THE HIGH COURT

JUDICIAL REVIEW

[2026] IEHC 391

Record No. 2026/592 JR

BETWEEN

J. K. AND THE MINORS S. K. , Y. M. K. , S. M. K. , R. M. K. , R. K. AND H. M. K. SUING BY THEIR MOTHER AND NEXT FRIEND J. K.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, HOME AFFAIRS AND MIGRATION, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

EX TEMPORE RULING of Ms. Justice Siobhán Phelan, delivered on the 17th day of June, 2026

INTRODUCTION

1. The First Named Applicant is a South African national who is mother to six minor children, the youngest of whom was born in Ireland. The matter comes before me seeking leave to proceed by way of judicial review to challenge the refusal under s. 3(11) of the Immigration Act, 1999 (as amended) (hereinafter "the 1999 Act") to revoke deportation orders made against the Applicants and an interlocutory order restraining deportation pending determination of the proceedings. The application to revoke the

deportation orders was grounded on medical evidence as to the suicide risk which a forced return to South Africa presents in the case of the First Named Applicant and the consequences of same for the minor children.

BACKGROUND

2. The Applicants arrived in Ireland in November, 2023 and applied for international protection. The claim was grounded on threats and extortion by gangsters, racial and religious abuse (First Named Applicant's husband is Pakistani and the family are Muslim), a physical attack on the First Named Applicant's husband (who is not with the family in the State) and fear for the children's safety.

3. The applications for international protection were refused at all stages of the statutory process. In refusing international protection, reliance was placed, *inter alia*, on the fact that South Africa is a "*safe country of origin*" and credibility issues were identified with the claim as presented.

4. Notably, the claim that the First Named Applicant was suffering from mental health difficulties was not advanced as part of her application for permission to remain presented under s. 49 of the International Protection Act, 2015 (hereinafter "the 2015 Act"), even though the attempt on her own life made by the First Named Applicant in early March, 2025, occurred before a decision was made on that application and following the delivery of a negative Tribunal decision in respect of her international protection claim.

5. Consequent upon a negative permission to remain decision, deportation orders were made on the 30th of April, 2025. To that point, no claim had been made in respect of risk to life arising from the First Named Applicant's mental state.

6. On the 12th of May 2025, the family were informed of the making of the Deportation Orders and of their obligation to leave the State by the 12th of June, 2025. They were requested to advise the Minister of their travel arrangements to comply with the Deportation Orders or, to present at the office of the Garda National Immigration Bureau (GNIB) on the 18th of June, 2025, to make arrangements for their removal from

the State. The family were also advised that in making the deportation order the Minister was satisfied that the provisions of s. 50 of the 2015 Act (prohibition on refoulement), had been complied with.

7. An application under s. 3(11) of the 1999 Act was made on behalf of the First Named Applicant (and on behalf of her children) on the 28th of May, 2025. The application was supported by an undated copy 'Discharge Plan' from a named provincial hospital which recorded that the First Named Applicant was assessed on:

> *"2/3/25 following presentation with distress, anxiety sx. We discussed the following plan with Dr [Name] SR on call ... Will refer [name] to social inclusion team for monitoring of mental state ... emergency nos. leaflet provided ... crisis pathway explained to contact GP / SouthDoc / Samaritan or come to ER".*

8. Reliance was also placed on a copy letter addressed 'To Whom it may Concern' from the First Named Applicant's GP, dated 10th May 2025, which recorded, *inter alia*, that the First Named Applicant:

> *"presented today with evidence of mental health issues, namely combined anxiety and depressive disorder. She was recently assessed in the [Name] Hospital and they referred her to Social Inclusion Psychiatric team which is led by Dr. [Name], Consultant Psychiatrist. She is awaiting assessment".*

9. The First Named Applicant's GP also recorded that he had "*prescribed short-course anxiolytics in the interim*" and that he would be "*grateful if you would consider her impending psychiatric appointment and its importance, whiles assessing her international protection application*". He referred to "*medical history ... Overdose over the counter sleep medication: March 2025*" and listed the medications prescribed to the First Named Applicant that day.

10. Separately, reliance was placed on a report from a Counsellor/Psychotherapist familiar with the First Named Applicant's care. This report advanced a case not previously disclosed that the First Named Applicant had suffered from coercive control at the hands of her husband for years. It was noted that when her initial application was refused, she lost all hope and attempted to end her life. It was stated that she was extremely vulnerable and emotionally fragile.

11. Most particularly, the application was supported by a medical report from a consultant psychiatrist to whom the First Named Applicant had been referred by her solicitors. The said Consultant Psychiatrist recorded that the First Named Applicant *"overdosed on Nytol in March 2024, following receipt of her deportation Order letter and the sudden withdrawal of financial support.*" This was in error as the overdose occurred before the service of the deportation orders but after the negative decision on the international protection application.

12. It was further recorded that "*on examination, [name] presented as frail, tearful and fatigued ...*". The Consultant Psychiatrist reported that the First Named Applicant described low mood, profound hopelessness, and a passive suicidal ideation. Her presentation was considered consistent with a severe adjustment reaction and depressive episode in the context of extreme psychosocial stress. It was considered that the First Named Applicant "*is not medically fit to travel at this time*" and further stated, *inter alia*:

> *"Deportation would pose a high risk of suicide, further trauma, and complete psychological collapse."*

13. In submissions made supporting the application for revocation, reliance was placed on a series of cases including caselaw finding that *"risks to life"* which require to be considered in deciding on a revocation application include a real and substantial risk that a person may commit suicide (*O.O. v. Minister for Justice* [2004] 3 IR 426, [2004] IEHC 426).

14. On the 11th of February, 2026, without a decision being made on the s. 3(11) application, the family were moved to hotel accommodation in Dublin to facilitate their removal from the State. On the 10th of March, 2026, under email cover, the Applicants' Solicitors advised, *inter alia*, that their client was "*extremely distressed given the recent deportations of South Africans*." It was stated that the stress of this situation was impacting both her and her children detrimentally.

15. A s. 3(11) decision had still not been made by April, 2026, almost a year after it was presented, when an updated medical report was prepared by the same consultant psychiatrist as previously and sent to the Minister by way of update based on an assessment conducted on the 3rd of April, 2026.

16. In this updated report, the First Named Applicant's reporting consultant psychiatrist said:

> *"The prior diagnosis of Adjustment Disorder with Prolonged depressive Reaction remains relevant".*

17. In the updated report, the Consultant Psychiatrist said, that:

> *"In my opinion, the risk remains high. Forced return or further coercive relocation would likely precipitate profound psychiatric decompensation including acute suicidality, severe depressive collapse, and inability to function effectively as sole caregiver."*

18. The updated clinical opinion, therefore, was that the First Named Applicant's psychiatric condition had worsened since the previous report. It was noted that an intervening forced relocation from a provincial city to Dublin had materially destabilised her mental health by removing continuity, safety, therapeutic support, school/community structure and practical survival supports. The reporting Consultant Psychiatrist's opinion was that the First Named Applicant continued to be not fit for

enforced removal. It was stated that steps to remove her could create a high risk of suicidal crisis. Humanitarian concerns in respect of her children were also noted.

19. On foot of these reports, furnished to the Minister in support of the s. 3(11) application, an undertaking not to deport pending the determination of the s. 3(11) application was sought but was not forthcoming.

20. These proceedings were commenced on the 29th of April, 2026, by filing papers in the Central Office seeking relief by way of judicial review, including injunctive relief, on the basis that deportation before deciding the revocation application would be unlawful and in circumstances where the Minister had refused to confirm that no enforcement measures would be taken before the revocation decision was made. On an *ex parte* application moved on the 18th day of May, 2026, an Order was made directing that the leave application be moved on notice and liberty was granted to bring a Notice of Motion returnable to the 21st of May, 2026 seeking an injunction restraining deportation pending a decision under s. 3(11). On the 21st of May, 2026, the application was adjourned to the first asylum list of the new term in light of anticipated developments.

21. Thereafter, a significant development occurred in that an adverse s. 3(11) decision (refusing to revoke the Deportation Orders in respect of the Applicants) was sent under cover of a letter dated the 22nd of May 2026. The Minister refused to revoke the deportation orders finding that the medical evidence did not meet threshold for blocking deportation and concluding that there is no proof that care in South Africa would be inadequate. The Minister concluded that the State interest in immigration control outweighed humanitarian issues. It was also concluded that there was no breach of Article 3 (ECHR) or Irish constitutional rights (without reference to the right to life) and no prohibition on return by reason of refoulement risk.

22. The decision was based on a lengthy consideration document in which the medical evidence relied upon was set out. Having summarised the submissions and information received, it was stated that these were considered with stated reference to principles identified as *Smith & Ors v. Minister for Justice* (Unreported, Supreme Court, February 2013; *C.R.A. and O.E.A. (a minor suing by his mother and next friend C.R.A.) v. The Minister for Justice, Equality and Law Reform* [2007] 3 IR 603; *Kouyape v. Minister*

for Justice [2005] IEHC 380 and *Mamyko v. Minister for Justice* (Unreported, High Court, Peart J., 6th November, 2003).

23. The decision-maker, having summarised the medical evidence stated:

> *"I have considered that Dr [Consultant Psychiatrist's] detailed Reports do not suggest that the medical treatment available to [Name of First Named Applicant], should she returned to South Africa would fall short of best international practice and/or short of the treatment that would be available to her should she remain in Ireland, which is the benchmark in determining whether returning her to South Africa would amount to a breach of Article 3 ECHR. In D.E. - v- The Minister for Justice and Equality & ors [2018] IESC 16, the Supreme Court concluded inter alia that 'it is important to identify the sequence of events which the ECtHR suggest requires to be followed in order that the question of whether deportation might give rise to a breach of Article 3 rights can properly be assessed. The first obligation is on the relevant applicant to adduce evidence capable of demonstrating that there are substantial grounds for believing that, in substance, there was a real risk that they would be "exposed to a serious, rapid and irreversible decline in their state of health resulting in intense suffering or a significant reduction in life expectancy", It is only when that evidence (sufficient to establish a real risk) is presented that the obligation shifts to the authorities to dispel any doubts thereby raised…..in this particular case, the medical evidence available does not support the contention that there are substantial grounds for believing that there is a real risk that, if returned to South Africa, [Name of Applicant] would be exposed to a serious, rapid and irreversible decline in her state of health resulting in intense suffering or a significant reduction in life expectancy on the basis of the fact that 14 months ago she presented in hospital with a friend reporting that she had overdosed on Nytol medication. [Name of Applicant] was not admitted to hospital on that occasion but referred to an outpatient team for engagement. No further information was proffered in that regard notwithstanding the detailed reports provided from a different source."*

24. The decision-maker continued:

> *"In light of all of the above, I am of the opinion that repatriating [name], and her [no.] dependent children to South Africa would not be in violation of Article 3 ECHR. Refoulement considerations giving rise to a possible breach of Article 3 ECHR have also been dealt with in the appropriate Section."*

25. The decision-maker then proceeded to consider Articles 40 and 41 of the Constitution concluding that a decision by the Minister to affirm the Deportation Orders in respect of this family, as a whole, "*does not constitute a breach in the right to respect for their personal rights and family life under Article 40 and 41 of the Irish Constitution.*" This conclusion was reached without considering the right to life of the First Named Applicant or any reference to Article 40.3.2. of the Constitution and the submissions made in this regard.

26. Finally, the decision-maker considered Article 8 of the European Convention on Human Rights but again without reference to the impact on the private and family life of the Applicants of a further suicide attempt or the loss of life of the First Named Applicant.

27. When the matter was listed in the asylum list on the 5th of June, 2026, these developments were outlined. On foot of the intervening negative decision under s. 3(11) of the 1999 Act, the Applicants indicated an intention to seek to amend the Statement of Grounds as originally filed to ask the Court to quash the Minister's refusal decision and to restrain deportation pending the determination of the proceedings. This relief, as apparent from the terms of the proposed Amended Statement of Grounds, is grounded on the contention that the Minister failed to properly consider the First Named Applicant's suicide risk, the children's rights and legal obligations on the Staet before refusing to halt deportation. Final directions were made for the Respondent's replying Affidavit and submissions. A hearing date of the 15th of June, 2026 was fixed.

28. To properly contextualise these proceedings with regard to the timeline for the s. 3(11) decision, I adopt with gratitude the chronology included in the Affidavit filed on behalf of the Minister as follows:

Date	Event
30 April 2025	Deportation Order made against the First Named Applicant and her children
28 May 2025	Section 3(11) application submitted seeking revocation of deportation order
23 March 2026	Correspondence raising constitutional right to life issue sent to Minister
3 April 2026	Updated psychiatric assessment carried out by consultant psychiatrist
16 April 2026	Updated medical report submitted to Minister
29 April 2026	Judicial review proceedings instituted
April 2026 (by this time)	Section 3(11) decision had still not issued
18 May 2026	Leave application first came before the High Court. Application on notice directed
21 May 2026	Return date for interlocutory injunction and leave application
21 May 2026	Minister indicates Section 3(11) decision is imminent
22 May 2026	Section 3(11) decision refusing revocation issued (notified by letter)
5 June 2026	Proceedings adjourned; directions given re: replying affidavits and submissions and liberty to bring application to amend pleadings granted. Hearing date fixed for the 15th of June, 2026

ISSUES

29. At the opening of the hearing before me, it was confirmed on behalf of the Minister that the application to amend the pleadings was not being opposed but it was denied that the substantial grounds threshold for leave had been reached. I was asked to refuse leave and all relief accordingly.

30. It was common case that if the Applicants are not successful in persuading me that the substantial grounds threshold for leave is reached, then the application for interlocutory relief must also fail. On the other hand, it was argued on behalf of the Minister that even if I am satisfied to grant leave to proceed by way of judicial review, I should not grant an interlocutory injunction as the applicable test is not met having regard to balance of justice considerations.

31. The legal grounds identified in the amended Statement of Grounds include a challenge to the decision on the basis of:

i. Failure to take into account or to reason in relation to the right to life under the Constitution.

ii. Breach of the Constitutional and/or Convention rights of the Applicants under Articles 40 to 42A and, in particular 40.1 and 40.3, of the Constitution and Articles 1, 2, 3 and/or 8 of the European Convention on Human Rights (as incorporated into Irish law by the provisions of the European Convention on Human Rights Act, 2003).

iii. Failure adequately or at all to adhere to the principles outlined in *Minister for Justice, Equality& Law Reform v. Rettinger* [2010] IESC 45; [2010] 3 IR 783 at paragraph 16 and/or the relevant case law of the ECtHR.

iv. Failure to adequately address the medical evidence in finding that removal does not give rise to an unlawful breach of rights.

v. Failure to give adequate or lawful reasons for finding that the evidence does not suggest that there are substantial grounds for believing that there is a real risk that, if returned to South Africa, the First Named Applicant would

be exposed to a serious, rapid and irreversible decline in her state of health resulting in intense suffering or a significant reduction in life expectancy.

vi. Breach of natural and/or constitutional justice and/or failed to apply the correct test(s) and/or applied the said test(s) incorrectly and/or failed to take into account relevant considerations and/or taken into account irrelevant considerations, and/or acted irrationally in reaching the conclusion he did.

LEGAL PRINCIPLES APPLICABLE

32. Although it was contended in written submissions in support of the leave application that the applicable leave threshold was arguable grounds, it was conceded during the hearing before me that this was incorrect and the decision under s. 3(11) of the 1999 Act is subject to s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 which imposes a substantial grounds threshold. The substantial grounds test for leave which applies by virtue of s. 5 of the 2000 Act, was set out in *McNamara v. An Bord Pleanála* [1995] 2 ILRM 125 and approved in *In Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 at 395. The word "*substantial*" was interpreted as being equivalent to "*reasonable*", "*arguable*", and "*weighty*" and the Court held that such grounds must not be "*trivial or tenuous*". To meet the test the Applicants must identify facts upon which a reasonable or weighty claim may be made that the refusal to revoke the deportation orders is unlawful on stateable legal grounds.

33. The applicable legal principles on an application for an interlocutory injunction in the immigration context are well established and were clearly summarised in the decision of Clarke J. in *Okunade v. Minister for Justice* [2012] 3 I.R. 152, [2012] IESC 49 as follows:

> *"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."

34. The primary issue for me on this application is whether there are substantial grounds for contending that the Minister failed to properly consider the medical evidence in the s. 3(11) decision issued after proceedings were commenced with due regard to the rights of the Applicants and, if there are, whether I should grant an order restraining deportation pending the determination of the within proceedings.

ANALYSIS AND DECISION

Amendment Application

35. In view of the sensible concession made on behalf of the Minister in not resisting this application being dealt with on the basis of the proposed Amended Statement of Grounds, noting that this matter comes before me at pre-leave stage and having regard to the decision in *B.W. v. RAT* [2017] IECA 296 to which I have been referred, I am satisfied to proceed to determine the leave application on the basis of the proposed amended Statement of Grounds.

Application for Leave

36. It has been submitted on behalf of the Applicants that the issues arising may be organized as follows:

i. Was the Minister's failure to refer to the right to life protected under the Constitution in this case unlawful and did the Minister deal adequately with the substance of the constitutional rights of the Applicants?
ii. Did the Minister lawfully address and apply the provisions of the ECHR in this case?
iii. Did the Minister comply with administrative law principles in this case?

37. In legal argument on behalf of the Applicants, great emphasis attaches to the fact that the reasoning in the Minister's decision under s. 3(11) of the 1999 Act does not reference the right to life under the Constitution at all despite the fact that the right to life under the Constitution had been raised in submissions made, most particularly in the letter of the 23rd of March 2026 where reliance was placed on the decision of Gilligan J. in *O.O. v Minister for Justice* [2004] 4 IR 426, a case concerning a failure to consider evidence in respect of the issue of the risk to the life of the applicant in deciding whether to exercise a discretion to revoke a deportation order pursuant to s. 3(11). It is recalled that in *O.O.*, Gilligan J. found that the risks to life which must be considered include the real and substantial risk that a person may commit suicide.

38. Reliance is also placed on behalf of the Applicants on the decision of the Supreme Court in *Y.Y. v. Minister of Justice* [2017] IESC 61 (an Article 3 case) where the Supreme Court (O'Donnell J) said at paragraph 21:

"...In principle therefore it is always advisable, and indeed necessary, to address the question as to the impact of the Constitution, which in most cases has an equal if not greater reach than the Convention and more powerful remedies..."

39. I am further referred to the dictum of Clarke J. in *Fox v Minister for Justice* [2022] 3 IR 221, [2021] IESC 61, itself a case concerned with the right to life, where he said at paragraph 12.14:

"In reality the argument put forward on behalf of Mr. Fox did not go much further than to say that this court should interpret the Irish Constitution in exactly the same way as the ECtHR has interpreted the Convention. I am not persuaded that that is an appropriate approach to adopt in defining the scope of rights conferred by the Irish Constitution which is, after all, an autonomous human rights instrument with its own provisions, its own values and its own established jurisprudential methodologies."

40. It is maintained on behalf of the Minister that a court cannot intervene by way of judicial review where the Minister has considered the medical evidence and concluded on the basis of the weight the Minister attaches to that medical evidence that it does not reach the threshold as would merit a stay on her deportation or a revocation of her deportation order. It is contended that the weight to be ascribed to the evidence and the conclusions reached are, subject to the bounds of rationality, matters for the Minister.

41. In submissions on behalf of the Minister, counsel seeks to elaborate to some extent on the reasoning contained in the considerations document, placing particular emphasis on the fact that no claim related to risk of suicide had been advanced during the s. 49 process, the medical evidence did not address the availability or otherwise of treatment in South Africa and the absence of up to date medical evidence from a treating physician supporting her claim to be at risk of suicide if deported. Reliance is also placed on the

"*material errors*" in the consultant psychiatrist's reports which refers to the attempted suicide by overdose occurring following the notification of the deportation order, which is incorrect. It is highlighted that this error was present in both reports. It bears note that the decision-maker did not attach any apparent significance to this error in the considerations leading to the decision to refuse to revoke the deportation order. Nonetheless, it is contended on behalf of the Minister on this application that this error affects the reliability of the opinion offered by the consultant psychiatrist and the weight to be afforded her reports.

42. While seeking to stand over the integrity of the s. 3(11) decision, it is fairly acknowledged on behalf of the Minister that the constitutional right to life was not separately considered in the s. 3(11) process. Despite this, it is contended that the right of life of the First Named Applicant was in "*substance*" considered, albeit without specific reference to Article 40.3.2, such that the substantial grounds threshold is not reached in this case.

43. I am referred on behalf of the Minister to *L.C. v. Minister for Justice, Equality and Law Reform* [2006] IEHC 36 where Hanna J. set out the applicable threshold to quash a refusal to revoke as a requirement to establish, on the balance of probabilities, that when the Minister decided to refuse to rescind the deportation order, there existed to the Minister's knowledge a real and substantial threat to the applicant's life by suicide as a direct consequence of his decision, the threatened act of suicide could only be forestalled by acceding to the request and stopping the process of deportation and not by other means such as medical intervention and the Minister either missed or disregarded, to the point of irrationality, compelling medical and other material evidence of the foregoing. I am similarly referred to the decision of Humphreys J. in *CM v. Minister for Justice and Equality* [2018] IEHC 217 and Peart J. in *R.B. v. Minister for Justice and Equality* [2017] IECA 26, both cases in which it was found that consideration of the evidence and the weight to be given it was a matter for the Minister. While the case-law demonstrates that, short of irrationality, the weight to be attached to the evidence is a matter for the Minister, I note that a plea is advanced that the decision on the evidence in this case is irrational.

44. Considering the position in this case in the light of all of the authorities to which I have been referred in argument, I am satisfied that both reports from the consultant psychiatrist and the other medical evidence placed before the Minister in support of the s. 3(11) application provide evidence capable of supporting a conclusion, that deportation would pose a risk of suicide, albeit on behalf of the Minister it is contended that the risk is not substantiated as real in circumstances where the attempted overdose occurred over 14 months ago when the First Named Applicant presented in hospital with a friend reporting that she had overdosed on over the counter sleep medication, was not admitted to hospital on that occasion but referred to an outpatient team for engagement. Although the weight to be attached to the medical evidence is a matter for the Minister as decision maker, this Court retains a role in ensuring that the decision reached is one which is properly open and not irrational in law or in fact having regard to the evidence and due consideration of the Applicants' rights.

45. It further appears on the proposed amended pleadings that a clear issue arises as to whether the Minister has asked the correct question in considering this s. 3(11) application by considering the risk to life by suicide only under Article 3 of the ECHR and without regard to Article 40.3.2 of the Constitution.

46. I have conducted a preliminary review of the s. 3(11) considerations to see whether they are so comprehensive regarding the substance of the right to life constitutionally protected as to render the claim that there has been a failure to apply the correct legal test having regard to the constitutional protection of the right to life, the complaints underlying these proceedings, untenable and unreal.

47. It seems to me from a preliminary reading of the consideration documentation, that no consideration was given to the risk to the Applicant's life in the Minister's considerations with reference to the prohibition on *refoulement* in the s. 3(11) considerations for the stated reason that no application had been made under s. 22 of the 2015 Act for a subsequent application based on the new circumstances now contended for and having regard to South Africa's designation as a safe country of origin. In any event, it is not clear that the prohibition on refoulement embraces a risk to life through suicide having regard to the terms of the statutory definition in s.3A of

the 1999 Act referenced in the consideration document. The said definition prohibits refoulement where a return to the country of origin would result in the life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. It is questionable whether this definition would extend to a risk to life by suicide arising from a forced return in this case.

48. In consequence of the approach adopted by the decision maker, the only consideration of medical issues which evidence a risk to life in the consideration document occurs in the context of consideration of Article 3 ECHR. Under this heading, the decision maker rejects the medical evidence as supporting a real risk of breach of Article 3 if returned to South Africa citing the absence of up to date reports from treating (referred to as "independent") doctors (in distinction to the report of the consultant psychiatrist retained by the Applicants' solicitors) and the absence of evidence suggesting that medical treatment available upon return to South Africa would fall short of best international practice and/or short of the treatment that would be available should she remain in Ireland. In the Article 3 considerations this was described as "*the benchmark in determining whether returning her to South Africa would amount to a breach of Article 3 ECHR*."

49. It seems to me that considering a risk to life by suicide which risk is associated with a fear of return to a country triggering consideration of the right to life under the Constitution could entail a different test to that which applies under Article 3 ECHR whereby the benchmark in a given case might not be the medical treatment available upon a forced return, as described by the decision maker, but embraces broader considerations. Indeed, the tests identified in *L.C.* and *O.O.* referred to above would suggest that the availability of medical treatment is not "*the benchmark*" but whether medical treatment might forestall the risk was identified as a relevant factor.

50. I am satisfied that there is a real argument to be made that subsuming the constitutional analysis into that of the ECHR is not acceptable decision making where such fundamental and serious issues arise. Cases such as *Gorry v. Ireland* [2024] 1 IR 666, [2020] IESC 55 are good authority for the proposition that treating a constitutional

analysis as identical, and perhaps even subsidiary, to the analysis by reference to the ECHR, can result in a flawed process. I cannot conclude that the arguments identified are tenuous or trivial and so lacking in substance as to justify a refusal of leave to develop these arguments at full hearing. If it were to be finally concluded following a full hearing that the Minister has not applied the correct legal test in vindicating the constitutionally protected right to life, then this would likely have real consequences for the sustainability of a consideration of the evidence by the Minister on the basis of an incorrect test.

51. As for the complaints made that the Minister has failed to lawfully address and apply the ECHR and has reached a decision which is not sustainable on the medical evidence before him, these are difficult arguments. Although the Applicants may face an uphill struggle at full hearing it nonetheless seems to me that there is a real, non-trivial, basis for contending, having regard to the material before the Minister and the reasons given in the decision, that the s. 3(11) decision is amenable to challenge both:

(a) For failure to consider the impact of the First Named Applicant's suicide, should this risk materialise, on the children under Article 8 of the ECHR; and
(b) on reasonableness or rationality grounds having regard to the decision in *Efe v. Minister for Justice* [2011] 2 I.R. 98.

52. In light of the foregoing, I am satisfied that the Applicants meet the substantial grounds threshold in respect of the grounds of challenge advanced. Accordingly, I will grant leave to proceed by way of judicial review in these proceedings.

Interlocutory Injunction

53. In deciding whether to grant interlocutory injunctive relief, it follows from my decision that the substantial grounds threshold has been reached, that the first limb of the *Okunade* is met as the Applicants have demonstrated more than an arguable case. Accordingly, I must now consider where the greatest risk of injustice would lie in granting or refusing an interlocutory injunction giving all appropriate weight to the orderly implementation of the deportation orders which are *prima facie* valid and are

not challenged in these proceedings and to the public interest in the orderly operation of the immigration system.

54. In considering the risk of injustice, I note the averments of Ms. Houlihan on behalf of the Minister to the effect that arrangements have been put in place to deport the Applicants. These arrangements have not been particularised. There is no evidence that positive steps have been taken to book flights or arrange for garda escort. While Ms. Houlihan further maintains that the orderly operation of deportation orders would be rendered "*impossible*" if the Minister were obliged to refrain from removing every individual who produces a medical report which suggests a risk of suicide, in my view this assertion is an oversimplification and a minimisation of what has occurred in this case. It fails to acknowledge that the medical evidence in this instance is from several experts including a consultant psychiatrist. This evidence is coupled with grounds identified on behalf of the Applicants for contending that the decision may not be legally sound due to errors in the legal test applied in the decision-making process.

55. In my view, granting an interlocutory injunction on the evidence and having regard to the decision-making process in this case would not make the orderly operation of deportation orders impossible as the decision to grant the order would be a decision made on the particular facts and circumstances of this case only. It should not have wider implications for the orderly implementation of deportation orders generally.

56. When it comes to balancing risk of injustice, when all due weight is given to the consequences for the Applicants of being required to comply with the challenged enforcement of deportation orders in circumstances where that measure may be found to be unlawful, in my view the risk to life and the consequences of the loss of their mother for the Applicant children outweighs any interference with the orderly implementation of the said orders which would result from a temporary restraint on the orders made against the Applicants pending a determination of these proceedings. Interference with the orderly implementation of the deportation orders may also be mitigated by directing the early hearing of the substantive proceedings.

57. This is not a case in which the availability of damages as an alternative remedy meets the exigencies of the case and an award in damages could never be an adequate remedy

were the direct consequence of the implementation of the deportation order the death of the Named First Applicant and the loss to the minor Applicants of their mother and sole carer.

58. I am satisfied that there is a credible basis for contending that a real risk of significant harm including death by suicide would attach to the First Named Applicant on deportation in the sense envisaged by Clarke J. at paras. 111 and 112 of his judgment in *Okunade* exists based on the medical evidence adduced. Accordingly, on the authority of *Okunade*, very weighty considerations are required to displace the balance of justice on the facts of this case. The evidence in this case is such, when combined with the relative strength of the legal grounds advanced, that I am satisfied that the balance of justice favours the *status quo* being preserved pending a determination of these proceedings. Accordingly, I will make an order restraining deportation on a temporary basis.

CONCLUSION

59. For the reasons set out above, I will grant leave to seek the relief set out at (d) of the Amended Statement of Grounds on the grounds set forth at (e) of the said Amended Statement of Grounds. I will also make an interlocutory order in terms of para. (d)(8) of the Amended Statement of Grounds restraining the deportation of the Applicants pending the determination of these proceedings and/or further order. I will hear the parties in relation to the making of directions to ensure the early hearing of this case.