THE SUPREME COURT

APPEAL NO. 2003/413

Murray C.J.
McGuinness J.
Hardiman J.
Geoghegan J.
Fennelly J.

BETWEEN:
C.S., B.S. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND C.S.) AND N.K. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND C.S.)

APPLICANTS

.v.

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of McGuinness J. delivered the 27th day of July 2004

The applicants in these proceedings on 28th October 2003 sought leave to bring judicial review proceedings seeking a number of reliefs pursuant both to Order 84 of the Rules of the Superior Courts and to section 5 of the Illegal Immigrants (Trafficking) Act 2000 (*"the Act of 2000"*). In accordance with the terms of section 5 subsection (2)(b) the applicants' application was made by motion on notice to the respondent Minister and, since the application was made outside the fourteen day period specified in section 5(2)(a) of the Act, among the reliefs sought by the applicants was an order extending the time for the bringing of the application.
The application for leave came on for hearing before O'Sullivan J. in the High Court. Following a full hearing the learned judge reserved his decision overnight. On 7th November 2003 O'Sullivan J. delivered an ex-tempore judgment and on 10th November 2003 he made an order extending the applicants' time for making their application for leave to apply for judicial review up to and including 6th November 2003. In addition O'Sullivan J. granted leave to apply for the following reliefs:

1. A declaration that the Immigration Act 1999 (Deportation) Regulations 2002 are *ultra vires* and void.
2. An order of certiorari removing for the purpose of being quashed the purported notification under section 3(3)(b)(ii) of the Immigration Act 1999 purportedly made on behalf of the first named respondent on the 25th day of September 2003 and notified to the applicants not earlier than the 28th day of September 2003 including a purported decision that section 5 of the Refugee Act 1996 is satisfied in a case of the applicants.
3. An order of certiorari removing for the purpose of being quashed the purported deportation orders under section 3(1) of the Immigration Act 1999 purportedly made by the first named respondent on the 7th day of August 2003 and notified to the applicants not earlier than the 28th day of September 2003.

The grounds on which leave was granted were set out in the statement of grounds as follows:

1. The second and third named applicants were not persons who have been refused a declaration that they are entitled to asylum and consequently were not persons who were liable to be deported by virtue of section 3(1)(f) of the Immigration Act 1999 as stated in the deportation orders or at all.
2. The respondents misdirected themselves and/or on the evidence in relation to the question of internal relocation.
3. Subject to full discovery, the first named respondent failed to apply his mind to section 4 of the Criminal Justice (United Nations Convention Against Torture) Act 2000 and failed to afford the applicants fair procedures in that regard.
7. The first named applicant was not a person to whom refugee status had been validly refused and consequently was not liable to deportation in accordance with the said notice or at all.
9. The deportation order does not indicate to where the applicants are to be deported. Insofar as the form of the order is determined by the Immigration Act 1999 (Deportation) Regulations 2002 those regulations are *ultra vires* and void.

Leave was refused in respect of the other reliefs sought by the applicants. The order of the High Court also placed a stay on the implementation by the respondent of the deportation orders made in respect of the applicants pending the final outcome of the judicial review proceedings.

Subsequent to the delivery of the judgment of the learned High Court judge application was made on behalf of the respondent pursuant to section 5(3)(a) of the Act of 2000 for leave to appeal against the determination of the court. O'Sullivan J. granted leave to appeal and in his composite order of 10th November provided as follows:

> *"IT IS ORDERED pursuant to section 5(3)(a) of the Illegal Immigrants (Trafficking) Act the court doth grant leave to appeal and doth certify that its decision herein involves points of law of*

exceptional public importance and it is desirable in the public interest that an appeal should be taken to the Supreme Court the points of law being

(1) The deportation order does not indicate to where the applicants are to be deported. Insofar as the form of the order is determined by the Immigration Act 1999 (Deportation) Regulations 2002 those regulations are ultra vires and void."

In the course of argument before this court it transpired that it was common case between the parties, and was agreed by the judge, that this appeal was governed by the decision of this court in **Scott v An Bord Pleanála** [1995] I.L.R.M. 424 where it was held that in a comparable situation under the planning code the provisions of section 39 of the Local Government (Planning and Development) Act 1992 did not restrict any appeal to a consideration of a point of law which had been certified.
There has been no argument before this court, nor was there any argument in the High Court, as to whether appeals pursuant to section 5(3) of the Illegal Immigrants (Trafficking) Act 2000 are governed by the same principles as those applied to planning appeals under **Scott v An Bord Pleanála**, or indeed by the principles applied by this court to a certificate under section 29 of the Courts of Justice Act 1924 in the case of the **People (Attorney General) v Giles** [1974] I.R. 422. This court therefore cannot and does not make any decision in principle on this question. However, for the purposes of the present case, since all parties accepted that the position was as set out in **Scott v An Bord Pleanála** and the leave to appeal was granted by the learned High Court judge specifically on that basis this court will treat the position as being that as set out as common case by counsel.
As matters unfolded during the hearing before this court, however, the main and practically the only question fully dealt with was the preliminary but crucial issue of the extension of time.

The Background

The applicants are a mother and her two children; they are of South African origin and belong to the Zulu ethnic group. They allege persecution by the Xhosa ethnic group. Mrs S and her two children arrived in this country on 15th November 2001. They applied for asylum and were admitted to the country for that purpose. They were served with the requisite notices and forms. Mrs S. completed asylum application forms on the 21st November 2001 on behalf of herself and her children. On or about the 25th March 2002 she attended at the Refugee Legal Service and arranged for legal representation through that Service. It appears that at all material times she and her children were residing in a mobile home in asylum seekers' accommodation in Athlone. Her children attended the local school.
On 10th April 2002 Mrs S. was interviewed by an officer of the Refugee Applications Commission. The relevant reports were prepared and on the

22nd May 2002 a recommendation was made to refuse her and her children's application for refugee status. She was informed of this refusal by notice dated the 21st June 2002. With the assistance of the Refugee Legal Service Mrs S. appealed this decision to the Refugee Appeals Tribunal. Her appeal was rejected; she was notified of this on the 19th November 2002. It appears that representations were made to the Minister to permit the applicants to remain in the country on humane grounds but this application was also refused.

Deportation orders in respect of all three applicants were made on the 7th August 2003. The making of these orders was notified to the applicants by letter dated the 25th September 2003 which was sent by registered post.

The above dates and events are ascertainable from the various documents exhibited in the proceedings. The course of events from 25th September 2003 to the day of issue of the judicial review proceedings on the 28th October 2003 is considerably more difficult to ascertain.

The evidence before the High Court consisted of two affidavits of Anthony Conleth Pendred solicitor for the applicants sworn on the 28th October 2003 and the 3rd November 2003, an affidavit of C.S. sworn the 5th November 2003 and a replying affidavit of Terry Lonergan, assistant principal officer in the Immigration Division of the Department of Justice, Equality and Law Reform. All these affidavits exhibit considerable numbers of relevant documents. There is also included a handwritten affidavit of Mrs C.S. sworn the 6th day of November 2003. Most unusually, it seems that this affidavit was actually drafted and sworn during the course of the proceedings before the High Court. The affidavit purports to contain further explanation of the course of action of the deponent during the period between receiving the notice of the deportation order and the issue of the judicial review proceedings.

It is also clear from the judgment of O'Sullivan J. that some oral evidence was given before the court. This court is not, however, provided with a transcript of any such oral evidence. The court was informed by counsel at the hearing that the only oral evidence given was by way of cross-examination of Mr Terry Lonergan on his affidavit and that his evidence consisted of explanation of technical and administrative points. Nevertheless it is most unsatisfactory that this court has no transcript of the evidence given. It seems to me also that it would be fair to imply from the High Court judgment that a certain amount of information was conveyed to the learned High Court judge by way of submissions by counsel rather than by means of evidence. Indeed, Mr O'Higgins, senior counsel for the appellant/respondent, informed this court that he had objected both to the conveying of information by this means and to the reception by the court of Mrs S's handwritten affidavit. However, it appears that his objections were overruled.

The court's difficulties are compounded by the fact that there are a number

of inconsistencies and contradictions, in particular regarding dates, between the two affidavits of Mr Pendred, solicitor, and between them and the two affidavits of Mrs S.

As far as can be ascertained from the evidence the course of events appears to have been as follows. The notices of the making of the deportation orders were sent by post by Mrs S. on Thursday, 25th September 2003. It is possible that this letter reached her on Friday, 26th September; however, if it did not reach her on that day, it cannot have reached her until Monday, 29th September, there being no postal deliveries on Saturdays and Sundays. Strangely, neither Mrs S. nor Mr Pendred depose in their affidavits as to the actual date on which she received these notices. Mr Pendred simply states in paragraph 2 of his affidavit of 28th October 2003 that the notices, being notices under section 3 of the Immigration Act 1999, were *"therefore deemed to have been received not earlier than the 28th day of December (sic) 2003"*. The learned High Court judge, realising that 28th September was a Sunday, deemed that the notices had been received on 29th September and in general in his judgment appears to have accepted that this was in fact the relevant date.

The omission from the original grounding affidavit of Mr Pendred of the actual date on which Mrs S. received the notices might be understandable on account of the extreme pressure of time under which counsel drafted the judicial review papers after 22nd October, but its omission from the later affidavits is quite unexplained.

One matter may support the contention that the notices were received on 29th September. The evidence of Mrs S., which appears to be unchallenged, is that on the day following receipt of the notices she was in telephone contact with her solicitor in the Refugee Legal Service. It is a great deal more likely that this would have occurred on 30th September (a Tuesday) than on 27th September (a Saturday). On the whole it seems more likely than not that the learned High Court judge was correct in accepting 29th September as the actual day on which the notices were received and therefore the day on which the fourteen day time period began to run.

Mrs S. deposes that the day after she received the notices she telephoned the Refugee Legal Service. She spoke to an official whom she knew as Nicola. Later that day the solicitor who had acted for her during the asylum process, whom she knew as Mary, returned her call and told her that the Refugee Legal Service was not in a position to assist her any further. There is no evidence before the court to indicate why further legal aid was refused at this point; since the Refugee Legal Service operates under the Civil Legal Aid Act 1995 it may be that a legal aid certificate pursuant to s.28 of the Act for judicial review proceedings was refused by the authorities within the Service. Be that as it may, Mrs S. found herself without legal advice or representation.

Her evidence is that on that same day (Tuesday, 30th) she told a fellow

asylum seeker who resided near her in Athlone about her lack of legal representation. This friend suggested that she should contact one John Rochford in Waterford and gave Mrs S. his telephone number. She accordingly telephoned Mr Rochford who asked her to send him her file of papers, which she did. It appears that she personally heard nothing further from him until he eventually returned her papers to her then solicitor, Mr Pendred, on 22nd October.

The evidence concerning the role played by Mr Rochford and his relationship (if any) with Brian Chesser and Company, a firm of solicitors based in Waterford, is far from clear. In her first affidavit sworn the 5th November 2003, Mrs S. describes him as *"John Rochford of Brian Chesser and Company Solicitors"*. In her second affidavit sworn during the course of the High Court proceedings on 6th November 2003, one day later, she says that it was *"her solicitors impression"* that John Rochford was connected with Brian Chesser and Company. Only on that day during the course of the High Court proceedings had Mr Pendred's apprentice discovered by telephone from Brian Chesser and Company that John Rochford had no relationship with that firm. He is apparently the administrator of the South Eastern Refugee Centre's Hostel.

Again, this piece of information is in strange contrast to the contents of Mrs S's affidavit of 5th November in regard to her instructing Mr Pendred and in regard to his efforts to recover her file of papers. In that affidavit she states that she consulted Mr Pendred apparently for the first time on Thursday, 2nd October 2003. She also states that she had been informed by Mr Pendred that he was on that day in touch by telephone with Brian J. Chesser and Company Solicitors, who promised to send on her file. She also states that on the following day, 3rd October, she was informed by Mr Pendred that on that day Brian Chesser and Company had informed him that they were sending the file. It is extremely difficult to understand why Brian Chesser and Company should have told Mr Pendred, if they did, that they were sending on a file which had been sent to a gentleman who had no relationship with their firm. It is also very difficult to know where the information that Mr Rochford had any connection with Brian Chesser and Company came from in the first place.

At a later stage in her affidavit of 5th November 2003 Mrs S. deposes that on 7th October Messrs Pendred informed her that Mr John Rochford contacted them and for the first time raised the question of outstanding fees alleged to be owing by Mrs S. to him. Apparently Messrs Pendred were also in touch by telephone with John Rochford on 13th and 15th October regarding Mrs S's file. At paragraph 33 of the same affidavit she states that an incomplete set of her papers arrived in the office of Messrs Pendred *"from Chesser and Company"* on 22nd October. Again it is impossible to understand why Messrs Chesser and Co. should be sending papers which had been in the hands of Mr John Rochford who had no relationship with

that firm. In her second affidavit Mrs S. explains that she personally was never approached for fees by Mr Rochford and that he simply withheld her papers for no good reason.
It is no part of the task of this court, nor was it of the High Court, to speculate on possible scenarios as to the relationship or lack of relationship between the administrator of a refugee hostel and a local firm of solicitors. One can only observe that such evidence as is available is contradictory and confusing. This situation is not assisted by the laconic and generalised affidavits of Mr Pendred, nor by the large amount of hearsay contained in all the affidavits sworn by and on behalf of the applicant.
Whatever may have been her actions in regard to Mr Rochford, the applicant states that she consulted Mr Pendred on 2nd October 2003. In Mr Pendred's original grounding affidavit, on the other hand, he says that he was instructed in the matter on or about the 6th October. On the 6th October Mr Pendred wrote to the first named respondent stating:
"Please be advised that we represent the above named client. We are briefing counsel with regard to High Court judicial review proceedings. Please postpone any deportation arrangements for a minimum period of four weeks, to enable us to seek counsel's opinion and the issue of court proceedings if necessary. "

He also wrote in the same terms to the Garda National Immigration Bureau. The applicant, however, in her affidavit of 5th November states that on 6th October 2003 she attended at Mr Pendred's office and *"discussed contacting the Refugee Legal Service regarding my file"*. Neither she nor her solicitor give any information as to whether any such contact was actually made, or if so when it was made and what was its result. However, Mr Terry Lonergan in his replying affidavit on behalf of the respondent states that by letter dated 2nd October 2003 the Refugee Legal Service wrote on behalf of each of the applicants seeking *"a copy of our client's file in relation to the reasons why a deportation order was made"*. He then states that by letter dated the 7th October 2003 the first named respondent forwarded the information requested by the Legal Aid Service. He exhibits the relevant letters. The letter from the Refugee Legal Service to the first named respondent dated 2nd October 2003 bears a stamp indicating that it was received in the Repatriation Unit of the first named respondent on 3rd October 2003. Having received the files from the first named respondent no further action was taken by the Refugee Legal Service until, it appears, the files were handed in to the learned trial judge during the course of the High Court hearing. The papers in question were not made available, it seems, either to the applicant or to her solicitor.
Since the Refugee Legal Service solicitor had already (on 30th September) indicated to the applicant that there was nothing further she could do for her it seems that either the applicant herself or a solicitor on her behalf had requested these papers. The applicant herself, however, already had her

papers but had sent them to John Rochford on either 30th September or 1st October. Since Mr Rochford was not a solicitor he would not have been in a position to seek papers from the Refugee Legal Service and in any event he already held the papers sent to him by the applicant.
The applicant in her affidavit refers to *"discussing"* the obtaining of her papers from the Refugee Legal Service with Messrs Pendred on 6th October 2003. If, however, Messrs Pendred had in fact requested the file from the Refugee Legal Service on 2nd October it is hard to understand why the Refugee Legal Service did not send it on to him when they received it from the first named respondent, presumably on or about 8th October. This is a matter which greatly exercised the mind of the learned High Court judge. One understands from his judgment that at his own request copies of all these papers were produced to him by the first named respondent at the hearing on 6th November 2003. Since neither the Refugee Legal Service itself nor the solicitor who had acted for the applicant in the asylum application played any part in the hearing no explanation had been given by them as to who requested the file from them or as to why it was not passed on to the person requesting it. The situation is rendered yet more confusing in that the learned trial judge in his judgment states on a number of occasions that the request to the Refugee Legal Service was made on 6th October whereas in fact the relevant letter of Maria Maguire Solicitor of the Refugee Legal Service is dated 2nd October and was received in the Repatriation Unit of the first named respondent on 3rd October.
Finally it is clear that once Messrs Pendred had received papers from John Rochford on 22nd October both they and their counsel, Mr Humphries, made every possible effort to draft and file the proceedings speedily over the bank holiday weekend so they were in fact filed in the Central Office on Tuesday, 28th October.

The decision of the High Court

In his judgment the learned High Court judge sets out what he understood to have been the sequence of events. This was principally based on the affidavit evidence which he had before him. At page 7 of his judgment he remarks that he *"was greatly assisted by the comprehensive submissions of counsel"*. It seems likely that in addition to submissions in regard to the law certain references were made by counsel as to matters of fact not contained in the original three affidavits which were filed on behalf of the applicant and which were before the court. This may lie behind the highly unusual situation that a further affidavit was sworn by the applicant during the course of the proceedings.
The learned judge laid stress on what he describes as *"a crucial piece of evidence which was furnished yesterday in an affidavit sworn on behalf of the respondents to the effect that the respondents received a request from the Refugee Legal Service on the 6th October for production of the papers*

connected with the reasoning underlying the challenged decisions, and it is sworn that on the 27th (sic) both papers were furnished by the respondent to the Refugee Legal Service." (It is clear that 27th is a typographical error for 7th). The learned judge notes that this is a matter which has *"significantly influenced my decision on this part of the application"*. (Pg. 7 of judgment) At page 10 of his judgment he notes that the applicants' solicitor states in one of his two affidavits that on 6th October, following instructions by the applicant, he made enquiries with, *inter alia*, the Refugee Legal Service, and he clearly assumes that this query resulted in the Refugee Legal Service seeking the relevant papers from the first named respondent. This assumption, however, is based on the learned judge's mistaken belief that the letter from the Refugee Legal Service to the Repatriation Unit of the first named respondent was dated 6th October rather than 2nd October. It is, of course, possible that the applicant, as she says herself, first consulted Mr Pendred on 2nd October and that on that day he made contact with the Refugee Legal Service in regard to the papers.
In his judgment the learned High Court judge referred to the law on extension of time in this type of judicial review as set out in the judgment of this court in ***In Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999*** [2000] 2 I.R 360. He went on to consider in some detail the question of blameworthiness in cases of delay. Here the learned judge relied on the judgment of Finnegan J. (as he then was) in ***G.K. v Minister for Justice*** [2002] 1 I.L.R.M. 81 (H.C.). At page 111 of his judgment he quoted Finnegan J. on the distinction between the Refugee Legal Service and a solicitor in private practice:
"It may be appropriate to distinguish between the Refugee Legal Service and a solicitor in private practice. In effect, the respondent provides the Refugee Legal Service for the applicant and if delay occurs due to deficiency or inefficiency in that Service, it would be unjust to regard the applicant independently of any personal blameworthiness as responsible for the same. The situation where a solicitor in private practice is retained by an applicant is quite different and the deficiencies and inefficiencies of such a solicitor may weigh more heavily on an applicant than would be the case for the Refugee Legal Service." (Page 11 of judgment).

O'Sullivan J. went on to say:
"Thirdly, Finnegan J. further in the context of determining personal blameworthiness distinguished the situation where a delay on the part of a private solicitor occurs and where he can be sued in damages procured, which would eliminate the loss to the applicant from the situation where his delay might be a remote cause of her being deported to a State in which her fundamental human rights would not be vindicated and which loss would not be remedied."

The learned judge also referred to Finnegan J's dictum in the same case that

the court should first consider the litigants' personal blameworthiness. O'Sullivan J. also referred to the judgment of Hardiman J. in this court in the same case (***G.K. v Minister for Justice*** [2002] 1 I.L.R.M. 401 (S.C.)). He noted that this court had held that some consideration of the merits of the arguments proposed to be put forward was appropriate to the court's deliberations as to whether to not to extend the time. Apart from these considerations the learned judge proposed to take into account the length of the period of delay, the complexities of the legal issues and any language or other personal difficulties of the applicant.

Applying the principles set out by him the learned trial judge held that the applicant could be said to be personally blameworthy for the delay incurred in giving away her papers to John Rochford and any ensuing delay due to his admitted default in furnishing those papers. However he believed that that consideration was significantly offset and in large part eliminated by *"the fact that the Refugee Legal Services were, apparently, in receipt on foot of a request from her current solicitors of the same or equivalent papers from the 8th October, but failed to make them available."* If in fact the Refugee Legal Service were not in receipt of these papers nonetheless the responsibility for the situation rested between the Refugee Legal Service and the first named respondent and therefore could not in fairness be laid at the door of the applicant.

O'Sullivan J. held that the applicant had clearly made up her mind to take whatever legal action was available to her well within the fourteen day period and when her lawyers were briefed with even defective papers they pulled out all the stops to ensure that no further delay occurred. On account of the failure of the Refugee Legal Service to furnish the papers which were ultimately produced to the court he felt that it would be unjust to hold the applicant responsible for any delay between at least the 8th October and the 22nd October. As far as the rest of the time was concerned it was largely taken up by the efforts of her lawyers working over the bank holiday weekend to draw up and issue the proceedings.

The learned judge then went on to consider carefully and at considerable length the various submissions made both on behalf of the applicants and on behalf of the respondent as to whether an arguable case had been made out on the grounds stated in the proceedings for the various reliefs sought by the applicants. He surveyed the law relevant to each of the reliefs sought and the grounds on which it was sought.

Finally he concluded that he would allow an extension of time up to the time sufficient to justify the commencement of the proceedings on the day that they were commenced and he also granted leave to bring proceedings for the reliefs set out at (a)(I); (b)(I) and (b)(II) on the grounds set out at paragraphs 1, 2, 5, 7 and 9 of the statement of grounds. Finally he made an order staying the implementation by the respondent of the deportation orders pending the outcome of the judicial review proceedings.

Submissions of Counsel

In the course of the hearing before this court it was accepted that the principal matter at issue was the extension of time. Senior counsel for the respondents Mr Paul O'Higgins, stressed the many lacunae and contradictions in the evidence that was available to the High Court. He detailed many of the points to which I have already referred in this judgment. He pointed out that Mr Pendred in his second affidavit accepted responsibility for the delay but gave no satisfactory explanation of how exactly the delay arose. Counsel submitted that the necessary documents were at all times available from the first named respondent, and from at least the 8th October there were obtainable from the Refugee Legal Service, yet the applicants' solicitor apparently made no effort to obtain them from either source. It was, he said, extraordinary that neither the applicant nor Mr Pendred put on affidavit the primary evidence of the date of which she received the deportation orders. Counsel argued that the learned trial judge had erred in attributing blame to the Refugee Legal Service when in fact there was no evidence other than a vague reference in Mr Pendred's affidavit that he had ever asked the Refugee Legal Service for the papers. No letter requesting them had been exhibited. It seemed on the contrary that Mr Pendred had wasted considerable time on a fruitless pursuit of Messrs Brian Chesser and Company without even ascertaining whether the mysterious Mr John Rochford was a member of that firm or employed by them.

Mr O'Higgins also argued that another feature of the affidavits filed on behalf of the applicants was that all contained an extraordinary amount of hearsay. Mr Pendred deposed to matters properly within the knowledge of the applicant. Mrs S., on the other hand, deposed to matters solely within the knowledge of her solicitor. The proper course was for the applicant to set out her own history on affidavit and for her solicitor to set out in detail from his own knowledge the efforts which he had made to prepare and issue the judicial review proceedings, together with the reasons for any delay. Counsel submitted that the applicant's delay was due to the fact that she herself had chosen to change solicitors twice in the course of a few days and thereby created immense confusion.

Mr O'Higgins went on to refer to the various reliefs which were sought in the proceedings and submitted that no arguable case had been made in the various grounds set out.

Senior counsel for the applicants, Mr Christle, made submissions in support of the judgment and decision of the High Court judge. He stressed Mr Pendred's admission that the major part of the delay was due to his fault and argued that that fault should not be visited on the head of the applicants. He also referred to the importance of the point raised in connection with the identification of the country to which the applicants were to be deported.

The Law and Conclusions

As was pointed out by the learned High Court judge in his judgment the applicant in these proceedings sought *inter alia* to challenge by way of judicial review the notification of a decision by the first respondent that the provisions of section 5 of the Refugee Act 1996 on refoulement were satisfied in a case of all the applicants and also the deportation orders made under section 3 of the Immigration Act 1999. Both these decisions are governed by section 5 of the Illegal Immigrants (Trafficking) Act 2000, the first being a notification under section 5(1))(b) and the second being an order under section 5(1)(c) of that Act (*"the Act of 2000"*). Section 5(2) of the Act of 2000, where relevant, provides:-

> *"5(2) An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in subsection (1) shall –*
>
> *(a) be made within the period of 14 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and*
>
> *(b) be made by motion on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave) to the Minister and any other person specified for that purpose by order of the High Court, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed."*

In the circumstances of the present case section 5(3)(a) is also relevant. It provides:

> *"5(3)(a) The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal shall be taken to the Supreme Court."*

The effect of the time limits set out in section 5(2)(a) gave rise to particular comment in the judgment of this court in **In Re Article 26 and the Illegal (Trafficking) Bill 1999** 2 I.R. 360 (*"the Reference case"*). Commenting on the arguments put forward by counsel assigned by the court, the court observed (at page 389 of the report):

"Certainly non-nationals who enter the State and seek asylum or refugee status face difficulties which are special to them. In many, if not most, cases they will be strangers to its culture, its way of life and its languages. They may be located a good distance away from the centre where decisions concerning them are taken and may be completely ignorant of the legal system. These and many other factors could combine to make it difficult to pursue applications for asylum or refugee status or, which is what the court is concerned with in this reference, to seek judicial review of administrative decisions affecting them. Indeed counsel for the Attorney General conceded that one could by no means exclude a combination of circumstances in a particular case which could result in an applicant not finding it possible to bring an application for leave to seek judicial review within the fourteen day period."

In its discussion of the proper test to be applied to a limitation period such as that contained in section 5 of the Act of 2000, the court said (at page 393 to 394):

"Where a limitation period is so restrictive as to render access to the courts impossible or excessively difficult it may be considered unreasonable in the sense that Costello J. found the rigid rule in ***Brady v Donegal County Council*** *[1989] I.L.R.M. 282 to be unreasonable, and therefore unconstitutional.*

> *In applying that test in this case, the court acknowledges that there are likely to be cases, perhaps even a very large number of cases, in which for a range of reasons or a combination of reasons, persons, through no fault of their own, (as in* ***Brady v Donegal County Council****), are unable to apply for leave to seek judicial review within the appeal limitation period, namely fourteen days. This is a situation with which the courts deal on a routine basis for other limitation periods. The fourteen day limit envisaged by the Bill is not the shortest with which the courts have had to deal.*
>
> *Moreover, the discretion of the court to extend the time to apply for leave where the applicant shows 'good and sufficient reason' for so doing is wide and ample enough to avoid injustice where an applicant has been unable through no fault of his or hers, or for other good and sufficient reason, to bring the application within the fourteen day period. For example counsel assigned to the court have argued that the complexity*

of the issues, or the deficiencies and inefficiencies in the legal aid service, may prevent the applicant from being in a position to proceed with his application for leave within the period of fourteen days.

However, where this has occurred through no fault of the applicant, it may be advanced as a ground for extending the time for applying for leave for judicial review. In ***R .v. Stratford-on-Avon*** *D.C. Ex p. Jackson [1985] 1 W.L.R. 1319, the Court of Appeal in England and Wales held the difficulty in seeking and getting legal aid constituted a good reason for extending the time limit within which to apply for judicial review. It held at page 1324 that:*

'…it is a perfectly legitimate excuse for a delay to be able to say that the delay is entirely due to the fact that it takes a certain time for a certificate to be obtained from the legal aid authorities.'

That was where despite proper endeavours upon the part of the applicant and her legal advisors, a difficulty still arose.
The court is satisfied that the discretion of the High Court to extend the fourteen day period is sufficiently wide to enable persons who, having regard to all the circumstances of the case including language difficulties, communication difficulties, difficulties with regard to legal advice or otherwise, have shown reasonable diligence, to have sufficient access to the courts for the purpose of seeking judicial review in accordance with their constitutional rights."

This approach was central to the ratio of the court in holding that the repugnancy of section 5 to the Constitution had not been established.
The issue of the proper circumstances in which the prescribed fourteen day time limit should be extended was further considered both in the High Court and in this court in the case of **G.K. v The Minister for Justice Equality and Law Reform** [2002] 1 I.L.R.M. 81 (H.C.) and [2002] 1 I.L.R.M. 401 (S.C.). In that case the applicants were informed by letter dated 23rd January 2001. Immediately upon receipt of the letter of notification the first named applicant went to the building which had previously housed the Refugee Legal Service and presented the letter there. He was informed that the Refugee Legal Service had moved offices but believed that he was being told that he could not be helped any further by that service. He then contacted a solicitor who was unwilling to act. On 1st February 2001 he contacted his present solicitor who reluctantly agreed to act on behalf of the applicants. That solicitor obtained the applicant's file from the Refugee Legal Service on 7th February 2001 but did not deal with the matter until later in February. On 26th February detailed instructions were taken from the applicants through an interpreter and subsequent to that leave to issue judicial review proceedings were sought.
In the High Court Finnegan J. (as he then was) granted an extension of time.

He held that where the period of delay in bringing the application to seek relief by way of judicial review is short then only a very slight justification would be necessary to justify the court in exercising its discretion. However where the period of delay was more substantial the court should have regard to the applicant's personal blameworthiness for the delay. Where a longer delay had occurred due to no fault of the applicant or his solicitor, the court should exercise its discretion in his favour.

Much of this judgment concerns the extent to which the applicant in cases such as this should be held vicariously liable for the deficiency or inefficiency of his solicitor and a distinction is made by the learned judge between the situation where the deficiency is on the part of a legal aid solicitor or on the part of a private solicitor. Finnegan J. (as he then was) was of the view that since the Refugee Legal Service was in effect provided for by the first named respondent (the Minister) it would be unjust to regard the applicant as responsible for any deficiency or inefficiency on the part of that Service. Where the deficiency lay at the door of a private solicitor the situation was different. At page 86 of the report the learned judge said:

*"...in **Rainsford v Limerick Corporation** [1995] 2 I.L.R.M. 561 at page 567 on an application to strike out a plaintiff's claim for want of prosecution Finlay P. said:*

> *'While the party acting through a solicitor must to an extent be vicariously liable for the activity or inactivity of the solicitor, consideration at the extent of the litigant's personal blameworthiness for the delay is material to the exercise of the court's discretion.'*

In the judgment on the reference the Supreme Court gave as an example the circumstances where through no fault of an applicant deficiencies and inefficiencies in the Legal Aid Service and went on to say:

> *'However, where this has occurred through no fault of the applicant, it may be advanced as a ground for extending the time for applying for leave for judicial review.'*

Having regard to the foregoing I take the position to be as follows. The court should in the first instance have regard to the applicant's personal blameworthiness for the delay. The applicant to some extent will be regarded as responsible vicariously for any delay resulting from his solicitor's deficiency or inefficiency. It may be appropriate to distinguish between the Refugee Legal Service and a solicitor in private practice. In effect the respondent provides the Refugee Legal Service for the applicant and if delay occurs due to deficiency or inefficiency in that Service it would be unjust to regard the

> *applicant independently of any personal blameworthiness as responsible for the same. The situation where a solicitor in private practice is retained by an applicant is quite different and the deficiencies and inefficiencies of such a solicitor may weigh more heavily on an applicant than would the case with the Refugee Legal Service.*
> *Further in determining the extent to which an applicant should be held vicariously liable for the default of his solicitor it is important to bear in mind the serious consequences which could result from an application failing because of delay. In a case such as* ***Rainsford v Limerick Corporation*** *the disappointed plaintiff will most likely be able to recover from his solicitor in an action for negligence the like amount which he would have recovered had the action proceeded. Where however an applicant is deported the consequences for him may be very serious indeed in that he may be deported to a state in which his fundamental human rights would not be vindicated. For this reason it seems to me that regard should be had primarily to personal blameworthiness and to a lesser extent to the defaults of the applicant's solicitor for whose default the applicant is in law vicariously liable."*

Finnegan J. (as he then was) concluded that it was proper to adopt the approach enunciated in **Rainsford v Limerick Corporation**. He also stressed that regard should be had to the applicant's right to life and liberty and other fundamental human rights in the context of the State to which it was proposed to deport him. He went on to point out that regard should be had to the *prima facie* strength of the applicant's case.
The appeal to this court turned almost entirely on this last issue, the merits of the applicant's substantive case. In his judgment (with which Denham J. and Geoghegan J. concurred) Hardiman J. held that when considering whether there was good and sufficient reason to extend time the court should consider the merits of the substantive case and not simply the merits of the application to extend time. The court should consider whether the substantive claim of the applicant was arguable. At page 406 of the report Hardiman J. delineated the approach to applications for extension of time:
"On the hearing of an application such as this it is of course impossible to address the merits in the detail of which they would be addressed at a full hearing, if that takes place. But it is not an excessive burden to require the demonstration of an arguable case. In addition, of course, the question of the extent of the delay beyond the fourteen day period and the reasons if any for it must be addressed."

He went on to hold that in the circumstances of that case the applicant's substantive case was unarguable and that in those circumstances there was

no basis for extending the time for the initiation of the proceedings.
Since the decision of the court was based on this issue, this court did not deal with the question of the vicarious liability of an applicant for the defaults of his or her solicitor, nor with the distinction made by Finnegan J. (as he then was) between the position of a Refugee Legal Service solicitor and a private solicitor. Yet it is this very distinction, together with the general question of blameworthiness, which is at the heart of O'Sullivan J's judgment in the instant case.
The question of extension of time was again considered by this court in **S v Minister for Justice Equality and Law Reform** [2002] 2 I.R. 163. In that case as is stated in the head note this court held, in allowing the appeal and extending time, that the stringent time limit in section 5 was balanced by the court's discretion to extend time where there was good and sufficient reason, such good and sufficient reason to include the merits of the case. Important factors to be considered were, *inter alia*, the margin of delay, the time when the intention to appeal was formed, the grant of leave for judicial review and the lack of prejudice to the State. At paragraph 11 of her judgment Denham J. pointed out that the delay in issue in that case was essentially delay by legal advisors. She stated (at page 167):
"The delay in issue is essentially delay by legal advisers. Legal advisers have a duty to act with expedition in these cases. In general, delay by legal advisers will not prima facie be a good and sufficient reason to extend time. Circumstances must exist to excuse such a delay and to enable the matter to be considered further."

Having considered the fact that the applicant had an arguable case in the circumstances Denham J. stressed the discretion given to the court to extend time where there was good and sufficient reason.
In the course of the submissions before this court reference was also made to the judgment of Finlay-Geoghegan J. in the High Court in the case of **Muresan v Minister for Justice Equality and Law Reform** (unreported, High Court, 8 October 2003). In that case the extension of time was sought not for the initiation of proceedings but for amendments to the relevant notice of motion and statement of grounds in the proceedings. Finlay-Geoghegan J. held that the proposed amendments were in effect a new cause of action. The main reason for the delay in bringing these new grounds was that a new counsel, who had given new advices, had been brought into the case. Finlay-Geoghegan J. did not consider that this was good and sufficient reason to extend time and in addition she held that the case which was proposed to be made by the applicants was not arguable. While the learned trial judge's judgment in **Muresan** is clearly in accordance with the decisions of this court both in **G.K**. and in **S**., the facts of that case are, in my view, very different and distinguishable from those in the instant case.

In this appeal the appellant/respondent in essence seeks two reliefs – an order setting aside the order of the High Court extending time and an order setting aside the order of the High Court granting leave to issue judicial review proceedings. When considering the appeal regarding the extension of time the court must take into account both the entire circumstances of the delay in issuing proceedings and in outline the merits of the applicant's substantive case.

In considering the circumstances of the delay the court is handicapped by the state of the evidence. One must accept that in all these asylum judicial review applications the applicants and their legal advisers are acting under pressure of time. The solicitors acting for the applicants in this case, however, are experienced in the field of asylum and immigrant law. Even if they were not there can be no excuse for relying on affidavits containing hearsay by the solicitor in regard to what is known to his client and, even more extraordinarily, hearsay by the client in regard to matters known only to her solicitor. This court has previously stressed that in this type of case the applicant should personally set out on affidavit the circumstances which gave rise to any delay by the applicant himself or herself while the solicitor should set out any circumstances of delay which arose in the legal process itself. Given that in practice affidavits are drafted by legal advisers rather than by their clients a great deal of the blame for the state of the evidence in this case must fall on the applicant's legal advisers.

In addition as has already been pointed out, there are remarkable lacunae in the evidence some of which, for example the date of the applicant's receipt of the notification of the deportation order, are even now totally unexplained.

Should, however, the blame for these difficulties be visited vicariously on the applicants so as to prevent their access to the court? The first named applicant suffered from a number of the disadvantages mentioned by this court in the passage quoted earlier from the Reference judgment. She was resident in what seems to be a species of caravan park in Athlone. Her Refugee Legal Service solicitor was located in Galway; at a later stage her present solicitor and counsel were located in Dublin. While she had, of course, experienced the full procedure of seeking refugee status through the Refugee Applications Commission and the Refugee Appeals Tribunal she had no other experience of the Irish legal system. The Refugee Legal Service, on which she had hitherto relied, had, apparently quite suddenly, informed her that there was nothing more that that Service could do for her. Neither the High Court nor this court has any knowledge of the (perhaps perfectly valid) reasons why the Refugee Legal Service took this course. The effect on the first named applicant must, however, have been both confusing and distressing.

What Mrs S. appears to have done is to seek the advice of a friend, a fellow asylum seeker. This was a natural and understandable course to take, but

unfortunately its result was the unproductive and damaging step of her contact with Mr Rochford, whose role in the whole matter is both ill-defined and suspect though it is fair to say that the court has not heard from him. It is difficult to believe that he himself did not create in the mind of Mrs S. that he was connected in some way with the firm of Brian Chesser and Company Solicitors. There seems to be no other source for this erroneous information. Be that as it may, Mrs S. seems to have taken the further step of instructing her present solicitors. It seems likely that she did so, as she says herself, on the 2nd October rather than, as her solicitor says, on the 6th October. This was well within the fourteen day period. It is clear that the applicant had from the beginning formed the intention of taking whatever legal steps were open to her to contest the deportation order.

As has been outlined above, there are a number of aspects of the course of conduct of her solicitor which are difficult to explain and which were hardly likely to expedite Mrs S's judicial review application. However, she herself seems to have kept in constant contact with her solicitor and on all possible occasions to have pressed for action in her proceedings. To her credit it must also be said that at all times when she was requested to attend with the Garda Immigration Authorities in connection with her proposed deportation she did so.

It appears to me that while the first named applicant was responsible for her own actions in seeking further legal and other advice when the Refugee Legal Service withdrew its services from her it would be going too far to catergorise her own actions as personally blameworthy. Nor, despite my considerable reservations arising from the various deficiencies of her present solicitors, do I consider that she should be held vicariously liable for their actions. In so holding I would bear in mind the observations of Finnegan J. (as he then was) in the **G.K.** case where he held (at page 87) that:

> *"In determining the extent to which an applicant should be held vicariously liable for the default of his solicitor it is important to bear in mind the serious consequences which could result from an application failing because of the delay…where however an applicant is deported the consequences for him may be very serious indeed in that he may be deported to a State in which his fundamental human rights would not be vindicated."*

Bearing these factors in mind, therefore, I would disagree with the learned High Court judge when he held that the applicant could be said to be personally blameworthy for the delay which occurred in giving her away her papers to John Rochford and any ensuing delay due to his admitted default in furnishing those papers.

With regard to the learned High Court judge's finding that the Refugee Legal Service must bear the responsibility for the delay in providing the requisite papers to the applicant's solicitor, I am in a difficulty in that there

is simply no evidence before the court as to whether Messrs Pendred in fact asked the Refugee Legal Service for the relevant papers and, if so, whether they pursued the matter with the Service after a first request. The learned trial judge appears to have accepted that Mr Pendred sought the papers from the Refugee Legal Service on or about the 6th October. This inference, however, is greatly weakened by O'Sullivan J's erroneous belief that the Refugee Legal Service sought the file from the first named defendant on the 6th rather than the 2nd October. Given the lack of evidence both from the applicants' solicitors and from the Refugee Legal Service itself as to what occurred I would be reluctant to agree with the learned High Court judge in attributing blameworthiness for delay in forwarding the papers to the Refugee Legal Service. Indeed it might well be said that the original refusal of the Refugee Legal Service to act for the applicants in their judicial review proceedings created far more difficulty and delay for the applicants than any problem caused by the Service in regard to the papers. Again, as in the case of Mr Rochford, the court has not heard directly from the Refugee Legal Service and should be slow to criticise the Service without according to them the benefit of a hearing.

Apart from these particular considerations I would also be somewhat reluctant to accept the distinction made both by Finnegan P. in **G.K**. and by O'Sullivan J. in the present case between defaults attributed to the Refugee Legal Service and defaults attributed to a privately instructed solicitor. Indeed it may well be that there has been an over-emphasis on the attribution of blameworthiness or fault, either direct or vicarious, in regard to the issue of extension of time. There is, it seems to me, a need to take all the relevant circumstances and factors into account. The Statute itself does not mention fault; it simply requires *"good and sufficient reason"*. The dicta of this court in the reference judgment quoted earlier indicate many factors which may contribute to *"good and sufficient reason"*. By no means all of these can be attributed to fault, or indeed absence of fault, on the part of an applicant. Both Denham J. in **S v Minister for Justice Equality and Law Reform** and Finnegan J. (as he then was) in **G.K. v Minister for Justice Equality and Law Reform** refer to other factors apart from blameworthiness which must be taken into account. In the present case it must also be borne in mind that two of the applicants are infants, to whom blameworthy delay cannot be imputed.

Taking into account all the circumstances of the case, and despite the numerous difficulties inherent in the evidence, there would in my view, as far as delay itself is concerned, be good and sufficient reason to extend the fourteen day limit. The delay was a matter of about two weeks. In the words of this court in the Reference judgment, the first-named applicant showed *"reasonable diligence"* in seeking access to the court.

However, in accordance with the decision of this court in **G.K. v Minister for Justice Equality and Law Reform** it is also necessary to have regard to

the merits of the applicant's case. In his judgment in the High Court in **G.K.** Finnegan J. (as he then was) referred briefly to the merits of the applicant's case. While he accepted that the case was a weak one he felt that it could be clarified in short affidavit. Hardiman J. on appeal in this court analysed the applicants' case in some detail and held that the applicants had no arguable case on either of the grounds put forward by them. On that account he refused to extend time.

The situation in the present case is somewhat different. The learned High Court judge was fully aware of this court's decision in **G.K**. He analysed at some length the submissions of counsel on all aspects of the applicant's case and referred to the relevant law (pages 18 to 28 of his judgment). As a result in his conclusions the learned judge rejected as unarguable the case made by the applicants on a number of grounds in which it was alleged that the applicant did not have available to her all the material which was before the first named respondent. He also rejected the applicant's argument in relation to the alleged failure of the Minister to express or give specific or particular reasons for his decision in relation to section 5 of the Immigration Act 1999. However he concluded that an arguable case had been made out that the three applicants applications were not treated individually or that appropriate consideration was not given as to how to conduct the assessment of the cases of the two minor applicants. He was also of the view that an arguable case had been made out in connection with the internal re-relocation point, on the absence of any reference to section 4 of the Criminal Justice (United Nations Conventions against Torture) Act 2000 and that the deportation order should indicate to which country the applicants were directed to be deported. In his judgment in this court in **G.K**., Hardiman J. points out that in hearing an application for extension of time under section 5 of the Act of 2000 it is *"impossible to address the merits in the detail of which they would be addressed at a full hearing"*. The demonstration of an arguable case is what is required. In the present case the learned High Court judge has by his comprehensive analysis of the submissions and the law more than fulfilled this requirement. His conclusions have been reached by a proper exercise of his discretion and I would not interfere with them.

As far as the order of the High Court extending time is concerned, therefore, I would dismiss the appeal.

The appellant/respondent also seeks the setting aside of the order of the High Court granting leave to the applicants to issue judicial review proceedings. Under section 5(2)(b) of the Act of 2000 leave to issue judicial review proceedings *"shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed."* The appellant in his notice of appeal claims that the learned trial judge applied the standard of an arguable or *prima facie* case rather than the *"substantial grounds"* standard in granting leave to the applicants to issue

their judicial review proceedings. It is, however, clear from the text of his judgment that the learned judge had in mind the *"substantial grounds"* requirement, which he mentions in refusing leave on a number of grounds put forward by the applicant. He refers to the jurisprudence concerning the meaning of *"substantial grounds"* and in particular to what he describes as *"the seminal judgment on this topic of Carroll J. in* ***McNamara v An Bord Pleanála****"*. While he refers to arguable grounds in the context of allowing an extension of time there is nothing to lead one to believe that he abandoned the *"substantial grounds"* standard in the actual granting of leave.

The general issue of the setting aside of leave which has been granted by the High Court has been dealt with in two recent judgments of this court – **Gordon v The Director of Public Prosecutions** (unreported 7th June 2002, Fennelly J.) and **Adam v Minister for Justice Equality and Law Reform** 2 I.L.R.M. 452. In both these decisions it was held that the jurisdiction to set aside leave once granted should be exercised sparingly and only in plain cases. In my judgment in the **Adam** case I quoted with approval the following passage from the judgment of Bingham L.J. in **R. v Secretary of State**, ex parte Chinoy [1991] C.O.D. 381:

"I would however wish to emphasise that the procedure to set aside is one that should be invoked very sparingly. It would be an entirely unfortunate development if the grant of leave ex parte were to be followed by applications to set aside inter partes which would then be followed, if the leave were not set aside, by a full hearing. The only purpose would be to increase costs and lengthen delays both of which would be regrettable results. I stress therefore that the procedure is one to be invoked very sparingly and it is an order which the Court will only grant in a very plain case."

Fennelly J. in his judgment in **Gordon v D.P.P**. relied on the same passage. The application to set aside leave in the **Adam** and **Gordon** cases arose where leave had been granted on an *ex parte* basis in the High Court and the application to set aside was later made *inter partes* in the High Court itself. However it seems clear that the same principles should apply in cases such as the present where leave has been granted following an *inter partes* hearing in the High Court and it is sought to set aside that leave through an appeal to this court.

In my judgment in **Adam** I pointed out:

"The danger outlined by Bingham L.J. in the passage quoted above would be equally applicable in this jurisdiction. One could envisage the growth of a new list of applications to discharge leave to be added to the already lengthy list of applications for leave. Each application would probably require considerable argument – perhaps with further affidavits and/or discovery…such a procedure would result in a wasteful expenditure of Court time and an unnecessary expenditure in legal costs; it could be hardly

said to serve the interests of justice."

The volume of litigation concerning asylum cases is already large; it is undesirable to add to it save for the most cogent reasons.
In his judgment in **Gordon v D.P.P**., Fennelly J. (as page 7) stated:
"It follows that the applicant for the order to set aside carries a heavier burden than the original applicant for leave. The latter has to show that he has an arguable case. The former has to establish that leave should not have been granted, a negative proposition. It is both logical and convenient to the administration of justice that this should be so. The leave procedure was intended to provide a filtering process, a protection against frivolous or vexatious applications. The judge at the ex parte case will scrutinise applications for leave. Obviously his decisions will not always be right. Hence the need to permit applications to set aside, where clearly unmeritorious applications have slipped through the net. There is also a need to be able to set aside orders where there has been a failure by the applicant to observe the principle of utmost good faith, of which the present case is not an example. On the other hand, to permit this option to operate as a pre-emptive hearing of the substantive trial would defeat the purpose of the judicial review machinery for all the reasons given by McGuinness J. and Bingham L.J."

Fennelly J. was, of course, dealing with the situation where leave is granted on an *ex parte* basis. However, very similar considerations, in my view, apply *mutatis mutandi* where the filtering mechanism provided under statute is an *inter partes* hearing and the standard is that of substantial grounds.
In the present case the learned High Court judge exercised his discretion within his jurisdiction and with considerable thought and care. In general this court would be reluctant to interfere with that exercise of his discretion. There is one matter, however, in which a difficulty arises. In his conclusions on the merits of the applicants' case (at page 29 to 30 of his judgment) the learned judge sets out four matters in regard to which he considered that an arguable case had been made out by the applicant. In his order of 10th November 2003 he gave leave to apply by way of judicial review for reliefs corresponding to these four matters. Both in his judgment and in his order he then gave leave to the applicants to rely on the grounds set forth at numbers 1, 2, 5, 7 and 9 in the statement of grounds. The grounds set out at numbers 1, 2, 5 and 9 in the statement of grounds appear to correspond to the conclusions of the learned High Court judge which are set out at page 29 to 30 of his judgment. Ground no. 7 is expressed as follows:
"The first named applicant was not a person to whom refugee status had been validly refused and consequently was not liable to deportation in accordance with the said notice or at all."

In the first place this ground does not seem to correspond to any of the

conclusions of the High Court judge. In the second place the refusal of refugee status to the first named applicant was notified to her in a letter dated 15th January 2003 written on behalf of the first named defendant by an officer of his Department. In the course of this letter which is exhibited with the affidavit of Terry Lonergan it is stated:

> *"The Minister, for the reasons set out in the recommendation of the Refugee Appeals Tribunal which you have already received, has decided in accordance with section 17(1)(b) of the Refugee Act 1996 (as amended), to refuse to give you a declaration as a refugee."*

This decision is one governed by section 5 of the Act of 2000. The first named applicant did not challenge this decision by application for judicial review either within fourteen days or at all. A challenge at this stage to that decision cannot therefore, in my view, form an arguable ground for any relief in the present proceedings.

This aspect apart, it appears to me that no sufficient grounds have been demonstrated for this court to interfere with the exercise of the discretion of the learned High Court judge.

I would therefore dismiss the appeal and would affirm the order of the High Court of the 10th November 2003 with the exception that paragraph (1) of the curial part of the said order should be amended to read :

> (1) that the Applicants do have leave to apply by way of application for judicial review for the reliefs set forth at paragraph
> A1 B1 2 C and D
> in the aforesaid Statement on the grounds set forth at 1 2 5 and 9 in the said statement.