

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 279

Record no. 2020/526/JR

BETWEEN

**M.B.B. AND H.S. AND M.B. ("A MINOR, MAKING AN APPLICATION BY HER MOTHER
AND NEXT FRIEND, H.S.")**

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Heslin delivered on the 7th day of April 2022

Introduction

1. The First and Second Named Applicants are nationals of Pakistan. The First Named Applicant arrived in this State in 2006. The Second Named Applicant arrived in this State in 2013. The first and Second Named Applicant have been in a relationship since 2014. The Third Named Applicant is their child who was born in this State on 6 June 2015.
2. In the present proceedings, the Applicants seek to quash: (1) the decisions of the Respondent dated 29 November 2019 to refuse the Applicants permission to remain in the State pursuant to s. 49 of the International Protection Act 2015 (hereinafter "the 2015 Act") and issued to the Applicants by letters dated 9 December 2019 (hereinafter the "Review Decisions"); and (2) Deportation Orders dated 17 February 2020 made by the Respondent in respect of the Applicants and issued to them by letters dated 11 March 2020 (hereinafter "the Deportation Orders").
3. No application for leave to seek judicial review was made within 28 days of the notification to the Applicants of the Review Decisions. In these circumstances, the Applicants also seek an order to extend time in which to bring the within judicial review proceedings.

Evidence before the court

4. I have carefully considered the entire of the evidence which was before the court and which comprised the following:
 - (1) the affidavit sworn by Ms. Ciara O'Reilly, solicitor for the Applicants, on 24 April 2020;
 - (2) the affidavit of M.B.B. sworn on 25 April 2020 verifying the facts set out in the Applicants' Statement of Grounds dated 24 July 2020;
 - (3) the contents of all exhibits "M.B.B. 1" to "M.B.B. 10" referred to in the said affidavit;
 - (4) the 26 May 2020 consent of next friend, signed by the Second Named Applicant, in respect of the Third;
 - (5) the affidavit of H.S., sworn 24 July 2020, verifying the facts set out in the Applicants' Statement of Grounds;

- (6) the Applicants' Amended Statement of Grounds, dated 31 July 2020;
 - (7) the supplemental affidavit of Ms. Ciara O'Reilly, sworn 09 November 2020;
 - (8) the affidavit of Mr. Paul McGuire of the Department of Justice, sworn 4 March 2021;
 - (9) the affidavit of Ms. Gráinne Keane of the International Protection Office, sworn on 4 March 2021;
 - (10) the contents of exhibits "G.K.1" to "G.K. 10" to the affidavit of Ms. Keane;
 - (11) the Statement of Opposition, dated 5 March.
5. Having carefully considered the contents of all the following, it is possible to set out a number of relevant facts which, for the sake of clarity, I propose to set out in chronological order.

Relevant facts

6. In August 2006 the Second Named Applicant entered the State. He arrived here illegally from the UK. He has worked in this State, largely illegally, since that time.
7. On or about 6 September 2013 the Second Named Applicant entered the State. She travelled to Ireland initially on a student visa which was valid between 9 August 2013 and 9 November 2013. On registration with the Garda National Immigration Bureau ("GNIB") the Second Named Applicant was given a student permission which was valid until 29 September 2014. This was extended to 17 October 2015, at which time the Second Named Applicant's visa expired. Since that point, the Second Named Applicant has resided in this State without permission.
8. From 2014, the First and Second Named Applicants have been in a relationship and the Third Named Applicant is their child who was born in the Rotunda Hospital on 6 June 2015.
9. On 13 January 2015 the First Named Applicant married M.D., a Slovakian national. In circumstances where the Third Named Applicant was born on 6 June 2015, the First Named Applicant's marriage to a Slovakian national took place when the Second Named Applicant was pregnant with the Third Named Applicant.
10. Through Garda operation "Vantage" the First Named Applicant's aforesaid marriage was later found to be one of convenience. This is a fact which neither the first, nor the Second Named Applicant disclosed in their respective affidavits. It was discovered that the Applicants were cohabiting with their child whilst the first applicant's EU national wife had returned to Slovakia immediately after the wedding. This was not referred to in the Applicants' affidavits.
11. At para. 6 of his verifying affidavit sworn on 23 April 2020, the First Named Applicant says only the following with regard to the aforesaid marriage:

"I say that I married a woman from Slovakia, [M.D.], a Slovakia national, on 13 January 2015 and I was granted permission to remain for a period of 6 months on the basis that I am a spouse of an EU citizen and residing in the State in exercise of her EU Treaty rights. [M.D.] left the jurisdiction in or about June 2015 and she told me that her mother was very sick. I have had had no further contact with [M.D.] and we are separated and I am in the process of obtaining a divorce. I beg to refer to a copy of the said marriage certificate..."

12. The foregoing averments which appear at para. 6 of the First Named Applicant's verifying affidavit reflect, precisely, the contents of para. 3 of the Applicants' Statement of Grounds of April 2020 and para. 3 of the Applicants' Amended Statement of Grounds dated 16 November 2020.
13. Although the Second Named Applicant's verifying affidavit of 3 July 2020 does not refer specifically to the First Named Applicant's marriage to a Slovakian national, the Second Named Applicant avers, at para. 2 thereof, that "This affidavit is sworn for the purposes of verifying the facts set out in the statement required to ground an application for judicial review filed herein which I have read, and which has been fully explained to me and I hereby so verify same."
14. Both the First and Second Named Applicants have also made the following averment which appears in para. 2 of their respective verifying affidavits: "Although English is not my first language I speak and understand it fully and I understand the contents of this affidavit and the pleadings had herein".
15. On 19 October 2016 the First Named Applicant was issued with a Deportation Order but failed to show for deportation on 23 November 2016. The foregoing was not referred to by the Applicants in their affidavits.
16. Following a visit to the Applicant's home by GNIB in February 2017, the First Named Applicant was detained in Cloverhill Prison and, upon release, the Applicants applied together for international protection (which required the revocation of the aforesaid Deportation Order in respect of the first applicant).
17. The application for international protection was made on 28 February 2017 and the Deportation Order in respect of the First Named Applicant was revoked on 08 March 2017. The Applicants did not refer to the foregoing in either their verifying affidavits or in the Applicants' Statement of Grounds.
18. On 28 September 2018 the International Protection Office issued a 23-page report, internal page 21 of which states the following with regard to the First Named Applicant:

"11. Recommendation:

The Applicant's case was considered under section 49 and section 50 of the International Protection Act, 2015. Consideration was also given to private and family rights under Article 8 of the European Convention on Human Rights (ECHR).

Therefore, having considered the Applicant's family and the exceptional circumstances of this case and the Applicant's right to respect for his private and family life, I conclude that the Applicant M.B.B. could not be given permission to remain in the State under s. 49 of the 2015 Act."

19. It is clear from the 28 September 2018 refusal of permission to remain pursuant to s. 49 of the 2015 Act that the claims advanced by the Applicants were that they would be persecuted if returned to Pakistan because they have a child together out of wedlock. Section 2 records that, at Question 87 on his questionnaire, the Applicant's legal representatives wrote on his behalf: "Applicant's parents are both dead now. Applicant is an upstanding person and never convicted of any criminal matter. Applicant is certain he will be tortured & killed if forced to return to Pakistan. Applicant loyal and devoted father to his daughter and partner. Applicant loves child and daughter and fears for their lives."
20. The aforesaid refusal for permission to remain under s. 49 of the 2015 Act also stated inter alia the following as regards the First Named Applicant's January 2015 marriage:

"The Applicant ... met [M.D.], a Slovakian national, and married her on 13/01/2015 in the State. He was given a temporary Stamp 4 permission valid from 24/07/2015 to 09/01/2016 pending the outcome of his application for permission to remain on the basis of this marriage. Following an investigation by An Garda Síochána as part of Operation Vantage, on 08/11/2015 a report was issued by An Garda Síochána which deemed this marriage to be a marriage of convenience and further permission to remain was refused on 12/04/2016" (internal p. 2, of 23);

"His immediate family members, including five sisters and three brothers are still living in Pakistan." (internal p. 6, of 23);

"The S. 39 report found that the Applicant was not at risk of persecution or serious harm in Pakistan". (internal p. 7, of 23);

"During the investigation into the Applicant's marriage, it was discovered that he was co-habiting with [H.S.] and his daughter while his wife, [M.D.] had returned to Slovakia, immediately following the wedding ceremony." (internal p. 13, of 23);

"The Applicant formed his family life in the State while he was residing illegally in the State prior to making his international protection application." (internal p. 19, of 23).

21. The Applicants did not exhibit the aforesaid 28 September 2018 refusal of permission to remain pursuant to s. 49 of the 2015 Act, but the foregoing comprises one of the exhibits to Ms. Keane's affidavit sworn on 4 March 2021.
22. The Applicants' application for international protection was unsuccessful and the Applicants appealed the relevant decision to the International Protection Appeals Tribunal ("IPAT"). An IPAT oral hearing took place on 27 February 2019. The Applicants' claims were rejected on credibility grounds.

23. On 16 May 2019 the First Named Applicant completed a "Section 49 review form" in the wake of IPAT's decision. In relation to the specific issue of "credibility" the First Named Applicant provided the following information to IPAT which was received at the IPO on 21 May 2019:

"Mr. M.B.B. wishes to clarify the following determinations from his IPAT hearing which he believes negatively impacted his credibility and the outcome of the international protection proceedings concerning him.

He states that he arrived from the UK to Ireland in 2006 to visit friends and ultimately ended up remaining in the State. He has a lengthy work history in positions of responsibility at Spar... as well as [F]... and [N.] Restaurant. The Applicant met H.S. at the end of 2013 and had a relationship with her, and ultimately they had a child together, M.B. born 06/06/2015.

The Applicant further states that he obtained the false marriage certificate obtained which was submitted to the Pakistani authorities further to obtaining a Pakistan birth certificate for the Applicant's daughter. It was at all times Mr. M.B.B.'s wish to obtain the Pakistan birth certificate for the purposes of the Applicant's daughter travelling to Pakistan to visit Mr. B.'s ailing mother, who has since passed away.

The Applicant maintains her (sic) position that there is a real and substantial risk of persecution and/or death for him, his partner and their daughter if returned to Pakistan, particularly motivated by his partner's family.

He wishes to continue his family life in Ireland with his partner Ms. H.S. and their daughter Ms. M.B. and asks the Minister for permission to remain in the State."

24. On the same day, i.e. 16 May 2019, the Second Named Applicant made a written submission to IPAT in the context of a "Section 49 review form" which she completed. This submission, which related to "credibility", was in the form of a typed document which stated *inter alia* as follows:

"Ms. H.S. wishes to clarify the following determinations from her IPAT hearing which she believes negatively impacted her credibility and the outcome of the international protection proceedings concerning her.

She states that she has sporadic contact with her mother and they are sometimes in communication, but this relationship has not been easy and has developed notwithstanding the external pressure of other family members and community members who are threatening towards her position as a v (sic) mother of a child outside wedlock to a father from another caste.

The Applicant further states that she did not have knowledge of the false marriage certificate obtained by her partner MMB; this false document was submitted to the Pakistani authorities further to obtaining a Pakistan birth certificate for the Applicant's daughter. It was at all times Mr. MBB's wish to obtain the Pakistan birth

certificate for the purposes of the Applicant's daughter travelling to Pakistan to visit Mr. B's ailing mother, who has since passed away.

The Applicant maintains her position that there is a real and substantial risk of persecution and/or death for her and her daughter if returned to Pakistan. The Applicant states that she entered the State on a student visa on 6th September 2013 and undertook studies at ... College, Dublin 2. She renewed her student visa once and accepts that she did not address her immigration status during the time of the birth of her daughter, M.B. She is a highly educated person who has proved to positively contribute to society when given the opportunity and not be burden on public resources.

She wishes to continue her family life in Ireland with her partner Mr. M.B.B. and her daughter Ms. M.B., and asks the minister for permission to remain in the State."

25. In his verifying affidavit, the First Named Applicant made no reference whatsoever to the aforesaid "credibility" issues arising from his IPAT hearing. It is clear from the information which the First Named Applicant provided to IPAT in his s. 49 review form, dated 16 May 2019, that he openly acknowledged having "obtained the false marriage certificate". Despite acknowledging this in his submission to IPAT, he made no reference to this fact in his verifying affidavit or in the Statement of Grounds, in its original or amended form. Nor did the Second Named Applicant.
26. Furthermore, although both the First and Second Named Applicants refer to the fact that they have a child together who was born in this State, no reference whatsoever was made in either verifying affidavit to the fact that "a Pakistan birth certificate" was obtained for the Applicant's daughter.
27. Moreover, whilst the Second Named Applicant avers, at para. 12 of her 3rd July, 2020 affidavit that "I am fearful for the care and welfare of our child ... should we be forced to leave the State" neither she nor the First Named Applicant have provided any explanation in their verifying affidavits or in their Statement of Grounds as to why, despite the foregoing fear, the First Named Applicant went as far as obtaining a false marriage certificate which was submitted to the Pakistani authorities in order to obtain a Pakistan birth certificate for the Applicant's daughter to facilitate the Third Named Applicant travelling to Pakistan to visit family.

Candour

28. The foregoing are not inconsequential matters and, before proceeding further with the chronology of relevant facts, it is appropriate to state that this court had an entitlement to expect, when leave was being sought, that the Applicants would be candid in respect of all relevant facts. It does not appear to me that they have been, and this is particularly troubling when the Applicants are seeking discretionary relief.
29. On 21 May 2019 the IPO wrote to M.B.B. acknowledging receipt of his 16 May 2019 communication in which inter alia he sought to "clarify" matters which arose during the

IPAT hearing and which “negatively impacted his credibility”. In the manner explained, this documentation concerning credibility was not exhibited by either of the Applicants, nor was it referred to in any way by them.

Reference to Practice Direction HC 81

30. In the affidavit sworn by the Applicants’ solicitor on 24 April 2020 she makes inter alia the following averments:

“2. *I make this affidavit in compliance with the asylum, immigration and citizenship law practice directions (HC 81) published in December 2018.*

3. *To the best of my knowledge, information and belief, all papers required by this practice direction to be exhibited have been so exhibited, and in particular each and every statement or representation made by or on behalf of Applicants, to any immigration or protection body, whether in the State or elsewhere, including but not limited to the Department of Justice and Equality, has been disclosed in the Applicants’ verifying affidavit in the within proceedings and exhibited thereto, save that the Applicants do not have to hand all documents and correspondence pertaining to the First Named Applicants’ applications for residence status in the State pursuant to his marriage to an EU citizen in 2015 and the Applicants do not have to hand all documents and correspondence pertaining to their application for international protection in the State in 2017.”*

31. I make no criticism whatsoever of Ms. O’Reilly who repeated the foregoing averments for a second time at para. 5 of her supplemental affidavit sworn on 9 November, 2020. I do, however, criticise the Applicants, in particular the First Named Applicant, who must have known the fact and content of detailed representations made by him on the question of “credibility” which he furnished to IPAT on 16 May 2019. Neither the fact of, nor the content of, those representations were disclosed to the court at the ‘leave’ stage. They undoubtedly should have been.

Facts not referred to

32. In circumstances where the First Named Applicant’s representations as to credibility were in the form of a typed document, it seems reasonable to infer that, at all material times following the creation of that document, he had access to it and there would not appear to have been any impediment which prevented the Applicants from exhibiting those representations or, failing that, disclosing, at the very least, (i) the fact that An Garda Síochána had investigated the First Applicant’s marriage and determined it was a marriage of convenience; (ii) the fact that a false marriage certificate had been obtained; (iii) such explanation as the Applicants’ or either of them had, in respect of the foregoing; (iv) the fact that the false marriage certificate was submitted to authorities in Pakistan; (v) the fact that a Pakistan Birth Certificate was obtained for the Third Named Applicant on foot of same; and (vi) the fact that this was obtained by the First Named Applicant in order to facilitate travel to Pakistan. None of this was disclosed.

No explanation

33. Furthermore, despite the fact that Ms. Keane exhibited documentation which, in my view, should have been exhibited by the Applicants in order to comply fully with HC 81, neither of the Applicants took the opportunity, at any stage, to swear any affidavit explaining their failure to put relevant documentation and information before the court. I now propose to continue with the chronology of relevant facts.
34. The Applicants' claims for international protection were denied by IPAT. The Review Decisions were dated 29 November 2019. Each of the Review Decisions was in the form of a letter from the international protection office, dated 29 November 2019, to the Ministerial Decisions Unit headed "Re: PTR Review under S. 49(7) and S. 49(9) of the International Protection Act, 2015 – REFUSAL". Each letter enclosed a signed report. The report in respect of the First Named Applicant comprised 9 pages. The report in respect of the second applicant comprised 10 pages. A copy of the first appears as part of exhibit "GK5" to Ms. Keane's affidavit, whereas a copy of the second comprises part of exhibit "GK10".
35. It is entirely clear what the Review Decisions state; and there could be no doubt that they informed the Applicants that the Respondent affirmed the decision dated 28 September 2018 that the Applicants should not be given permission to remain in the state under s. 49 of the 2015 Act.
36. By letter dated 9 December 2019 a deciding officer in the Ministerial Decisions Unit of the Respondent wrote to each of the First and Second Named Applicants informing them of the decision to refuse permission to remain in the State. This correspondence stated *inter alia*:

"Under section 47(5) of the International Protection Act, 2015 the Minister is refusing to give you a refugee or subsidiary protection declaration";

"The Minister has decided, pursuant to section 49(4)(b) of the 2015 Act to refuse you permission to remain in the State. A statement of reasons for this decision is enclosed.";

"You have now ceased to be an applicant under the 2015 Act and, as such, the permission to enter and remain in the State which was granted to you for this purpose has expired.";

"Temporary Residence Certificate (TRC) your TRC is no longer valid and you must return it to the Minister immediately";

"If you were issued a permission to access the labour market, this is no longer valid and must be returned to the Minister immediately";

"You no longer have permission to remain in the State and you must now return voluntarily to your country of origin or be deported";

"If you decide not to return voluntarily, or if you do not let the Minister know within the required time frame that you have decided to return voluntarily, the Minister will make a Deportation Order in respect of you under section 51 of the 2015 Act. Once this is made and served it will require you to leave the State and remain out of the State indefinitely."

Not a preliminary or conditional decision

37. The receipt by the Applicants of the letters dated 9 December 2019 is not in doubt. The terms of the foregoing were clear. The Applicants were aware that a decision had been made refusing them permission to remain in this State. Viewed objectively, there is nothing whatsoever in the letter to suggest that this was a preliminary decision. By no means could the Review Decisions be read as dependent, for their effectiveness, upon some future decision (which the Respondent Minister might or might not make). There was no suggestion whatsoever that the Minister had yet to make a further decision in order for this one to be operative. On the contrary, this was not a decision in any way conditional on something else occurring (or not). It was perfectly clear from the 9 December 2019 letters that the Applicants ceased to have permission to remain in the State.

Time 'ran' from 9 December 2019

38. Insofar as the question of a Deportation Order was concerned, the letter did not suggest that there was any further decision that the Minister might or might not make. Rather, the letter was explicit that if the Applicants did not return voluntarily or inform the Minister of same (within 5 days) "the Minister will make a Deportation Order" (emphasis added). In light of the foregoing, I am satisfied that 'time' for the purposes of a challenge to the Review Decisions began to 'run' from the receipt by the Applicants of the 9 December 2019 letters from the first named respondent.

28-day time limit

39. The relevant time-limit to challenge the Review Decisions is 28 days commencing on the date when the Applicants were notified of the decision. This is clear from s. 5 of The Illegal Immigrants Trafficking Act, 2000 (as Amended) (hereinafter "the 2000 Act"). It is not in dispute that the Review Decisions comprise decisions within the meaning of s. 5(1) of the 2000 Act, which makes clear that "a person shall not question the validity of" such decisions "otherwise than by way of an application for judicial review under Order 84...". Section 5(2) goes on to state that:

"An application for leave to apply for judicial review ... shall be made within the period of 28 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 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."

40. Both the First and Second Named Applicants aver that they received the 9 December 2019 letter. There is no suggestion in their affidavits that either of them were unclear as to the meaning of the letter. Rather, both aver that the 9 December 2019 letter informed them “that the Respondent has refused to grant us permission to remain in the State”. In other words, there is no question of the Applicants being confused about what the letter meant, nor any question of not receiving the Review Decisions of 9 December 2019.
41. As to what the First and Second Named Applicants did in the days, weeks and, indeed, months, after receiving the Review Decisions, their affidavits are entirely silent. The only averments the Applicants make is to say:

“Our solicitors, FH O’Reilly & Company Solicitors, have responded to the Respondent’s correspondence dated 9 December 2019 by letter dated 26th February 2020 in a further application for permission to remain in the State.”

77 days

42. The 26 February 2020 is 77 days after notification to the Applicants of the Review Decisions. Although in an entirely different context (such as *inter partes* litigation) a period of 77 days might not be considered lengthy, here, however, the Oireachtas has laid down a very specific period of 28 days within which judicial review can be sought. Not only did the Applicants fail to comply with that 28-day time-limit, they failed to comply with a period of twice that and more. They have not proffered a good reason for that. They have proffered no reason whatsoever to explain why judicial review was not sought within the period mandated by s. 5 of the 2000 Act. The Applicants do not, for example, assert that they had any difficulty with obtaining legal advice. They refer to no such impediment, be it temporal or financial, and this is true in respect of the entire period of 77 days.
43. The Applicants do not even inform the court as to when they instructed their current solicitors. I deliberately say current because exhibit “G.K. 7” to Ms. Keane’s affidavit includes correspondence from the International Protection Office, dated 1 October 2018, sent to Messrs. “Cahir O’Higgins & Co.” who were then acting as solicitors for the Second Named Applicant which states, *inter alia*: “I am directed by the Minister to refer to your client’s application for international protection and to enclose a copy of correspondence issued to your client”. That correspondence, also of 1 October 2018, comprised a letter to the Second Named Applicant from the IPO informing her that an international protection officer had considered her application and was recommending that she should be given neither a refugee declaration nor a subsidiary protection declaration. Thus, despite having retained solicitors in 2018; and despite retaining a different firm of solicitors from 26 February 2020; no reason or explanation whatsoever is offered by the Applicants for their failure to comply with the 28-day time limit which expired as of 7 January 2020.
44. Many of us will recall the speech by An Taoiseach, on or about 12 March 2020, when he announced the introduction, later that month, of significant restrictions in response to the Covid-19 pandemic. That, however, in no way explains or excuses the failure on the Applicants’ part to comply with the aforesaid 28-day time limit, given that their delay

occurred prior to any public health restrictions being imposed. Nor do either of the Applicants suggest in their respective affidavits that restrictions consequent on the Covid-19 crisis were of any relevance.

26 February 2020

45. In her supplemental affidavit sworn on 9 November 2020 Ms. O'Reilly, the Applicants' solicitor, avers that she wrote to the Respondent by letter dated 26 February 2020 "making further representations regarding permission to remain in respect of the Applicants enclosing further documentation in the matter". Ms. O'Reilly does not indicate when she received instructions. There was no suggestion whatsoever that the Applicants consulted her within the 28-day time limit prescribed. Nor does Ms. O'Reilly's affidavit proffer, on the Applicants' behalf, any reason or excuse for the passage of 77 days between the notification to the Applicants of the Review Decisions and her firm's 26 February 2020 letter.
46. At the risk of stating the obvious, that letter did not stop 'time' from 'running'. The Review Decisions were unequivocal and, regardless of the making of further representations regarding permission to remain, it was a matter of fact that the prescribed time limit for the bringing of judicial review had already expired. Nor was 'leave' to bring judicial review sought on 26 February 2020.

Request to remain

47. A copy of the aforesaid letter dated 26 February 2020 comprises exhibit "M.M.B. 7" to the First Named Applicant's affidavit. It is fair to say that it represents a setting-out of the background, based on the Applicants' instructions, and comprises a request for permission to remain, wherein the Applicants' solicitor states *inter alia*:

"We respectfully submit that the Appellants satisfies the general thrust of criteria under which the Minister is required to review such applications seeking permission to remain in the State which is pursuant to s. 3(4), Immigration Act, 1999 (as amended) and in particular, having regard to the considerations outlined in s. 3(6) of the Act".

Particular reference is laid on the Applicants' residence in the State, including the Third Named Applicant's birth and residence in the State; that the Applicants have sought to be productive members of society and not a burden on the State; their employment record; their integration into Irish society; their lack of any criminal record; that they do not represent a threat to national security or public order; and that the Applicants "are healthy young family" (emphasis added) with the "potential to contribute in a positive and productive fashion to the Irish economy and to Irish society in general". The letter concludes with the following statement: "At this stage, the Appellants are keen to regularise their life, and on their behalf, we should be most grateful if you would look favourably on this application."

48. There was no reference whatsoever in the 26 February 2020 letter to judicial review. The letter did not, for example, state that the Applicants regarded the Review Decisions as unlawful but, as an alternative to the immediate commencement of judicial review

proceedings, they were affording the Respondent an opportunity to address what the Applicants regarded as legal errors in decision making. Fairly considered, the 26 February 2020 letter comprised representations which spoke to the merits of the decisions and reflected the Applicants' hope for a positive response, rather than any assertion whatsoever that the Review Decisions were unlawful.

49. The author of the 26 February 2020 letter could not reasonably have believed that, by sending it, that 'time' would 'cease to run' against the Applicants, for the purposes of seeking leave to bring judicial review proceedings with regard to the Review Decisions. Indeed, nowhere does the 26 February 2020 letter suggest that, by reason of its contents, the Applicants, or their solicitor, took the view that 'time' ceased to 'run' against them, or that the Applicants regard the Respondent as estopped from raising the issue of delay for so long as a reply to the aforementioned letter remains outstanding.
50. Fairly considered, the letter was no more and no less than representations made in the hope that the Minister "would look favourably on this application". I am also satisfied that no new issue or fresh evidence was raised in the letter which had not already been considered and determined by means of the Review Decisions.
51. To say the foregoing is not to criticise the Applicants' solicitors in any way. It is merely to point out certain salient facts.

False impression given to the Minister

52. It is also important to quote verbatim certain statements made in the 26 February 2020 letter to the Respondent, wherein it was stated, *inter alia*, that:

"In or about January 2014 the appellant '1' and '2' met and they were first as a friend (sic) and then their relationship developed over the period and the appellant '2' got pregnant in or around August 2014. In the beginning the appellant '2' did not told (sic) the appellant '1' about the pregnancy. The appellant '1' did know the pregnancy (sic) until in or around December 2014. However, both the appellant '1' and '2' was not sure to continue (sic) their relationship at that time. The appellant '1' got married to the EU national [M.D.] in January 2015. The appellant could not continue his relationship with [M.D.] and [M.D.] also has (sic) to leave the State after 6 months to look after her mother. The appellant '1' and the appellant '2' got back together while the appellant '2' was pregnant and decided to stay together and formed love relationship and child (sic), the appellant '3' who was born on 06 June 2015. The appellant '1', '2' and '3' are residing, working and going to school in the State and they are requesting the refugee and subsidiary protection status (sic)..."

53. In circumstances where it was sent by Messrs. F.H. O'Reilly & Co. solicitors on behalf of the Applicants, I am entitled to assume that the contents of the 26 February 2020 letter accurately reflected the instructions provided by the Applicants to their solicitors.

54. Regardless of whether or not the letter was ever received by the Respondent (and for the reasons set out earlier, I cannot hold that it was), it is entirely fair to say that the representations quoted above give the very clear impression that the first named respondent entered, *bona fide*, into a marriage with a third-party, which relationship was frustrated by *inter alia* the need for the First Named Applicant's wife to leave this State six months after that marriage, in order to look after her mother.
55. There is no suggestion whatsoever made by the Applicants to the Respondent Minister, on 26 February 2020, that the aforesaid marriage was a 'sham'. This was despite the fact that, at that time, both the first and Second Named Applicant knew very well that it was a sham.
56. It will also be recalled that in written submissions dated 16 May 2019, i.e. prior to the Review Decisions being made, the First Named Applicant stated as follows with regard to the sham marriage:

"The Applicant further states that he obtained the *false marriage certificate* obtained which was submitted to the Pakistani authorities further to obtaining a *Pakistan birth certificate* for the Applicant's daughter." (emphasis added)

57. It will also be recalled that, on the same date the Second Named Applicant stated the following with regard to the marriage of convenience: "The Applicant further states that she did not have knowledge of the *false marriage certificate* obtained by her partner MBB; *this false document was submitted to the Pakistani authorities further to obtaining a Pakistan birth certificate* for the Applicant's daughter." (emphasis added).
58. Even if one accepts entirely that the Second Named Applicant was not aware of the 'sham' marriage prior to 16 May 2019, she was plainly aware of it at that point and beyond. Despite this knowledge on the part of both the First and Second Named Applicants, it is clear that, over 8 months later, via correspondence written by their solicitor on 26 February 2020, both of the Applicants were giving the Minister to understand that the marriage was *bona fide* when they knew that it was false. Not only that, details were given in that letter with regard to the development of the relationship between the first and second named defendants (including what was, and was not known, concerning the Second Named Applicant's pregnancy) in apparent attempt to explain-away the First Named Applicant's marriage to a third party.
59. Furthermore, what is said in the letter of 26 February 2020 is impossible to square with the following statement which appears in the first-instance decision of 28 September 2018, as regards the First Named Applicant:

"During the investigation into the Applicant's marriage, it was discovered that he was co-habiting with Ms. S. and his daughter, while his wife, [M.D.] had *returned to Slovakia, immediately following the wedding ceremony.*" (emphasis added)

Thus, in a material way, this Court is entitled to conclude that the Applicants were (i) misrepresenting relevant facts to the Respondent and (ii) were doing so as recently as 26 February 2020 and (iii) were doing so 77 days after receipt of the Review Decisions, and this was (iv) in an attempt to persuade the Respondent to make a different decision but without, it has to be said, (iv) seeking leave to challenge the Review Decisions.

No evidence the letter was received

60. Ms. O'Reilly avers that "this letter has never been replied to by the Respondent". No certificate of ordinary post or registered post is exhibited. The letter does not appear to have been sent by email and no 'read receipt' of any email transmission is exhibited. I accept entirely the averment that this letter was written to the Respondent and, no doubt, sent. However, based on the evidence before this court, I cannot be satisfied, on the balance of probabilities, that it was ever received. I say this because, in an affidavit sworn on 4 March 2021, Mr. Paul McGuire, a Higher Executive Officer in the Immigration Service delivery function in the Department of Justice, averred (at para. 2) "that there is no record on the repatriation database of the application for permission to remain, exhibited at 'M.B.B. 7' and dated 26 February 2020, ever having been received by the Minister". In light of the foregoing I cannot safely assume that the 26 February 2020 letter was ever received by the Minister. What can safely be said, however, is that, even if it had been received, the letter would not have stopped time 'running' insofar as the 28-day prescribed time limit is concerned. Nor could the 26 February 2020 letter excuse, in any way, the 77 days delay which preceded it. Moreover, the letter itself materially misrepresents relevant facts in a deliberate fashion as the Applicants must have been well aware when they gave the instructions to send it.

Deportation Orders

61. Deportation Orders issued in respect of the Applicants, dated 17 February 2020. It will be recalled that the Review Decisions made perfectly clear that Deportation Orders would be made if the Applicants did not agree to leave the State voluntarily and so inform the Minister within 5 days (which 5-day period expired on or about 15 December 2019). Thus, it is a matter of fact that the Deportation Orders, dated 17 February 2020, were made 9 days before the Applicants' solicitor wrote to the Respondent to ask that permission be given for the Applicants to stay. Having regard to the evidence before this court, it does not appear that the Applicants had even consulted their solicitor by the time the Deportation Orders were made. The said Deportation Orders issued to the Applicants under correspondence dated 11 March 2020.

Certain comments in relation to the position as of 26 February 2020

62. It seems to me that the situation as regards delay, up to 26 February 2020, can be fairly summarised as follows. The Applicants have offered no reason whatsoever, still less any good reason, to explain their complete inaction up to 26 February 2020. Having regard to the analysis I have just conducted, I cannot accept that the letter dated 26 February 2020 offers any excuse for prior delay, nor did it prevent time from 'running' against the Applicants from that point onwards (even if I was in a position to hold that such a letter was ever received by the Respondent). In the manner explained, the Applicants' conduct can fairly be characterised as not only involving delay, but also demonstrating a

willingness to misrepresent the true facts of the situation, with a view to securing their aims.

63. All humans are fallible and the desire to achieve an end might prove so overwhelming that it could result in a preparedness to omit, or to misrepresent, relevant facts. This is something the court can understand but simply cannot condone, particularly when what the Applicants seek is discretionary relief.

Covid-19

64. At para. 12 of her affidavit, Ms. O'Reilly avers that she encountered difficulties, due to Covid-19 restrictions, in filing the requisite documentation to support an application seeking leave to apply for judicial review. Although she does not specify what these difficulties are, one can well understand that such difficulties might have arisen, in particular, from the first national 'lockdown' in March 2020. She avers that the *ex parte* docket seeking leave for judicial review, together with the Statement of Grounds, was finalised and stamped on 23 April 2020 and that the verifying affidavit of the First Named Applicant was sworn and stamped on 23 April 2020, with Ms. O'Reilly's own affidavit sworn and stamped on 24 April 2020. I accept entirely Ms. O'Reilly's averment that the Applicant's solicitors were unable to bring the matter to court, at that juncture, due to Covid-19 restrictions.
65. Fairness does require me to take account of the effect of the Covid-19 pandemic and related restrictions which commenced after 11 March 2020. It seems to me that the averments made by Ms. O'Reilly in her 9 November 2020 affidavit constitute reasons to explain delay from 11 March 2020 until some time later. However, I am not at all satisfied that they constitute good and sufficient reasons to explain the fact that it was not until 24 July 2020 that the Statement of Grounds and papers to support the application for leave were filed in the High Court Central Office. To see why I take that view, it is appropriate to look at the chronology of relevant events from early March 2020 onwards.

The sequence of events from 11 March 2020

66. As to the sequence of events from 11 March 2020 onwards, the averments by Ms. O'Reilly can be summarised as follows:
- The *ex parte* docket seeking leave for judicial review together with the Statement of Grounds were finalised and stamped on 23 April 2020;
 - The First Named Applicant's verifying affidavit was sworn and stamped on 23 April 2020;
 - The verifying affidavit of Ms. O'Reilly was sworn on 24 April 2020;
 - On 1 May 2020, Ms. O'Reilly wrote to the Respondent, via the Chief State Solicitor's Office, enclosing the aforesaid documentation;
 - On 5 May 2020, Ms. O'Reilly sent the aforesaid documentation to the High Court Central Office and it was received on 11 May 2020;

- The Central Office returned the documentation, pointing out that the Third Named Applicant, a minor, required the 'consent of next friend' and this was obtained, dated 26 May 2020, with the documentation returned to the Central Office on 29 May 2020;
- On a date not specified by Ms. O'Reilly, the Central Office returned the documentation, requesting a verifying affidavit be sworn on behalf of the Second Named Applicant;
- The verifying affidavit of the Second Named Applicant was sworn and stamped on 3 July 2020;
- The documentation required to support the application for leave was eventually filed in the High Court Central Office on 24 July 2020;
- On 31 July 2020, counsel for the Applicants appeared before this court (Humphreys J.) to seek leave. The application was opened and was adjourned to October 2020 in circumstances where, as Ms. O'Reilly avers at para. 20 of her affidavit, Mr. Justice Humphreys "sought further documentation in the matter";
- On 16 November 2020, the application for leave was moved, on notice to the Respondent, and leave was granted by order of this court (Ms. Justice Burns) which order made explicit that leave was given "Without prejudice to the determination at the substantive stage of any point which could have been contended for by the Respondent at the leave stage including any point in relation to time limits for the bringing of this application."

11 March to 5 May 2020

67. In light of the foregoing, it appears that delay between 11 March 2020 and 5 May 2020 has been explained by Covid-19 restrictions which seem to me to provide a good and sufficient reason for same. However, it is evident that, notwithstanding Covid-19 restrictions, it was possible for the Applicants to file documentation in the High Court Central Office on 11 May 2020 (because they did so).

5 May to 24 July 2020

68. There is no averment to the effect that any of the delay which occurred between 5 May 2020 and 24 July 2020 was caused by the Covid-19 pandemic or any restrictions resulting from same. In my view none of the averments made concerning the period from 11 May 2020 to 24 July 2020 constitute good or sufficient reasons to explain the Applicant's delay, from 11 May 2020 onwards, in seeking leave.

24 July 2020 onwards

69. There could be no criticism in respect of the period from 24 July 2020 until 31 July 2020 when leave was first applied for. Nor can there be any criticism of the Applicants in respect of the period which elapsed between 31 July 2020, when the application was first moved, and 16 November 2020, when leave was granted (without prejudice to the issue of delay).

An overview of the delay

70. The evidence reveals no reason whatsoever to explain the first 77 days of delay on the part of the Applicants (i.e. up to 26 February 2020). The letter dated 26 February 2020, even if it was received, did not stop time 'running' at that point. The evidence discloses no good and no sufficient reason to explain 90 days of delay (i.e. up to 11 March 2020, being the date when the Applicants were written-to in relation to the Deportation Orders and which is also the earliest conceivable date from which Covid-19 restrictions could have played any role).
71. Thus, by the time the Deportation Orders were received by the Applicants, they had already allowed to elapse over three times the prescribed period of 28 days in respect of challenging the Review Decisions (during which period their only act appears to have been to give instructions to their solicitor to request the Respondent to change their mind by way of representations which, in a material way, misrepresented the factual backdrop).
72. In the manner explained, whilst the Covid-19 pandemic and restrictions explains the delay from 11 March 2020 to 11 May 2020, a further period of 74 days elapsed between (i) the point at which documents were first lodged in the Central Office (i.e. 11 May 2020) and (ii) the date on which, as is averred at para. 18 of Ms. O'Reilly's affidavit: "the requisite legal documentation to support the within judicial review application was eventually filed" (i.e. 24 July 2020).

Bona fides

73. It must also be stated that, even when the requisite documentation to support the application for leave was ultimately filed in the form of the Statement of Grounds and verifying affidavits sworn by the first and Second Named Applicant, that documentation created the clear impression that the marriage which the First Named Applicant entered into was bona fide, when it was not.

Birth certificates

74. This was not the only way in which the Applicants' pleadings misrepresented the factual backdrop. In both of the Applicants' verifying affidavits, they emphasised that their child was born in this State on 6 September 2013 and they exhibited the Third Named Applicant's Irish birth certificate. What neither of the Applicants stated, although both of them knew it when they swore their verifying affidavits, is that the First Named Applicant procured a birth certificate for the Applicants' daughter from the authorities in Pakistan. This birth certificate was neither exhibited, nor referred to.

Less than candid account

75. In my view the 'sin of omission' is no less grievous when it comes to an application for discretionary relief. It is prejudicial to the public interest in the proper administration of justice if, in an application of this kind, the court cannot be confident that a complete and accurate picture of relevant facts has been put before it. In my view there has been a lack of candour on the part of the Applicants. On any reasonable analysis the evidence before this court reveals that the Applicants knowingly gave a less than candid account of

material facts to this court (and, indeed, to the Minister, by letter of 26 February 2020, regardless of whether that was ever received).

Uberrima fides

76. An application for judicial review requires *uberrima fides* on the part of every applicant. That obligation has not been discharged in the present case. The Applicant has failed to disclose material facts. They were material because they related directly to the Applicant's status and to the basis upon which they assert an entitlement to remain. The material non-disclosure also speaks to the question of credibility. It is plain from the evidence before the court that the Applicants' credibility was very much in issue, in the manner I have explained. Despite this, and despite making written submissions following the first-instance decision, in which the Applicants attempted to explain-away the credibility issues (including with reference to a false marriage certificate; a Pakistan birth certificate; travel to visit relatives in Pakistan; and contact with family in Pakistan) none of this was referred to by the Applicants themselves.
77. The evidence before this court also makes clear that it was not until An Garda Síochána found that the First Named Applicant's marriage was a 'sham' and he was issued with a Deportation Order (which he refused to comply with) that the Applicants sought international protection following the release of the First Named Applicant from Cloverhill Prison. None of the foregoing was disclosed by the Applicants. It also seems to me to be relevant and material.

Uncontested averments

78. In Ms. Keane's affidavit she makes the following averment at para. 6:

"The first applicant has resided in the State unlawfully since 2006. The second applicant has resided in the State unlawfully since 2015. Both have worked unlawfully since that time. The first applicant applied in 2015 for EU Treaty rights on the basis of his marriage to an EU national. *As part of Operation Vantage, it was found that the first applicant was residing with another woman and their child (the second and third applicants) and that his marriage to the EU national was one of convenience (a fact not disclosed by the Applicants on affidavit to this Honourable Court). On foot of this, he was previously issued with a Deportation Order on 19 October 2016. He failed to appear for deportation and was subsequently arrested in 2017 and detained in Cloverhill Prison. At that point, both applicants applied for international protection (which required the automatic revocation of the Deportation Order). Both claims were rejected on credibility grounds. Accordingly, insofar as the relief sought by way of judicial review is discretionary, the Applicants (the first applicant in particular) have demonstrated a complete disregard for the laws of this State and have engaged in a serious abuse of the immigration and asylum system for over a decade. So for the period between 9 August 2013 – 9 November 2013 when the second applicant had a student permission, none of the Applicants have ever had a permission to reside in the State outside of those recently granted for the sole purpose of processing their international protection claims.*" (emphasis added)

Neither of the Applicants swore any replying affidavit contesting the accuracy of the foregoing averments, which are uncontested for the purposes of the present application.

Practice Direction HC 81 – Extracts

79. There can have been no doubt, on the part of the Applicants, as to what was required of them when applying for leave to seek judicial review. Practice Direction HC81 makes explicit (under the heading “Affidavits generally”) that affidavits “must set out all material facts relevant to the issue before the court.” That did not occur in the present case. Furthermore, para. 7 thereof makes explicit reference to the “duty of candour to the court”. HC81 also refers *inter alia* to the obligation to draw for the court’s attention matters adverse to the Applicants’ case for relief. A useful “explanatory note” accompanies practice direction HC81 and it is sufficient to simply quote the following from same:

“In view of the principle of Uberrima Fides applying to ex parte applications (e.g., Adam v Minister for Justice, Equality and Law Reform [2001] IESC 38), applicants have a general duty to put all relevant material before the court when making any form of ex parte application. The purpose of practice direction HC81 is inter alia to give practical effect to this requirement”.

That an applicant’s conduct may disentitle them to discretionary relief is emphasised in the analysis set out by Mr. Justice Humphreys in *F.A.F. (Nigeria) v The Minister for Justice and Equality & Ors.* [2019] IEHC 263:

“Although classically discretion arises in an ‘applying the proviso’ sense, that is if a purely legalistic flaw is uncovered or one that would not have made a difference to the outcome, that is not the sole basis for discretion. It has broader application in equitable and discretionary remedies, such as judicial review. It also arises in a context where a person intentionally and unlawfully frustrates and undermines a particular process and then reserves the right to himself or herself to challenge the outcome of that process if unfavourable. As put by Lord Carnwath in Yousef v. Secretary of State for the Home Department [2016] UKSC 3 (para. 61): ‘Judicial review is a discretionary remedy. The court is not required to ignore the appellant’s own conduct, or the extent to which he is the author of his own misfortunes.’

This applies here. This applicant successfully and unlawfully frustrated the enforcement of the Deportation Order for an almost ten-year period and I do not think it would be appropriate to give her the benefit of a discretionary remedy in the context of seeking to challenge the outcome of the deportation process. Thus I would have refused the relief on discretionary grounds even if, counterfactually, she had established any legal flaw in the process.”

80. It also seems to me that the following principles articulated by Humphreys J. in *C.M. & Ors. v The Minister for Justice and Equality* [2018] IEHC 217 are of particular relevance given the facts and circumstances in the present case:

"The court cannot countenance a situation where a person frustrates the operation of a particular statutory system and then seeks judicial review as a discretionary remedy once the system has caught up with them. In such a case, discretion can legitimately be exercised against the person even if they are otherwise entitled to relief, which these applicants are not." (para. 20)

Decision to refuse discretionary relief having regard to the Applicants' conduct

81. For the reasons set out in this decision, and having taken full account of the fact that the Third Named Applicant, a young child, is entirely blameless, I am nevertheless satisfied that the conduct of the first and second applicants, including their lack of candour, entitles me, in the particular facts and circumstances of this case, to refuse relief on a discretionary basis.
82. This seems to me to be sufficient to dispose of this application. Lest I be entirely wrong to come to the foregoing views and lest I be wrong to refuse discretionary relief having regard to the conduct of the First and Second Named Applicants, I now turn to the question of delay and set out my reasons in respect of a decision on the question of whether time ought to be extended.

Decision to refuse an extension of time

83. There can be no dispute as to the fact that the relevant time limit in respect of bringing a challenge against the Review Decisions was 28 days. If there was ever any doubt that the said time limit applied, it was ruled out by the decision in *A.W.K. (Pakistan) v The Minister for Justice and Equality & Ors.* [2018] IEHC 550 (see Humphreys J. at para. 5). In the present case, that time-limit commenced running as of 9 December 2019 when the Applicants were notified of the Review Decisions.
84. This court's order of 16 November 2020, which granted leave, was explicitly without prejudice to any point taken by the Respondent in relation to time limits. Earlier in this judgment I set out the relevant facts and it is not necessary to repeat the analysis which can be found above. Suffice to say that, by the time there can be any question of Covid-19 excusing delay (i.e. 11 March 2020) the Applicants were already "out of time" three times over. There is simply no reason or excuse whatsoever advanced by the Applicants in respect of the first 77 days of delay (ie up to 26 February 2020). In the manner previously explained, I do not consider the writing of the 26 February 2020 letter to be a good or a sufficient excuse for the delay which arose between 26 February 2020 and 11 March 2020) and I am satisfied that the writing of this letter did not stop time from running.
85. I have held that time ceased to 'run' against the Applicants as of 11 March 2020, due to Covid-19 related restrictions (i.e. some 90 days after the Applicants learned of the decision to refuse them permission to remain in the State). Time began to 'run' again, once papers were lodged on 11 May 2020 and, in the manner explained, it ceased to 'run' on 24 July 2020 when, as the Applicants' solicitor has averred: "the requisite legal documentation to support the within judicial review application was eventually filed" (i.e. after an additional 74 days of delay, for which no good reason has been given).

86. It is perhaps unsurprising that the Applicants have not directed this court's attention to any legal authority for the proposition that the court can and should extend time where no reason whatsoever has been offered to explain the first 90 days of delay in the present case (being a multiple of the prescribed time-limit of 28 days).
87. Furthermore, I am satisfied that no good or sufficient reason has been advanced to explain the 74 days of delay which occurred from 11 May 2020 to 24 July 2020. Crudely put, the 'damage was already done' by the point at which when time stopped 'running' against the Applicants (i.e. as of 11 March 2020). Thus, perhaps very little turns on the fact that time started running against them, once more, on 11 May 2020 (when papers were first lodged in the High Court Central Office). It is a fact, however, that it took until 24 July 2020 until the requisite papers to support an application for leave to seek judicial review were filed. Thus, in the present case, extraordinary and utterly unexplained delay was compounded by further delay for which no good reason has been given.
88. In total, the Applicants' delay amounts to 90 days (from 9 December 2019 to 11 March 2020 for which no reason whatsoever has been given) plus a further 74 days (11 May to 24 July, for which no good or sufficient reason has been furnished). This is a total of 164 days. This can be contrasted with the period of 28 days which is allowed for the bringing of a judicial review application.
89. I have no hesitation in saying that carefully considering all the facts and circumstances in the present case, including the underlying merits of the application, I am satisfied that it is appropriate to refuse an extension of time.

Deportation Orders and time 'running'

90. With regard to the case made by the Applicants, it is entirely fair to say that its focus was squarely on the Review Decisions, of which they were informed on 9 December 2019. I reject entirely the submission that time only begins to 'run' against the Appellants once they were informed, on 11 March 2020, about the Deportation Orders.
91. Implicit in that submission is that, regardless of how much time might pass between (i) an adverse Review Decision and (ii) the making of a Deportation Order, an applicant who wishes to challenge the former need do nothing and can, with impunity, allow weeks or months (or more) to elapse, safe in the knowledge that if they challenge a Deportation Order within 28 days they can in effect 'jump backwards in time' to challenge the Review Decisions.
92. Even if I am entirely wrong in this view, and even if the Appellants are entirely correct to say that time only began to 'run' against them from 11 March 2020, it is a matter of fact that 74 days elapsed between 11 May and 24 July 2020 for which no good or sufficient reason has been proffered.
93. Thus, even on the Applicants' analysis, over two and a half times the prescribed period elapsed before they sought leave to challenge the Deportation Orders. More pertinently,

the grounds of challenge do not, in substance, speak to the Deportation Orders. Their whole focus is on the Review Decisions.

94. I also must reject the submission that the Review Decisions of 9 December 2019 were “merely a stepping stone” in relation to the Deportation Orders, which were communicated to the Applicants on 11 March 2020. On the contrary, there were ‘free-standing’ orders which required no further decision-making and which informed the Applicants, in the most explicit of terms, that they no longer had permission to remain in the State. Earlier in this decision I addressed this issue and it is a matter of fact that the Review Decisions were by no means preliminary or conditional or dependent on anything.

Collateral attack

95. Nor did the Review Decisions suggest, for example, that the Minister was proposing to make Deportation Orders and was inviting submissions with regard to Deportation Orders which the Minister might, or might not, make. On the contrary, and in the manner explained earlier in this judgment, the Review Decisions made clear to the Applicants that, unless they agreed to leave the State voluntarily and notified the Minister of same within 5 days, “the Minister *shall* make a Deportation Order in respect of you” (emphasis added). That is what occurred. In light of the foregoing, it seems to me that, insofar as the Applicants challenge the Deportation Orders, this challenge is no more than a collateral attack on the Review Decisions.

96. Far from being ‘stepping stones’ to Deportation Orders which might or might not issue, the Deportation Orders were the inevitable consequence of the Review Decisions, just as the Respondent told the Applicants they would be. Thus, it seems to me that a challenge to the Deportation Orders is entirely moot unless the Applicants can also challenge the Review Decisions from which the Deportation Orders inexorably flowed. They cannot.

97. In contending for an extension of time, counsel for the Applicants laid particular emphasis on the decision of the House of Lords in *R (Burkett) v. London Borough of Hammersmith and Fulham* [2002] All ER 97, in particular from para. 44 onwards. The backdrop to that case concerned a decision by a local planning authority, on 15 September 1999, that planning permission should be granted for a large-scale development in Fulham, subject to certain conditions being fulfilled. On 6 April 2000, the appellant applied for leave to seek judicial review of that decision. On 12 May 2000, planning permission was actually granted. The question in the appeal to the House of Lords was if the application was amended to challenge the grant of planning permission rather than the resolution, whether time runs from 15 September 1999, or 12 May 2000. The Applicants rely in particular on paras. 45 and 46 of the judgment, wherein the House of Lords stated the following: -

“45. First, the context is a rule of court which by operation of a time limit may deprive a citizen of the right to challenge an undoubted abuse of power. And such a challenge may involve not only individual rights but also community interests, as in environmental cases. This is a contextual matter relevant to the interpretation of the rule of court. It weighs in favour of a clear and straightforward interpretation

which will yield a readily ascertainable starting date. Entrusting judges with a broad discretionary task of retrospectively assessing when the complaint could first reasonably have been made (as a prelude to deciding whether the application is time barred) is antithetical to the context of a time limit barring judicial review.

46. Secondly, legal policy favours simplicity and certainty rather than complexity and uncertainty. In the interpretation of legislation this factor is a commonplace consideration. In choosing between competing constructions a court may presume, in the absence of contrary indications, that the legislature intended to legislate for a certain and predictable regime. Much will depend on the context. In procedural legislation, primary or subordinate, it must be a primary factor in the interpretative process, notably where the application of the procedural regime may result in the loss of fundamental rights to challenge an unlawful exercise of power. *The citizen must know where he stands*. And so must the local authority and the developer. For my part this approach is so firmly anchored in domestic law that it is unnecessary, in this case, to seek to reinforce it by reference to the 'European principle of legal certainty'". (emphasis added)
98. It seems to me that the factual background in the present case is materially different to that in *R (Burkett)*. The Applicants in the present case undoubtedly knew where they stood, as of 9 December 2019. Furthermore, and wholly unlike the position which pertained in *R (Burkett)*, the Applicants were informed on 9 December 2019 not that the Minister had made (to quote from para. 5 of the House of Lords decision) "a resolution conditionally authorising" the refusal of leave to remain in the State. Rather, the Applicants were told in the clearest of terms that such a decision had been made. There was nothing conditional about it. They no longer had leave to remain in the State from that point.
99. The Applicants also rely on para. 50 from the decision in *R (Burkett)* as follows: -
- "50. Thirdly, the preparation of a judicial review application, particularly in a town planning matter, is a burdensome task. *There is a duty of full and frank disclosure on the Applicant*: 053/14/57 to RSC Ord 53, r 14. The Applicant must present to the court a detailed statement of his grounds, his evidence, his supporting documents in a paginated and indexed bundle, a list of essential reading with relevant passages sidelined, and his legislative sources in a paginated indexed bundle. This is a heavy burden on individuals and, where legal aid is sought, the Legal Services Commission. The Civil Procedure Rules and Practice Direction - Judicial Review Supplementing Part 54 contain similar provisions: see also the Pre-Action Protocol for Judicial Review. An applicant is at risk of having to pay substantial costs which may, for example, result in the loss of his home. These considerations reinforce the view that it is unreasonable to require an applicant to apply for judicial review *when the resolution may never take effect*. They further reinforce the view that it is unfair to subject a judicial review applicant to the

uncertainty of a retrospective decision by a judge as to the date of the triggering of the time limit under the rules of court". (emphasis added)

100. Because it was a passage upon which the Applicants place very significant reliance, it is necessary to observe that it is one which emphasises a duty of full and frank disclosure which, in the manner explained earlier in this judgment, is a duty which the Applicants have failed to discharge.
101. The second portion of the passage which I have underlined highlights the stark factual difference between the position in *R (Burkett)* and the situation in the present case. There is no question whatsoever of the 9 December 2019 Review Decisions being resolutions which "may never take effect". The Review Decisions were 'stand-alone' and final and could not conceivably have been considered otherwise.
102. For these reasons, *R (Burkett)* provides no assistance to the Applicants in the present case. Indeed, the reference in *R (Burkett)* to their duty of full and frank disclosure brings into sharp focus the fact that 77 days after the receipt by the Applicants of unconditional final decisions, they gave instructions to their solicitor which resulted in the writing of a letter to the Respondent which materially misrepresented the relevant factual backdrop.
103. Put simply, *R (Burkett)* offers no support for the proposition that time does not begin to run against the defendants until 11 March 2020; and it also underlines the crucial role which the duty of good faith plays in judicial review and, on the facts of the present case, that duty is one the Applicants have failed to discharge.
104. I am entirely satisfied that none of the authorities cited on behalf of the Applicants provide any support for their contention that they are entitled to an extension of time within which to seek judicial review. Counsel for the Applicants made particular reference to the decision of Finlay Geoghegan J. in *M. O'S. v. The Residential Institutions Redress Board & Ors* [2018] IESC 61. At para. 46 of her decision, Finlay Geoghegan J. referred to the decision in *de Roiste v. The Minister for Defence* [2001] 1 IR 190 and it is appropriate to quote para. 46 of the M. O'S decision, as follows: -

"In *de Roiste*, Denham J. stated at p. 207: -

'The Rules of the Superior Courts, 1986, set out a scheme which indicates a specific, short, time span within which to bring an application, whilst also retaining a discretion in the court to allow an application if there is good reason. The discretion is rooted in the writs and common law. There have been many cases over the centuries where the nature of the discretion of the court has been considered. In general, courts have stressed that the remedy is discretionary.'

She then referred to a number of decisions and continued, at p. 208: -

'Thus, the general rule is that certiorari is a discretionary remedy. However, if, for example, a conviction was made without jurisdiction the general course

would be for the court to grant the application. There are no absolutes in the exercise of a discretion. An absolute rule is the antithesis of discretion. The exercise of a discretion is the balancing of factors - a judgment.

In analysing the facts of a case to determine if there is a good reason to extend time or to allow judicial review, the court may take into account factors such as; (i) the nature of the order or actions the subject of the application; (ii) *the conduct of the Applicant*; (iii) the conduct of the Respondents; (iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed; (v) any effect which may have taken place on third parties by the order to be reviewed; (vi) public policy that proceedings relating to the public law *domain take place promptly except when good reason is furnished*. Such list is not exclusive. It is clear from precedent that the discretion of the court has ever been to protect justice...' " (emphasis added)

105. At para. 57, Finlay Geoghegan J. acknowledged, with reference to the decision in *G.K. v. Minister for Justice* [2002] 2 IR 418 that: -

"... one of the factors which a court may consider in the context of determining whether there exists good and sufficient reason to extend the time is the *underlying merits* of the application, in the sense at least of requiring demonstration of an arguable case". (emphasis added)

106. Later in this judgment I will look closely at the merits of the Applicants' claim, as pleaded. For the reasons set out in this decision, I am entirely satisfied that the Applicants have not even demonstrated an arguable case. The underlying merits of their application certainly do not, in my view, constitute a good reason to justify an extension of time. It also seems appropriate to quote, in full, para. 60 from the Supreme Court's decision in *M. O'S*, as follows: -

"60. I have concluded that the case law cited above, insofar as it applies to the extension of the time specified under O. 84 for the bringing of judicial review proceedings, makes clear that the jurisdiction which the Court is to exercise on an application to extend time is a discretionary jurisdiction which must be exercised in accordance with the relevant principles in the interests of justice. It clearly requires an applicant to satisfy the Court of the reasons for which the application was not brought both within the time specified in the rule and also during any subsequent period up to the date upon which the application for leave was brought. *It also requires the Court to consider whether the reasons proffered by an applicant objectively explain and justify the failure to apply within the time specified and any subsequent period prior to the application* and are sufficient to justify the Court exercising its discretion to extend time. The inclusion of sub-rule (4) indicates expressly that the Court may have regard to the impact of an extension of time on any respondent or notice party. The case law makes clear that *the Court must also have regard to all the relevant facts and circumstances*, which include the decision

sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties, and must ultimately determine in accordance with the interests of justice whether or not the extension should be granted. The decision may require the Court to balance rights of an applicant with those of a respondent or notice party. The judgments cited do not, in my view, admit of a bright line principle which precludes a court taking into account a relevant change in the jurisprudence of the courts when deciding whether an applicant has established a good and sufficient reason for an extension of time. Further, the judgments cited above do not envisage any absolute rule in relation to what may or may not be taken into account or constitute a good reason or a good and sufficient reason. The Court, in an application for an extension of time, is exercising a discretionary jurisdiction and in the words of Denham J. in *de Roiste*, '[t]here are no absolutes in the exercise of a discretion. An absolute rule is the antithesis of discretion. The exercise of a discretion is the balancing of factors - a judgment'". (emphasis added)

107. The Applicant's conduct is plainly one of the circumstances which this Court is also entitled to take into account. By their conduct, the Applicants have disentitled themselves to discretionary relief. This is the first reason the application falls to be dismissed. Taking the Applicant's conduct into account in the context of their application to extend time, their conduct argues against any extension. Taking all relevant facts and circumstances into account, and weighing all matters up with a focus on the interests of justice, I am very satisfied that the appropriate exercise of this Court's discretion is to refuse to extend time. This is a second reason why the Applicants' claim must be dismissed. Lest I be entirely wrong in respect of both of the foregoing decisions, I now turn to the case made by the Applicants.

The Amended Statement of Grounds

108. The Respondent has raised objection in the Statement of Opposition to the generality of the grounds upon which relief is sought in the Applicants' Amended Statement of Grounds and, in this regard, the Respondent relies on the para. 12 of the decision in *J.W. & R.S. v Minister for Justice and Equality & Ors.* [2020] IEHC 500, wherein Humphreys J. stated (at para. 12 (ix)) that:

"A judicial review applicant must plead with specificity: O. 84, r. 20(3) that an 'assertion in general terms' is inadequate, but the Applicant must 'state precisely each such ground, giving particulars where appropriate'."

109. In my view, the Amended Statement of Grounds largely comprises generalised assertions and complaints. The Respondent also draws the court's attention to the decision of Humphreys J. in *M.H. (Pakistan) v The International Protection Appeals Tribunal & Ors.* [2020] IEHC 364 and it is appropriate to quote *verbatim* paras. 17 and 18 of that decision, in which the court looked at the grounds relied on in that case which, it has to be said, reflect very closely the assertions made in the present case:

"17. This ground alleges 'In making the Impugned Decision, the Respondent, his servants and agents, erred in law, including s.49(3) of the Act and/or Article 8(1) of the European Convention on Human Rights ('ECHR'), and/or fettered his discretion and/or engaged in unfairness in the consideration of the private and family rights of the Applicant and in the manner in which the review under Section 49 of the Act was conducted:

(i) The Respondent acted unfairly and/or fettered his discretion in the assessment of the additional documentation submitted under the factors set out at Section 49(3) of the Act, namely, (a) the nature of the Applicant's connection with the State, (b) humanitarian considerations (c) the character and conduct of the Applicants (d) considerations of national security and public order, and (e) any other considerations of the common good;'

18. That is not a proper ground for judicial review. It is wholly unparticularised and does not specify any basis to hold that the Minister erred in law, fettered his discretion or acted unfairly on these facts. The Applicant attempted to make up for some of the inadequacies of the Statement of Grounds in legal submissions, but that is not a permissible procedure. The actual alleged infirmities in the decision and the legal basis for relief need to be specified in the grounds. In any event, no illegality as suggested has been demonstrated."

110. I am entirely satisfied that the foregoing commentary applies with equal force to the grounds contained in the Applicants' Amended Statement of Grounds. Before looking more closely at specific pleas in the Applicants' Amended Statement of Grounds, the following comments can fairly be made.

- (1) The Applicants acknowledge that the Respondent conducted the relevant review;
- (2) It is not suggested by the Applicants that the decision-maker had no relevant material which would support the impugned Review Decisions;
- (3) Nor do the Applicants claim that the Respondent did not consider everything which was before the decision-maker;
- (4) The Applicants have not pleaded that the Respondent's decisions were unreasonable, irrational or disproportionate.

111. In oral submissions at the hearing, Counsel for the Applicants referred inter alia to the following paragraphs from the Applicants' 30 September 2020 written legal submissions, which were provided in the context of the 'leave' application:

"1. Whether the conclusions arising from the review dated 29 November 2019 performed by the Respondent pursuant to s. 49, International Protection Act, 2015 (IPA 2015) were unreasonable and/or irrational and/or in breach of fair procedures.

...

2. *It is therefore submitted that the Respondent's determinations in this matter are unreasonable and/or irrational and in breach of fair procedures and should be set aside in accordance with the jurisprudence in Meadows as outlined above and in vindication of the Applicants' constitutional and human rights."*

112. Similar paragraphs appear in the Applicants' 8 April 2021 written legal submissions. In oral submissions, Counsel for the Applicants asserted, *inter alia*, that "the submissions are part of the pleadings" and the thrust of his submission was that the Applicants were entitled, at the hearing, to challenge the decision in a range of ways, as canvassed in legal submissions. I regard myself as compelled to reject that assertion. This court is confined to a determination of the case as pleaded, namely, in the Amended Statement of Grounds. It is the case, as pleaded, in respect of which the court gave leave to seek judicial review (without prejudice to the issue of 'time'). Legal submissions do not comprise pleadings.

113. This is not, for a moment, to criticise the Applicants' legal advisors, or the manner in which their claim has been pleaded. Mr. Cormack conducted the Applicants' case with consummate professionalism, skill and obvious commitment to the Applicants' case. Furthermore, it seems to me that the case, as pleaded, reflects precisely the case which the Applicants wish to make, namely, that the Respondent should have come to different decisions on the merits.

114. That the foregoing is at the heart of the Applicants' complaint is very clear from the numerous pleas in the Amended Statement of Grounds which speak to the underlying merits. The following are examples:

- *"the Applicants has (sic) developed close connections within the State, namely...." (p. 5);*
- *"the First Named Applicant's medical condition and the nature of his treatment determines that his close connections and ties to the State are extremely close and of critical importance in circumstances where..." (p. 5);*
- *"the Second Named Applicant's medical condition and the nature of her treatment determines that her connections and ties to the State are likewise close and of critical importance" (p. 6);*
- *"the Applicants' application for permission to remain on the basis of humanitarian considerations has been clearly demonstrated in circumstances where..." (p. 6);*
- *"the First Named Applicant and the Second Named Application (sic) have been gainfully employed since their arrival in the State thereby contributing to the domestic economy and to society in general..." (p. 7);*
- *"it is submitted that the Applicants satisfy the general thrust of the criteria under which applications seeking permission to remain are required to be reviewed in light of the information provided in respect of the Applicants..." (p. 8).*

It must be emphasised in the clearest of terms that this court is not tasked with conducting a merits-based analysis. This is not an appeal against any decision made by the Respondent. The court, in judicial review proceedings, is concerned with the lawfulness of decision making. Despite this, it is plain that the Applicants' central assertion and complaint is that they satisfy the criteria for obtaining permission to remain in this State and, by not deciding to grant them permission to remain, the Respondent Minister was wrong.

115. There is simply no evidence to support the proposition of unlawfulness with regard to the Respondent's decision-making and, thus, the Applicants are not entitled to relief (even if (i) their conduct had not dis-barred them from obtaining discretionary orders, which it has; and (ii) even if the justice of the situation required an extension of time to be granted for the seeking of judicial review, which it does not). In short, the core of the Applicants' claim is to impugn the qualitative assessments of the evidence undertaken by the Respondent and, in essence, to ask this court to set aside decisions made, lawfully, by the Respondent and, instead, to supplant this court's own view on the merits. The foregoing is something this court simply cannot do. As Cooke J. made clear in *I.S.O.F. v Minister for Justice* [2010] IEHC 386 (at para. 12):

"The onus of establishing the unlawfulness of the decision lies with the Applicant. The duty to balance proportionately the opposing rights and interests of the family on the one hand and the interests the State seeks to safeguard on the other, lies with the Minister. It is the Minister who must assess and decide by reference to all of the matters he is required to consider under the statutes and in light of all of the information and representations put before him, whether the latter interests should prevail or not. Contrary to the implication of the argument made by counsel for the Applicants, *the High Court is not entitled or obliged to re-examine the case with a view to deciding whether, in its own view, the correct balance has been struck. To do so would be substitute its own appraisal of the facts, representations and circumstances for that of the Minister.*" (emphasis added)

116. In her recent judgment in *KAS v Minister for Justice* [2021] IEHC 100, Ms. Justice Burns cited the foregoing passage with approval (at para. 13) making it clear that the foregoing reasoning applies with equal force to a s. 49(7) review, such as those in the present proceedings. The above passage is equally relevant in the present case.
117. At this juncture it is useful to look at the Review Decisions made on 29 November in respect of the Applicants.

The Review Decision concerning the First Named Applicant

118. Section 2 contains *inter alia* the following statement:

"The following documentation was submitted by or on behalf of the Applicant in support of his application for review.

- Medical documentation including:

- discharge summaries dated 03/10/2017, 04/10/2017,
- letters referring to cardiac rehabilitation, dated 12/10/2018,
- letters from GP, dated 12/10/2018 & 16/05/2019,
- letters stating he is unfit for work due to heart attack, dated 14/08/2017,
- client contract for counselling,
- patient information sheet for coronary patients,
- invitation letters for Ireland Aspire Study, dated 16/10/2018,
- HAD Scale x 2, dated 31/10/2017 & 10/10/2017,
- medical submissions sent to IPAT.
- Letters confirming applicant's daughter's enrolment and attendance in pre-school and Junior Infants.
- Wife's medical submissions.
- Medical letter dated 07/02/2019 listing medical symptoms and issues.
- Various reference letters.
- Income levy certificates for 2010, 2009; P60's for 2009, 2010, 2012, 2013, 2014, 2015, 2016,
- Section 49 Review Form and attached Statement dated 16/05/2019.

All representations and correspondence received from or on behalf of the Applicant relating to permission to remain and permission to remain (review) have been considered in the context of drafting this report, including the section 35 interview report/record and Matters to be considered for PTR review arising from Section 35 Interview record." (emphasis added)

119. Several things can be said in relation to the foregoing. Firstly, the Review Decision fairly summarises the documentation which was submitted, copies of which comprise exhibits in the proceedings before this court. Later in this judgment, I will look at certain of those documents, in circumstances where counsel for the Applicant laid so much emphasis on their contents. However, it is very important to emphasise that it is not suggested that the Respondent did not receive or did not consider the information put to the Minister, by or on behalf of the First Named Applicant. On the contrary, there is an explicit confirmation that it was considered. Section 3 of the Review Decision went on to state the following:

"In deciding whether to give the Applicant a permission, *regard has been given to the Applicant's family and personal circumstances and his or her right to respect for his or her private and family life*, having regard to –

- (a) the nature of the Applicant's connection with the State, if any,
- (b) humanitarian considerations,
- (c) the character and conduct of the Applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions),
- (d) consideration of national security and public order, and
- (e) any other considerations of the common good." (emphasis added)

120. Section 4 of the Review Decision concerns the nature of the Applicant's connection with the State and notes the submission by the Applicant that his "health concerns are much better addressed in Ireland than in Pakistan". At this juncture, it is appropriate to note that there was no evidence put to the Minister to the effect that any medical treatment which the Applicant requires could not, or would not, be provided in Pakistan.

Applicants' attempt to admit additional material

121. During the course of oral submissions at the hearing, counsel for the Applicants sought to admit into evidence documents which apparently concern the healthcare system in Pakistan. These documents were not before the Respondent decision-maker. Nor did they comprise exhibits to either of the Applicants' verifying affidavits. The documents which the Applicants sought to introduce were not referred to in their pleaded case.

122. Counsel described the documentation as "publicly available" documents issued by the "UK Home Office" (apparently comprising a 50-page document, dated September 2020, concerning the Pakistan healthcare system). It was described as a "neutral document" and counsel for the Applicant offered to have one of the Applicants swear an affidavit to exhibit it.

123. Having heard submissions by both sides on the topic, I made a ruling that this court should not admit and should have no regard to the foregoing documents. The reasons for this ruling, as I made clear at the time, comprise –

- (1) It seemed to me that the documentation spoke to the merits of the underlying claim, insofar as the Applicants saw them, whereas this court's focus is on the lawfulness of decision-making;
- (2) This documentation was not put before the decision-maker by the Applicants and, therefore, did not appear to be relevant to the decision under challenge;
- (3) Counsel for the Respondent objected to the admissibility of this documentation, submitting that, if the court were to consider a passage from that documentation as of relevance, the Respondent would have been placed at an evidential deficit; and

- (4) It also seemed to me that, had they regarded it as appropriate, the Applicants could have made reference to this documentation in their pleaded case and they could have exhibited same and, despite making amendments to their Statement of Grounds, there was no such reference to the documentation; nor was any application made at any time prior to the trial, for liberty to swear a further affidavit exhibiting the documentation.

The healthcare system in Pakistan

124. After my ruling refusing to admit this documentation, counsel for the Applicants went on to submitted that "It is common knowledge that the healthcare system in Pakistan, in particular, the public healthcare system is poor". This does not appear to me to be a submission I can accept. I say this for several reasons. Firstly, it is not a submission grounded in evidence. Secondly, and more importantly, this court is not the decision-maker and is not conducting a merits-based analysis as to whether or not the Applicants should be granted permission to remain in this State. Thirdly, it seems to me that the Applicants were, in effect, urging this court to take 'judicial notice' of the 'fact' that the healthcare system in Pakistan, particularly the public healthcare system, "is poor" and to impute that 'knowledge' to the Respondent decision-maker at the time the Minister made the Review Decisions. This is something the court simply cannot do.
125. It also seems entirely fair to say that, it was open to the Applicants to put forward for the Minister's consideration such evidence as they wished. For example, the Applicants could have provided a medical report in respect of their medical conditions. It is fair to say that no such evidence was ever tendered by either of the Applicants.
126. In the wake of my ruling that the court could not consider documentation which was not put before the Respondent, counsel for the Applicants went on to submit that "Should the Applicants be deported, they would inevitably require medical treatment in the public healthcare system in Pakistan". Again, the foregoing submission, whilst made with skill and no little ingenuity, is not based on evidence and does not provide any basis for the relief sought by the Applicants.
127. Counsel for the Applicants went on to submit that they are "of limited financial means" and, that being so, they would "inevitably" require care in the public healthcare system in Pakistan.
128. None of the foregoing submissions are based in evidence. This court has before it all the material which was submitted by, or on behalf of the Applicants, in advance of the Respondent taking the Review Decisions. By no means does that material give rise to an inference (which the Respondent failed to draw) that the Applicants would inevitably require medical treatment in the public healthcare system in Pakistan, which treatment would be sub-standard.
129. Moreover, the submission made to the Minister to the effect that the First Named Applicant is not a burden on the public purse in receiving treatments which are financed "by his own means" seems to be wholly inconsistent with the submission made at the

hearing by counsel for the Applicants to the effect that their limited financial means would mean the Applicants' inevitable reliance on a public healthcare system in Pakistan.

130. The foregoing comments are, however, somewhat beside the point, in circumstances where there is simply no evidence before this court that the Respondent did other than carefully consider all relevant evidence and come to a lawful decision.
131. That the Applicants disagree with the Respondent's decision is plain, and that they contend for a different decision based, in particular, on what is said to be their state of health (and the knock-on effect of same on their daughter) is equally clear. The fundamental and insurmountable problem facing the Applicants is that this court is not the decision-maker and a lawful decision cannot be set aside in favour of what this court might have done, had it been tasked with making the relevant decision.
132. Section 4 of the Decisions challenged also refers to the Applicants' daughter having progressed well at a named childcare centre and refers to the hope that she will attend primary school in the State, should her parents be granted permission to remain.
133. Section 5 accurately summarises what emerges from the documentation submitted to the Respondent concerning the Applicant's medical condition and the following is a direct quote from the first paragraph of the Respondent's decision in respect of the first applicant: "The Applicant submitted that he suffered from cardiac illness, hypertension, stress, anxiety symptoms and depression. He states that he spent 5 days in hospital after suffering a heart attack. He received 6 stents in his heart and stress increases the risk of this condition worsening." The Respondent went on to make clear that "*having considered all the information and representation on file*, the Applicant's medical condition does not reach the threshold of a violation of Article 3 and therefore no further consideration of Article 3 is required." Section 5 goes on to consider Art. 8 and it is observed that the Applicant "has not submitted any evidence on how the impact of returning to Pakistan would affect his mental or physical health. Therefore, Article 8 has not been engaged and there is no interference with respect to his private life on the basis of his medical grounds."
134. Section 6 of the Review Decision concerns the Applicant's character and conduct and it is made clear that the relevant submissions "*Have been considered*" (emphasis added).
135. Section 7 deals with considerations of National Security and Public Order and it is made clear that these do not have a bearing on this case.
136. Section 8 makes clear that no additional consideration is required in respect of the common good, in light of the consideration previously undertaken in the decision.
137. Section 9 deals with 'Private Life' and the following is explicitly stated:

"Having considered and weighed all the facts and circumstances in this case, a decision to refuse the Applicant permission to remain does not constitute a breach

of the right to respect for private life under Art. 8(1) of the ECHR” (emphasis added).

138. Section 10 of the Review Decision concerns ‘Family Life’. Having accurately summarised matters, the Respondent explicitly stated that:

“having considered and weighed all the facts and circumstances in this case, a decision to refuse the Applicant permission to remain does not constitute a breach of the right to respect for family life under Art. 8(1) of the ECHR” (emphasis added).

139. Section 11 of the Review Decision concerns s. 49(3) findings and it states as follows:

“While noting and carefully considering the submissions received regarding the Applicant’s private and family life and the degree of inference that may occur should the Applicant be refused permission to remain, it is found that a decision to refuse permission to remain does not constitute a breach of the Applicant’s rights. All of the Applicant’s family and personal circumstances, including those related to the Applicant’s right to respect for family and private life, have been considered in this review, and it is not considered that the Applicant should be granted permission to remain in the State.” (emphasis added)

140. Section 12 deals with prohibition of refoulement under s. 50 of the 2015 Act and, having cited country of origin information from the United States, Department of State 2018 Country Reports on Human Rights Practices (Pakistan) of 13 March 2019, the Respondent’s Review Decision states:

“I have considered all the facts of this case together with relevant current country of origin information in respect of Pakistan. The prohibition of refoulement was also considered in the context of the International Protection determination. The prohibition of refoulement has also been considered in the context of this report. The country of origin information does not indicate that the prohibition of refoulement applies if the Applicant is returned to Pakistan. Accordingly, having considered all of the facts in this case and relevant country of origin information, I am of the opinion that repatriating the Applicant to Pakistan is not contrary to s. 50 of the International Protection Act 2015, in this instance, for the reasons set out above.” (emphasis added)

141. Section 13 sets out the decision under s. 49(4) of the 2015 Act and it is appropriate to quote that section *verbatim* as follows:

“The Applicant’s case was considered under s. 49 and s. 50 of the International Protection Act, 2015, on review. Refoulement was not found to be an issue in this case. Consideration was also given to private and family rights under Article 8 of the European Convention on Human Rights (ECHR).

Having considered the Applicant and the particular circumstances of this case and the Applicant’s right to respect for his private and family life, I affirm the decision

dated 28/09/2018 that the Applicant M.B.B. should not be given permission to remain in the State under s. 49 of the 2015 Act.” (emphasis added)

142. Having highlighted certain of the explicit statements made by the Respondent, it is appropriate to note that there is a presumption that material has been considered if the decision says so (per Hardiman J. in *G.K. v Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418).
143. Furthermore, the weight to be given to the evidence is quintessentially a matter for the decision-maker (per Birmingham J. (as he then was) in *M.E. v Refugee Appeals Tribunal* [2008] IEHC 192 - unreported, High Court, 27th June, 2008) at para 27).
144. Moreover, an applicant does not have a legal entitlement to a discourse of a narrative decision addressing all submissions (*per* Clarke J. (as he then was) in *Rawson v Minister for Defence* [2012] IESC 26 - unreported, Supreme Court 1st May, 2012; at para. 6.9; Fennelly and MacMenamin JJ. concurring).
145. In his pre-review submissions the following was stated in respect of the First Named Applicant:

“The Applicant wishes to state that he has presented with a number of health complications and wishes the Minister to consider that these health concerns are much better addressed in Ireland than Pakistan. Further, the Applicant wishes to state that he is not a burden on the public purse in receiving treatments and finances by his own means, and has presented documentation to this effect.

Mr. M.B.B. has submitted medical evidence concerning his health condition, including the increase in blood pressure suffered at his arrest at the end of April 2017 when arrested by immigration police. He was later transferred to Tallaght Hospital from Cloverhill and ultimately spent five days at St. James’ Hospital following a heart attack. The Applicant instructs that he has received six stents in his heart and stress increases the risk of the condition worsening.

It is further noted that the Applicant’s daughter M. has progressed well at ... childcare centre... and it is hoped that she will start to attend primary school in the State should her parents be granted permission to remain in the State.”

It is clear that these submissions were considered by the Respondent and, regardless of how sincerely the Applicants may believe that the Respondent should come to a different view, they have not demonstrated that the Respondents’ Review Decisions were unlawful. In this regard, it is appropriate to note that the onus of proof remains on the Applicant at all times (per Denham J. (as she then was) in *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 at 743).

Specific medical evidence

146. Although the First Named Applicant’s pre-review submissions contain what might be called a ‘bald’ assertion that his “health concerns are much better addressed in Ireland

than Pakistan”, it should be pointed again out that there is simply no evidence that this is so. Having emphasised, repeatedly, that this court is not looking at the evidence in order to reach a merits-based decision, it is nonetheless appropriate to see what the medical evidence which the Applicants put before the Respondent, actually says.

147. In a letter dated 3 October 2017 Dr. Andrew Maree, Consultant Cardiologist, of St. James’ hospital wrote to Dr. Hussain Tabesh, concerning the First Named Applicant, and his letter begins as follows: “I brought M. back for planned pressure wire assessment of his right coronary artery today. He has been very well since his multi-vessel angioplasty in the setting of an acute MI on the 23.05,17. He is currently in week three of his cardiac rehabilitation programme.” The letter concludes by stating: “The way forward is with ongoing medical therapy and aggressive prevention with a high dose statin. I will continue to follow Mr. B’s progress in my outpatients.”
148. This court has no medical expertise, but it is common knowledge that a “statin” is a cholesterol-lowering drug. In October 2017, the First Named Applicant’s consultant cardiologist described him as having been “very well” since the procedure he underwent in May 2017 and there is no evidence before this Court that the First Named Applicant’s condition deteriorated thereafter.
149. The most recent of the exhibits concerning the First Named Applicant’s medical condition comprised a letter from Dr. Tabesh, dated 7 February 2019, which states as follows:

"To whom it may concern,

This is to certify that Mr. B. has been a patient of mine since 13 December 2013.

He currently has cardiac illness, hypertension and is now under the regular care of consultant cardiologists in St. James’ hospital.

He is also suffering from anxiety symptoms, depression and delay grief symptoms due death of his mother in 2016.

I feel that it is important for Mr B. to be given the opportunity to remain in Ireland so his future medical needs can be met, so therefore support his visa application."

150. There is nothing to suggest that the First Applicant’s recovery did not continue to go well. It is also fair to say that there is neither a detailed setting-out of what treatment the First Applicant requires, or receives, or that this treatment would not be available in Pakistan.
151. As regards the Second Applicant, her pre-review submissions stated the following with regard to her health situation and the Applicants’ daughter:

"The Applicant wishes to state that she has presented with a number of health complications, particularly in the past year, and wishes the Minister to consider that these health concerns are much better addressed in Ireland than Pakistan. Further, the Applicant wishes to state that she is not a burden on the public purse in

receiving treatments and finances by her own means, and has presented documentation to do this effect.

Ms. H.S. has submitted medical evidence concerning a tumour removed in St. Vincent's hospital last year. She continues to suffer with muscles swollen from stress and continues treatment for torn tissue. The Applicant instructs that this condition increases the risk of future tumours developing.

The Applicant has benefitted under the work permission scheme for International Protection applicants receiving permission to work in late July 2018 and returned to work for her former employers at "X" in the "Y" Centre. It is further noted that the Applicant's daughter M. has progressed well at ... childcare centre... and it is hoped that she will start to attend primary school in the State should her parents be granted permission to remain in the State."

152. Just as was the position in respect of the First Named Applicant, the foregoing is a 'bald' assertion that her "health concerns are much better addressed in Ireland than Pakistan". It is appropriate to look at the documentation which was exhibited, and which comprised part of the information furnished to the Respondent which was considered in the context of the Review Decision challenged in the present proceedings.

153. In a letter (typed on 24 May 2018) Mr. Alan Molloy, Consultant Orthopaedic Surgeon, wrote to Dr. Jim Holden in relation to the Second Named Applicant to state the following:

"H. attended the Day Surgery Unit on Monday 30th April 2018 for removal of what was discussed at the MDT and described as a typical neurofibroma. It was removed without issue. See her back in the clinic for review of wound and histology results in two weeks-time."

154. The exhibits also contain a more recent letter which was sent by a Dr. Emma Jane McGovern to St. Vincent's Hospital's MRI Department, on 22 January 2019. That letter states as follows:

"Thank you for seeing HS, aged 33yr 2m with ? recurrence of neurofibroma in the cervical spine. H. has been complaining of cervical spine neck pain for one year, with no improvement despite conservative measures. She has cervical spondylosis of C6C7 on plain film x-ray, however her pain is described as constant pain, worse with movement to the extent where she cannot get the bus to work due to vibrations and no improvements. She had a neurofibroma removed from the left knee in 2017 please see attached documentation and was advised of a small risk of recurrence in other parts of the body. I would appreciate if you could organise an urgent MRI cervical spine for her."

155. The foregoing letter, which dates from January 2019, makes reference to the removal from the Second Applicant's left knee of a neurofibroma in 2017 and reference is made to a "small risk of recurrence elsewhere". The balance of the letter refers to neck pain which

the Second Applicant appears to have been suffering from at that juncture, resulting in the referral for an MRI in January 2019. It will be recalled that the Second Named Applicant's verifying affidavit was sworn some 18 months later, on 3rd July 2020. The following is the entirety of the averments made by the Second Named Applicant with regard to her own health:

"11. I say that I suffer from neurofibromas and I have undergone treatment at St. Vincent's Hospital in 2018 for the removal of a tumour. I continue to suffer from swollen muscles and my medical condition increases the risk of future tumours developing."

156. Several comments can fairly be made in relation to the foregoing. Firstly, the Second Named Applicant's affidavit provides no specific details in relation to her state of health or any treatment which she requires, or is receiving. Nor is there any evidence that any such treatment would not be available to her in Pakistan. It is also fair to say that, if anything arose from the MRI of her cervical spine in January 2019, the Second Named Applicant has not made any reference whatsoever to it in the verifying affidavit she swore 18 months later.
157. During the course of oral submissions, counsel for the Applicants submitted that the Second Named Applicant has "issues with her cervical spine and in any layman's terms, that is pretty serious". The submission was also made, with regard to both applicants, that "you don't need to be a medical doctor to come to the view that both the medical conditions affecting the Applicants are serious". It was also submitted that the consequent adverse effect on the Third Named Applicant was serious.
158. Quite apart from the fact that the Second Named Applicant says nothing about any issue regarding her cervical spine in her verifying affidavit, the reality which no legal submissions can argue away, regardless of the sophistication and skill with which they are made, is that the Respondent considered everything which was put before them and reached a decision which was lawful. There is simply no evidence which would allow this court to hold otherwise.

"healthy young family"

159. Far from putting before the Respondent any medical report in which a doctor indicated that either of them suffered from, for example, a very serious or a life-threatening illness or that they would receive inadequate care if deported, in truth, there is nothing in the documentation which the Applicants submitted to the Respondent which indicates how seriously, if at all, their health conditions impact on their day to day lives. In a range of oral submissions, this Court is invited to assume that the Applicants suffer from very serious health conditions and are in very poor health. This is something the court simply cannot do, on the basis of the evidence before it which is, of course the self-same evidence which was before the Respondent. Moreover, these submissions are impossible to square with the explicit representation, which was made by the Applicants to the Respondent, in the form of a letter written by the Applicant's solicitor dated 26 February 2020, the final page of which stated *inter alia*: -

“The Appellants are a *healthy young family* and they has the potential to contribute in a positive and productive fashion to the Irish economy and to Irish society in general”. (emphasis added)

The fact that the Respondent has no record of ever receiving this letter does not explain away the incontrovertible fact that the Applicants were, as of 26 February 2020, holding themselves out as being “healthy”, in the context of asking the Respondent, in effect, to re-visit the Review Decisions which were made by the Respondent after full account was taken of all material submitted, including as regards health issues to which the Applicants had referred.

Material change

160. It is not unfair to say that the Applicant’s assertions, insofar as their health is concerned, have changed in a material manner, depending on what was sought to be achieved. Initially, their health situation comprised a material aspect of their pre-review submissions. Subsequently, and when the Review Decisions went against them, they represented to the Minister that they were healthy (in a letter written by their solicitors, doubtless based on instructions). Later still, in the context of seeking judicial review, the Applicants, through their counsel, assert that they are not at all healthy.
161. The foregoing fortifies me in the views I expressed earlier with regard to the Applicant’s conduct disentitling them to discretionary relief. It is equally clear, however, that the Applicants have no entitlement to relief on the merits of their judicial review proceedings.
162. The Applicants have not discharged the burden of proof resting on them, even if unreasonableness and irrationality had been pleaded (which they were not). In truth, what the court is presented with in the present case is an attempt at an appeal on the merits. This court simply cannot ‘step into the shoes’ of the decision maker (*per* Finlay C.J. in the *State (Keegan) v Stardust Compensation Tribunal* [1986] I.R. 642 at 654; *per* Denham J. (as she then was) in *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 at 743; and *per* Clarke J. (as he then was) in *Sweeney v Fahy* [2014] IESC 50 at paras 3.8 to 3.15 (McKechnie and Dunne JJ. concurring)). Yet that appears to be what the Applicants want this court to do.
163. The comments I made earlier, and the extracts to which I have referred in relation to the Respondent’s Review Decision concerning the First Named Applicant, also applies insofar as the Review Decision concerning the Second Named Applicant. The following is a verbatim quote from section 2 of the 10 – page 29 November 2019 Review Decision in respect of the second applicant:

“The following documentation was submitted by or on behalf of the Applicant and her dependant in support of their application for review:

- Medical reports, invoices and receipts;
- Painkiller prescriptions from Harolds Cross Medical Centre;

- Appointment sheet x 2;
- ... childcare centre letter x 2;
- St. Vincent's Hospital pre and post op instructions, discharge letter, and discharge summary;
- Harold's Cross Medical Centre: patient registration form, consultation notes, STI test results;
- Medical letter re.: neurofibroma in cervical spine, general diagnostic sheet, X-ray appointment, discharge summary;
- Husband's medical documentation, P60's, personal statement and various documents;
- Section 49 review form and statement dated 16/05/2019;

All representations and correspondence received for and on behalf of the Applicant and her dependant relating to permission to remain and permission to remain (review) have been considered in the context of drafting this report, including the s. 35 interview report/record and Matters to be considered for PTR review arising from s. 35 interview record." (emphasis added).

164. Section 3 of the Review Decision also makes explicit that regard was given to family and personal circumstances, including the right to respect for private and family life of the Second Named Applicant and her daughter, having regard to the considerations (a) to (e) specified. Section 4 accurately summarises the submissions made in relation to the Second Named Applicant and her dependent child with regard to their connection with the State. Section 4 deals with humanitarian considerations and accurately sets out what was submitted by or on behalf of the Second Named Applicant and her daughter. Section 5 states inter alia the following: "Having considered all the information and representation on file, the Applicant's medical condition does not reach the threshold of a violation of Article 3 and therefore no further consideration of Article 3 is required." (emphasis added). Section 5 goes on to state that the Second Named Applicant "has not submitted any evidence on how the impact of returning to Pakistan would affect her mental or physical health. Therefore, Article 8 has not been engaged..."
165. Section 6 relates to character and conduct and it is made clear that these have been considered. Section 7 makes clear that national security and public order considerations do not have a bearing on the case. Section 8 confirms that no submissions have been made in relation to the common good and no additional consideration is required.
166. Section 9 which concerns Art. 8 (ECHR) Private Life accurately summarises the submissions made and the evidence submitted and the following is stated explicitly:

"Having considered and weighed all the facts and circumstances in this case a decision to refuse the Applicant and her dependant permission to remain does not constitute a breach to the right to respect for private life under Article 8(1) of the ECHR". (emphasis added)

167. Section 10, which relates to Art. 8 (ECHR) Family Life summarises accurately the submissions and relevant facts and goes on to state that:

"Having considered and weighed all the facts and circumstances in this case, a decision to refuse the Applicant and her dependant permission to remain does not constitute a breach of the right to respect for family life under Art. 8(1) of the ECHR". (emphasis added)

168. Section 11 of the Review Decision concerns the s. 49(3) findings and states as follows:

"While noting and carefully considering the submissions received regarding the Applicant and her dependant's private and family life and the degree of interference that may occur should the Applicant be refused permission to remain, it is found that a decision to refuse permission to remain does not constitute a breach of the Applicants' rights. All of the Applicant and her dependant's family and personal circumstances, including those related to the Applicants and her dependant's right to respect for family and private life, have been considered in this review, and it is not considered that the Applicant and her dependant should be granted permission to remain in the State." (emphasis added)

169. Section 12 of the Review Decision concerns prohibition of refoulement pursuant to s. 50 of the 2015 Act and, having referred to country of origin information concerning Pakistan, the following is stated:

"I have considered all the facts of this case together with relevant current country of origin information in respect of Pakistan. The prohibition of refoulement was also considered in the context of the International Protection determination. The prohibition of refoulement has also been considered in the context of this report. The country of origin information does not indicate that the prohibition of refoulement applies if the Applicant and her dependant are returned to Pakistan. Accordingly, having considered all of the facts in this case and the relevant country of origin information, I am of the opinion that repatriating the Applicant and her dependant to Pakistan is not contrary to s. 50 of the International Protection Act, 2015, in this instance, for the reasons set out above." (emphasis added)

170. Section 13 comprises the decision under s. 49(4) of the 2015 Act and it is appropriate to quote it verbatim as follows:

"The Applicants' case was considered under s. 49 and s. 50 of the International Protection Act, 2015, on review. Refoulement was not found to be an issue in this case. Consideration was also given to private and family rights under Art. 8 of the

European Convention on Human Rights (ECHR). *I have considered the best interest of the child in this report.*

Having considered the Applicant and the particular circumstances of this case and the Applicant's right to respect for her private and family life, I affirm the decision dated 28/09/2018 that the Applicant, H.S., and her dependant, M.B., should not be given permission to remain in the State under s. 49 of the 2015 Act." (emphasis added)

As I observed earlier, there is a presumption that material has been considered if the decision says so and the foregoing decision undoubtedly says so. Once again, this highlights that the true complaint made by the Applicants in this case relates to the outcome rather than the Applicants having identified any legal error in the decision making process.

171. At this juncture, it seems appropriate to note that there is a presumption of validity in respect of administrative decisions (*per* Finlay P. (as he then was) in *Re. Comhaltas Ceoltóirí Éireann* - Unreported, High Court, 5th December, 1977; and *per* Keane J. (as he then was) in *Campus Oil v Minister for Industry and Energy (No. 2)* [1983] I.R. 88 at 102).
172. In the present case, the Applicants do not contest the fact that information and submissions were considered by the Respondent. As well as being, in my view, an overly general and vague plea, the Applicants have not established that the Respondent "failed to consider the full range of humanitarian considerations" (see para. 3(b) on internal p. 6 of the Amended Statement of Grounds).
173. The Applicants have not established that there was any failure on the part of the Respondent to have regard to any Articles of the European Convention on Human Rights to which the Respondent Minister was obliged to have regard. As the contents of the Respondent's Review Decisions make explicit, regard was had to Art. 3 and Art. 8, in circumstances where they arose for consideration on foot of the Minister's obligations. Articles 2 and/or 14 did not arise for consideration. Moreover, Art. 14 relates to a prohibition on discrimination but has no independent existence, and there was no submission made to the Minister (nor is there a submission made to this court) as to why Art. 14 was relevant, nor was any comparator proffered in respect of which discrimination was alleged to have occurred.
174. The Applicants have not established that there was any failure to have regard to any Articles in Bunreacht na hÉireann. Paragraph 2 on internal page 4 of the Amended Statement of Grounds refers to Arts. 40, 41, 42 and 42A of the Constitution and, quite apart from the fact that no submission was made by or on behalf of the Applicants to the Minister with regard to any Article in the Constitution, the following can safely be said.
175. Article 40 concerns personal rights and no specific personal right is alluded to as having been breached. Art. 41 relates to the family and affords protection to a family based on

marriage. In the present case, the First Named Applicant entered into a 'sham' marriage with a third-party who makes no application in the present case. Insofar as the three applicants are concerned, it is difficult to see how they constitute a family within the meaning of Art. 41. I say this in circumstances where the First Named Applicant avers, at para. 6 of his verifying affidavit, that he married a Slovakian woman on 13 January 2015 and is "in the process of obtaining a divorce". If it is the case that such a divorce was obtained between the swearing by the First Named Applicant of his verifying affidavit (on 23 April 2020) and the swearing of her verifying affidavit by the Second Named Applicant (on 3 July 2020) the latter does not aver this. Nor does she aver that she got married to the First Named Applicant. What she says is that they "have been in a relationship for about six years and we have child together" (para. 3).

176. During his submissions, Counsel for the Applicants described them as being "partners or married". When this was pointed out by counsel for the Respondent, the submission was made by the Applicants' counsel that "it is very difficult for me to be definitive. We are talking about persons of the Islamic faith", the thrust of the submission being that the First and Second Named Applicants may have entered into a religious marriage in accordance with their faith.
177. The foregoing state of affairs seems to me to be wholly unsatisfactory. I direct no criticism at their counsel but, insofar as the Applicants seek to challenge a decision with reference to rights said to be derived from Art. 41 of Bunreacht na hÉireann, the very least the Court expects is for clarity in respect of their marital status.
178. In any event, there is simply no question of the effect of the Review Decisions or resultant Deportation Orders being to 'split up' what might be called the "family unit" comprising the first, second and third named applicants.
179. Article 42 concerns education and, of particular relevance, is a right to primary school education with Article 42A relating to the rights of children. In *K.R.A. and M.B.A. (A Minor) v The Minister for Justice and Equality* [2017] IECA 284, the Court of Appeal (rejecting the approach of Eager J. in *O. v Minister for Justice and Equality* [2015] IEHC 139) found that Art. 42A did not alter the existing obligations of the Minister in the context of deportation. The principles derived from *K.R.A.* make clear that the Third Named Applicant's right to free primary education in the State is generally irrelevant to the State's entitlement to deport. Furthermore, in *K.R.A.*, the Court of Appeal stated that there was no requirement on the Minister to carry out any assessment or consideration of the schooling available in the home country of a deportee.
180. Moreover, the Court of Appeal found that a decision was not invalidated because there was no separate consideration carried out in respect of the minor. In the present case there was no individual assessment sought in respect of the Third Applicant, but it is equally clear that her position was considered in the context of the Review Decision relating to the Second Named Applicant and her dependent child. For these reasons, there is simply no question of a breach by the Respondent of constitutional rights in the present case.

181. The Amended Statement of Grounds also refers *inter alia* to articles 1, 2, 3, 4, 7, 19, 21, 22, 24, 35 and 41 of the Charter of Fundamental Rights of the European Union ("CFREU") but it was made clear during the hearing that the Applicants no longer rely on arguments made with reference to the said CFREU.

182. It is, however, pleaded that the Respondent "should have regard to" the United Nations Convention on the Rights of the Child ("UNCRC"). Article 3 of the UNCRC provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The Applicants refer to a decision by MacMenamin J. in *M.X. & Ors. v Health Service Executive* [2012] 3 I.R. 254 wherein (at 282, para. 61) the learned judge stated that:

"Although the United Nations Convention itself is not part of our law, it can form a helpful reference point for the identification of "prevailing ideas and concepts", which are to be assessed in harmony with the constitutional requirements of what is "practicable" in mind."

I am satisfied, however, that, for several reasons, submissions based on the UNCRC cannot avail the Applicants. As Finlay Geogheghan J. made clear in the Court of Appeal's judgment in *Dos Santos v Minister for Justice* [2015] 3 I.R. 411 (at 417, para. [13]):

"The Convention has been ratified by Ireland. However, it has not been implemented by an Act of the Oireachtas and it is accepted on behalf of the Applicants that, by reason of Article 29.6 of the Constitution, it does not form part of the domestic law of the State."

Furthermore, the evidence before this court puts beyond doubt the fact that the Respondent, in fact, considered the best interests of the child in the context of the decision made. This is because the Respondent explicitly said so in a decision which also explicitly referred to all submissions and documentation furnished for the Minister to consider, and these included, *inter alia*, information concerning the Third Named Applicant's position and education.

183. None of the grounds in respect of which the Applicants were granted leave to seek judicial review raise any specific challenge to the reasonableness or rationality of any specific finding made by the Respondent in either of the Review Decisions and it is uncontroversial to say that a judicial review applicant is confined to the case pleaded and in respect of which leave has been granted.

184. Even if that were not so, the Applicants have not established unreasonableness or irrationality in the sense in which those terms are used in judicial review. On the contrary, the Review Decisions are clear, reasoned, evidence-based and cogent. There is no question of the Review Decisions not flowing from the premises on which they are based; and there is simply no basis for suggesting that the Review Decisions are at variance with reason and common sense.

185. It also seems appropriate to observe that the State has a wide discretion in immigration matters (per Keane C.J. for the court in *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 (paras. 82 – 83, citing Costello J. (as he then was) in *Pok Sun Shum v. Ireland* [1986] ILRM 593 at 599). Moreover, the common good includes the control of non-nationals and the normal system of application to enter the State is from outside (Hardiman J. in *F.P. v. Minister for Justice* [2002] 1 IR 164, at p. 174).
186. Counsel for the Applicants describes the Respondent's decision as "unreasonable and not tenable". There is simply no evidence before this Court which would support this submission and a careful analysis of the evidence demonstrates the contrary.

Jurisdiction

187. In *Sweeney v. District Judge Fahy & Anor* [2014] IESC 50, Clarke J. (as he then was) stated as follows: -

*"... judicial review is concerned with the lawfulness of a decision affecting legal rights. If the decision maker did not have jurisdiction to make the decision in the first place, then clearly the decision was unlawful. If a certain set of facts are necessary in order to establish that jurisdiction exists, then the absence of any evidence of the existence of those facts demonstrates that the decision maker has not been shown to have jurisdiction at all. There is, thus, a clear distinction between evidence of facts which are a necessary pre-condition to the exercise of any jurisdiction at all, on the one hand, and evidence of facts which are relevant to the way in which the decision maker exercises a jurisdiction which has been shown to exist, on the other. In a case such as this, where an accused is tried before the District Court on a charge of driving under the influence of a drug, the relevant District Judge clearly has jurisdiction in the narrow sense provided that the accused is properly summonsed to appear before the Court. Whether the accused is guilty is a question of fact (or, in many cases, a mixed question of law and fact) to be decided by the District Judge on the evidence. Save in an extreme case, it is not a matter for the High Court (or this Court on appeal), in considering whether to quash a conviction thus arising, to, to use the language of Keane C.J. in *D.P.P. v. Kelliher* [2000] IESC 60, inquire '... into the merits into the decision and inquiring whether on the facts before him the District Judge was right or wrong in the course that he took. That is not a course which is open to the Superior Courts to take in judicial review proceedings. It is tantamount to affording the Director a right of appeal in such a case and of course it must inevitably follow that such a right of appeal would have to exist also in the case of an accused person who conversely took exception to an order returning him or her for trial'.*

- 3.8. Thus, there are very significant limitations on the extent to which it is appropriate for the superior courts to exercise their judicial review jurisdiction arising out of allegations that the evidence before a lower court or other decision maker was insufficient to justify the conclusions reached rather than insufficient to establish that the decision maker had any lawful capability to make the relevant decision in the first place. Absence of a lawful power to make the decision would render the decision unlawful. Save in an extreme case,

absence of sufficient evidence as to the merits would only render the decision incorrect and, thus, not amenable to judicial review”.

188. In the present case, there is no doubt about the Respondent having had the jurisdiction to make the decisions which are challenged. The proceedings before this Court comprise precisely what the former Chief Justice made clear could not be done, save in “an extreme case”.

Cumulative effect

189. I have no hesitation in saying that the Applicants have not demonstrated that theirs comprises one of the rare and extreme cases where it would be appropriate for this Court to take the view that the evidence before the Respondent was insufficient to justify the conclusions reached. Counsel for the Applicants submits that what he calls the “cumulative effect” of the health issues suffered by the Applicants and the significance of same for their child renders this “an extreme case”. The evidence provides no basis for such a submission.

190. In *Sweeney*, the court went on to comment (paras. 3.9 – 3.11) on the question of the availability of an appeal in the context of judicial review as a method of challenging criminal proceedings and in what circumstances an appeal might be considered an alternative remedy. Nothing in this dicta assists the Applicants and it is also appropriate to note that the Review Decisions constituted what was the latest step in a process which, as a matter of fact, had offered the Applicants an appeal.

191. Considerable reliance was placed by the Applicants on the decision of Mac Eochaidh J. in *N.J. v. Minister for Justice, Equality and Law Reform* [2013] IEHC 603. Reliance on the decision in *N.J.* cannot assist the Applicants. In *N.J.*, the court accepted that the Applicant had established on the balance of probabilities that a particular medical report was not considered by the official with responsibility for compiling the final written advices to the Minister as to whether a Deportation Order should be made. It was in those circumstances that the Applicant established that a failure to consider this particular medical report breached the provisions of s. 3 (6) of the 199 Act. As Mac Eochaidh J. stated (at para. 32): -

“It is not part of the court's function to forgive the failure to consider the medical report on the basis that its consideration would have made no difference to the outcome. The law requires that certain matters be considered before the drastic step of deportation is taken and where those matters are not attended to then the resulting Deportation Order is ultra vires and must be set aside”.

192. It was in those very particular circumstances that *certiorari* was granted. The facts in the present case are utterly different and there is no question of the Respondent having failed to consider any information, documentation or submission. Indeed, it is worth observing that, despite having had the opportunity to do so, neither of the Applicants submitted any medical report to the Respondent for consideration (as opposed to furnishing

correspondence between their doctors, including that which I have referred to earlier in this judgment).

193. Insofar as the submission is made on behalf of the Applicants that the Respondent did not carry out an analysis of the healthcare system in Pakistan, including with reference to what was described as “publicly available information”, I reject that proposition as fundamentally unsound. In the present case, not only did the Applicants: (i) fail to furnish the Respondent decision-maker with any of this so-called publicly available information concerning the healthcare system in Pakistan, the Applicants; (ii) never asserted that they would be unable to access healthcare in Pakistan. Nor did they; (iii) assert that medical care in Pakistan would be inadequate.
194. The furthest the Applicants went was to make the ‘bald’ assertion in their pre-review submissions that their health concerns would be “much better addressed in Ireland than in Pakistan”. Even that assertion is not a claim that adequate healthcare would not be available to the Applicants in Pakistan. Nor, as I have previously observed, did the Applicants provide clarity in the form of any medical report as to the nature and effect on them of their health conditions. Furthermore, the Applicants submitted after the Review Decisions that they comprise a “healthy” family.
195. In light of the foregoing, reliance on authorities such as *D. v. UK* [1997] 24 EHRR cannot avail the Applicants. The *D* case concerned a gentleman suffering with AIDS who had an extremely poor prognosis and, in respect of whom, the professional opinion of his treating consultant was that his “life expectancy would be substantially shortened if he were to return to St. Kitts where there is no medication”. Having been released on licence from prison in the United Kingdom, the Applicant in question was placed in immigration detention pending his removal to St. Kitts.
196. Wholly unlike the situation in the present case, there was extensive evidence in relation to what was described as “a relentlessly progressive disease” with the Applicant’s prognosis being “extremely poor”. In addition, there was clear evidence that the medical facilities in St. Kitts did not have the capacity to provide the medical treatment which the Applicant would require. The Applicant maintained that his removal to St. Kitts would, in those very particular circumstances, expose him to inhuman and degrading treatment in breach of Article 3 of the Convention.
197. To understand how starkly different, the facts in the *D* case were to the facts which emerge from the evidence put to the Respondent, one need only look to paras. 51 – 53 of the judgment in the *D* case, from which the following are *verbatim* quotes: -

"51. *The Court notes that the Applicant is in the advanced stages of a terminal and incurable illness. . . . The limited quality of life he now enjoys results from the availability of sophisticated treatment and medication in the United Kingdom and the care and kindness administered by a charitable organisation. . . .*

52. *The abrupt withdrawal of these facilities will entail the most dramatic consequences for him. It is not disputed that his removal will hasten his death. There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering. Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts*

53. *In view of these exceptional circumstances and bearing in mind the critical stage now reached in the Applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the Respondent State in violation of Article 3. The Court also notes in this respect that the Respondent State has assumed responsibility for treating the Applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate"*

In short, given the utterly different factual situation between the D case and the present application, if provides no assistance to the Applicants, insofar as the relief sought is concerned.

Decision-maker not a doctor

198. Insofar as the Applicants contend that there was some defect in the Respondent's decision, by virtue of the fact that the Review Decisions were taken by someone who is not a medical doctor, I adopt the comments made by Ms. Justice Burns in her 9 February 2021 decision in *KAS v The Minister for Justice* [2021] IEHC 100, wherein (at para. 30) the court stated that "this is an argument which is absolutely without merit and wild in the extreme... obviously, the Respondent has no medical expertise but that does not mean that she cannot determine issues relating to medical conditions in relation to decisions which are in her remit to determine. This ground of challenge is dismissed out of hand."

Conclusion

199. This court has no jurisdiction to re-examine the evidence which was before the Minister with a view to conducting some sort of merits-based 'appeal'. It was for the Respondent Minister to consider the evidence and submissions and the Applicants have utterly failed to demonstrate any flaw in the manner in which the Respondent conducted the exercise they were obliged to conduct. They may not like the outcome; indeed, it is plain that they wholly object to it, but that view alone, however sincerely held, cannot entitle the Applicants to any relief in the present proceedings.

200. For the reasons set out in this judgment, I am bound to dismiss the Applicants' claim. I do so on three separate bases. Firstly, by their conduct, the Applicants have disentitled themselves to discretionary orders. Secondly, and independent of the first reason, the proceedings were brought 'out of time' and the Applicants are not entitled to an extension

of time. Thirdly, even if those two 'free-standing' reasons did not apply, I am satisfied that the substance of the Applicants' claim is wholly devoid of merit, regardless of the undoubted skill and commitment with which the Applicants' legal team sought to argue the case.

201. In conclusion, and having regard to the facts in this case, it is necessary for this Court to emphasise, in the very clearest of terms, the duty of candour which every applicant for Judicial Review is subject to. A failure to comply with the obligation of good faith, as in this case, disentitles an applicant to relief.
202. Whilst taking nothing away from the foregoing, I feel the court should also acknowledge that the material which was submitted to the Minister includes very positive references in respect of both applicants, indicating that they are persons of good character, anxious to make a positive contribution to Irish society and keen to educate and care for their daughter in this State. All of the foregoing is to their credit and nothing in this decision takes away from that. For the reasons given in this judgment, however, this Court is obliged to dismiss the Applicants' claim.
203. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."
204. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs which should be made. My preliminary view is that there are no facts or circumstances which would justify a departure from the 'normal rule' that costs should 'follow the event'. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within 14 days. Finally, an effort was made to include appropriate redactions in this judgment but if the parties agree that further or other redactions are appropriate, they are invited to make such proposals as are agreed between the parties in that regard, again, within 14 days.