THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 609 J.R.]

BETWEEN

LEOW KWAN MUN, FOO LAY HUN, CHUN HEE LEOW (A MINOR SUING BY HIS FAThER AND NEXT FRIEND LEOW KWAN MUN), AND RENEE LEOW (A MINOR SUING BY HIS FATHER AND NEXT FRIEND LEOW KWAN MUN)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 10th day of May, 2018

1. The first and second named applicants are partners and are nationals of Malaysia, born in 1977 and 1980 respectively. They are the parents of the third and fourth named minor applicants born in Ireland in 2011 and 2012. The first-named applicant says he arrived in Ireland in 2002 and that his partner arrived in 2003. Neither of them had permission to be in the State. The first knowledge the Minister had of their presence dates from 2011 when on 22nd February, 2011 the second named applicant was granted a stamp 2 student permission until 3rd February, 2012.

2. On 10th August, 2011 the first named applicant was given a similar permission until 3rd February, 2012. Neither permission was extended and no subsequent permissions were given to any of the applicants. The applicants were subject to a proposal to make deportation orders, on foot of which they applied for leave to remain on 28th April, 2016. Deportation orders were made on 29th July, 2016, which were never challenged.

3. On 16th and 20th September, 2016 the applicants sought revocation of the deportation orders under s. 3(11) of the Immigration Act 1999. Those applications were refused by notification dated 17th July, 2017.

4. I granted leave for the present proceedings seeking *certiorari* of the revocation refusals, on 23rd October, 2017. On 11th January, 2018 the minor children applied for certificates of nationality contending that they were not Malaysian citizens and therefore claiming to be Irish citizens by operation of law.

5. I have heard helpful submissions from Mr. Michael Conlon S.C. (with Mr. Garry O'Halloran B.L.) for the applicants and from Mr. Daniel Donnelly B.L. for the respondents.

The limited scope of the s. 3 (11) process.
6. It is at this stage well-established that to successfully challenge a s. 3(11) refusal an applicant has to raise a point that could not have been raised at the s. 3 stage in a context where there is either an unchallenged deportation order or an order that has been unsuccessfully challenged: see my decision in *C.O. (Nigeria) v. Minister for Justice and Equality* [2017] IEHC 725 [2017] 11 JIC 2406 (Unreported, High Court, 24th November, 2017) and the caselaw referred to, in *particular L.C. v. Minister for Justice, Equality and Law Reform* [2006] IESC 44 [2007] 2 I.R. 133. To seek to attack a s. 3(11) refusal on a ground that could have been raised at the s. 3 stage is in effect to launch in an impermissible collateral attack on a deportation order: see *Nawaz v. Minister for Justice, Equality and Law Reform* [2012] IESC 58 [2013] 1 IR 142, *X.X. v. Minister for Justice and Equality* [2018] IECA 124 (Unreported, Court of Appeal, 4th May, 2018).

7. Paragraph 9 of the applicants' supplementary submissions makes this difficulty clear in that the applicants assert that there is no jurisdiction to either make or affirm a deportation order in the circumstances of this case. It is clear the applicant is reaching back to attack the original unchallenged deportation order. There may be very exceptional circumstances where the court may permit such an exercise but certainly not by afterthought. The main point now relied on was not put to the Minister in the s. 3(11) application.

Ground 1 – failure to apply the "*scheme*" in relation to long term unlawful residence
8. Mr. Conlon has indicated that he is no longer pursuing this ground, so an issue that previously arose in relation to cross-examination does not now fall for further discussion.

Ground 2 – failure to treat the applicants similarly to similarly situated persons
9. It is not unlawful for the Minister to refuse to revoke a deportation order simply because other relatives of an applicant have been here for a long time.

Ground 3 – irrationality or breach of constitutional rights
10. This is a boilerplate allegation. In any event, no irrationality or breach of constitutional rights has been established nor has there been anything pointed to that was not there at the time of the original s. 3 decision.

Ground 4 – failure to lawfully consider art. 8 of the ECHR
11. In a s. 3(11) context the Minister is not required to consider the making of a deportation order *ab initio* or art. 8 issues under the ECHR (as applied by the European Convention on Human Rights Act 2003) *ab initio*. The Minister in any event did consider all submissions made. Furthermore, these applicants who only had permission to be in the State for a period of approximately one year out of a sixteen year presence could not under any stretch of the imagination, even on the wildest speculation on the applicants' side of the house, be regarded as settled migrants. Well-established caselaw under the ECHR makes clear that the deportation of unsettled migrants breaches art. 8 only in exceptional circumstances, which do not arise here.

Ground 5 – failure to consider best interests of the child and selective reading of court decisions
12. The best interests of children issue was there at the s. 3 stage. It did not come into existence simply because the applicants had the idea of making a s. 3(11) application. The position of the children had in any event been considered in the s. 3 analysis, which

referred to the Supreme Court decisions in *P.O. v. Minister for Justice and Equality* [2015] IESC 64 [2015] 3 I.R. 165, citing *Butt v. Norway* (Application no. 47017/09, European Court of Human Rights, 4th December 2012). Article 42A of the Constitution does not require that the best interests of the child be a paramount consideration for deportation purposes: see *Dos Santos v. Minister for Justice and Equality* [2015] IECA 210 [2015] 3 I.R. 411, *K.R.A. v. Minister for Justice and Equality* [2017] IECA 284 (Unreported, Court of Appeal, 27th October, 2017) *per* Ryan P. at paras. 34 – 35. Best interests are not directly applicable to immigration decisions under Article 42A. They only arise indirectly by art. 8, which I have already addressed above.

Ground 6 – failure to consider the rights of the children under Article 42A.
13. The Minister is not obliged to write an essay on constitutional law. Illegal immigrant children have no right not to be removed pursuant to Article 42A: see by analogy *K.R.A. v. Minister for Justice and Equality* [2017] IECA 284 per Ryan P. at paras. 34 – 35.

Ground 7 – best interests
14. This is repetitive of ground 5.

Ground 8 – allegation of fettering discretion by not conducting a substantive and qualitative analysis of the facts and circumstances of the applicants.
15. There is no obligation at the revocation stage to revisit all s. 3 matters.

Ground 9 – alleged deferral to the original decision.
16. This allegation has not been made out. Affirming the original decision does not amount to failing to consider whether it should be revoked.

Ground 10 – allegation that the Minister irrationally concluded that the children would be entitlement to Malaysian citizenship or failed to consider their entitled to Irish citizenship and/or acted outside jurisdiction.
17. The applicant minor children did not seek a certificate of nationality until after the s. 3(11) decision. That decision cannot be quashed on a basis that was not put. An application for a certificate of nationality possibly combined in a given case with a further s. 3(11) application is the appropriate procedure to determine an issue of this type: see *S.Y. v. Refugee Appeals Tribunal* [2009] IEHC 18 (Unreported, McMahon J., 13th January, 2009), *G.E.O. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 131 [2018] 3 JIC 0807 (Unreported, High Court, 8th March, 2018). It is procedurally inappropriate to quash the decision on a basis that was not put to the Minister.

Ground 11 – alleged misapplication of the caselaw
18. Again the Minister is not required to write a legal essay. No misdirection of law has been made out. The decision is not invalid even if a court would phrase the reasoning differently.

Order
19. The application is dismissed.

20. I should record however that, in view of the applications made for certificates of nationality, the respondents have undertaken not to enforce the deportation orders against any of the applicants pending the determination of the certificate of nationality application or until fourteen days after notification of that decision. In the event that the decision is positive, the deportation order as against the children will be revoked and those against the parents will not be enforced pending consideration of the position under the CJEU ruling in C-34/09 *Ruiz Zambrano*, provided that the *Zambrano* application is made within 28 days of notification.

Postscript
21. I should record that in the course of an application for leave to appeal the foregoing decision, the applicants disclosed to their legal advisers that the children were in fact Malaysian citizens all along. The applicants' legal advisers very properly secured instructions to advise the court of this matter straight away and are blameless in the applicants' endeavours to mislead the court. The leave to appeal application was withdrawn. The respondents, in those circumstances, must be regarded as released from their undertaking.