THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1066 J.R.]

BETWEEN

LELA SIVSIVADZE, SOFIA ARABULI (A MINOR SUING BY HER MOTHER AND NEXT FRIEND LELA SIVSIVADZE), MARIAM TOIDZE (A MINOR SUING BY HER MOTHER AND NEXT FRIEND LELA SIVSIVADZE), DAVIT ARABULI

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Kearns P. dated the 21st day of June, 2012

By order of the High Court (Hogan J.) dated 26th April, 2012, the applicants were granted leave to apply for judicial review. The primary reliefs sought by the applicants include the following:-

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

By way of ancillary relief, the applicants also seek a declaration that the deportation of the fourth applicant on the 4th November, 2011 was a disproportionate interference with the rights of the applicants under the Constitution and the ECHR; an order of *certiorari* quashing the decision of the first respondent to affirm the said deportation order; a declaration that the deportation order is *ultra vires* and void, and an order compelling the first respondent to revoke the deportation orders against the fourth applicant. The applicants seek these reliefs on the following principal grounds:

> (i) The indefinite, potentially lifelong, duration of expulsion provided under s. 3 of the 1999 Act is disproportionate;
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> (ii) The legislature has failed to establish any principles and policies regarding the exercise of the power to revoke under s. 3(11) of the 1999 Act.

FACTUAL BACKGROUND

The fourth named applicant is a Georgian national who was born in either 1974 or 1977 (he has furnished different dates). He entered the State and applied for asylum in January 2001 under the name of Datia Toidze. One week later, on the 15th January 2001, he applied for asylum once more this time using the name of Dato Arabuli. He subsequently withdrew this latter application however, and stated that he wished to be known as Datia Toidze. He did not attend his scheduled interviews with the Refugee Applications Commissioner and his application for asylum was therefore refused. The Minister gave notice of his intention to deport the fourth applicant on 30th August, 2001. The fourth applicant made no submission in response to this notice and on 5th December 2001, a deportation order issued in respect of the fourth applicant. He was instructed to report to the Garda National Immigration Bureau (GNIB) on the 14th December, 2001 but failed to do so and was thereafter classified as an evader.

It subsequently transpired that the fourth applicant had travelled to Iceland in 2002 on a forged Spanish passport in the name of Pinto Jose and applied for asylum in that jurisdiction under yet another identity. He was transferred to Ireland under the terms of the Dublin Convention on 25th April, 2003. He was required to present thereafter at regular intervals to GNIB. Immigration officers from the Georgian Embassy in London visited the fourth applicant on three occasions in an attempt to verify his identity. However, the fourth applicant did not co-operate and these attempts proved unsuccessful such that a travel document could not be issued in order to facilitate his deportation. The fourth applicant therefore, remained in the State until November 2011.

The first named applicant is also a Georgian national. She was born in October, 1986, and lived with her mother in Tbilisi in Georgia until her mother's death in December 2000, following which she contends she was subjected to assaults, including sexual assaults, by her stepfather, which drove her to flee the country in 2003. Her claim for refugee status on the basis of a well-founded fear of persecution under the Refugee Act 1996 was rejected by the Refugee Appeals Commissioner in June 2004. That decision was upheld on appeal to the Refugee Appeals Tribunal where she clarified in evidence that she did not fear anyone in Georgia other than her stepfather. She was, however, granted humanitarian leave to remain in the State on a temporary basis and in May 2011 this leave was extended until 2014. In this context she undertook to accept that the renewal of her permission to remain did not confer any entitlement on any other person to remain in the State.

She met the fourth applicant in Ireland after his return from Iceland in 2003. They had two daughters together, neither of whom is an Irish citizen. The eldest daughter, the third applicant, was born in April 2005, and the fourth applicant was registered as her father

under the false identity of Datia Toidze. It seems that his wife was aware of the use of the false identity given that her signature was on the birth certificate. Another daughter, the second applicant, was born in August 2009; this time the father's name was recorded as Davit Arabuli. The first and fourth applicants married in July 2009. It seems that in order to facilitate this marriage, unbeknownst to GNIB, the fourth applicant obtained a Georgian passport in March 2009, in the name of Davit Arabuli.

In October 2008, the fourth applicant applied to the Minister to revoke his deportation order pursuant to s. 3(11) of the 1999 Act. This application was unsuccessful and the order was affirmed on the 17th June, 2009. He made a second application to revoke on 27th July, 2010. This application enclosed a copy of his marriage certificate, in which he was referred to as Mr. Arabuli; his children's birth certificates and a letter from his wife to the Minister requesting that her husband, whom she referred to as Mr. Toidze, should be allowed to stay in the State. This letter, in addition to the eldest child's birth certificate, makes it clear that the first applicant knowingly participated in the deception practised by her husband.

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

The fourth applicant filed a third application to revoke pursuant to s.3(11) on the 25th October, 2011 which was refused on 3rd November, 2011. He then sought an injunction restraining his deportation. This was also refused and, on 4th November 2011, the fourth applicant was deported to Georgia. On 26th April 2012, in a detailed judgment, the applicants obtained leave to bring this substantive application ([2012] IEHC 137).

RELEVANT LAW

Article 41.1 of the Constitution provides as follows:-

"1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2 ° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

Article 41.3.1 provides:

"1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."

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

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

Section 3(11) provides:-

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

Article 8, European Convention on Human Rights states:-

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

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

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

Section 5 of the European Convention on Human Rights Act 2003 provides:

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

SUBMISSIONS OF THE APPLICANTS

The applicants acknowledge the inherent power of the State to expel or deport non-nationals. However, it is submitted that the requirement in section 3(1) that the addressee must leave the State and "remain thereafter out of the State" has the effect that the subject of the order must endure an indefinite, potentially lifelong, exclusion from the State. The applicants submit that the effect of this provision is that the legislature has restricted the power of the Executive, leaving no discretion to exclude a deportee from the State for a lesser period of time.

It is accepted that the right to family life is not absolute and may be curtailed in order to protect the integrity of the immigration and asylum systems. However, it is submitted that any such interference must comply with the principle of proportionality. In the facts of the instant case, it is submitted that a ban of indefinite duration does not impair the right to family life in the most minimal manner and therefore, it is not proportionate to the objective pursued. Although the applicants acknowledge that the deportation of the fourth applicant may not be disproportionate having regard to his immigration history and the State's legitimate interest in maintaining immigration control, it is submitted that the indefinite duration of the ban constitutes a disproportionate sanction. The applicants claim that in order to strike a fair balance between the respective interests of the State and the applicants, the governing legislation must authorise the Minister to impose a ban of limited duration; the 1999 Act fails to confer the Minister with the authority to impose such a ban such that it is repugnant to the provisions of Article 41 of the Constitution.

The applicants submit that the right to family life is a fundamental right which the Constitution guarantees to protect, even in circumstances where all members of the family are not nationals of this State *(Illegal Immigrants (Trafficking) Bill*, 1999 [2000] 2 I.R. 360 at p382). The applicants submit that the mandatory ban of indefinite duration contained in s.3(1) of the 1999 Act violates the constitutional protection of family life.

In the circumstances of the instant case, it is submitted that the deportation of the fourth applicant has interfered with the applicants' right to family life. It is submitted that the potentially lifelong effect of s.3(1) deprives the first applicant of contact with her husband and deprives the second and third applicants of any real contact with their father, amounting to an attack on the institution of marriage.

The applicants argue that the power to revoke pursuant to s.3(11) is a residual power that is not intended to alter the effect of section 3(1). In addition, it is submitted that the existence of the power to revoke a deportation order at a future date cannot, and does not, alter the effect of the order once it is made, *i.e.*, that the deportee must leave the State within such period as may be specified and remain thereafter out of the State. It is submitted that the possibility that the Minister may revoke the deportation order is currently, purely speculative.

In the alternative, the applicants submit that if the Oireachtas intended s.3(11) to modify the duration of the deportation orders, the issue that then arises is whether this represents an impermissible and invalid delegation of law-making power to the Minister. In this regard, the applicants submit that when the legislature enacted s.3(11) it failed to establish any principles and policies as to the circumstances in which the power to revoke deportation orders is to be exercised and therefore, it has transferred its legislative role to the Minister.

By reference to the European Convention on Human Rights it is submitted first that deportation of a non-national may amount to an interference with the right to respect for private and family rights under Article 8 of the European Convention on Human Rights (*Dalia v. France* [1998] ECHR 5). In this regard, the applicants accept that there is a distinction made between the expulsion of non-nationals with the right of residence in a contracting state and the expulsion of those who never enjoyed such a right. In the case of the former, expulsion constitutes an interference with the rights of the non-national. However, the applicants submit that the expulsion of a non-national who does not have a right of residence requires examination of whether the contracting state is under a duty to allow the individual to reside in the host state, thus enabling him/her to maintain and develop family life in its territory.

It is submitted that the European Court of Human Rights (ECtHR) has held that the expulsion of a non-national, who is not a settled migrant, from the territory of a contracting state in which his/her minor child resides may offend Article 8 of the ECHR (*Nunez v. Norway* [2011] ECHR 1047). The applicants submit that the proportionality of the expulsion must be assessed with reference to its effects upon the family unit as a whole (*Sezen v. The Netherlands* (2006) 43 EHRR 30).

The applicants submit that there are two elements to the obligation of the contracting State: it must have regard to the extent to which family life would be ruptured by the deportation of the individual family member and it must also assess whether there are insurmountable obstacles to the family relocating as a unit to the country of origin of the deportee. In conducting the proportionality analysis, the applicants submit the ECtHR also takes account of Article 3, UN Convention on the Rights of the Child whereby the best interest of the child is a primary consideration.

In the context of these proceedings, the applicants submit that in assessing proportionality, the ECtHR also has regard to the duration of the non-national's expulsion from the State. It is submitted that the ECtHR has made clear that, although deportation may be permissible, an unlimited exclusion from the State can be disproportionate (*Ezzouhdi v. France* [2001] ECHR 85, *Yilmaz v. Germany* [2003] ECHR 187). On the other hand, the European Court has had regard to the temporary nature of expulsion orders when upholding the proportionality of the measure (*Benhebba v. France* [2003] ECHR 342, *Uner v. The Netherlands* [2006] ECHR 873).

The applicants place particular reliance on the cases of *Emre (No.1) v. Switzerland* (Application No. 42034/04, 22nd August, 2008) and *Emre (No.2) v. Switzerland* (Application No. 5056/10, 11th October, 2011) which concern a Turkish national who had lived in Switzerland since the age of six but had been expelled indefinitely following a number of convictions for serious criminal offences. He had returned illegally to Switzerland where he was convicted of further criminal offences before being removed again in 2005. In the first of these cases, the ECtHR held that in order to assess the proportionality of the measure, "the Court must take into account the provisional or definitive nature of the pronounced territorial ban." It regarded the indefinite nature of the expulsion as "particularly strict" and the possibility under Swiss law of requesting a temporary or definitive lifting of the expulsion as "currently purely speculative." In response to the judgment of the ECtHR, the Federal Supreme Court in Switzerland reduced the expulsion from an indefinite period to a ten-year ban. The applicant made a further complaint to the ECtHR claiming that this violated his right to private life. In *Emre (No. 2)* the Court found that the reduction in the length of the ban did not execute its prior decision and the Federal Court had failed to consider whether the period of time was significant and disproportionate with regard to the offences committed.

SUBMISSIONS OF THE RESPONDENTS

The respondents claim that there is a valid and unchallenged deportation order in this case since 2001 and that by impugning s.3(1) of the 1999 Act, these proceedings, in effect, amount to an attempt to launch a collateral attack on the validity of that order. In this regard, the respondents point out that the Minister carried out extensive and fact specific reviews of the deportation order on three separate occasions following the applications to revoke made on behalf of the fourth applicant.

The respondents addressed the constitutional challenge to s.3 of the 1999 Act, arguing that the provision enjoys the presumption of constitutionality (*Re Haughey* [1971] 1 I.R. 217 and *East Donegal Co Operative v. Attorney General* [1970] 1 I.R. 317). The respondents point out that the terms of the provision are similar to those of Regulation 13 of the Aliens Order 1946 which provided that, "the Minister may, if he deems it to be conducive to the public good so to do make an order (in this Order referred to as a deportation order) requiring an alien to leave and to remain thereafter out of the State." The constitutionality of this latter regulation was examined and upheld in a number of judgments of the High Court, including *Pok Sun Shun v. Ireland* [1986] 1 ILRM 593 and

Osheku v. Ireland [1987] ILRM 330. It is submitted that these cases were endorsed by the Supreme Court in the context of a consideration of the statutory framework under the Immigration Act, 1999 in *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1. It is submitted that the Supreme Court was aware of the indefinite nature of the duration of a deportation order in this latter case and expressed no unease with regard to its compatibility with the Constitution.

The respondents argue that the fourth applicant is seeking to vindicate constitutional rights in respect of a period during which he had no legal entitlement to reside in the State. In this regard, the fourth applicant could have left the State voluntarily in 2001 in accordance with the law with the result that he would not have been the subject of a deportation order or a territorial ban.

It is submitted that the provisions of s.3(1) of the 1999 Act must be read in the context of the entire scheme of the Act and, in particular, in the light of s.3(11) of the 1999 Act. It is submitted that these two subsections cannot be artificially isolated from each other as they constitute an integral part of the immigration procedure operated by the Minister. The respondents relied on the decision of Cooke J. in *Afolabi v. Minister for Justice* (Unreported, High Court, Cooke J., 17th May, 2012), in which he rejected an application to amend proceedings to include a challenge to the alleged lifelong nature of the deportation order as he was of the opinion that the proportionality or otherwise of a continuing exclusion could be addressed in an application to revoke the deportation order.

The respondents rejected the applicants' submission that s.3(11) is repugnant to the Constitution for failing to establish principles and policies as to the circumstances in which the power to revoke should be exercised. It is submitted that the exercise of discretion pursuant to s.3(11) does not constitute a 'policy' decision. It involves the exercise of a wide margin of appreciation when examining the facts of an individual case and the Oireachtas was entitled to leave this discretion to the Minister (*Baby O v. Minister for Justice* [2002] 2 I.R. 169). It is submitted that the section must be understood within the entire scheme of the 1999 Act and the fact that the Minister must determine every application on its merits and must act, *inter alia,* in accordance with natural and constitutional justice and the State's international obligations.

Finally, it is submitted that constitutional rights are not absolute and that the Minister had regard to the legitimate aim of maintaining the integrity of the asylum and immigration process *(Fajujonu v. Minister for Justice* [1990] 1 I.R. 151 and *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1).

The respondents deny that section 3(1) of the 1999 Act is incompatible with the ECHR. In this regard, it is submitted that the ECtHR has never held that an exclusion order of indefinite duration is automatically in violation of this Article. Instead, the respondents argue that the determination of whether there has been a violation of Article 8 is dependent on the facts of each particular case. In that regard, it is argued that the jurisprudence of the ECtHR places a significant emphasis on whether the non-national was a settled migrant in the host state and that, significantly, the duration of the exclusion is only one of a number of extensive factors examined when considering whether exclusion is proportionate for the purposes of Article 8.

The respondent submits that the ECtHR has previously upheld permanent exclusion orders in *Dalia v. France* [1998] ECHR 5 and *Kaya v. Germany* [2007] ECHR 538. The respondents also acknowledge however, that in other cases permanent exclusion orders have been found to be disproportionate and in violation of Article 8 (*Yilmaz v. Germany* [2003] ECHR 187). It is thus argued that the Court must have regard to a number of other factors other than duration in order to determine whether there has been a violation of Article 8, including, *inter alia* the status of the family members and, in particular, the applicant, the duration of any lawful residence in the host state, the nationality of the family members and their ties to both the host country and the country of origin, the nature of any breaches of immigration law and to determine further whether there are insurmountable obstacles to the family unit relocating in the country of origin.

It is argued that the duration of the exclusion order is not a conclusive or determinative factor which takes precedence over any of these other considerations in an individual case. Thus, in *Antwi v. Norway* [2012] ECHR 259, the ECtHR held that "the public interest in favour of ordering the applicant's expulsion weighed heavily in the balance when assessing the proportionality under Article 8" and that its considerations were "not altered by the duration of the prohibition on re-entry for five years." In the circumstances, the respondents submit that the Minister considered fully the circumstances of the applicants and determined that the deportation of the fourth applicant was a proportionate measure.

THE CONSTITUTIONAL ARGUMENT

Both sides are agreed that, by virtue of the requirement contained in s.5 of the European Convention on Human Rights Act 2003 that a declaration of incompatibility with the Convention may only be made "where no other legal remedy is adequate and available", the case on the constitutional arguments should first be decided. Obviously if the applicants' case in that regard is successful, no need arises to consider the case by reference to Article 8 of the Convention.

The constitutional question is best approached from the standpoint of first principles, applying the three pronged test of proportionality propounded by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593 at 607:

> "In considering whether a restriction on the exercise of rights 1s permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (see, for example, *Times Newspapers Ltd v. United Kingdom* (1979 2 EHRR 245) and has recently been formulated by the Supreme Court of Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:
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> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
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> (b) impair the right as little as possible, and
>
> (c) be such that their effects on rights are proportional to the objective."

Applying those principles in the context of the present case, the Court must first consider if the legislation providing for the deportation of persons found to have engaged in an abuse of the immigration laws through deception is rationally connected with important state interests (controlling immigration flows and upholding the integrity of the asylum system) and not simply based on arbitrary, unfair or irrational considerations. Second, subject to the application of the third test, while the deportation of the fourth applicant may have impaired the Article 41 rights of the other family members by, *e.g.*, effectively depriving the children of their right

to the care and company of their father, the Court must consider whether those rights were impaired as little as possible on the basis that it is simply not possible to have effective control of immigration without the sanction of deportation. Third, the Court must consider whether the effect "on rights is proportional to the objective" in that the deportation order is not time specific in duration.

I am satisfied that, far from conducting some sort of roving or theoretical inquiry into the general constitutional state of health of s.3 of the Act, the function of this Court is to evaluate the constitutional arguments by reference to and in the context of the specific facts of this individual case. That is not to ignore the fact that a declaration of unconstitutionality would not only affect the present case but would have implications for all deportation orders made to date by the Minister in reliance on this particular section.

Any consideration of the constitutional issue must begin with an acknowledgement that the legislation in question enjoys a presumption of constitutionality. That presumption is not lightly to be displaced where the legislation, as in this case, concerns a core aspect of State functions. I would therefore add that this case requires something more than a *pro forma* acknowledgement that sovereign states are entitled to establish and uphold an immigration regime. The control of immigration is a fundamental aspect of state sovereignty and a function which, if exercised loosely or haphazardly, is capable of engineering, or at least facilitating, social disorder and unrest of a serious and dangerous kind. This danger is exacerbated in times of economic and financial crisis which, as recent events in Greece have demonstrated, provoke xenophobic attitudes towards immigrants and foster the growth of political parties who espouse such views. The operation of an ordered and well-balanced immigration regime which can be seen to operate fairly is thus critically important in modern European States. As long ago as 1987, Gannon J. pointed out in *Osheku v. Ireland* [1987] ILRM 330:-

> "The control of aliens which is the purpose of the Aliens Act 1935 is an aspect of the common good related to the definition, recognition, and the protection of the boundaries of the State. That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter."

To that I would add only that the proper protection of immigrants in turn demands the sensible application of laws and not one which fosters or exacerbates feelings of resentment and hostility to immigrants from citizens of the State.

In *A.O and D.L. v. The Minister for Justice Equality and Law Reform* [2003] 1 I.R. 1, Keane C.J. alluded to deportation, without expressing reservations as to its duration, as part of that regime, stating in the context of s.3(1) of the 1999 Act that:

> "...every citizen, including the minor applicants in the present case, enjoys in general terms the right not to be expelled from the State. It would seem, however, that like so many other rights acknowledged or conferred by the Constitution, this is not an absolute right ..."

He continued at p.19 "what is in dispute is whether they have a constitutional right to that care and company in the State in circumstances where their parents have no legal right to remain in the State and can lawfully be expelled from the State. (Emphasis added)

> At page 24 he stated:
>
> "The inherent power of Ireland as a sovereign State to expel or deport non-nationals (formerly described in our statute law as "aliens") is beyond argument . . . However, while the power to expel or deport non-nationals inheres in the State as a sovereign state, and not because it has been conferred on particular organs of the State by statute, it has, almost from the foundation of the State, been regulated by statute."

Thus it may be seen that the most senior court in this jurisdiction has always understood the words "remain thereafter outside the State" as meaning expulsion and as such not objectionable or inconsistent with the provisions of the Constitution.

In her judgment in the same case, Denham J. (at p.62) similarly referred to the State's right to deport without expressing reservations as to the duration of such an order, stating:

> "If the respondent is satisfied for good and sufficient reason that the common good requires that the residence of the parents within the State should be terminated, even though that has the necessary consequence that in order to remain a family unit the child who is an Irish citizen must also leave the State, then that is an order he is entitled to make"

Similar statements appear at p. 54 of the judgment of Denham J. when she considers the "kernel" of the decision in *Fajujonu v. Minister for Justice* [1990] 2 I.R. 151

Similarly in *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795, Denham J. set out a list of factors which the Minister should consider when making a decision to make a deportation order. That list included item 13, a requirement that the making of a deportation order be proportionate and a necessary measure "for the purpose of achieving the common good".

Quite clearly, the Supreme Court understood a deportation order to be of indefinite duration and there is no hint or indication in the course of an enumeration of the relevant factors which the Minister had to consider before making a deportation order that its indefinite nature was a factor or cause for concern.

For various reasons this is a case ill-suited for a constitutional challenge by the fourth-named applicant. The fourth applicant was never lawfully in this State. Neither the fourth applicant nor indeed any of the other applicants is an Irish citizen. The fourth applicant was in fact deported to Georgia on the 4th November 2011. Throughout the entirety of his unlawful stay in this jurisdiction he has displayed both an egregious lack of candour and *mala fides*, only finally admitting to his true identity during cross examination during the Article 40 hearing before the Irish High Court in October 2011.

He never challenged the propriety or constitutionality of the deportation order made in this case as far back as December, 2001. He was then unmarried and had not even met the first applicant. There were no family rights of his at stake at the time of making the order and the delay in effecting deportation thereafter was entirely due to the fourth applicant's subterfuge and fraud in which, as appears below, the first applicant was also complicit. Their subsequent marriage was one entered into when both the first and fourth named applicants were fully aware of the precarious circumstances affecting the fourth applicant.

Far from presenting as required to a garda station following the making of the order, he became an evader, living under a false name. He travelled to Iceland using a forged Spanish passport in the name of Pinto Jose and lodged an application for asylum there in 2002 using the name Agamedov Ahi. When he was returned to Ireland in April 2003 under the Dublin Convention, he signed on in the name of Datia Toidze after this time. Georgian Embassy officials visited Dublin on various occasions between 2004 and 2009 but, despite interviewing the applicant repeatedly, were unable to verify or establish his identity because of the applicant's lack of co-operation. There was thus a perfectly sound basis for the view expressed by the Minister when, in refusing the third revocation application, he stated that the fourth applicant "evaded his deportation, used false identities and refused to remove himself from the State as required by the Deportation Order. As a result of his flagrant abuse of the asylum and immigration system his Deportation Order should be affirmed".

The ensuing delay in effecting deportation was entirely the fault of the fourth applicant and I cannot see how delay brought about by his own wrongdoing and breach of immigration laws can be invoked in aid of his constitutional challenge to section 3(1). There are extensive dicta from the courts of this jurisdiction that fraud and abuse of the immigration and asylum process will not be tolerated.

In *D. (O.S.) (Infant) & Ors. v. The Minster for Justice and Equality* [2010] IEHC 390 Clark J. had regard to the following disentitling facts in the context of an injunction application:-

> "Mr. D. entered this country illegally and has misrepresented the truth of his circumstances since his arrival in Ireland. His eventual asylum claim when his partner was pregnant with a second child was a method to remain in Ireland. He made no claim to fear persecution at his s.11 interview. The wife noted throughout her IBC application that her partner's whereabouts were unknown. Their older child's birth certificate originally contained no details of paternity but in January 2008 it was re-registered to include Mr. D.'s name. The information provided to the Minister at the leave to remain stage was that Mrs. D. was working as a sales assistant. In all of the wife's revenue certificates, her name appears in a quite misleading form, excluding her first name and using part of her pre-marriage surname to give the impression that it is a first name."

In the later case of *C. (R.) and M (G.G.) [Zimbabwe] v. The Refugee Applications Commissioner & Ors.* [2010] IEHC 490 Clark J. stated:-

> "The applicants appear to have ignored that they have a duty when engaging in the asylum system to cooperate by presenting their account in a truthful manner. Those duties are set out in the form which is provided to all applicants at the initial stages of the process and when applicants are asked to fill out a questionnaire where applicants are warned of the consequences of not telling the truth. Those obligations and consequences are based on the terms of the Refugee Act."

She referred in particular to s.11C(1) of the Refugee Act 1996 and noted that s.20(2) provides that it is a criminal offence to provide any statement or information which is known to be false or misleading in any material particular. She further referred to the obligation arising under the Convention Relating to the Status of Refugees 1951 where at Article 2 it is stated:-

> "Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order."

Further, article 11 of Council Directive 2005/85/EC ("the Asylum Procedures Directive") provides:-

> "Member States may impose upon applicants for asylum obligations to cooperate with the competent authorities insofar as these obligations are necessary for the processing of the application."

Clark J. continued:-

> "In this case the behaviour of the applicants in knowingly providing the Commissioner with false and misleading information has all the appearance of criminal behaviour. Their gross misconduct in abusing the integrity of the asylum process would entitle the Court to refuse *certiorari*. It is deeply offensive to the justice system that applicants who have exploited the refugee system by their conspiracy to deceive should now come to this court and complain that the system was unfair to them in that the husband was not afforded a second opportunity to admit his lies."

In *A.G. A.O. v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 492, MacMenamin J. had regard to the conduct of an applicant who had maintained two separate aliases in the State:-

> "54. At no time in the year 2002 is there evidence that the respondents were made aware that the applicant known as A.A. was one and the same person as G.O. whose documents were in the possession of the State authorities, thereby placing the State on notice that the applicant could not as a matter of law leave the State voluntarily. Had the respondents known of the applicant's various aliases they could have questioned the validity of the letter of the 3rd December, 2002 and its claim that the applicant was leaving the country as in fact his passports were in the possession of the Garda National Immigration Bureau since his re-entry on the 15th October of that year.
>
> 56. Were it necessary to so find this court would conclude that the applicant had by his conduct disentitled himself to the reliefs which were sought. . . . Serious doubts must arise as to his credibility in relation to the dishonesty of his interaction with the immigration authorities. .. . In the premises the court must conclude that the applicant has acted not only in bad faith but that also his interactions with the various organs of the State were designed to mislead and deceive the State in such a way as to endeavour rights and benefits to which he was not lawfully entitled. It is unavoidable that the court should conclude that these actions were deliberate and cannot be condoned. The case fails for want of credibility also."

The foregoing dicta are equally applicable to these proceedings and in some instances the facts are strikingly similar. The facts of the within case go even further given that the applicants actively sought to mislead the High Court during the Article 40 enquiry. There can be no doubt that the actions of the fourth applicant and first applicant were designed to mislead and deceive the State over a protracted period of time.

In *G. O. & Ors. v. the Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 19, Birmingham J. stated:-

> "I cannot accept that it is open to individuals to arrive in the State on what is essentially a false basis, as indicated by

the rejection of their claim to asylum status, and then proceed to so organise their family affairs as to frustrate the operation of the immigration system."

The first and fourth applicants have undoubtedly organised their family affairs in a manner designed to frustrate the operation of the immigration system. It is this family life which they now seek to vindicate in the course of the within proceedings. Birmingham J. has stated that this practice cannot and will not be condoned.

In the circumstances I do not see how the applicant can contend that the statutory provision under which he was deported operated disproportionately having regard to his particular history and the very real requirement that this State have the capacity to maintain effective immigration controls. The Minister by his order was doing no more than restoring the position required by the Oireachtas when it enacted s.5 of the Immigration Act 2004, namely that no non-national should be in the State other than in accordance with a permission given by or on behalf of the Minister.

To hold that a deportation order of a specific time duration must, as a matter of constitutional obligation, be fashioned for a person in the applicant's position strikes me as somewhat unreal. I readily acknowledge that various European countries have adopted different rules regarding the duration of deportation orders, but that of itself cannot determine the issue. Indeed the duration of fixed time period deportations seems to have produced a further set of problems leading to a multiplicity of appeals about duration to the ECtHR, and, as virtually every case turns on its own particular facts, one is left with an impression of considerable uncertainty as to how the rules of different national immigration authorities stand in the eyes of that Court. In the courts of this jurisdiction similar problems have in the past arisen in relation to certain categories of cases which turn on their own particular facts - such as those where prosecutions of criminal charges were opposed on grounds of delay or where it was suggested that missing evidence precluded a fair trial - eliciting over time a response from the Irish courts which manifested a strong desire for certainty in how such cases be dealt with. In the context of immigration that need is particularly strong both for administrative authorities and asylum seekers alike. I can not avoid thinking that to specify a fixed time limit for a deportation order somehow implies that a status of illegality attaching to a deported person will cease to be such and be converted into one of lawfulness at the end of the specified period. In this realm of fixed time deportations the deported person must inevitably have an expectation that he/she will be treated differently at the end of the period. Such an approach seems counter-intuitive. For example, the application of similar reasoning in the context of domestic landlord and tenant law would mean that if a trespasser who is removed from the lands or premises of another could only be ejected for a specific period, he would thereafter acquire some sort of legal entitlement or expectation that he might return to those lands or premises. Every expulsion or removal would be provisional only. A system which permits the making of an indefinite deportation order only after the most careful scrutiny of the various factors identified by the ECtHR does on the other hand provide certainty and, under our system, does not preclude a later application, or even a number of applications, for a revocation of the order where a change of circumstances so warrants, or even indeed where no change of circumstances at all has occurred.

The Immigration Act 1999, far from being a blunt instrument for deportation to be exercised at the whim of the Minister, contains multiple safeguards for a person in respect of whom the Minister proposes to make a deportation order. By virtue of s.3(3)(a), the Minister must notify the person of his proposal to deport and the reasons for it, following which that person may make submissions to the Minister to argue that he should not be deported (none were made in this case). The Minister must consider these representations when they are made. Further s.3(6) contains a litany of factors which the Minister must consider before making a deportation, which include:-

> "(a) the age of the person;
>
> (b) the duration of residence in the State of the person; (c) the family and domestic circumstances of the person;
>
> (d) the nature of the person's connection with the State, if any;
>
> (e) the employment (including self-employment) record of the person;
>
> (f) the employment (including self-employment) prospects of the person;
>
> (g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions;
>
> (h) humanitarian considerations;
>
> (i) any representations duly made by or on behalf of the person;
>
> (j) the common good; and
>
> (k) considerations of national security and public policy."

It is a long and demanding list, whereby proportionality as an element in decision-making by the Minister is both mandated and provided for in advance by the relevant statutory provisions. The fourth named applicant singularly failed to engage with the process of which he now complains.

Further, the attack on the constitutionality of s.3(1) must not only be read within the scheme of the entire Act but in particular in the light of s.3(11) of the Act. In the recent case of *Afolabi v. Minister for Justice* (Unreported, High Court, 17th May, 2012) Cooke J. rejected an application to amend proceedings to include a challenge to the alleged "life long ban" of a deportation order, stating that the proportionality or otherwise of a continuing exclusion can be addressed in an application to amend or revoke a deportation order for submitted reasons. A continuing exclusion under s.3(1) must always remain open to submissions under s.3(11) and the two sections cannot be artificially isolated from each other. I do not interpret s.3(11) as being confined to the issue of changed circumstances arising between the time of making the deportation order and the time of its implementation (although of course it does include and cater for such). Had that been the intention of the legislature it could easily have been so provided. In my view it is a power exercisable by the Minister at any time when he is asked to revoke or amend a deportation order during the continuance of the deportation order.

The rights of the other applicants must be taken into account when a decision is made under section 3(11). Those interests were taken into account. It is impossible for those applicants to argue the case on the provision for the making of the deportation order given that the marriage in this case was entered into many years after the deportation order was made. However, even in the context of the challenge to s.3(11) to which I will now turn, it must be remembered that the first applicant entered into that marriage

with full knowledge of the fourth named applicant's precarious status which at all times left him exposed to immediate deportation.

At the outset any substantive (as distinct from procedural) challenge to the constitutionality of s.3(11) is on the face of it not easy to understand. The provision therein contained operates affirmatively and can only assist a person affected by a deportation order. As it can never disadvantage the person served with a deportation order, it is difficult to understand how it may be said to breach any constitutional right. The point under Article 15 was one raised by the judge who granted leave and not a point initially advanced by the applicants. It is one which derives from the learned judge's view that the subsection conferring the power to be exercised by the Minister might be seen as failing to articulate criteria whereby the power is to be exercised, thus offending Article 15.2.1 of the Constitution which provides that:

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

It is thus contended on behalf of the applicant that no guidelines, principles or policies have been written into the section and that the Minister is thus 'at large' when exercising what should properly be seen as a law making function in relation to decisions under section 3(11). But is the power one to make subsidiary laws or form policies, or is it a discretionary power exercisable by reference to the facts of individual cases? In speaking of the power available to the Minister under s.3(11) of the Act, Fennelly J. in *T C. v. Minister for Justice* [2005] 4 I.R. 109 stated at para. 26:

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

The exercise of this power does not strike me as the making of a 'policy' decision but rather involves the exercise of a margin of appreciation related to the facts of individual cases. That discretion was clearly left by the Oireachtas to the Minister.

As Keane C.J. stated in *Baby O. v. The Minister for Justice Equality and Law Reform* at p. 184:-

> "It was entirely a matter for the first respondent to determine whether the circumstances relied on were such that he was obliged to revoke the deportation order already made. I was satisfied that neither the High Court nor this court on appeal had any jurisdiction to interfere with the first respondent's determination that the change of circumstances referred to would not justify him in revoking the deportation order."

In the more recent case of *Irfan v. The Minister for Justice and Equality* (Unreported, High Court, 23rd November, 2010) Cooke J. stated:-

"In effect the power of the Minister under s. 3(11) to revoke an order exists in order to permit the Minister to accommodate circumstances which have arisen since the making of the order and which give rise to a material change such that it becomes either illegal (by reason of the intervention of one of the prohibitions on refoulement) or inappropriate on humanitarian grounds or otherwise to implement the valid order. The obligation of the Minister in dealing with an application to revoke an order has been dealt with in a number of cases and is well settled at this stage. (See for example the judgment of O'Neill J. in *Dada v. Minister for Justice, Equality & Law Reform* (Unreported, High Court, 3rd May, 2006); of MacMenamin J. in *Akujobi and Anor v. Minister for Justice, Equality & Law Reform* [2007] I.E.H.C. 19; and *O.O. & Anor. v. Minister for Justice, Equality & Law Reform* [2008] I.E.H.C. 325). This court summarised the position as gleaned from that case law in a judgment of 17th December, 2009 in *M.A. v. Minister for Justice, Equality & Law Reform*:-

> 'When an application to revoke is made to the Minister under s.3(11) of the Act, the Minister has, in effect, two duties. He is required to consider carefully and fairly the reasons that are put forward for revocation; and he must also verify that since the deportation order was made, no change of circumstance has occurred, either so far as concerns the applicant or the situation in the country of origin, which would bring into play any of the statutory prohibitions on the return of a failed asylum seeker to the country of origin.... Otherwise ... in dealing with an application to revoke, the Minister is not obliged to embark on any new investigation or enquiry; nor is he obliged to enter into any exchange of observations and replies or into any debate with the applicant or the applicant's legal representatives or even perhaps to supply any extensive narrative statement of his reasons for refusal. Once it is clear to the court that the Minister has properly discharged those two functions, a decision to refuse to revoke a valid order of deportation will not be interfered with."

Therefore, the Minister's obligation under s.3(11) is 'to accommodate circumstances which have arisen since the making of the order' and his jurisdiction in this regard to do so may be considered to be 'well settled'.

The allegation that the absence of procedures/standards/goals/criteria in s.3(11) renders that section unconstitutional is made without any regard to the actual function of that subsection (as outlined by Cooke J.), the scheme of the 1999 Act (in particular s.3 as a whole), and the exercise of the Minister's discretion in accordance with natural and constitutional justice/international obligations which have been incorporated into domestic law by the Oireachtas (as per *Cirpaci v. The Minister for Justice and Equality* [2005] IESC 42). As was stated in *East Donegal Co-Operative & Ors. v. Attorney General*:-

> "All the powers granted to the Minister by s.3 which are prefaced or followed by the words 'at his discretion' or 'as he shall think proper' or 'if he so thinks fit' are powers which may be exercised only within the boundaries of the stated objects of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse at his will. Therefore, he is required to consider every case upon its own merits, to hear what the applicant or the licensee (as the case may be) has to say, and to give the latter an opportunity to deal with whatever case may be thought to exist against the granting of a licence or for the refusal of a licence or for the attaching of conditions, or for the amendment or revocation of conditions which have already attached, as the case may be." (Emphasis added)

As regards the provisions regarding the revocation of a licence it is stated:-

> "As already stated in an earlier portion of this judgment, the Minister must act in the way indicated and, so far as the revocation of a licence is concerned where it falls to be dealt with under subs. 6(a) of s.3, the provisions of subs. 7 of s.3 also require the Minister to cause the statement of his reasons for so doing to be laid before each House of the Oireachtas. The Act simply provides a particular formal structure of inquiry in respect of matters falling under subs. 6(b)

> of s.3, and in the absence of an express provision in the Act to the contrary, or in the absence of provisions from which the only reasonable construction is that in all other cases the Minister is to act in an unconstitutional manner, the only valid inference is that the Oireachtas did not purport to vest any such power in the Minister. The other provisions of s.3 of the Act do not demonstrate or indicate, whether expressly or by necessary implication, any intention on the part of the Oireachtas to confer such power upon the Minister. The provisions indicate different procedural requirements but they do not indicate that it is the clearly recognisable will of the Oireachtas that the Minister should be empowered to act in a manner contravening the provisions of the Constitution."

Therefore, the provision of s.3(11) is entitled to the presumption of constitutionality and the absence of 'criteria, standards, goals' does not indicate that the Minister is empowered to act unconstitutionally. The Minister must determine every application on its merits and must act *inter alia* within the boundaries of the 1999 Act and the European Convention on Human Rights.

I am therefore of the view that s.3(1) of the Act passes the test of proportionality - both for the reasons elaborated in this first part of my judgment and for the reasons elaborated in relation to the Convention argument appearing hereunder and accordingly the applicants' constitutional challenge to the validity of s.3(1) and s.3(11) must fail.

Insofar as the most recent decision of the Minister not to amend or revoke is concerned I am satisfied that it was one made in accordance with constitutional principles. It withstands any test of proportionality in that the Minister when exercising his power under s.3(11) did, along with all other factors in the case, give due weight to the fourth applicant's altered family circumstances when considering the application. Notwithstanding those circumstances the fact remains that the applicant was at all times unlawfully within the State and his stay had been prolonged by fraud and deception in which the first applicant was also implicated from at least the time they became married. Both parties knew their circumstances were precarious when they did marry. The marriage was contracted in the full knowledge that the fourth applicant had no entitlement to be in Ireland. The particular factual and local circumstances in Georgia which affected the first applicant alone and which resulted in her being granted permission on humanitarian grounds to remain in the State are not grounds which have been shown either to constitute a continuing danger to her now nor are they matters which are of general concern in Georgia. Thus no case has been made out to suggest she is unable, with her children, to join her husband in Georgia should she so wish. The ultimate decision may therefore be seen as proportionate and fair and there is nothing in this case to suggest that the Minister discharged his function other than in a manner which complied with constitutional principles of natural justice and fair procedures. Indeed, it has not been seriously suggested on behalf of the fourth applicant that the Minister failed in any way to engage fully with the requirements identified by Fennelly J. as being integral to the exercise of his function under section 3(11). Thus, on simple judicial review grounds, I am not satisfied that the applicant has demonstrated any case to establish that the Minister's refusal to amend or revoke the decision to deport was exercised irrationally or unreasonably as that term is understood in the context of judicial review.

THE CONVENTION ARGUMENT
It is probably fair to say that the main thrust of the applicants' case was that a deportation order of indefinite duration had been found by the European Court of Human Rights to violate Article 8 of the Convention in a significant number of cases. However, it would, in my view, be quite incorrect to approach the issue of compatibility on the simple basis of an arithmetical computation of cases where a violation was found to exist as against the number of cases where a violation was not found to have occurred. Counsel for the respondents has pointed to a number of decisions, notably *Dalia v. France* [1998] ECHR 5 and *Kaya v. Germany* [2007] ECHR 538 where the Court decided that permanent exclusion orders did not violate Article 8.

In the latter case the Court noted that the expulsion order imposed on the applicant had a serious impact on his private life and on the relationship with his parents, but continued:-

> "However, having regard to all the circumstances of the case, and in particular to the seriousness of the applicant's offences, which cannot be trivialised as mere examples of juvenile delinquency, the Court does not consider that the respondent State assigned too much weight to its own interest when it decided to impose that measure."

The Court concluded that a "fair balance was struck in this case" and further held that the expulsion of the applicant was "proportionate to the aims pursued and therefore necessary in a democratic society".

It is worth noting that the applicant in that case had been born in Germany and had been in possession of a valid residence permit. However, the regional government of Karlsruhe considered that his expulsion was proportionate having regard to his record of criminal offending. Having married a German national subsequent to his deportation the applicant ultimately prevailed upon the regional government to limit the period of his exclusion order for a period of five years from the date of his deportation.

In *Uner v. The Netherlands* [2006] ECHR 873 the applicant had permanent residence status in the Netherlands and there are a number of other cases where applicants had extensive ties to their host country. *Mehemi v. France* [1997] ECHR 77 dealt with an applicant who had been born in France, although he did not have French citizenship. In *Bousarra v. France* [2010] ECHR 1999, the applicant had arrived in France at the age of three weeks and remained there without interruption until 2002. Similarly in *Bouchelkia v. France* [1997] ECHR 1 the applicant was born in Algeria and moved to France at the age of two. In *Benhebba v. France* [2003] ECHR 342, *Boujlifa v. France* [1997] ECHR 83 *and Ezzoudhi v. France* [2001] 85, the applicants had arrived at the age of five.

These cases underline the importance of an applicant having a real and genuine connection with the host country, a connection which can scarcely be said to exist in the case of the fourth applicant.

The case law also underlines the multifactorial nature of the issue when the Strasbourg Court considers these cases. While the duration of the deportation order is clearly a factor of major significance to which the Court has regard, I think it may safely be stated that no one factor trumps all when the Court makes a decision as to the proportionality of any particular deportation order.

Thus in *Antwi v. Norway* [2012] ECHR 259 the Court noted in particular the entitlement of national immigration authorities and courts to have regard to the failure of an applicant to comply with the requirements of national immigration laws. At para. 90 the Court noted:-

"The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see *Nunez*, cited above, para. 71, and *Darren Omoregie & Ors. v. Norway*, No. 265/07, para. 67, 31st July, 2008; see also *Kaya v. The Netherlands* (dec.) No. 44947/98, 6th November, 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an

issue of failure to comply with Article 8 of the Convention. In the Court's view, the public interest in favour of ordering the applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see *Nunez*, cited above, para. 73)."

The case of *Nunez v. Norway* (28th June, 2011) is an important case because of the general statement by the Court of the relevant principles where the State's requirement to maintain and uphold domestic immigration laws come into conflict with an applicant's rights under Article 8 of the Convention. At para. 66 the Court noted that:-

> "A State is entitled, as a matter of well established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The Convention does not guarantee the right of an alien to enter or to reside in a particular country.
>
> 67. In the case under consideration the applicant, after having first been deported from Norway in March 1996 with a two year prohibition on re-entry due to a criminal conviction, defied that prohibition by re-entering the country in July 1996 with the use of a false identity and travel document. In October 1996 she married a Norwegian national and obtained a residence permit having informed the immigration authorities that she had not previously resided in Norway and had no criminal record. On the basis of her misleading information, she was granted a work permit in January 1997 and a settlement permit in April 2000. Thus, her successive permits to reside in Norway had all been granted on the basis of information that had been false to begin with and which remained false. As found by the Norwegian authorities and was undisputed by the applicant, at no time had her residence in Norway been lawful.
>
> 68. The court recalls that, while the essential object of this provision is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective 'respect' for family life. However, the boundaries between the state's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both contexts the State enjoys a certain margin of appreciation.
>
> 69. Since the applicable provisions are similar the court does not find it necessary to determine whether in the present case the impugned decision, namely the order to expel the applicant with a two year prohibition on re-entry, constitutes an interference with her exercise of the right to respect for her family life or is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation.
>
> 70. The Court further reiterates that Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligation to admit to its territory relatives of a person residing there will vary according to the particular circumstances of the persons involved and of the general interest. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the contracting state, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances." (Emphasis added)

The Court has thus adverted to the problem of marriages subsequently contracted when conducting its balancing exercise. In *Omoregie v. Norway* [2008] ECHR 761 the Court, having enumerated the various factors which go into the mix of decision-making on the issue, stated as follows at par 57:

> "Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances." (Emphasis added)

In *Dalia v. France* [1998] ECHR 5 the Court noted that the applicant had formed a vital family link while she was in France illegally, stating (at par 54):

> "She could not be unaware of the resulting insecurity. In the Court's view, this situation, which was created at a time when she was excluded from French territory, cannot therefore be decisive."

The family circumstances invoked in this case came into being long after the making of the deportation order in circumstances where both the first named applicant and the fourth named applicant were well aware of the "precarious circumstances" surrounding their stay in Ireland.

In *Emre (No. 2)* the definitive expulsion of the applicant from Swiss territory had been reduced to a ban on residence for a period of ten years. This limited ban was the subject matter of a further challenge by the applicant to the European Court of Human Rights which culminated in a further decision of the court to the effect that even this limited ban constituted a violation of Article 8. The decision is useful, however, for the reiteration of relevant principles by the Court in cases of this nature which appear at para. 72 of the Court's decision:-

> "In this respect, the court refers to the extremely detailed reasoning of its first judgment, including the concrete assessment of the different interests at stake (paras. 72 - 86) which include the examination of multiple elements, namely the nature of the offences committed by the applicant, the gravity of the sanctions pronounced, the length of residence of the applicant in Switzerland, the time elapsed between the perpetration of the offences and the measure in question, the conduct of the person concerned during this period, the solidity of the social, cultural and familial links with the host country and with the country of destination, the particularities of the case, namely the health problems of the applicant, and finally the definitive character of the expulsion measure. The court observes that the considerations of the Federal Supreme Court are limited to this latter element. It believes that, to satisfy the strict obligations which fall on states by virtue of Article 46 of the Convention, the investigation should on the contrary have concerned all of these arguments."

This pronouncement of the court, made as recently as October, 2011, forcibly brings home the correctness of the submission by counsel for the respondents in this case that the duration of a deportation order is not the determining factor in cases of this nature coming before the Court but rather one of a list of factors all of which must be duly weighed and examined.

Nor do I believe that the delay in this case can be laid at the door of the State, given that it was entirely the behaviour, fraud and deceit of the fourth applicant which resulted in such a lengthy interval of time between the making of the deportation order and its coming into effect. I have already held in the course of this judgment that he cannot invoke delay created by his own wrongdoing in aid of his challenge to the constitutionality of s.3(1) and I see no reason why a similar approach should not at least be a factor in this Court's consideration of the arguments under the Convention.

The Convention jurisprudence also takes into account the existence or otherwise of obstacles to the relocation of the family unit in the country of origin. (See recent cases of *Biraga v. Sweden* [2012] ECHR 785, *Nunez v. Norway* [2011] ECHR 1047, *Haghigi v. The Netherlands* [2009] ECHR 765, *Omoregie v. Norway* [2008] ECHR 76, *Konstatinov v. The Netherlands* [2007] ECHR 336 and *G.J. v. Switzerland* (1996) 22 EHRR 93). In the case of *Aponte v. The Netherlands* [2011] ECHR 1850, an applicant from Venezuela married a Dutch national at the time when both were aware that her immigration status was precarious. The Court considered that there were no insurmountable obstacles to the exercise of family rights outside of the Netherlands; her husband had a reasonable grasp of Spanish and her child was of an adaptable age. Thus the Court considered that the family could make the transition from the Netherlands to Venezuela although the Court appreciated that this would entail a certain degree of social and economic hardship.

No insurmountable obstacles in this case to establishing the family unit in Georgia have been demonstrated should the parties decide or wish to locate there, albeit that the transition may cause a degree of hardship. The children are young and still very much at an adaptable age. Further, I reject any suggestion that the harassment and assaults suffered by the first named applicant when she was a young teenager constitute an 'insurmountable obstacle' now that she has achieved adulthood and is married to the fourth applicant.

Given the degree to which all of these cases are rooted in their own particular facts, I find it impossible to conclude that I should make a declaration that s.3(1) of the Act is *per se* incompatible with the State's obligations under the European Convention of Human Rights with the consequence that *all* orders ever made under the section are rendered invalid. That is not to say that an individual decision taken by the Minister in some other case might not result in some different conclusion but I regard the facts of the applicant's case as requiring that no such finding be made in this instance.

Ultimately, I am left with the impression that the applicants do not so much challenge the correctness of the Minister's decision to deport the fourth named applicant, but rather have drawn from jurisprudence of the European Court of Human Rights to argue a case which was never made in the context of the two earlier refusals to revoke or amend the deportation order in this case. Still less was any case or argument advanced over the past eleven years to impugn the validity of statutory provision contained in s.3(1) of the Immigration Act 1999, or, to argue for its supposed incompatibility with the provisions of the Convention.

I am satisfied therefore that I should not hold that s.3(1) of the Immigration Act 1999 is *per se* incompatible with the Convention, particularly when that provision is assessed in association with the provisions contained in s.3(6) and s.3(11) of the Act.

I would therefore refuse relief to the applicants in respect of this part of their case also.