THE SUPREME COURT

[Appeal No: 481/11]

Denham C.J.
Hardiman J.
Fennelly J.
O'Donnell J.
Clarke J.

Between/

Oluwaseun Comfort Okunade and Daniel Temiloluva Okunade

(an infant suing by his mother and next friend

Oluwaseun Comfort Okunade)

Applicants/Appellants

and

The Minister for Justice Equality and Law Reform,

Ireland and The Attorney General

Respondents

Judgment of Mr. Justice Clarke delivered the 16th of October, 2012

1. Introduction

1.1 It hardly needs to be stated that there has been a significant growth, over the last decade or so, in the number of persons coming to Ireland seeking international protection under the various legal schemes which apply in such cases. That growth in numbers has, in turn, led to a very significant expansion in the volume of immigration cases which have come before the courts. Decisions of statutory bodies connected with that immigration process or related decisions made by the first named respondent ("the Minister") are frequently challenged in judicial review applications. It also does need to be noted, and will be addressed further in the course of this judgment, that the statutory regime for the consideration of applications involving international protection and the statutory regime which governs any challenges in the courts against adverse decisions made in that process, are cumbersome and apt to add to the difficulties with which the courts are faced in considering such challenges.

1.2 It is against the backdrop of that situation that the applicants in these proceedings ("the Okunades") came to challenge two separate decisions made by the Minister. It will be necessary, in due course, to set out in a little more detail the interaction between the Okunades and the persons and bodies dealing with international protection in this jurisdiction. However, a stage was reached where the Okunades had failed in an application to have refugee status conferred on them and also had subsequently failed in an application for subsidiary protection under EU law as implemented in Ireland. The Minister had made a decision to deport. In those circumstances the Okunades sought to commence judicial review proceedings directed towards challenging both the refusal of their application for subsidiary protection and the decision to deport. For reasons which it will be necessary to address, there are procedural complications (which stem from the legislation itself) with how such applications are required to progress before the court. In addition, partly because of aspects of the statutory regime which controls the way in which some judicial review challenges in this field can be brought, and partly because of the large number of cases requiring to be heard, it can take some significant time before the court can conduct even the initial assessment required to decide whether leave to seek judicial review should be granted.

1.3 In the past it would appear that, where a relevant application for leave was pending, the Minister usually gave an undertaking not to deport until such time as the court had an opportunity to hear an application for leave to seek judicial review. However, in circumstances which will be addressed in this judgment, the Minister took a somewhat different view in more recent times and indicated that such an undertaking would not be given, at least in some cases. The case of the Okunades was one such. Faced with the prospect of deportation while their application for leave was pending, the Okunades brought an application before the High Court (Cooke J.) seeking to have their deportation restrained. For reasons set out in his judgment Cooke J. came to the view that a restraining order should not be made. It is against that decision of the High Court that the Okunades have appealed to this court.

1.4 In order to understand the precise issues which arise in these proceedings it is necessary to start by describing some of the difficulties which derive from the complex statutory context to which I have referred.

2. The Difficulties with the Statutory Context

2.1 The starting point has to be to note that two separate bases exist for formal international protection in the Irish statutory context. As a matter of Irish law, and as a result of the implementation of Ireland's international obligations, a person is entitled to seek refugee status under the provisions of the Refugee Act, 1996 as amended ("the 1996 Act"). Separately a person is entitled to apply for subsidiary protection under the provisions of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518/2006) ("the Regulations") which implement, in this jurisdiction, Council Directive 2004/83 EC (of the 29th April, 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection) ("the Directive"). For completeness it should be noted that, prior to making a deportation order, the Minister is required to consider the criteria set out in s.3(6) of the Immigration Act, 1999 ("the 1999 Act"). In practical terms proposed deportees have an opportunity to make representation to the Minister for leave to remain in the country on the sort of humanitarian grounds specified in that section or on the basis of a contended interference with respect for private and family life protected by Art.8 of the European Convention on Human Rights ("EHCR").

2.2 The 1996 Act did not, in the main, come into operation until the 20th November, 2000. It is not necessary to set out in any great

detail the procedure which that Act prescribes for persons seeking refugee status. In simple terms an application is first considered by the Refugee Applications Commissioner ("RAC"). Where the RAC recommends that the relevant applicant be declared to be a refugee the Minister has no discretion but to accept the report of the RAC and give the relevant applicant a declaration of refugee status (see s.70(1)(a) of the 1996 Act).

2.3 However, where the commissioner recommends against the applicant, an appeal is available to the Refugee Appeals Tribunal ("RAT"). Persons whose application for refugee status is ultimately refused as a result of that process can seek to have the decision reviewed by the High Court in judicial review proceedings. However, s.5 of the Illegal Immigrants (Trafficking) Act, 2000 ("the 2000 Act") controls the manner in which such a challenge (and certain but not all other challenges to decisions in the immigration field) can be brought. First, any challenge governed by s.5 must be brought by means of an application for judicial review under Order 84 of the Rules of the Superior Courts ("RSC") (see s.5(1)). In addition the application for leave is required, under subsection (2), to be made within 14 days of the notification of the measure to be challenged (with the power in the High Court to extend that time for good and sufficient reason) and on notice to the Minister. Furthermore, the High Court is required not to grant leave (under subsection (2)(b)) unless satisfied that there are "substantial grounds" for contending that the relevant measure is invalid or ought to be quashed. In addition, for completeness, there is, in cases covered by s.5, a limitation on the right to appeal from an adverse decision of the High Court to this court in that leave of the High Court must be obtained by means of a certificate to the effect that the decision of the High Court "involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken" to this court.

2.4 Under Irish law it is necessary that a person have been refused refugee status, in order that such a person can apply for subsidiary protection. While the benefits of subsidiary protection are not as extensive as the benefits of refugee status they are, nonetheless, significant. The application for subsidiary protection is made to the Minister who is entitled to have regard to the reports and decisions of both the RAC and the RAT in considering the matter.

2.5 However, s.5 of the 2000 Act does not apply to a challenge to a decision to refuse subsidiary protection. Therefore, the ordinary provisions of Order 84 of the RSC apply. In that context it should be noted that Order 84 itself has been modified since these proceedings commenced. It was, however, the old version of Order 84 which applied at the time when these matters were considered by Cooke J. In those circumstances the ordinary rule required that an application for judicial review in respect of a subsidiary protection order be made promptly, but in any event within six months of the decision under challenge. In addition, because the ordinary provisions of Order 84 applied, the application for leave could be made ex parte rather than on notice to the Minister and the ordinary threshold for the grant of leave to seek judicial review, being that there is an arguable case, applied. There are, therefore, very significant differences between the judicial review regime which applies relating to, respectively, challenges to decisions made under the 1996 Act, on the one hand, and challenges in respect of subsidiary protection decisions, on the other hand.

2.6 The final piece of the statutory jigsaw is the deportation order made by the Minister. Obviously an effective deportation order requires that a person has either not sought to avail of any of the international protection measures to which reference has been made or, having so sought, has failed to achieve either refugee status, the benefit of subsidiary protection measures or humanitarian leave. It follows that a successful challenge to adverse determinations in respect of any of those questions has the potential to affect the effectiveness of a deportation order. However, adverse orders remain valid and in force unless and until they are either quashed by a court of competent jurisdiction or an interlocutory order of such court is made which has the effect of suspending the operation of the measure in question. It follows that there will, in many cases, be a significant interaction between a challenge to an adverse order made on foot of an application for subsidiary protection, on the one hand, and a deportation order, on the other. Provided otherwise valid, the fact that there is a challenge to an adverse subsidiary protection determination will not, of course, of itself prevent a deportation order from remaining in force in the absence of a court order.

2.7 However, in order to challenge a deportation order, the provisions of s.5 of the 2000 Act do apply. There are, therefore, at least two major difficulties with the current statutory regime. The first concerns the fact that in Ireland, unlike, the court understands, any other member state of the EU, separate statutory processes for the consideration of applications for refugee status, subsidiary protection and humanitarian leave, exist. Indeed, as pointed out, it is necessary that an application for refugee status have been made and refused before an application for subsidiary protection can be commenced. Given that there are, at a minimum, in practice, very close connections between the bases on which a party is likely to seek refugee status, on the one hand, and to seek subsidiary protection measures, on the other hand, it is, perhaps, surprising that the two processes are kept so completely apart. Indeed, a number of judges of the High Court who deal on a regular basis with cases of this type have regularly commented that the grounds put forward for refugee status are almost always closely replicated in the grounds put forward in seeking subsidiary protection. There have, indeed, been proposals for reform included in the Immigration, Residence and Protection Bill, 2010 which would unify both processes into one. While the adoption of such measures is, of course, a matter of policy for the Oireachtas, it does seem to me that such measures are likely to simplify the process and, of particular relevance to the role of the courts, make any review by the courts of decisions made in this field significantly more straightforward. This is a topic to which it will be necessary to return.

2.8 However, as the circumstances of this case demonstrate, the difference in the statutory regime applicable to judicial review between, a challenge to, on the one hand, a subsidiary protection refusal and, on the other hand, a deportation order makes the court process extremely complicated and, in my view, unnecessarily so. It is again noted that there are proposals for reform in this area. However, unless and until any such measures are adopted by the Oireachtas, the courts have to deal with the statutory regime as it stands.

2.9 Persons, such as the Okunades, who wish to challenge both a deportation order and a refusal of subsidiary protection, are faced with the situation where the ordinary method for challenging the refusal of subsidiary protection allows for a challenge within six months, commenced by an ex parte application, and where the ordinary threshold of arguable grounds has to be established. On the other hand a challenge to a deportation order requires leave to be sought on notice to the Minister within 14 days and on the basis that substantial grounds need to be established. It is fairly obvious that a challenge by the same applicant to both a subsidiary protection refusal and a deportation order is fraught with procedural complexity. To that complexity is added the fact that a certificate is necessary to appeal a refusal of judicial review in respect of a deportation order but not in relation to subsidiary protection.

2.10 In addition, some comments on the practicalities involved are required. As pointed out s.5 of the 2000 Act requires, in a range of judicial review proceedings in the immigration field, that applications for leave to seek judicial review are brought on notice. It follows that, before the leave application can be heard, the motion needs to be served on the Minister with the Minister being given an opportunity to decide how to respond. Furthermore, as the hearing of the application involves, in the majority of cases, opposition from the Minister to the grant of leave, it follows that the hearing requires a significant allocation of court time (far beyond that which would be required to deal with an ex parte application) and thus requires the court to manage its list in such a way that adequate time is given for the filing, on behalf of the parties, of written submissions and in a manner which requires cases to be

placed in a queue of those awaiting hearing until such time as court time becomes available. For all of those reasons the regime which derives from s.5 of the 2000 Act leads inevitably to a reasonably significant wait before a contested leave application, in the cases to which that regime applies, can be heard. It follows that it is inevitable that a party who seeks to challenge a deportation order will be placed in a position where the hearing of the leave application itself will take some time to come on.

2.11 It is, of course, the case that a challenge to a subsidiary protection refusal could, on a stand-alone basis, be the subject of an immediate application for leave on an ex parte basis. If separate proceedings were commenced in relation to, respectively, a subsidiary protection refusal and a deportation order, then a situation might arise where leave was immediately granted to challenge the subsidiary protection order but there would still be extant a deportation order in circumstances where the leave application in relation to the challenge to the deportation order would, for the reasons already addressed, not be likely to be heard for some time. Such an eventuality would bring its own difficulties. On the other hand, if both challenges are brought in the same proceedings, as happened here, then the anomalous situation arises that some of the relief can only be the subject of leave on notice while leave to pursue other parts of the relief sought could be granted on an ex parte application. Part of the problems with which the High Court is faced in attempting to deal with the very large volume of judicial review challenges in the immigration field are statutory measures which have, as their inevitable effect, either the delay of applications or the necessity to hear additional applications arising out of the same set of facts. This is highly undesirable. I express the hope that desirable reform for the purposes of streamlining and simplifying both the underlying process in refugee and subsidiary protection applications and the statutory regime concerning judicial review challenges in respect of adverse decisions in those processes, should be expedited. Some comments as to possible reform are set out later in this judgment for as long as that reform remains unimplemented the already difficult situation which exists in the High Court by reason of the very large number of judicial review cases in the immigration field will be significantly exacerbated.

2.12 However, aspects of the problems which derive from those complications form the basis for some of the legal issues which arise in this case. I will shortly turn to the facts. However, in simple terms the Okunades launched a single set of judicial review proceedings in which a challenge was made both to the refusal of subsidiary protection and the deportation orders in their case. The procedural complexities already identified came into full focus in those circumstances. In the context of the Minister not being willing, in this case, to give an undertaking not to deport pending the hearing of the leave application insofar as it related to the deportation order, it followed that a separate application for an injunction or stay was moved on behalf of the Okunades. It certainly is far from desirable that yet another layer of potential application is required to be made in an already overcrowded list. The situation which has arisen in this case is likely to arise in other similar cases. However, such applications are an inevitable consequence of the as yet unreformed statutory regime coupled with the Minister declining to give undertakings. I now turn to the facts.

3. Factual Background

3.1 The Okunades are mother and son and are Nigerian nationals. The Okunades have resided in the State since 2008. They were refused asylum and subsequently denied subsidiary protection. The factual basis of their case was as follows. The father of the first named appellant (Ms Okunade) was said to have been the ward chairman for the Active Congress political party in Nigeria. As a result of these perceived political associations, the father and elder brother of the first named appellant were said to have been killed on 14 July 2006 by what was described as a group of local thugs in the village of Yenoga in the Beyalsa province. Ms Okunade then says she fled to a neighbouring village with her mother and infant daughter. In January 2007 she claims the same locals killed her mother. After this incident, Ms. Okunade suggests that she fled to Lagos and sought out the father of her infant daughter. She located this partner and she and her daughter lived with him in Lagos from January 2007 until May 2008. At this time in May 2008, there was an explosion in an oil pipeline close to where Ms. Okunade was living. She says she became unconscious and that a man brought her to the hospital. That man was, it was said, unaware of whether her partner or daughter survived the explosion. This man, she claims, subsequently arranged for her passage to Ireland on 29 May 2008, through Istanbul, via an agent. Ms. Okunade's case was that she, therefore, fled her country because she was at risk of persecution due to her familial association with politics, her imputed political opinion and because she was at risk of persecution as a member of a particular social group comprising young single mothers, with no family support and no means of protection.

3.2 At the time she left Nigeria, Ms Okunade was pregnant and the second named applicant/appellant ("Daniel Okunade") was born in Ireland on 23 June 2008. The Okunades reside at the Old Convent, Ballyhaunis, County Mayo. Ms Okunade is enrolled in a part-time Computer course in Ballyhaunis Community School. It is suggested in a letter by her solicitor, dated 27 May 2011, that Ms Okunade is engaged to marry an Irish citizen, Seamus Gaffney.

3.3 Daniel Okunade, although born in the State, is not an Irish citizen. He is four years old and has lived in Ireland since his birth. He is too young to have commenced primary school in Ireland but, it is said, would face significant educational problems if forced to relocate to Nigeria, including substantial language difficulties.

3.4 Ms Okunade applied for asylum on the day she arrived in the State, 30 May 2008 and availed of the services of the Refugee Legal Service on 3 June 2008. She completed her questionnaire on 9 June 2008. According to the questionnaire, she is a 30-year-old woman with 16 years of education, qualifying as a teacher in 2002. She taught for 1 year in Nigeria.

3.5 The Okunades' claim for asylum was rejected by the RAC. The Refugee Legal Service filed a Notice of Appeal to the RAT on the 15th December 2008. Ms Okunade then instructed Sinnott & Company to act on her behalf. Her hearing before the RAT was arranged for the 23rd February 2009 but for reasons which are not material to this case the RAT did not hear the appeal until the 24th June 2009 with a negative decision being made on the 14th August 2009.

3.6 As noted by the trial judge at para. 44 of his judgment the RAT came to the conclusion that Ms. Okunade had "not related a true account of her circumstances". The RAT went on to note: "On examination of the applicants' claims a number of inconsistencies and credibility issues arise in the first named applicant's account which are not properly explained by her and are such that I do not accept that she ever had any difficulties in her country of origin as she alleges or has any fear of returning there, for herself or her child, the second named applicant herein, for any reason". In addition the trial judge noted, at para. 45 of his judgment, that Ms Okunade had successfully relocated to Lagos such that the immediate reason for her flight from Nigeria derived from the explosion to which reference has been made rather than any continuing fear attributable to her father's political involvement or the activities of the so called thugs who were said to have murdered her family members.

3.7 It is clear, therefore, that the Okunades' claim to refugee status was rejected on the basis that the account given by Ms. Okunade could not be believed and that, even accepting that account, there did not appear to be any continuing risk to Ms. Okunade in Lagos. On that basis the trial judge concluded that he did not have evidence before him from which he could conclude that the Okunades would be subject to any significant risk should they be returned to Nigeria. There was clearly more than sufficient material before the trial judge to allow him to come to that conclusion and it does not seem to this court that there is any basis for challenging that aspect of the trial judge's decision.

3.8 Subsequent to the refusal by the RAT of the Okunades' appeal, proposal to deport letters were sent to the Okunades on the 5 October 2009. An application for subsidiary protection was made on the 27 October 2009. An application for leave to remain was also made on the 27 October 2009.

3.9 The Okunades then commenced these judicial review proceedings on the 16 August 2011 and were given a return date of the 3 October 2011. As the process followed in these proceedings forms an important part of the backdrop to this appeal it is, therefore, necessary to turn to that procedural history.

4. Procedural History and the High Court Judgment

4.1 In their application for judicial review the Okunades sought leave to apply for orders of certiorari to quash, first, the decision of the Minister refusing their application for subsidiary protection dated the 7th April, 2011 and second, deportation orders dated the 15th July, 2011. The notice of motion seeking leave included notice of an intention to apply for an interlocutory injunction to restrain deportation of the Okunades pending the determination of the proceedings.

4.2 Immediately after the commencement of the proceedings the Minister gave an undertaking not to implement the relevant deportation orders prior to the return date of the notice of motion being the 3rd October, 2011. However, the Minister declined to give a continuing undertaking beyond that date. It was, as has been pointed out, in that context that the Okunades moved their application for an interlocutory injunction. The judgment of the trial judge was in two parts with the first being delivered on the 22nd November, 2011 and the second on the 2nd December, 2011. As noted by the trial judge the reason for this approach was because of the differing thresholds which applied in respect of the application for leave to seek judicial review of the refusal of subsidiary protection, on the one hand, and of the deportation order, on the other hand. The differences between the statutory regime in respect of such challenges have already been set out in this judgment.

4.3 As appears from the first part of his judgment, the trial judge had to consider the proper approach which should be adopted by the court in the particular circumstances arising before him being a case where an application to challenge a deportation order, which is, as pointed out, governed by s.5 of the 2000 Act, has been commenced within the statutory time limit of 14 days but the application for leave had not yet been heard. In that context an argument was made for what was described as a quasi automatic stay. For reasons which will be analysed in the course of this judgment and as set out by the trial judge in his determination, the High Court came to the view that a quasi automatic entitlement to a stay did not arise and that, as a consequence, the matter needed to be considered on principles analogous to those which would arise in respect of an application for an interlocutory injunction in a private law dispute. The trial judge, therefore, went on to consider whether a fair issue had been raised for leave to challenge the subsidiary protection refusal. For reasons set out in his judgment, the trial judge concluded that no such fair issues had been raised.

4.4 In the second part of his judgment the trial judge went on to consider the position in respect of the deportation order. In that regard the trial judge, at para. 40, said that:-

> *"The Court has some doubt as to the tenability of the arguments advanced in support of those grounds, but given that that is primarily an issue to be addressed at the leave application hearing, it considers it appropriate for present purposes to consider first whether it is necessary for the Court to intervene at this stage to preserve the status quo on the assumption that a fair issue can be made out in respect of at least one of those grounds".*

In substance, without so determining, the trial judge was prepared to assume, for the purposes of the application, that a fair issue had been made out. The trial judge then proceeded to consider the criteria which would ordinarily apply in relation to the grant of an interlocutory injunction in private law proceedings and apply same to the facts of this case. For the reasons set out in his judgment the trial judge came to the view that the application of those principles, notwithstanding an acceptance, in the limited way already identified, that a fair issue had been established, led to the refusal of the interlocutory injunction concerned. The precise reasoning behind that view will be considered later in this judgment. It is against that refusal, arising in those circumstances, that this appeal is brought.

4.5 However, before concluding an account of the procedural history it is necessary to note one significant development which occurred after the decision of the trial judge. The application for leave to seek judicial review was ultimately heard by the High Court (Cross J.) with judgment being delivered on the 30th March, 2012. For the reasons set out in that judgment, Cross J. concluded that the Okunades had "*failed to sustain any arguable grounds which the case against the subsidiary protection decision could be challenged and [had] failed to establish any grounds either arguable or indeed substantial to challenge the deportation decision*". It follows that the application for leave was refused prior to the appeal to this court coming on for hearing. The court's attention was, quite properly, drawn to that fact. Finally, it should be noted that Cross J. did put in place an order which prevented deportation pending an appeal against his refusal to grant leave being brought to this court. The refusal by the trial judge to grant an injunction was, therefore, overtaken by those latter events. In that context it is necessary to turn to the issue of mootness.

5. Mootness

5.1 From that procedural history it is clear that the specific issue which arises on this appeal is, strictly speaking, moot. The question which was determined by Cooke J., and which is the subject of this appeal, was as to whether the deportation order against the Okunades should remain operative so that they could be deported pending the hearing of the application for leave to seek judicial review. That leave application has now been determined and, as pointed out, leave was refused by Cross J. The precise question which was determined by Cooke J. and which, therefore, arises on this appeal is moot.

5.2 However, it does need to be noted that the issue was not moot at the time when the appeal to this court was initially brought. That factor, of itself, would not, of course, warrant the court hearing an appeal which was moot. However, significant additional factors arose in this case. The Okunades brought a motion before this court seeking a stay on the relevant deportation order pending a hearing of their appeal. It seemed to the members of the court before whom that motion came on for hearing that it might be preferable to arrange for an early hearing of the appeal itself rather than waste court time on a stay application which would become largely irrelevant if an early hearing of the substantive appeal could be arranged. On that basis the full appeal was listed for hearing at an early stage. A further reason for adopting that course of action was that the court was told that the issues which arise on this appeal, at least at the general level of principle, arise in a significant number of other cases so that an early determination by this court of the substantive appeal was considered desirable for the purposes of clarifying the law in this area. Indeed, the broad application of the issues of principle which arise in this appeal led to a decision being made that it was more appropriate that the substantive appeal be considered by a panel of five judges rather than the panel of three judges originally designated.

5.3 This case had, therefore, been, in a sense, designated as an appropriate test case by reference to which the broad issues which are addressed in this judgment were to be determined. That designation occurred at a time prior to the issue becoming moot by virtue of the decision of Cross J. In those unusual circumstances the Minister was anxious, and the court agreed, that this appeal should be

heard notwithstanding the fact that the issue had, by the time the appeal actually came on for hearing, become moot. The unusual set of circumstances outlined above formed the basis for that decision. In addition it seemed to the court that any case in which this issue might arise was likely to become moot in a relatively short period of time for the issue concerns the proper approach that should pertain pending the hearing of a leave application. Every case of this type will, therefore, become moot when the leave application is heard. The problem which emerged in this case, being that arrangements for an expedited appeal had been set up with a date set but that the issue became moot by virtue of the hearing and determination of the leave application before that date was reached, has a significant risk of occurring in any other case. In those special and unusual circumstances this court felt that it was appropriate to hear the appeal notwithstanding its mootness.

5.4 In so doing the court was following a practise which goes back as far, at least, as *Condon v. The Minister for Labour & anor* [1981] I.R. 62. In that case this court proceeded to consider a challenge to the validity of a statute which had been in force at the time when the litigation in question had been commenced but had expired (the statute being of temporary duration) by the time an appeal came to be determined. This court was of the view that such a challenge could be considered unless it was clear that no similar legislation would be introduced in the future. There is a clear analogy with the circumstances of this case where any injunction pending a leave application is necessarily temporary and of short duration and where the same issues are likely to arise repeatedly before the High Court. In similar vein, and in more recent times, this court, in *O'Brien v. Personal Injuries Assessment Board* [2007] 1 I.R. 328, determined an appeal on the merits notwithstanding the fact that the individual case had become moot, but where it was likely that the same issue would arise again in many other cases.

5.5 Before going on to address the specific issues which arise on this appeal, and in the light of the problems already analysed in this judgment concerning the current statutory structure, I propose to make some observations on a structure for the consideration of hearings and decisions in the immigration field and judicial review challenges to such decisions.

6. A Suggested Structure

6.1 I am mindful of the fact that some of the issues which arise in relation to the appropriate statutory structure for the consideration of immigration matters (including judicial review of decisions made in that process) involve policy questions which are properly within the constitutional remit of the Oireachtas. However, I am also mindful of the fact that whatever statutory structure is put in place can have (as recent experience has, unfortunately, demonstrated) a very real impact on the courts using up, as it does, a significant amount of court time and giving rise to circumstances where, for the reasons already analysed, it seems to me that the amount of court resources that have to be allocated is significantly increased by reason of the anomalies in that statutory structure which have already been addressed.

6.2 It does not seem appropriate for me to comment on the precise way in which applications for refugee status, subsidiary protection or any other form of permission to remain in Ireland in like circumstances should be determined. That structure is a matter for the Oireachtas. I do, however, feel that it is appropriate to emphasise the desirability of there being a single and coherent structure within which all relevant decisions are made as a result of a single process. If that is not done then experience has shown that there is a real risk that there will be multiple challenges at different stages of the same process leading not only to a significant increase in the amount of court time that needs to be devoted to same but also adding, in many cases, to the complexity of such challenges and, in addition, significantly lengthening the overall process. The length of the process brings its own problems arising from the fact that persons engaged in the process will, therefore, remain in Ireland for a lengthy period pending the completion of that process. While it would be wrong to assume that a single process will eliminate those problems it would, in my view, significantly alleviate them.

6.3 However, it is in respect of the court's role in considering challenges to decisions made in the process that these comments are principally directed. It is my view that the system of applications for leave on notice (which was designed to weed out unmeritorious applications at an early stage) has had significant unintended consequences. The High Court list is full of cases awaiting a hearing of the leave application precisely because many of the leave applications are opposed thus requiring time for the filing of materials and submissions and, because of the necessarily longer hearing time required for opposed applications, a significant waiting list exists until a sufficient slot for such hearing can be provided. It seems to me that the concept of leave on notice, while well intended, has turned out to be counter-productive.

6.4 As part of the measures designed to ensure a speedy resolution of any issues arising out of a decision in the immigration process s.5 of the 2000 Act requires, as has been pointed out, that applications for leave be initiated within 14 days of the decision under challenge save where the court considers that there are grounds for extension. However, the reality is that the leave on notice system has created such a backlog that it takes many months for applications for leave to be heard. An extremely short period for commencement and a very long period before even the leave application can be considered, hardly makes sense. If a single system for the consideration of all issues that arise in the immigration field is, as earlier suggested, put in place, then there will be only one potential challenge, at least in the vast majority of cases.

6.5 If the requirement for substantial grounds were to remain but the application for leave was not to be on notice then the most unmeritorious cases would still disappear at the leave stage and it seems unlikely that the delay before there could be a hearing of those cases in which leave is granted would be significantly longer than the delay currently experienced in getting the leave hearing on. It also seems essential, in the context of a single decision making process, that the procedural law relating to judicial review challenges in the immigration field be harmonised so that the same rules apply to all challenges. In addition a requirement that all applications for leave be accompanied by written submissions filed at least (say) four days prior to the relevant court hearing would be advantageous. A judge of the High Court who has had an opportunity to read the papers in advance may be able, in some clear cases, to grant leave after a very short hearing but will also be able to conduct a significantly more focused leave hearing in cases of doubt. In addition to weeding out unmeritorious cases such a process is likely to lead to a narrowing of the grounds on which leave is granted in those cases where the leave application is successful. That in turn is likely to lead to more focused, and thus shorter, substantive hearings.

6.6 It seems to me that such measures would be likely to significantly shorten the overall timescale within which all issues in any individual case are determined. It would also remove at least some of the complications which arise in the conduct of judicial review proceedings by virtue of the current statutory structure which is, in my view, unnecessarily complicated.

6.7 The shortening of the overall time within which a final determination (including a decision on any judicial review) is made, seems to me to be for the benefit of all concerned. If persons have a legitimate case to remain in Ireland, on whatever basis, then the sooner a positive decision is made the better for all concerned. If persons do not have a legitimate case to remain in Ireland then it is very much in the interests of the State that a final decision to that effect is made as quickly as possible and acted on within a timeframe that does not give rise to persons in the system putting down roots. If people are not to be permitted to remain in Ireland then the final decision in that regard should be made an acted on as quickly as possible consistent with fair process. If such persons are to

stay then they are also entitled to know that fact as quickly as possible. Having made those comments it is next necessary to turn to the specific issues which arise on this appeal.

7. The Issues
7.1 It seems to me that, in reality, there are only two sets of issues arising.

7.2 The first set of issues is as to whether, as argued on behalf of the Okunades, a proper interpretation of the rules of court (as those rules were at the time of the decision under appeal) gives rise to a situation where persons in a position such as the Okunades were at the time when the matter came before Cooke J., are entitled, as of right, to a stay or injunction save, perhaps, in exceptional circumstances (what was described as a quasi-automatic stay). If that be so then it would be determinative of this appeal and, it seems likely, many other cases.

7.3 On the other hand if the proper interpretation of the rules gives rise to a situation where the court has to consider the merits of whether a deportation order should be stayed or an injunction put in place in respect of same, then the second set of issues arises as to the criteria which should be applied by the court in considering that question. Are the criteria, as found by Cooke J. in the decision under appeal, the same as those which apply in respect of any application for interlocutory injunction or are some different criteria to be applied in the public law field.

7.4 The issues raised concern, perhaps at the level of greatest generality, as to the proper approach of the courts to the situation which may arise pending a hearing of judicial review proceedings as to the circumstances in which any order decision or measure sought to be challenged is not to remain in full effect pending the hearing of the substantive judicial review case. The issues also raise, on a more narrow basis, the question of the application of any such general principles in the field of immigration and obviously, and finally, the application of any relevant principles to the facts of this case as they were at the time when the matter was before Cooke J. I propose, therefore, to consider first the question of a quasi-automatic stay, second, the question of the proper test to be applied in the event that there is no quasi-automatic stay and third, the application of that test both in the field of immigration judicial review challenges generally and on the facts of this case.

8. A Quasi Automatic Stay?
8.1 As pointed out earlier one of the matters considered by the trial judge was an argument to the effect that a so called quasi automatic stay applies in the particular circumstances of a case such as this. The argument was put in this way by the trial judge at para. 3 of his judgment:-

> *"It was submitted that, as a matter of law, an applicant for judicial review who is seeking leave to apply for an order of certiorari to quash a deportation order is entitled, as of right, to an interlocutory injunction restraining implementation of the order until the application for leave can be determined".*

The somewhat complicated procedural rules (derived from statute) which apply have already been noted. The substance of the argument is that, as a matter of the proper interpretation of the relevant rules of court as they were at the time, a party who has commenced a judicial review challenge to a deportation order within the 14 day statutory time limit applicable, is entitled, as of right, to a stay until such time as the application for leave (which will be on notice to the Minister and will, for the reasons already analysed, frequently take some time to come on for hearing) is heard.

8.2 As again noted by the trial judge the argument advanced by the Okunades relied on certain observations made obiter in the judgment of Geoghegan J. in this court in *Adebayo v. Commissioner of An Garda Síochána* [2006] 2 I.R. 298 and on the judgments of Hogan J. in *L.A. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 523, and *P.J. and ors v. Minister for Justice, Equality and Law Reform* [2011 IEHC 433. In the latter judgment Hogan J. had suggested that such an applicant was entitled to a stay in the absence of special circumstances. As is clear from the judgment of Hogan J. in *P.J.* the starting point is a consideration of the provisions of Order 84 Rule 20(7) of the RSC in the form in which it was at the time when this case was before Cooke J. The rule then provided as follows:

> *"Where leave to apply for judicial review is granted then:-*
>
> > *(a) If the relief sought is an order or prohibition or certiorari and the court so directs the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the court otherwise directs.*
> >
> > *(b) If any other relief is sought, the court may at any time grant in the proceedings such interim relief as could be granted in an action begun by plenary summons".*

8.3 As Hogan J. noted the provisions of the relevant Irish rule were borrowed, more or less verbatim, from the former Order 53 Rule 10(a) of the English Rules of the Supreme Court. Hogan J. then went on to examine English authority on the meaning of the term "stay" as used in those rules. Reference was made to *R. v. Secretary of State for Education and Science Exp. Avon C.C.* [1991] 1 QBD, *Minister for Foreign Affairs, Trade and Industry v. Vehicle and Supplies Limited* [1991] 1 WLR 550 and *R.(H) v. Ashworth Hospital Authority* [2003] 1 WLR 127. In substance Hogan J. came to the view that the term "stay" should, based on at least some of those authorities, be interpreted widely so as to ensure that the High Court can make an order with suspensive effect in respect of both administrative and judicial decisions.

8.4 Hogan J. went on to refer to the judgment of Geoghegan J. in *Adebayo* where, at p.315, the following is stated:-

> *"In summary, therefore, I take the view that no deportation may be implemented during the currency of the fourteen day period and that if, in fact, an application for leave is brought within that period no deportation order may be implemented until the court determines the application for leave and only then if the court does not order otherwise upon the granting of leave. Having regard to the very nature of this legislation and its intent it would seem likely that a court properly exercising its discretion would normally grant the stay or the injunction as the case might be if leave was being given".*

8.5 As Hogan J. noted there were a number of judgments of this court in *Adebayo* with McGuinness J. agreeing with Geoghegan J., Fennelly J. disagreeing and Denham and Hardiman JJ. reserving their position on this particular point.

8.6 The reasoning of Hogan J. stems from the distinction between Rule 20(7)(a) and Rule 20(7)(b). Hogan J. took the view that the reference in Rule 20(7)(b) to "*interim relief as could be granted in an action brought by plenary summons*" clearly referred to,

amongst other things, an injunction and thus imported, into cases covered by Rule 20(7)(b), the ordinary principles that would be applied by the court in considering whether or not to grant an interlocutory injunction in private law proceedings. Hogan J. considered that the creation of two separate sub-rules applying, respectively, to certiorari and prohibition, on the one hand, and cases where other relief is sought, on the other hand, would have been unnecessary unless it were intended that different approaches to the position which was to pertain pending a full hearing were to be considered appropriate depending on which form of order was sought.

8.7 However, it seems to me that the distinction between a stay where certiorari or prohibition is sought and an injunction in other cases is not based on an intention that different criteria apply to the grant of, on the one hand, a stay and, on the other hand, an injunction. Rather the reason for the distinction is that there is a difference in substance between a stay and an injunction.

8.8 As pointed out by Hogan J., when the current regime for judicial review in Ireland was adopted the Irish Rules Committee took, more or less verbatim, the text of the then current English Rules. However, I do not consider that some of the considerations which applied in the courts of the United Kingdom to the interpretation of the United Kingdom rules have equal application in this jurisdiction. As pointed out by Lewis on Judicial Remedies in Public Law (2004 Edition) at para. 6 – 027:- "*The question of the scope of the jurisdiction to grant stays used to be important where it was thought that interim injunctions were not available against Ministers of the Crown*" but where there was no absolute bar against the grant of a stay against a Minister for the Crown. As the author points out if "stays" were not limited to judicial proceedings then the grant of a stay could be used to stop the decision making process or the implementation of a Minister's decision. It was only in *M. v. Home Office* [1995] 1 A.C. 377 that the principle that injunctions might be available against the Crown became established in the law of the United Kingdom. However, the immunity of the State, in this jurisdiction, from certain types of civil litigation disappeared at a much earlier stage and at least from *Byrne v. Ireland* [1972] I.R. 241. The need, in this jurisdiction, for an expanded definition for "stay" so as to cover situations where the State could not be injuncted was no longer in being by the time the modern judicial review regime came into place. In those circumstances it does not seem to me that there is the same need for an expanded view of the term "stay" in Ireland as formerly existed in the United Kingdom. United Kingdom authorities on this point must, therefore, be treated with some caution.

8.9 In my view the true distinction between a "stay", on the one hand, and an "injunction", on the other hand, stems simply from the substance of the order sought. I do not consider, and in this respect I agree with the United Kingdom jurisprudence, that a stay applies only to judicial orders but agree that a stay can apply to other measures having legal effect. Where, however, there is in existence a legally binding measure and where it is considered appropriate to deprive that measure of legal effect pending the determination of proceedings, then it is appropriate to grant a "stay" which will have the effect of preventing the measure concerned from full force and effect for as long as the stay remains in being. However, as pointed out by the trial judge in this case, the term "stay" could have no real application to a negative decision. To take a simple example in the context of judicial proceedings it is useful to consider an applicant for an interlocutory injunction in the High Court. If the applicant fails but wishes to pursue an appeal to this court then, if the applicant wishes to preserve the position pending appeal, it would be necessary for the applicant to invite either the High Court or this court to grant some form of short term injunction pending the hearing of the appeal. A stay on the refusal by the High Court of an interlocutory injunction is meaningless. There is, as Cooke J. pointed out in this case, nothing to stay.

8.10 It seems to me, therefore, that the term "stay" is appropriate to refer to circumstances where a legally binding measure is already in place which it is sought to quash or to be prohibited from having legal effect and where it is sought to prevent, pending a full trial, the relevant measure from having force. The availability, under sub-rule (b), of other temporary measures such as an injunction is simply intended to cover decisions which it is not possible to stay (such as, for example, a refusal) so that the only temporary remedy that can be available is the grant of an injunction. Viewed in that way it does not seem to me that the rule can be interpreted as implying that the criteria for the grant of a "stay" are any different from the criteria for the grant of an interlocutory injunction.

8.11 It is, of course, correct to state that sub-rule (a) speaks of the grant of leave operating as a stay "*until the court otherwise orders*". Sub-rule (b), on the other hand, permits the court to grant "interim relief". Thus it requires a positive order of the court in order that the grant of leave to seek certiorari or prohibition not operate as a stay, whereas it requires a positive order of the court in order that an injunction be granted. In passing, it should, again, be remembered that Cooke J. was dealing with this case under the relevant provisions of the rules which applied at the time in question. There has been a material change in those rules since that time. It may well be that the issue with which this part of this judgment is concerned would not really arise under the current rule. However, even on the basis of the rules in their former form, it does not seem to me that the distinction in the language used can provide a justification for the existence of a so called quasi automatic stay. As will be analysed in more detail in the next section of this judgment a court, when faced with the question as to what is to happen pending a full trial, has to balance the competing legitimate interests involved. It does not seem to me that the task of balancing those legitimate competing interests is different dependent on whether the measure sought to be challenged is said to be one which should be quashed by certiorari or prohibited, on the one hand, or whether an injunction is considered the appropriate means of intervening, on the other. Nor is it the case that the mere fact that there may be a measure in place which can be "stayed" should alter that balance in comparison with a case where the most effective means of preserving the position pending trial may be to consider the grant of an injunction. The underlying requirements of justice are not dependent on the form of judicial review order ultimately sought or the form of temporary order applied for. It does not seem to me, therefore, that the criteria to be applied in deciding whether a stay should be excluded under O.84 r.20(7)(a) are, in principle, be any different to the criteria which are to apply where the court is invited to grant some other form of interim relief under O. 84 r.20(7)(b).

8.12 That, of course, leads to the question of what the appropriate criteria are or, put another way, what the test is for the grant of a stay or injunction which has the effect of preventing an otherwise valid measure or order from having effect pending trial.

9. The Proper Test

9.1 It seems to me that there are two connected but separate questions which arise under this heading. The first is as to whether it matters whether the order sought is described as a "stay" or as an "injunction". The second is as to what the proper test or tests maybe.

9.2 I have already set out its reasons for coming to the view that the distinction between a "stay" and an "injunction" in the context of judicial review in modern times simply refers to the form of the temporary order sought. Where there is already in being some form of decision, order or instrument of a lower court, statutory body, minister, administrative tribunal, or the like which is amenable to judicial review ("a reviewable measure") then it is appropriate to speak of that measure being "stayed" where it is considered by the court to be appropriate to prevent the reviewable measure having immediate effect pending a review of its lawfulness. In those circumstances the measure ceases to have effect or force as long as the stay continues in existence. Obviously, to the extent that the existence of any such reviewable measure may be necessary to entitle lawful action to be taken, the fact that the reviewable measure concerned is stayed removes, for as long as the stay remains in place, the legal justification for the action in question. For example, because a conviction imposing a term of imprisonment by a court of competent jurisdiction is a prerequisite to the

imprisonment of an accused for an alleged crime then it follows that a stay on an order providing for conviction and imprisonment removes the justification for the relevant accused being imprisoned for as long as the stay in question remains in place. Likewise an order or direction given by a commercial regulatory body which, if valid, would be binding so as to require an operator in the relevant field to act in a particular way will, if stayed, be inoperable so that the operator is not, so long as the stay continues, bound to comply with the order. In such cases the effect of a stay will be the same as an injunction preventing implementation of the measure stayed.

9.3 As pointed out I am not satisfied that there is any difference per se in the proper approach to be adopted by the court in considering whether to stay an existing reviewable measure (in the words of O.84 r.20(7)(a) to consider whether to "otherwise direct" that there not be a stay) or put in place some other regime (such as by way of injunction), necessary to properly protect the interests of all parties pending a full trial. The underlying situation is the same in both cases. There is an inevitable risk that, with the benefit of hindsight, and after a full trial has been conducted, an injustice may be seen to have been done. A party may be subject to a challenged reviewable measure only to find that the measure is held to be invalid after a full trial. If the court does not, on a temporary basis, stay that measure or otherwise prevent it from having effect pending trial then there is an obvious risk of injustice in subjecting the party concerned to the measure in question only to find that the measure is invalid.

9.4 On the other hand an order by way of stay or injunction which has the effect of absolving a person or body from being subject to an otherwise valid measure pending trial itself runs the risk of injustice, for if the result of the trial is that the measure is found to be valid, the person or body will have escaped from being subject to what, in that eventuality, is found to be a lawful measure for whatever period of time elapses between the stay or injunction being imposed and the final resolution of the proceedings.

9.5 In both cases the problem stems from the fact that the court is being asked, on the basis of limited information and limited argument, to put in place a temporary regime pending trial in the full knowledge that the court does not know what the result of the trial will be. It seems to me that, recognising that a risk of injustice is an inevitability in those circumstances, the underlying principle must be that the court should put in place a regime which minimises the overall risk of injustice. It seems to me that the underlying principle remains the same whether the court is considering placing a stay on a measure or granting an injunction. Indeed, although it is unnecessary to go into detail for the purposes of this case, it seems to me that a like general principle underlies the approach of the court in many other types of cases where the same broad problem arises. In many situations it is necessary to decide what is to happen in the intervening period pending a trial or other determination (or indeed an appeal) when, by definition, it is not possible to decide what the ultimate outcome will be. All such cases involve the risk that, when the dust has settled, it will be seen that some person or body has suffered either by the intervention of the court or, equally, by its non intervention. However the only way to remove that risk of injustice would be by deciding the case, issue or appeal immediately. The whole problem is that that process takes time. In those circumstances I do not believe that the test as to whether the court should intervene pending trial depends on whether the temporary measure sought is described as a stay or as an injunction or, indeed, as any other form of order which might arise on the special circumstances of an individual case. The court must, in all cases, act so as to minimise the risk of injustice.

9.6 However the second question which arises is as to whether that underlying principle, which has found expression in the context of the injunction jurisprudence in the test set out in *Campus Oil v. Minister for Energy* (No.2) [1983] I.R. 88, applies in exactly the same way when the court is being asked to put in place a temporary regime pending the resolution of judicial review proceedings. While this case is concerned with the proper test to be applied in judicial review proceedings generally and in immigration proceedings in particular, it is necessary to first analyse the underlying basis for the grant or refusal of interlocutory injunctions generally.

9.7 It is fair to say that much of the detailed analysis of the *Campus Oil* test has occurred in the context of injunction proceedings which at least have a significant commercial contractual or property character. The basic rules for the grant or refusal of such injunctions at the interlocutory stage are well settled. The test perhaps finds its most detailed exposition in the judgment of McCracken J. in *B&S Limited v. Irish Auto Trader Limited* [1995] 2 I.R. 142 at 145 which has been approved by Laffoy J. in *Symonds Cider v. Showerings (Ireland) Limited* [1997] 1 ILRM 481 and Quirke J. in *Clane Hospital Limited v. Voluntary Health Insurance Board* (Unreported, High Court, Quirke J., 22nd May 1998).

9.8 As formulated in B&S the test can be summarised as follows:-

- The party seeking the injunction must show that there is a fair or bona fide or serious question to be tried.

- If that be established the court must then consider two aspects of the adequacy of damages. First the court must consider whether, if it does not grant an injunction at the interlocutory stage, a plaintiff who succeeds at the trial of the substantive action will be adequately compensated by an award of damages for any loss suffered between the hearing of the interlocutory injunction and the trial of the action. If the plaintiff would be adequately compensated by damages the interlocutory injunction should be refused subject to the proviso that it appears likely that the relevant defendant would be able to discharge any damages likely to arise.

- If damages would not be an adequate remedy for the plaintiff then the court must consider whether, if it does grant an injunction at the interlocutory stage, a plaintiff's undertaking as to damages will adequately compensate the defendant, should the latter be successful at the trial of the action, in respect of any loss suffered by him due to the injunction being enforced pending the trial. If the defendant would be adequately compensated by damages then the injunction will normally be granted. This last matter is also subject to the proviso that the plaintiff would be in a position to meet the undertaking as to damages in the event that it is called on.

- If damages would not adequately compensate either party then the court must consider where the balance of convenience lies.

- If all other matters are equally balanced the court should attempt to preserve the status quo.

9.9 It can be seen that the analysis of McCracken J. involves an application of the basic principle, under which the court is required to minimise the risk of injustice, to the sort of facts which normally arise in the context of commercial or property litigation. If a plaintiff does not establish a fair case or serious issue to be tried then interfering with the position of the defendant by means of imposing an interlocutory injunction on that defendant would create a serious and disproportionate risk of injustice. Where damages are adequate on either side and likely to be capable of being recovered in practice then there is no great risk of injustice for the plaintiff or defendant, as the case maybe, will, if they win the case, be either awarded damages (in the case of a plaintiff) or be able to recover damages on the undertaking (in the case of a defendant). There is, of course, no real risk of injustice if such recovery would adequately compensate the relevant party.

9.10 The test of the balance of convenience is, of course, itself expressly directed to deciding where the least harm would be done by comparing of the consequences for the plaintiff in the event that an interlocutory injunction is refused but the plaintiff succeeds at trial with the consequences for the defendant in the event that an interlocutory injunction is granted but the plaintiff fails at trial.

9.11 Finally even that part of the test which suggests that maintaining the status quo might be determinative where all other factors are evenly balanced is in itself a recognition that, in order to interfere with the situation as it currently stands, the court requires a justification. Therefore the risk of injustice from not acting must be greater than that from acting in order that the court depart from the status quo.

9.12 However it is clear that those detailed rules derive from the courts regular experience of having to deal with the day to day issues which are thrown up in deciding whether to put in place interlocutory orders in the context of commercial or property litigation so as to minimise the risk of injustice. In that context it does also need to be noted that the courts have had to evolve variations on the test or move accurately the precise implementation of the test in order to deal with the specific types of problems which arise in particular types of litigation.

9.13 It is unnecessary for the purposes of this judgment to analyse in detail each of the types of cases where a refinement of what might be described as the "pure" Campus Oil test has evolved. However, some examples are illustrative of the fact that that such refinements and variations can be seen as a response to the need to minimise the risk of injustice in the context of the particular types of issues which are likely to arise in special cases.

9.14 A first example may be found in relation to mandatory interlocutory orders. As Megarry J. observed in *Shepherd Homes Ltd. v. Sandham* [1971] Ch.340:-

> *"In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."*

O'Higgins C.J. made similar comments about the difficulty in granting mandatory orders at an interlocutory stage in *Campus Oil* itself. Perhaps the area where mandatory interlocutory orders have received their most extensive recent consideration in this jurisdiction is in the field of so called employment injunctions (that is applications brought by plaintiffs seeking to restrain either dismissal or certain steps being taken in a disciplinary process) where the courts have applied a test which involves a variation on the "pure" *Campus Oil* principles. Where, for example, the substance of the order sought in those cases involves something which, in substance, is a mandatory order (as to which see *Bergin v. Galway Clinic Doughiske Ltd* [2007] IEHC 386 and *Giblin v. Irish Life and Permanent plc* [2010] IEHC 36), the courts have required the plaintiff to establish not just a fair or arguable case but rather the higher standard noted by this Court in *Maha Lingam v. Health Service Executive [*2006] 17 ELR 137.

9.15 Second it may well be that there is a category of case where the court has to take into significant account the fact that the grant or refusal of an interlocutory order may go a long way towards resolving the case itself. See *N.W.L. Ltd v. Woods* [1979] 1 WLR 1294. Likewise *AIB plc & ors v. Diamond & ors* [2011] IEHC 509 involved a so called springboard injunction, which involves the court in taking action to deprive former employees, who are alleged to have acted unlawfully, (either by taking their employer's secrets properly so described or by improperly dealing with the former employer's clients while still in employment or the like) of the fruits of that alleged unlawfulness. In Diamond it was held that a higher standard, similar to that required for the granting of a mandatory interlocutory injunction, required to be established. The so called springboard injunction is only for a limited period of time and once granted cannot be undone even if the defendants win at trial leaving the court with only an award of damages on the plaintiff's undertaking as a remedy.

9.16 Furthermore, injunctions which seek to interfere with continuing disciplinary proceedings can have the effect of making the management of personnel in companies virtually impossible. It is, therefore, hardly surprising that, in such cases, where the result of the interlocutory application will either completely, or significantly, decide the case, the courts have felt it necessary to impose a higher standard before an injunction can be granted (normally the *Maha Lingam* standard). That variation from the pure *Campus Oil* test can be seen as nonetheless still coming within the general principle of attempting to fashion an order which runs the least risk of injustice for if the grant or refusal of an interlocutory order will go a long way towards deciding the case then the risk of an injustice is even greater and the court requires a greater degree of assurance before intervening.

9.17 It has sometimes been suggested that the court should, in deciding whether to grant or refuse an interlocutory injunction, place much greater weight on the strength or weakness of the parties' case on the facts and thus engage in a detailed analysis of the facts at the hearing of an application for an interlocutory injunction. At least in the commercial context there are strong reasons for not so doing. Those reasons are set out in my judgment in *AIB v. Diamond*. It would be very difficult to resist repeated applications by the parties to put in continuing additional evidence and argument if a nuanced view as to the strength of either party's case was likely to form a significant part of the courts consideration as to whether to grant or refuse an interlocutory injunction. Such a practice would defeat the whole purpose of the interlocutory injunction hearing. Indeed it could lead, as was pointed in *Diamond*, to the court having to have an earlier hearing to decide what was to happen pending the determination of the interlocutory application. Such a practice would not be in the interests of litigants or of the proper management of scarce court resources. Indeed it is, perhaps, worthy of some note that the problem which has arisen in these proceedings derives from the fact that statutory intervention has led to a significant hearing at the leave stage in immigration judicial review cases. This means, as has been pointed out, that the parties have to be given an opportunity to file evidence together with detailed legal argument and, because the case is going to take some time at hearing, a slot in the court list has to be awaited. The very problem with which this court is confronted in this appeal stems in significant part from the fact that there are practical reasons why there is likely to be a longish gap before a contested leave application in the immigration field can be heard.

9.18 In passing it might be noted that it could be said that there is something of a tension between the practical requirements which suggests that the court should not engage in a detailed analysis of the facts (or indeed of complex legal questions) at an interlocutory stage, on the one hand, and the requirement, in categories of cases such as those referred to in *Maha Lingam* or *Diamond*, that a higher standard than "fair issue to be tried" be established. Of course, in the majority of cases the straightforward "fair issue to be tried" threshold is all that requires to be met. A determination on that issue does not require a detailed factual or legal analysis. However, even in those cases where a higher threshold may need to be met that requirement does not involve the court in a detailed analysis of the facts or complex questions of law. Rather it obliges the plaintiff to put forward, in a straightforward way, a case which meets the higher threshold. The practical difficulties identified in Diamond would only arise if the court were required to put into the balance a nuanced estimate of the strength of each of the parties' cases.

9.19 Against that overall background I am satisfied that the same underlying principle applies in any application taken in the context of a judicial review which is designed to determine what position is to pertain until the substantive judicial review proceedings in

question have been finally determined (including the position which is to pertain pending a contested inter partes leave application). The court is required to make an order which minimises the risk of injustice. I am also satisfied that the so called *Campus Oil* test provides a useful starting point in determining the proper principles to be applied in the analogous situation which arises pending the hearing of a judicial review application. However it does not appear to me that it necessarily follows that the detailed rules for the implementation of that general principle work in exactly the same way in the context of the sort of issues with which the court is likely to be concerned in judicial review proceedings as opposed to those which arise in the context of injunctions sought in proceedings involving commercial questions, property issues, employment law disputes or the like. The underlying principle is the same. The detailed application of that principle is likely to be different. In that context it is necessary to turn to how the general principle is to be properly applied in the context of applications arising in judicial review cases.

9.20 It seems to me that the first question arising in the *Campus Oil* test, being as to whether the moving party has established a fair or arguable question to be tried, remains the starting point in considering whether a stay or injunction should be granted in judicial review proceedings or in ordinary plenary proceedings. In that context I note the argument put forward on behalf of Ms. Okunade which suggested that imposing the *Campus Oil* test amounted to denial of access to the court or a failure to provide for an effective remedy. The argument started by noting, correctly so far as it goes, that persons in a position such as Ms. Okunade are entitled to an effective remedy before a court (whether as a matter of Irish constitutional jurisprudence or, where engaged, under EU law). However, the argument then went on to suggest that an applicant who had sought leave within the time limits prescribed by the relevant legislation but whose application for leave had not been heard by reason of the unavailability of a judge, must necessarily be entitled to remain in the jurisdiction pending the leave application if such a party was to enjoy an effective remedy. I do not accept that argument.

9.21 What the first part of the *Campus Oil* test requires is that the applicant establish a fair or arguable case. However, if an applicant was in a position to have an immediate hearing of the leave application, then it would be necessary to establish a sufficient case in order that leave be granted. I find it difficult to understand how it can be argued that an applicant, who could be refused leave by reason of failing to establish a sufficient arguable case, has an effective remedy but an applicant who, pending leave, is, in order to meet the first leg of the *Campus Oil* test, required to meet a similar (or in some cases, where substantial grounds would need to be shown to obtain leave, lower) standard is said to be denied access or an effective remedy.

9.22 While acknowledging the important rights involved in cases in the immigration field it is difficult to see how requiring a party to meet the threshold of a fair or arguable case before such party is entitled to an order from the court, imposes any barrier to access to the court or to an effective remedy such as might be inconsistent either with Irish constitutional jurisprudence or any rights guaranteed as a matter of European law.

9.23 I have already noted the procedural mire into which certain aspects of immigration law has been thrust by reason of what might be said to be anomalous aspects of the legislation. That situation undoubtedly adds to the complexity of the situation with which the court can frequently be faced. Indeed, one likely practical consequence of the Minister declining, in at least some cases, to give an undertaking not to deport pending the hearing of a leave application, is that the court will be faced with interlocutory applications seeking to restrain deportation in many such cases. The very problem of providing adequate court time to hear the leave application in a timely fashion is most unlikely to be solved by requiring, in at least some of the same set of cases, that there be sufficient court time set aside to hear a contested interlocutory application which would at least have to address a variation on one of the same questions (i.e. whether the applicant has made out an arguable case) as would arise on the leave application in any event. If it were to transpire that the court had to provide time for a significant number of contested interlocutory applications then those applications themselves might not be able to get a very early hearing which situation would, in turn, lead to the question as to what was to happen pending the hearing of an interlocutory application. These complications, which do not directly arise on the facts of this case, only go to emphasis the need for legislative reform.

9.24 This case is, however, concerned with is the proper test to be applied where there is an interlocutory application before the court which is designed to prevent the implementation of a deportation order pending either a relevant leave application in judicial review proceedings or, indeed, at least in theory, post leave and pending a full hearing. For the reasons already analysed I am satisfied that the fair or arguable issue to be tried leg of the Campus Oil test must also be met in the context of judicial review applications.

9.25 On the second set of questions which arise under *Campus Oil* (being as to the adequacy of damages) I am of the view that such questions are less likely to be of any significant relevance in relation to judicial review proceedings. There is reference in the judgment in the High Court in this case to "irreparable harm". It is not clear whether the trial judge intended the term "irreparable harm" to mean something other than harm that is not adequately compensatable in damages. However, it seems to me that the true question is as to whether any relevant harm can be compensated in damages. The reason for this stems from the underlying principle. If a plaintiff can adequately be compensated in damages then no real injustice is risked by the plaintiff being required to wait until the trial of the action before obtaining any court intervention. Even if whatever wrong is alleged continues until the trial of the action (and thus the wrong is greater by lasting longer) nonetheless if an award of damages amounts to adequate compensation (and provided that the defendant is likely to be a mark) no real injustice will have been suffered for the plaintiff will recover additional damages to reflect the fact that the wrong was greater by lasting longer. If, and to the extent that, it can be said that exposing the plaintiff to the wrong for a longer period of time than might otherwise be the case is unjust then that will only represent a significant argument if the additional damages which would follow would be inadequate to compensate for the additional period of time for which the wrong was suffered. Any arguments that can arise under that heading are, in truth, therefore arguments as to whether damages are really an adequate remedy in the first place.

9.26 In that context it is relevant to consider *American Cyanamid Company v. Ethicon Limited* [1975] A.C. 396. At p.402 of the report there is reference to the question of "irreparable damage". However, the reference in question is to the submissions of counsel. When it came to the determination of the court, Lord Diplock, at p.408, describes as a governing principle the fact that the court should consider whether the plaintiff "*would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendants continuing to do what was sought to be enjoined between the time of the application and the time of trial*". It is clear, therefore, that where the term irreparable damage is used it can only be taken to refer to damage which can not be adequately compensated in an award of money rather than damage which may be limited in scope. It seems to me that this represents the position in this jurisdiction as well.

9.27 However, where the applicant in judicial review proceedings can argue that the harm done to that applicant by being forced to comply with some allegedly unlawful measure pending a full hearing is non-financial and, thus, not capable of being compensated in damages, then it seems to me that the question of irreparable harm cannot really arise. If the real point made is to the effect that compliance with the contested measure is not particularly onerous then that is an issue which more properly arises under the balance of convenience. The fact that it may not be unduly onerous to comply with a challenged measure pending trial is, therefore, a factor,

but one to be taken into account in balancing the risk of injustice rather than in suggesting that there is no irreparable damage. Requiring a party to comply with an arguably unlawful measure gives rise to a situation where damages will not be an adequate remedy except, perhaps, in the limited circumstances where the judicial review may be commercial contractual or property oriented in the first place and where the consequences of complying with the measure under challenge may, in those unusual and limited circumstances, be capable of being adequately compensated in damages. However, even in such cases damages may well not be recoverable and thus, by definition, not be capable of providing adequate compensation. For example, in *Kennedy v. The Law Society* [2005] IESC 23, this court discussed the very limited circumstances in which it is possible to obtain damages against a state authority or official notwithstanding a finding that there was an appropriate basis for quashing a decision made by the state body or official in question. Like views were also expressed by this court in *Glencar Exploration plc and anor v. Mayo County Council* [2001] IESC 64. It is unnecessary, for the purposes of this judgment, to go into detail about the precise circumstances in which an award of damages might arise save to note that there can be little doubt but that those circumstances are limited. It follows that, in many cases, a successful applicant for judicial review who succeeds in, for example, having a relevant order or measure quashed or a proposed action prohibited will not obtain damages at all.

9.28 It, therefore, seems to me that the question of the adequacy or otherwise of damages is unlikely to be a significant feature in reaching an assessment as to how best to minimise the risk of injustice in the context of an interlocutory application pending trial of judicial review proceedings.

9.29 In the particular context of judicial review in the immigration field there are, indeed, even further reasons why the adequacy of damages is unlikely to feature. First, it is unlikely, in the vast majority of cases, that an applicant would be in a position to meet any undertaking as to damages or, indeed, that any rational basis for calculating the damages, to which the respondent authorities might be entitled should an interlocutory order or stay be granted but the proceedings ultimately fail, could be shown to exist. Likewise, it is unlikely, at least in the vast majority of cases, that a successful outcome to the judicial review process could lead to an award of damages to the applicant in any event. The mere fact that an order or determination made in the immigration field turns out to be legally invalid does not carry with it an entitlement of a party affected by the order or determination in question to any award in damages.

9.30 However, there is a further feature of judicial review proceedings which is rarely present in ordinary injunctive proceedings. The entitlement of those who are given statutory or other power and authority so as to conduct specified types of legally binding decision-making or action taking is an important part of the structure of a legal order based on the rule of law. Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise. It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way. Regulators are entitled to regulate. Lower courts are entitled to decide. Ministers are entitled to exercise powers lawfully conferred by the Oireachtas. The list can go on. All due weight needs to be accorded to allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion. It seems to me that significant weight needs to be attached to that factor in all cases. Indeed, in that context it is, perhaps, appropriate to recall what was said by O'Higgins C.J. in *Campus Oil*. At p.107 of the report he said the following:-

> *"The order which is challenged was made under the provisions of an Act of the Oireachtas. It is, therefore, on its face, valid and is to be regarded as a part of the law of the land, unless and until its invalidity is established. It is, and has been, implemented amongst traders in fuel, but the appellant plaintiffs have stood aside and have openly defied its implementation."*

It is clear, therefore, that the apparent prima facie validity of an order made by a competent authority was a factor to which significant weight was attributed. While the comments of O'Higgins C.J. were directed to a ministerial order made under an Act of the Oireachtas it seems to me that there is a more general principle involved. An order or measure which is at least prima facie valid (even if arguable grounds are put forward for suggesting invalidity) should command respect such that appropriate weight needs to be given to its immediate and regular implementation in assessing the balance of convenience.

9.31 It is also, in my view, appropriate to take into account the importance to be attached to the operation of the particular scheme concerned or the facts of the individual case in question which may place added weight on the need for the relevant measure to be enforced unless and until it is found to be unlawful.

9.32 That is not to say, however, that there may not also be weighty factors on the other side. It is necessary for the court to assess the extent to which, in a practical way, there is a real risk of injustice to an applicant for judicial review in being forced to comply with a challenged measure in circumstances where it may ultimately be found that the relevant measure is unlawful. The weight to be attached to such considerations will inevitably vary both from type of case to type of case and by reference to the individual facts of the case in question.

9.33 Finally, so far as the cases where the risk of injustice may be evenly balanced are concerned, it does seem to me that there may be greater scope, in the context of judicial review proceedings, for the court to take into account the strength of the case, as it appears on the occasion of the application for a stay or injunction, than may apply in an ordinary injunction case. I have already set out the reasons why it is neither desirable nor practicable in ordinary cases for the court to have to routinely form an assessment of the strength of the case. However, it is of some interest to note the way in which this question was put as far back as the decision of the House of Lords in *American Cyanamid*.

9.34 At p.407 Lord Diplock said the following:-

> *"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."*

9.35 It is well worth recalling that Lord Diplock spoke of the court refraining from deciding questions of disputed fact or "difficult" questions of law. In the context of an application for an interlocutory injunction in the commercial, contractual, property or allied fields the wisdom of those remarks is obvious. If it were to be otherwise then the problems referred to earlier, as noted in *AIB v. Diamond*, would loom large. However, those considerations may be of significantly less weight in judicial review applications. First, it is rarely the case that questions of fact as such are an issue in judicial review proceedings. Even if the decision maker had to decide facts then the only question which can arise before the court in a judicial review challenge to the decision in question is as to whether the decision-maker could rationally (in the sense in which that term is used in the jurisprudence) have come to the conclusion of fact concerned. On that question the only matters that the court ordinarily needs to consider are the materials which were before the relevant decision-maker.

9.36 In addition, while there may well be some judicial review proceedings which could come within the parameters of what Lord Diplock spoke of as "difficult" questions of law, many such cases involve either very net questions of law or involve the application of well established principles to the circumstances of the case. It seems to me, therefore, that in considering whether to grant a stay or injunction pending the progress of judicial review proceedings, the court can have regard to the strength of the case at least where, as will frequently be the case, the challenge does not involve issues of fact as such or the sort of complex questions of law which, in the words of Lord Diplock, "*call for detailed argument and mature considerations*".

9.37 In the particular context of judicial review in the immigration field it is, therefore, important to note that the relevant facts will almost certainly be readily placed before the court by the applicant for the facts which will be relevant to the judicial review are likely to consist almost entirely of the materials which were before, and considered by, the decision-maker. Likewise, at least in many cases, the legal principles will be relatively clear. It is unlikely, therefore, that most cases involving a judicial review challenge in the immigration field would, at the interlocutory stage, again in the words of Lord Diplock, "*call for detailed argument and mature considerations*".

9.38 Finally, it is argued on behalf of the Okunades that the application of a test similar to *Campus Oil* would amount to a denial of an effective remedy either as a matter of Irish constitutional law or, insofar as subsidiary protection is concerned, a denial of the right to an effective remedy deriving from Article 47(1) of the Charter of Fundamental Rights of the European Union which provides that "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article*".

9.39 It is not necessary, for the purposes of this appeal, to analyse any of the issues raised which are concerned with whether the regime in Ireland applicable to applications for subsidiary protection provides for an effective remedy. Those issues of substance are not before the court. What is before the court is the question of the proper test to be applied at an interlocutory stage. In that context it needs to be noted that any applicant for judicial review is entitled to bring an application for a stay or an injunction and to have that application determined by the court. The relevant applicant does, therefore, have access to the court (to the extent required to comply with the Irish Constitution) and is entitled to seek to persuade the court to provide an interlocutory remedy. In that context it seems to me that for reasons similar to those addressed in *Farrell v. Bank of Ireland* [2012] IESC 42, the issue is not so much one of right of access to the court but rather one concerning the right to fair process.

9.40 It does need to be noted that no question arises on the facts of this case concerning the position which should pertain after an application for leave to seek judicial review has been brought and before an application for an interlocutory injunction is heard. There are very real questions as to whether it could be permissible to implement a deportation order in those circumstances having regard to the jurisprudence of the ECtHR in cases such as *Conka v. Belgium* (Case no. 51564/99), *N.A. v. The United Kingdom* (Case no. 25904/07) and *Abdolkhani and Karimnia v. Turkey* (Case no. 30471/08). However, what those cases are concerned with is the absence of an effective remedy which arises by the implementation of a deportation order before a person who wishes to mount a challenge to that order has had the opportunity to have a hearing in court. It does not seem to me that the jurisprudence of the ECtHR in those cases has any application to the situation which is to pertain after a person has had the opportunity to be heard in court as to whether a deportation order is to remain operative pending a more detailed consideration of the challenge which the person concerned wishes to bring. Whether that court hearing is procedurally a leave application or an application for a stay or an injunction does not alter the fact that the applicant has access to the court to seek to have a temporary restraint placed on the deportation order. It is deportation before such access is provided that infringes the ECHR.

9.41 Requiring that the applicant establish a prima facie case does not seem to me to, in any way, deprive an applicant of an effective remedy for the purposes of EU law. The relevant applicant has access to a tribunal and is only required to satisfy that tribunal (being the High Court) that there is an arguable case to be tried on the merits. It is hard to see how an applicant who fails to meet that relatively low threshold could be said to have been denied an effective remedy in the event that the court does not make an interlocutory order. Furthermore, it is clear, as already pointed out, that very significant weight would need to be attached to any credible case made on behalf of an applicant which suggested that the relevant applicant would be impaired in their ability to present their case if that applicant were to be deported pending the trial. In those circumstances the ability of the applicant to present whatever case on the merits they may wish at the substantive hearing is fully preserved. I am not, therefore, satisfied that there is any basis for suggesting that the application of the sort of test which has been the subject of analysis in this section of this judgment, would amount either to an impermissible interference with the right of access to the court or, indeed, the right to fair process, or would give rise to a failure to provide for an effective remedy as required under EU law.

9.42 As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:-

> (a) The court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;
>
> (b) The court should consider where the greatest risk of injustice would lie. But in doing so the court should:-
>
> > (i) Give all appropriate weight to the orderly implementation of measures which are prima facie valid;
> >
> > (ii) Give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and
> >
> > (iii) Give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;
> >
> > but also
> >
> > (iv) Give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.
>
> (c) In addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages.

(d) In addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case.

9.43 Having regard to those general principles it is next necessary to turn to the application of those principles both to immigration cases generally and to the facts of this case.

10. Application to Immigration Cases

10.1 For the reasons already outlined this Court has only been prepared to deal with what might, on one view, be considered a moot case, by reason of the fact that the court was informed that issues of the broad type which arise in this case are likely to occur on a regular basis. It follows that it is appropriate to start with some general observations on the application of the test identified in the preceding section of this judgment in the field of immigration judicial review.

10.2 The entitlement of the executive of any country to exercise a significant measure of control, within the law, of its borders is an important aspect of the public interest of any state. It seems to me, therefore, that a significant weight needs to be attached to the implementation of decisions made in the immigration process which are prima facie valid. It would, in my view, be an insufficient recognition of the legitimate entitlement of the state to ensure the orderly conduct of the immigration and asylum process not to place a high weight on the need to respect orders and decisions made in that process unless and until they are found to be unlawful. The importance to be attached to the exercise by the state of its right to control its borders and implement an orderly immigration policy has been touched on by this court in a number of decisions most recently in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3. In *Meadows* Murray C.J. referred to "*public policy, including the integrity of the asylum system*" as being part of the balance which needed to be struck in decision making. Likewise Denham J., in the same case, noted that "*the Executive has a primary role in relation to policy and immigration*". While those comments were made in a case involving an assessment of substantive rights it seems to me that like considerations require that appropriate weight be attached to the orderly implementation of immigration policy in determining where the balance of justice lies at the interlocutory stage.

10.3 On the other hand it is also clear that a person, who asserts either an entitlement to remain in the state or an entitlement to have consideration given to their being allowed to remain in the state in circumstances where it is said that the consideration given to date was not in accordance with law, will suffer some injustice if that person were to be removed from the state pending the result of a challenge to the legality of the decision to deport but where the court ultimately found in favour of the challenge in question to the extent that either deportation did not follow or a further process was required which was ultimately resolved in favour of the applicant concerned. On this later point it must be recalled that, in at least some of the cases, the only consequence of a successful judicial review challenge will be a rehearing or reconsideration rather than a court determined right to remain in Ireland. The possible injustice to an applicant, to which I have referred, is a factor to which weight must also be given, independent of any additional consequences that might be said to flow from deportation on the facts of the individual case.

10.4 However, in the absence of any additional factors on either side, it seems to me that, if faced simply with an assertion on the part of the Minister that it is desired that a deportation order be enforced unless and until it be found invalid and an assertion on the part of an applicant that the applicant in question does not wish to run the risk of being deported only to be readmitted if the relevant proceedings are sufficiently successful, the position of the Minister would win out. It should also be taken into account that, at least in many cases, the result of a successful judicial review challenge will not necessarily lead to the applicant in question being entitled to remain indefinitely in Ireland or if already out of Ireland to be entitled to come back to Ireland for the purposes of remaining here indefinitely. In very many cases the only consequence of a successful challenge is, as has been pointed out, that issues of substance will require to be considered again or that some further process will need to be engaged in before a final decision is made. That too is a factor to which appropriate weight should be attached and which favours, in the absence of material countervailing factors, the implementation of a deportation order. Of course, where the presence of the relevant applicant in Ireland might be necessary to enable any subsequent process to be conducted or hearing to be held, that factor too would need to be taken into account, although there are many ways (such as an by appropriate undertaking) by which such attendance, if found necessary, could be facilitated.

10.5 The default position is, therefore, that an applicant will not be entitled to a stay or an injunction. However, it may be that, on the facts of any individual case, there are further factors that can properly be taken into account on either side. If, for example, (and it should be made clear that no such consideration arises on the facts of this case) there was a serious risk of criminality or other activity contrary to the public interest then that would be a factor to which significant additional weight would lie on the side of refusing an injunction. Perhaps more likely an applicant must, of course, be entitled to put before the court the practical consequences of being deported pending the conclusion of the judicial review process such as the relevant conditions in any country to which the applicant is likely to be deported. There may, as already noted and as the trial judge recognised, be some cases where the presence of the applicant for the hearing of the judicial review proceedings is necessary. If that is so then all due weight needs to be attached to that factor. In a case where an applicant would suffer material prejudice in the presentation of the case at trial very great weight would need to be attached to that fact.

10.6 Furthermore, if an applicant can demonstrate that deportation, even on a temporary basis, would cause more than what one might describe as the ordinary disruption in being removed from a country in which the relevant applicant wished to live, such as a particular risk to the individual or a specific risk of irremediable damage then such factors, if sufficiently weighty, could readily tilt the balance in favour of the grant of an injunction or a stay.

10.7 In that context it does need to be noted that counsel on behalf of the Okunades placed reliance on the fact that the rights invoked on their part are fundamental human rights guaranteed both by the Irish Constitution, by the Charter of Fundamental Rights of the European Union, insofar as applicable to European Union measures such as subsidiary protection, and by the ECHR. That the right to be protected from being deported to a situation where one is placed in significant danger is an important or fundamental right can hardly be doubted. However, regard has to be had, on the facts of any individual case, to the basis put forward for the suggestion that there is a real risk of harm should the person concerned be deported. Where, as will frequently be the case, such a person has had the opportunity to have the facts underlying their claim to such a risk analysed by a series of administrative and judicial bodies, then the court will, as the trial judge in this case was, be in a much better position to form a judgment on the question of whether there is a real risk of serious harm should a deportation order be implemented. Where, on an arguable grounds basis, the situation with which a judge of the High Court is faced when considering an interlocutory injunction application in this field is one where there is a credible basis for suggesting that a real risk of significant harm would attach to the applicant on deportation, then it would require very weighty considerations indeed to displace the balance of justice on the facts of that case, certainly if what was intended was a deportation back to the country in which the relevant applicant would face those risks (rather than, for example, to an earlier "safe" country in accordance with the Dublin Convention). While, therefore, important and fundamental rights can be involved it does not necessarily follow that, in each case in which an interlocutory injunction is sought, there is any credible basis for suggesting that truly fundamental rights are, in fact, involved. Where such rights are involved a very heavy weight indeed needs to

be attached to them.

10.8 It also seems to me that, in the context of deciding what is to happen on a temporary basis pending trial or a leave application, a disruption of family life which has been established in Ireland for a significant period of time is a material consideration. As pointed out earlier the reason why the maintenance of the status quo is considered as part of the ordinary interlocutory injunction jurisprudence is that the risk of injustice is increased when action is taken so that some justification for action must be found. In addition it seems to me that it has to be taken into account that part of the problem which gives rise to a risk of disruption of family life stems from the highly complicated structure of the statutory regime applicable in circumstances such as those with which the court is concerned in this case with the consequent prolongation of the process. That is a factor which is within the state's control and does often lead to situations where parties (most particularly children) have put down roots. All due weight needs to be attached to the undesirability of disrupting family life involving children in circumstances where, after a successful conclusion of both the judicial review proceedings and any other process which might follow on, the children concerned might be allowed to remain in or return to Ireland.

10.9 In that context it is important to emphasise the distinction between, on the one hand, the considerations which are appropriate for a court considering whether to grant a stay or an interlocutory injunction, and on the other hand, the considerations which apply in determining the substantive rights of parties. In *A.O. & D.L v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1, a majority of this court determined that the constitutional right of an Irish born applicant (who, at that stage, was an Irish citizen) to the company, care and parentage of its parents within the State was not absolute and unqualified. It is clear that, even in the context of Irish born infants who have the status of Irish citizens, other factors may properly be taken into account in deciding whether the undoubted entitlement of such infants to the care of their parents must be exercised in this jurisdiction. That general point remains valid even if the precise position as identified in A.O. may not remain the same as a result of developments in European law, such as the decisions of the ECJ in *Zhu and Chen v. Secretary of State for Home Department*, (2004) ECR 1-9925, *Zambrano*, (2011 ECR 1-0000 and, possibly also *Dereci*, Case 256/11.

10.10 However, it seems to me that the situation which pertains at an interlocutory stage is different. At an interlocutory stage the court is not considering whether a relevant infant has the right to remain in Ireland as such, but rather the court has to decide where the least risk of injustice lies in formulating a temporary measure to cover the situation which is to prevail until the substantive legal rights of the infant concerned are established. The court is not, therefore, concerned with whether an infant, citizen or otherwise, who has remained in Ireland for a significant period of time, or a parent of such an infant, is entitled, as a matter of substantive right, to remain in Ireland. Rather the court has to weigh in the balance of convenience the consequences for such an infant, in all the circumstances of the case, of being deported only to find that the infant concerned may become entitled to return to Ireland if the relevant proceedings are sufficiently successful.

10.11 It should be emphasised that the weight to be attached to any such difficulties will, necessarily, be dependent on the facts of the case. It also needs to be emphasised that any such difficulties are not necessarily decisive. They are but one factor to be taken into account with the weight to be attached to that factor being, itself, dependent on all relevant circumstances.

10.12 Finally, for the reasons analysed in the previous section of this judgment, it seems to me that the strength of the case can be taken into account provided that reaching an assessment as to that strength does not involve analysing disputed facts or dealing with complex issues of law. It seems to me that the overall considerations which I have sought to analyse apply in all cases involving an application for a stay or an injunction in the context of immigration or deportation judicial review challenges. On that basis I now turn to the facts of this case.

11. The Facts of this Case

11.1 So far as the facts of this individual case are concerned I am of the view that the court should only be prepared to determine whether the decision made by the trial judge not to grant a stay or injunction pending the hearing of the application for leave to seek judicial review in this case was correct on the facts before the trial judge. It seems to me that that question comes down to an assessment of whether there was any sufficient countervailing factor to alter the default position that the deportation order should take its course. For the reasons analysed by the trial judge it does not seem to me that the applicant put forward any significant basis for suggesting that there would be a real risk of harm on deportation such that the risk of injustice on that basis would go beyond the "ordinary" risk that someone might be deported in circumstances which were ultimately found to be unjustified.

11.2 However, I feel that it is not possible, on the facts of this case, to overlook the fact that one of the applicants is a child of some four years of age who has known no country other than Ireland. It is hardly the fault of that child that the substantial lapse of time involved in this whole process has led to such a situation. Rather that current status is a function of the lack of a coherent system and sufficient resources. As pointed out earlier a significant disruption of family life is a countervailing factor which, provided it be of sufficient weight, can be enough to tip the balance in favour of the granting of a stay or an injunction.

11.3 On the facts of this case I have come to the view that the trial judge was wrong in failing to afford sufficient weight to that factor and was, therefore, wrong in failing to grant an injunction restraining deportation until the hearing of the application for leave. As emphasised earlier I express no view on what the position should be after refusal of leave. That issue was not before the court.

11.4 The trial judge formed the view that no irremediable loss had been established. For the reasons analysed earlier I do not agree. Even without a serious risk of harm, deportation, albeit on a possibly temporary basis, is not compensatable in damages. It was necessary, therefore, to consider the balance of justice. The trial judge correctly concluded that no arguable basis for significant risk on return to Nigeria had been established. However, on the facts of this case, the disruption to family life already analysed was, in my view, sufficient to tilt the balance of justice in favour of the grant of an interlocutory order.

11.5 Finally, it should be noted that the trial judge did not conduct any real assessment of the strength of the Okunades' case. Notwithstanding the views expressed in this judgment that such an assessment can form an appropriate part of the courts overall balancing consideration I have not, therefore, taken that factor into account in this case.

12 Conclusions

12.1 In the light of the fact that the specific issues which were determined by Cooke J. had become moot by the time this appeal came on for hearing it seems to me that the appropriate order to make on this appeal is simply to allow the appeal against the refusal of Cooke J. to grant an interlocutory injunction but to make no order in substitution therefor by virtue of the fact that events have overtaken the necessity for any such order in substitution.