cases concerning the one individual's presence in the State. It is also contrary to public policy that an individual be permitted to litigate without apparent end in a manner which precludes the operation of the State's immigration laws.

31. Finally, it is an over-arching requirement that the Appellant establish that there are exceptional circumstances warranting a direct appeal to this Court. The Respondent acknowledges that as a result of the statutory scheme under section 5 of the Illegal Immigrants (Trafficking) Act 2000 which precludes an appeal to the Court of Appeal without a certificate of leave to appeal being granted by the High Court, an individual may be able to establish that the refusal of a certificate gives rise to exceptional circumstances. However it is submitted that refusal of a certificate cannot of itself and in all cases be regarded as establishing that exceptional circumstances exist. The Oireachtas in establishing a statutory scheme for judicial review under the 2000 Act clearly intended that in normal course an immigration decision would not be readily appealable. While the constitutional architecture clearly allows for such an appeal even where a certificate has been refused, such cases must be truly exceptional. The Appellant here relies on his personal circumstances and the claim of damage to his health to assert exceptionality. However it is those very same individualised factors which prevent the appeal which he seeks to advance from being one which raises matters of general public importance.

32. 5. Respondent's reasons for opposing appeal if leave to appeal is granted.

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

- i. The Respondent relies upon the points made above in Section 4 in opposing the grounds of appeal set out in the Appellant's notice of appeal (s. 6) in the event that leave is granted. In those circumstances it is unnecessary to repeat them in full here however, the main points are reiterated below.
- ii. There is no obligation under Irish law that a decision maker publish a statement of policy as to how or the circumstances in which a statutory power will be exercised and no such obligation exists in respect of decisions under section 3(11) of the Immigration Act 1999.
- iii. It is clear from the express wording of the Examination of the Appellant's file Decision that there was no policy that any person who had been in the State for five years or more would, in effect, automatically or systematically be granted residency regardless of the circumstances as alleged by the Appellant. The Working Group had made a Recommendation and the Minister was considering cases to which that recommendation might apply but without having adopted the said recommendation nor guaranteeing that it would be implemented in any particular case.
- iv. Without prejudice to the foregoing, the Appellant asked the Minister to apply one part of the Recommendations of the Working Group in isolation. The Appellant was aware of and thus on notice of the all of the contents of the Report. The Minister referred to same noting that the Recommendations were not Government policy and that even if applied the Appellant did not meet the criteria.
- v. Further without prejudice to the foregoing, insofar as the Minister's response to the recommendation(s) of the Working Group can be considered a policy (which is denied), the said recommendation was published and the Appellant through his mother and/or his solicitor had actual notice and knowledge thereof.
- vi. The Judgment of the High Court reflected the case law of this Court that decisions under s. 3(1) and (11) of the Immigration Act are discretionary in nature. It is evident from the wording of s. 3(11) of the Immigration Act, 1999, that the decision on revocation must be an individual decision taken in respect of a particular applicant in all the circumstances of his or her case. That is what was done in this case.
- vii. There was no case made by the Appellant to the Minister that he might be subjected to

inhuman or degrading treatment on account of his medical condition if returned to Nigeria. Article 3 of the European Convention on Human Rights was simply never mentioned in the Appellant's solicitor's letter of the 2nd July, 2015. At p. 2 of the said letter dated 2nd July, 2015, it was stated that the Appellant's health would deteriorate rapidly if returned to Nigeria as the medical opportunities open to him will be significantly less than those available to him in this jurisdiction. It was also submitted that the educational opportunities available to him would be significantly less. No case was made to the Minister in reliance upon Article 3 of the European Convention on Human Rights. The Appellant did not establish that his deportation would prima facie amount to torture or inhuman or degrading treatment. The Appellant did not make the case that he would be unable to access medical care but rather that the standard of care would not be as good.

- viii. Without prejudice to the foregoing, it is submitted that the facts relied upon in the report of Dr. McMahon do not meet the high threshold required as set out in the caselaw. The Minister considered the medical material in the case and country of origin information. The Minister considered the information contained in the medical reports which had been submitted and country of origin information. The Minister considered all of the country of origin information in respect of the treatment of sickle cell disease including, *inter alia*, the availability of blood transfusions and concluded that treatment was available in Nigeria.
- ix. The High Court correctly applied *Dos Santos and C.I.*
- x. Judicial Review provides an effective remedy, *Meadows v. Minister for Justice and ISOF, PM (Botswana)* and *NM (DRC)*.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

Nuala Butler S.C.

Fiona O'Sullivan B.L.

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

N/A

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

☐

Yes

☒

No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

☐

Yes

☒

No

If Yes, please give details below:

Will you request a priority hearing?

☐

Yes

☒

No

If Yes, please give reasons below:

Signed: Maura Dineen, Cluif Solicitors
(Solicitor for) the respondent

Please submit your completed form to:

The Office of the Registrar to the Supreme Court

The Four Courts

Inns Quay

Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.