Neutral Citation: [2014] IEHC 521

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 104 J.R.]

BETWEEN

L.K. (AN INFANT ACTING BY HIS MOTHER AND NEXT FRIEND, M. .) AND T.K. (AN INFANT ACTING BY HIS MOTHER AND NEXT FRIEND, M.K.) AND M.K. AND M.O.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 5th day of November, 2014

1. M.O. is a failed asylum seeker who arrived in the state from Nigeria on 28th October, 2008, and claimed asylum. A recommendation was made by the Office of the Refugee Applications Commissioner (ORAC) that he be refused refugee status. This was appealed to the Refugee Appeals Tribunal. The appeal was rejected on 7th August, 2009. A "three options letter" issued on 8th September, 2009. Applications for subsidiary protection and leave to remain on humanitarian grounds were made on 19th September. The application for subsidiary protection was refused on 16th November and notified to the applicant on 26th. A deportation order was made on 8th December, 2009, and notified to the applicant on 11th December. This application is by way of telescoped hearing whereby the applicants seek an order of *certiorari* quashing the deportation order made against M.O. and a declaration that his deportation in accordance with that order prior to the determination of a subsequent application to revoke the order under s. 3(11) of the Immigration Act 1999, made on 26th January, 2010, would be unlawful. On 25th January, 2010, the respondent was requested by the applicants' solicitors not to enforce the deportation order pending the making of a decision on the application for revocation. This undertaking was not forthcoming and an application seeking an injunction restraining the deportation of the applicant was made on 3rd February, 2010, and refused (Cooke J.). The applicant was deported on the same day. These proceedings were initiated on 2nd February, 2010, and were not brought within the fourteen day period required under s. 5 of the Illegal Immigrants (Trafficking) Act 2000. Accordingly, an extension of time is required if the application is to proceed.

Delay

2. The proceedings were instituted 37 days out of time. The court may grant an extension of time if satisfied that there is good and sufficient reason for so doing. The basis upon which an extension is sought is set out in the second affidavit of the third named applicant, M.K. She stated that following the receipt of notification of the deportation order in mid December, 2009, M.O. called his former solicitor several days later. He was informed that no assistance could be given to him and he then contacted his present solicitor. An appointment was given for 2nd January, 2010. M.K. and M.O. were married on 31st December, 2009, and M.O. was informed by his solicitors that he must obtain the balance of the file documents before an opinion could be obtained. These were obtained two weeks later from the former solicitor. A consultation was held on 9th January, 2010, and further documents from the file were requested by the solicitors, which were later given on a date unspecified. On receipt of same, counsel was briefed and proceedings issued on 2nd February. M.O. was arrested on the evening of 19th January, and this, it is implied, further hampered the preparation of the case. In addition, it is claimed that further delay was caused by the fact that the applicants' solicitor and counsel were not working for periods during the Christmas vacation.

3. The court is also entitled to take into account whether any grounds have been established upon which leave might be granted, and in this case the fact that two of the applicants are minors. The court is satisfied that M.K. and M.O. formed an early intention within the fourteen day period to pursue a challenge to the deportation order by way of judicial review but were not in a position in any practical sense to do so until 2nd February, 2010. The court is satisfied that good and sufficient reason has been demonstrated upon which to grant an extension of time on the basis of the matters set out above and because the court is also satisfied that a ground exists upon which to grant leave to apply for judicial review.

Application for Leave to Remain

4. The first and second named applicants L.K. and T.K. are minors and the children of M.K. and J.K. (who is not a party to these proceedings). A relationship developed between M.K. and M.O. at a time which is not specified in any of the documents. There is no reference to the dates of birth or the ages of the children. There is no reference in the asylum application or the appeal to the Refugee Appeals Tribunal to the existence of this relationship. It emerged for the first time in the course of the applications for subsidiary protection and humanitarian leave to remain in the state made on 19th September, 2009. The respondent was then informed that M.O. was engaged to be married to M.K. and that plans for the wedding were at an advanced stage. It was intended that the applicant would live with his wife once they married. The respondent was also informed that M.K. was an Irish national. The existence of M.K.'s children was not mentioned. There is no explanation for this omission, although a complaint is now made that certain claimed rights on behalf of the minor applicants were not considered by the respondent when making his decision.

Examination of File

5. As is required under s. 3(6) of the Immigration Act 1999, a number of relevant matters were considered when assessing M.O.'s case. It was noted that he was born on 4th April, 1980. Both his parents were dead and he had one sister residing in Nigeria. The fact that he was engaged to be married to M.K., an Irish national, was recorded and a brief submission made in that regard by his solicitor was considered. There was an elaborate consideration of the applicant's right to private and family life under Article 8 of the European Convention on Human Rights. In respect of family life, it was noted that he was single and engaged to be married to M.K., but that "no further information was received regarding the intended marriage or their relationship". It was accepted that his intended marriage might constitute an interference with his right to respect for family life under Article 8(1). The decisions in *Abdulaziz & Ors v. The United Kingdom* [1985] 7 EHRR 471 and *R (Mahmood) v. Home Secretary* [2001] 1 W.L.R. 840 were considered and applied. In that regard it was noted that a state had a right under international law to control the entry of non-nationals into its territory subject

always to its treaty obligations. Article 8 did not impose on a state any general obligation to respect the choice of residence of a married couple. It was also noted that the removal of one family member from a state where other members of the family are lawfully resident will not necessarily infringe Article 8 provided there were no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involved a degree of hardship for some or all members of the family. The knowledge on the part of one spouse at the time of marriage that the rights of residence of the other were precarious militates against a finding that an order excluding the latter violates Article 8. It was accepted that whether interference with family rights is justified in the interests of controlling immigration will depend on the facts of the particular case and the circumstances prevailing in the state whose action is impugned.

6. It was also accepted in the examination of file that M.K. may have some difficulty integrating into and adapting to life in Nigeria. However, it was noted that "no argument has been submitted as to why M.O. and M.K., if they marry, could not reside together as a family unit in Nigeria". It was considered relevant that M.K. and M.O. must have been aware that the status of M.O. was precarious and that he had no legal basis for residing in the state and might be required to leave. It was noted that M.K. had a choice of whether to remain in Ireland or travel with the applicant to Nigeria. The fact that M.O. was a Nigerian national who had resided in Nigeria until moving to Ireland was a factor which would ease the transition for M.K. of travelling to reside in Nigeria if she so chose. It was, therefore, considered that in making a deportation order against M.O. there was no lack of respect for family life and, therefore, no breach of Article 8. It was not accepted that any possible interference with his right to respect for his private life would have consequences of such gravity as to engage the operation of Article 8 and his right to private life would not breached by his deportation.

The Challenge

7. The applicants claim that the respondent failed to have regard to the state's duty under Article 41 of the Constitution to recognise the family as the natural, primary and fundamental unit group of society possessing inalienable and imprescriptible rights antecedent to positive law, and to guard with special care the institution of marriage on which the family is founded and protect it against attack. It is clear from the evidence that the couple were not married at the time the deportation order was considered or made. They intended to marry and there was no interference with the right to marry under Article 40.3 of the Constitution. They married on 31st December, 2009, approximately two weeks after the making of the deportation order. The respondent was given only the barest information about the relationship and none about the order's potential affect on the children or their father. In *McHugh & Asemota v. The Minister for Justice and Equality* (Unreported, High Court, Hogan J., 9th March, 2012), it was held that marriage to an Irish national did not of itself confer on the foreign national an automatic right to reside in Ireland, and that it could not be said that the arrest of a foreign national in advance of his wedding for the purpose of giving effect to an otherwise valid deportation order, was unlawful. Since a non-national spouse of an Irish citizen may be deported and does not have an absolute right to reside or choose to reside in Ireland, a fiancée cannot be in a stronger legal position than the married spouse. The court is not satisfied that the respondent failed to consider adequately or at all the applicants right to marry. Article 41 of the Constitution did not apply to the couple at the time of the making of the order or its notification.

8. The deportation order is also challenged on the grounds that the respondent failed to provide adequate reasons and failed to give consideration to Article 8(2) of the European Convention on Human Rights, and acted unlawfully in restricting the right to respect for private and family life on a basis of a "pressing social need" which was not in accordance with Article 8.

9. The court is satisfied that this submission does not take full account of the matters considered in the examination of file. In particular, it was stated that the deportation order was in accordance with s. 3 of the Immigration Act 1999, and pursued a pressing social need and legitimate aim of the state to maintain control of its own borders and operate a regulated system for the control, processing and monitoring of non-nationals in the state. This was in conformity with the State's domestic and international legal obligations. M.O.'s rights were considered under Article 8 against the rights of the state and in weighing those rights, the conclusion was reached that there was no less restrictive process available which would achieve the legitimate aims of the state outlined above. Indeed, it is difficult to see how any restrictive method other than deportation on the basis of the facts of this case could have been employed having regard to the paucity of evidence advanced by M.O.. The relevant legal principles as outlined in the cases to which reference was made in the examination of file were properly considered and applied. There is no basis upon which to conclude that the decision in respect of Article 8 rights was unreasonable, irrational or disproportionate.

Sections 3 of the Immigration Act 1999 and Section 5 of the Refugee Act 1996

10. Section 3 of the Immigration Act 1999, provides that:-

> "3.—(1) Subject to the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996, and the subsequent provisions of this section, the Minister may by order (in this Act referred to as "a deportation order") require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State."

Under s. 2(2)(f) a deportation order may be made against, *inter alios*, "a person whose application for asylum has been refused by the Minister".

11. Section 3 also provides the procedure whereby the decision must be considered. The Minister is obliged to inform the proposed deportee of the proposal to make an order in writing and the reasons for it. A proposed deportee has fifteen days to make representations in writing to the Minister which must be taken into account when making a decision on the matter. Under s. 3(3)(b)(ii) the Minister must notify the person in writing of the decision and the reasons for it.

12. Section 5 of the Refugee Act 1996, prohibits refoulement in the following terms:-

> "5.—(1) A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion."
>
> (2) Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, inter alia, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature)."

Refoulement

13. In the letter notifying M.O. that the Minister had decided to make a deportation order against him on 11th December, 2009, it was

stated:-

> "In reaching this decision the Minister has satisfied himself that the provisions of s. 5 (prohibition of refoulement) of the Refugee Act 1996 (as amended) are complied with in your case. The reasons for the Minister's decision are that you are a person whose application for a declaration as a refugee has been refused. Having had regard to the factors set out in s. 3(6) of the Immigration Act 1999 (as amended), including the representations received on your behalf, the Minister is satisfied that the interest of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this state."

14. In the examination of file the issue was dealt with in the following way:-

> "The applicant claims that his problems started when his father, the pagan priest of (his) village…died in April, 2008. The applicant claims that three months after the funeral he got notice that he would have to take over from his father and work as the Priest of the Pagan Shrine in the village. The applicant claims he refused the request. He claims he was told that bad things would happen because of his refusal. The applicant claims after his refusal his business went into decline, he returned to the village in connection with the inheritance of his land. He claims once again he refused to become the Priest of the Shrine and was taken prisoner in the King's home. The applicant claims he managed to escape with the help of the King's daughter, and a group of his friends. The applicant claims if he were to return to Nigeria he fears he will die. The applicant claims he reported the whole matter to the police in Lagos, however they told him that he needed to report it to the authorities in (his home village). The applicant claims in (his home village) friends of his reported the matter to the police, however, they would not intervene as it was a cultural issue."

It is clear that the applicant lived in Lagos between 1995 and October, 2008 where he carried on his business. It is not contended that the history of the facts set out in the examination of file is in any way inaccurate.

15. The examination then cites and quotes from country of origin information relevant to the applicant's case, including United Kingdom Home Office Country of Origin Information Report Nigeria 9th June, 2009, which in turn quotes from a number of other reports on Nigeria by the United States State Department, The Refugee Board of Canada, The Human Rights Watch, United Nations Commission on Human Rights and other sources. The author of the examination then states:-

> "Having considered all the facts of this case, I am of the opinion that repatriating M.O. to Nigeria is not contrary to s. 5 of the Refugee Act 1996, as amended."

Having considered issues relating to the Article 8 rights of the applicant, the examination concludes with a recommendation in the following terms:-

> "M.O.'s case was considered under s. 3(6) of the Immigration Act 1999, as amended, and under s. 5 of the Refugee Act 1996, as amended. Refoulement was not found to be an issue in this case. In addition, no issue arises under s. 4 of the Criminal Justice (UN Convention against Torture) Act 2000. Consideration was also given to private and family rights under Article 8 of the European Convention on Human Rights (ECHR). Therefore, on the basis of the foregoing I recommend that the Minister make a deportation order in respect of M.O.."

16. The order made on 8th December, 2009, recites as follows:-

> "Whereas it is provided by subs. (1) of s. 3 of the Immigration Act 1999, (No. 22 of 1999) that, subject to the provisions of s. 5 (Prohibition of Refoulement) of the Refugee Act 1996, (No. 17 of 1996), and the subsequent provisions of the said s. 3, the Minister for Justice, Equality and Law Reform may by order require a non-national specified in the order to leave the state within such period as may be specified in the order and to remain thereafter out of the state;
>
> Whereas M.O. is a person in respect of whom a deportation order may be made under subs. (2)(f) of the said s. 3;
>
> And whereas the provisions of s. 5 (Prohibition of Refoulement) of the Refugee Act 1996 and the provisions of the said s. 3 are complied with in the case of M.O."

The operative part of the order requiring M.O. to leave the state appears immediately after these recitals.

Meadows

17. In *Meadows v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 701, the Supreme Court granted leave to apply for judicial review in respect of a deportation order on the grounds that it was couched in terms which were so vague and opaque that its underlying rationale could not properly or reasonably be deduced. In that case in respect of s. 5 the Minister had also stated in the letter to the applicant that "In reaching this decision the Minister satisfied himself that the provisions of s. 5 (Prohibition of Refoulement) of the Refugee Act are complied with in your case", as was also stated in the letter to M.O.. The recommendation in the *Meadows* case to the Minister also stated "Refoulement was not found to be an issue in this case" as does the recommendation in this case. Murray C.J. reviewed the effect of s. 5:-

> "Accordingly, before making a deportation order the Minister is required to consider in the circumstances of each particular case whether there are grounds under s. 5 which prevent him making a deportation order. In cases where there is no claim or factual material put forward to suggest that a deportation order would expose the deportee to any of the risks referred to in s. 5 then no issue as regards refoulement arises and the decision of the Minister with regard to s. 5 considerations is a mere formality and the rationale of the decision will be self-evident.
>
> On the other hand if such material has been presented to him by or on behalf of the proposed deportee, as the case here, the Minister must specifically address that issue and form an opinion. Views or conclusions on such issues may have already been arrived at by officers who considered a proposed deportee's application for asylum, at the initial or appeal stages, and their conclusions or views may be before the Minister but it remains at this stage for the Minister and the Minister alone in the light of all the material before him to form an opinion in accordance with s. 5 as to the nature or extent of the risk, if any, to which a proposed deportee might be exposed. This position is underscored by the fact that s. 3 envisages that a proposed deportee be given an opportunity to make submissions directly to the Minister on his proposal to make a deportation order at that stage. The fact that certain decisions have been made by officers at an earlier stage in the course of the application for refugee status does not absolve him from making that decision himself."

18. In *Baby O. v. The Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 169, Keane C.J. (at pp. 181 – 183) rejected a submission that fair procedures required that the Minister give reasons for holding that s. 5 had been satisfied stating:-

> "I am satisfied that this submission is also without foundation. Section 5 of the Act of 1996, does not require the first respondent to give any notice to a person in the position of the second applicant that he proposes to make a decision under that section: It simply requires the first respondent to satisfy himself as to the refoulement issue before making a deportation order. In this case, representations having been made to the first respondent as to why the second applicant should not be deported she was informed that:-
>
> > 'The Minister has satisfied himself that the provisions of s. 5 (Prohibition of Refoulement) of the Refugee Act 1996, are complied with in your case.'
>
> I am satisfied that there is no obligation on the first respondent to enter into correspondence with the person in the position of the second applicant setting out detailed reasons as to why refoulement does not arise. The first respondent's obligation was to consider the representations made on her behalf and notify her of his decision: that was done, and accordingly, this ground was not made out."

19. Murray C.J. in *Meadows* noted that Keane C.J. in *Baby O.* did not refer to any material specifically relevant to refoulement relied upon by the applicant at the s. 3 stage. He noted that if there were no such material, then the Minister's decision under s. 5 would have been one of form only not requiring any rationale. He added:-

> "However, I do not in any event understand Keane C.J.'s statement in that case as absolving the Minister from ensuring that his decision pursuant to s. 3 at that stage, in a case where an applicant has relied in his or her submissions on material expressly relevant to the prohibition on refoulement , is in terms which would enable the rationale, at least, of the decision to be discerned expressly or by inference. Certainly, the Minister when making a decision in relation to s. 5 on non-refoulement is not bound, absent special circumstances at least, to enter into correspondence with the person concerned setting out the detailed reasons as to why refoulement does not arise. If the criteria for judicial review set out in *Keegan* and *O'Keeffe* are to be effectively deployed, even in circumstances where the application of the principle of proportionality does not arise, at the very least the rationale underlying the decision must be discernible expressly or inferentially."

20. In holding that the applicant had established "substantial grounds" for impugning the deportation decision, Murray C.J. stated in respect of s. 5:-

> "An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.
>
> Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.
>
> In my view the decision of the Minister in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced.
>
> The recommendation with which the memorandum was submitted to the first respondent with the file is not helpful and adds to the opaqueness of the decision. That states that "refoulement was not found to be an issue in this case".
>
> This decision is open to multiple interpretations which would include one that refoulement was not an issue and therefore it did not require any discretionary consideration. On the other hand it may well be that the Minister did consider refoulement an issue and that there was evidence of the applicant in this case being subject to some risk of being exposed to female genital mutilation but a risk that was so remote that being subject to female genital mutilation was unlikely: alternatively he may have considered that while there was evidence put forward to suggest that the applicant might be subjected to female genital mutilation, that evidence could be rejected as not being of sufficient weight or credibility to establish that there was any risk.
>
> The fact remains that it is not possible to properly discern from the Minister's decision the actual rationale on foot of which he decided that s. 5 of the Act had been "complied with". Accordingly in my view there was a fundamental defect in the conclusion of the first respondent on this issue."

21. In *Meadows* a detailed submission was made on behalf of the applicant referring to the fact that she had as part of her refugee claim contended that she would be subjected to Female Genital Mutilation, and that the forcible return of the applicant to Nigeria would amount to a violation of her fundamental rights to her personal life. The examination of file submitted to the Minister in *Meadows* dealt with the nature and extent of the practice of FGM in Nigeria and the personal circumstances relied upon by the applicant in her claim that she ran the risk of being subjected to it. All the relevant documentation relating to various stages of her application for asylum was included with the file.

22. In this case M.O. relied in his application for leave to remain upon the asylum file and the only submission made in respect of the basis for claiming that the prohibition of refoulement under s. 5 applied was "this is more properly a matter for the Minister to decide". Nothing further was specifically advanced on this aspect of the case apart from country of origin information which was of a general kind and not specifically related by the applicant to his personal circumstances.

23. The Minister was referred to the applicant's evidence to date in respect of humanitarian considerations which he wished to bring to the Minister's attention.

24. It is clear from the papers that the officials were cognisant of the evidence of the applicant as previously outlined in his asylum and subsidiary protection applications when considering the issue of refoulement. The Tribunal decision in respect of his application for asylum concluded that he was not telling a true story. He claimed to have suffered from the use against him of some form of diabolic power on the part of a group from his native village. The aim of this group was to get him to become Chief Priest of a Shrine in succession to his late father. He had fears of the use of magical powers and the power of pagan cult members to affect him from a distance. When he visited his home village following his father's death, he was briefly detained and assaulted, and was helped to escape. He returned to Lagos. He was not approached by any of his tormentors in Lagos. The Tribunal concluded that the applicant

had neither a subjective or an objective fear from any cultist believers in his home state. If he were to return to Lagos, it was thought that he would be quite capable of making his way in life. He did not believe in the occult practices about which he complained. No legal challenge by way of judicial review was taken against the decision of the Tribunal.

25. The applicant sought subsidiary protection on the same grounds which were rejected as untrue by the Tribunal. He relied upon country of origin information and the documentation on file to date. Officials prepared a file for consideration by the Minister in respect of the applicant's claim. The submission recited the same facts as are set out in the Tribunal decision and the examination of file. Country of origin information was examined concerning the refusal of Chieftaincies or Chaplaincies of a Shrine. It was concluded that it was possible to refuse a priestly role. There was great competition for the position and it was considered that the appointment could be refused without any serious consequences. The Nigerian police investigated ritual and cult activity and any threats arising from those engaged in such behaviour. The application for subsidiary protection also failed on the basis of lack of credibility as set out in the Tribunal decision. This decision was not challenged by way of judicial review. This lack of credibility applied to his entire story. It was not accepted that he feared magical powers in which he himself did not believe. It was not accepted that he had been detained by villagers because he failed to take up his priestly duties. He had not been approached while living in Lagos by anybody from the village or who sought to do him harm physically. His complaints in that regard referred to afflictions in his ears which he attributed to the magical powers exercised by those who were seeking to coerce him into taking up his priestly role. There is nothing in the materials or evidence advanced by the applicant which gives rise to any realistic concern that any of his constitutional or internationally protected fundamental or human rights are threatened by a return to Lagos. It is difficult to fathom how any argument could be made that the conclusions reached in either decision might be regarded as unreasonable or irrational. No further facts were advanced by the applicant on his application for leave to remain and, in particular, in respect of refoulement, beyond those considered by the Tribunal and the Minister in respect of subsidiary protection.

26. The entire file and set of documents previously relied upon were once again relied upon by the applicant in seeking leave to remain. It is in that context that the submission was made that it was a matter for the Minister to consider the issue of refoulement. Nevertheless, notwithstanding the contents of the examination of file, the previous detailed consideration of the applicant's evidence as untrue or lacking in credibility and the failure to advance any further information or make any further submission in respect of refoulement, the applicant claims that the wording of the examination of file, the order of deportation and the letter informing the applicant of the making of the order suffer from the same deficiencies as the decision in the *Meadows* case. Consequently, it is submitted that the deportation order against M.O. should be quashed because it is so vague and opaque as not to give the applicant any or any adequate understanding of the reasons for the decision made.

27. In *J.E. v. The Minister for Justice, Equality and Law Reform* [2010] IEHC 372, Cooke J. refused to quash a deportation order for failure to disclose "the salient or any reason" for the finding that the deportation was not contrary to s. 5 of the Refugee Act 1996. The applicant, a failed asylum seeker, claimed that because he suffered from HIV/AIDS, his return to Nigeria gave rise to a risk of termination of his treatment and a restriction on his access to equivalent treatment based on a pervasive attitude of stigmatisation and discrimination in Nigeria which would give rise to a threat to his s. 5 rights. Though the examination of file acknowledged the existence of evidence of potential stigmatisation and discrimination, no reason or explanation was given for the conclusion that the prohibition on refoulement did not apply. Cooke J. reviewed the contents of the examination of file and held that the conclusion reached that "having considered all the facts of the case, I am of the opinion that repatriating E. to Nigeria is not contrary to section 5", was referable to the issues set out under s. 5 in the examination. These issues included a summary of the facts of the case and country of origin information relied upon by the applicant. Cooke J. did not accept that the conclusion reached was in any way ambiguous. The case was to be distinguished from *Meadows* on the basis that the phrase quoted above did not appear to have been used in the *Meadows* examination of file and was not referred to in any of the judgments. Furthermore, the conclusion as formulated in *J.E.* was not open to the several interpretations caused by the phrase "refoulement is not in issue" considered in *Meadows*.

28. In *T.K. v. The Minister for Justice, Equality and Law Reform* [2011] IEHC 99, the same phraseology was adopted in an examination of file prior to the making of a deportation order. The applicant was a failed asylum seeker from Togo. ORAC and the Refugee Appeals Tribunal found against the claim for asylum on credibility grounds. The applicant feared persecution, torture or ill-treatment if returned to Togo. Hogan J. found that if T.K's account was capable of attracting s. 5 protection, the *Meadows* case was applicable. The learned judge considered that it was irrelevant that ORAC and the Tribunal rejected the applicant's credibility: this was also the case in *Meadows*. Hogan J. was satisfied that the applicant's account of his experiences in Togo potentially engaged the prohibition under section 5. He noted that the phraseology in the case of *T.K.* could not be regarded as materially different from that considered in *Meadows*. In effect:

> "The Minister does not disclose whether he believed or disbelieved the applicant's account or what his views are regarding the extent or the existence of the risk of such ill-treatment or whether or not he believed the applicant is subject to risk, or, if not, why not." (para. 28)

Hogan J. emphasised that the overwhelmingly negative country of origin information in respect of Togo's human rights record and treatment of political dissidents and his reasons for fleeing Togo (notwithstanding that these were not accepted by ORAC or the Tribunal) imposed on the Minister an obligation to say why this conclusion was reached and why repatriation would not infringe section 5. The deportation order was quashed.

29. The respondent in this case urges the court to have proper regard to the evidence and materials, including country of origin information, which were submitted during the course of M.O.'s asylum and subsidiary protection applications, both of which resulted in negative credibility findings on the core element of the claim which could not have been sustained as a matter of reality or commonsense. Particular emphasis is placed on the fact that the three officials who compiled the examination of file before the making of the deportation order were the same officials who compiled the submission to the Minister in respect of the subsidiary protection application. These applications were made on the same day and based on the same evidence. The conclusion reached concerning the applicant's lack of credibility in his subsidiary protection application was, of course, well known to those compiling the examination of file: it was their conclusion. The application for subsidiary protection was refused approximately three weeks prior to the making of the deportation order. It is submitted that in accordance with the Meadows decision, the reasons for the s. 5 decision were readily apparent to the applicant and to be inferred from the materials set out in the examination of file when read in conjunction with the decision on subsidiary protection.

30. A similar submission was made in the case of *J.S. v. The Minister for Justice, Equality and Law Reform* [2012] IEHC 291. The applicant claimed asylum on the basis that she was a Muslim who married a Christian to the disapproval of her father. She claimed that upon informing her father she was pregnant, he forced her to drink a potion causing her to have a miscarriage. She claimed that she and her husband were threatened by her father and that when she moved to her sister in law's home, her father sent another man who threatened to kill her if she did not move back to her father's house. Following a short period she fled Nigeria. Her claim for asylum was rejected by ORAC and the Refugee Appeals Tribunal and an application for subsidiary protection in which she claimed risk

of serious harm on the basis of the threat posed to her by her father was also rejected. A statement of her case and a series of extracts from country of origin information from a diversity of sources was set out in the examination of file under the heading "Section 5 of the Refugee Act 1996", and this section of the examination concluded with the familiar sentence:-

> "Having considered all the facts of this case, I am of the opinion that repatriating (the mother) to Nigeria is not contrary to s. 5 of the Refugee Act 1996, as amended, in this instance."

Similarly, at the conclusion of the memorandum under the heading "Recommendation", it was noted that the mother's case was considered under s. 5 and that "refoulement was not found to be an issue in this case". It was submitted that it was impossible to tell from the s. 5 consideration and concluding recommendation what the rationale of this decision was and what particular reasons the Minister had for concluding that repatriation would not be contrary to the prohibition. It was submitted that the mother's claim that she had converted to Christianity which resulted in her life being threatened by her father who had forced or tricked her into aborting her pregnancy brought the representations within the scope of the s. 5 prohibition and called for a clear, rational and intelligible decision on the part of the Minister.

31. Cooke J. noted that during the asylum process considerable doubts had been expressed concerning the credibility of elements of the applicant's personal history. Notwithstanding that finding, the Tribunal expressed the opinion that the applicant could and should have relocated to another part of Nigeria. The relevance of these observations arose from the fact that having summarised the applicant's claim based upon threats to her life from her Muslim father at the beginning of the s. 5 analysis, the memorandum then proceeded to recite country of origin information. This included extracts relating to the existence of and possible protection by security forces and police, the availability of avenues of complaint and freedom of religion and movement. However, the memorandum drew no explicit conclusions from these extracts. The implication was that a Christian woman threatened by a Muslim father because she had converted to Christianity would have avenues of complaint available to her in Nigeria which would secure her domestic protection, or could relocate elsewhere in Nigeria. Furthermore, there was no reiteration or reliance upon credibility doubts expressed in the asylum process. Cooke J. stated:-

> "Because this assemblage of country of origin information covering different possible topics is followed directly by the opinion of the author as already quoted above, without any linking explanation or particularisation of reasoning, it is not possible, in the view of the court, to understand precisely why the Minister formed the opinion that the applicant could be repatriated without risk that the prohibition would be violated. The implication clearly arises that, in the absence of any reiteration of or reliance upon credibility doubts expressed in the asylum process, the Minister is accepting that this is a woman who has converted to Christianity and has been or might have been the subject of threats to her life by her Muslim father but that, if so, she would not now be at risk of repatriation because:
>
> (a) she can complain to the police or security forces…
>
> (b) she can relocate away from her father and it is unlikely he will pursue her…
>
> (c) such fundamentalist religious threats are only a problem in certain northern states of Nigeria where she has never lived.
>
> In these circumstances the court accepts that the fundamental proposition advanced in support of the leave ground is correct. While it is possible and even highly probable that the hypothesis advanced on behalf of the Minister as to the rationale and reasons for the s. 5 conclusion is that suggested, the addressee of a deportation order cannot be expected to wait for the forensic analysis of the memorandum in the course of judicial review in order to understand why the crucial opinion has been reached…It is necessary in the view of the court that the decision should explain why the deportation order is being made and why, in particular, it is concluded that the deportee faces no risk to life or to person on repatriation contrary to the prohibition in section 5."

The deportation order was quashed.

32. In this case no representations of any kind were made to the Minister in respect of the refoulement issue. No new material was submitted on the matter. The applicant relied in his s. 3 application on the complete file to date, including the asylum and subsidiary protection files. It is clear from the authorities cited that the existence of prior adverse credibility findings against an applicant does not absolve the Minister of the obligation to consider the s. 5 issue afresh, notwithstanding the fact that issues considered in the asylum and subsidiary protection applications may overlap with those to be considered in respect of refoulement. However, a decision reached in respect of s. 5 must be clear and not suffer from the opaqueness and vagueness evident in *Meadows*, and must at least contain a rationale underlying the decision which is discernible "expressly or inferentially".

33. In *T.K.* and *J.S.* it was clear that the operative parts of the decision which were more elaborate than those criticised in *Meadows* but similar to those contained in the examination in this case, did not contain a link between the facts and country of origin information outlined and the conclusions reached in those decisions. In essence, the reasons for the conclusion were not expressed nor was the court in either case satisfied that the rationale for the decision could be "properly or reasonably deduced" from its terms and context.

34. In *J.S.,* the court was invited to consider the context of the decision by reference to the previous asylum decision and refusal of subsidiary protection. The court found, on the particular facts of the case, that the order could not stand because there remained ambiguities raised by the operative sentences of the determination which were not capable of being resolved, as is clear from the extract from the judgment quoted above.

35. In this case the operative elements of the s. 5 conclusion in the examination of file are in exactly the same terms. The writer does not specifically state the underlying rationale for the conclusion reached. The court is invited to infer that the rationale may reasonably be deduced from the facts and country of origin information set out and the failure on the part of the applicant to advance any specific reasons as to why he should not be expelled on the application of section 5. The court is satisfied that this case differs somewhat from *T.K.* and *J.S.* in that no reason or submissions were made as to why s. 5 applied at all. However, the examination of file does not refer to these omissions, rather it proceeds to consider the facts of the case and the country of origin information as directed towards the issue of risk to the applicant from pagan cults in Nigeria because he refused to take up a sacerdotal position. The court is mindful that it is not a court of appeal and should not enter upon a consideration of the merits of any aspect of the s. 5 issue. However, the nature of the facts outlined, together with the country of origin information quoted in the decision, clearly demonstrate why a decision-maker might find any claim in respect of s. 5 to be totally unconvincing if not

unstateable. The Minister could not reasonably accept that because the applicant was the subject of threats from Voodoo or magic that he could not be repatriated to Lagos or other parts of Nigeria apart from his home village. A claim based on such insubstantial material which is not susceptible to commonsense, logic or scientific analysis, could not possibly equate to the very real ambiguities and difficulties discussed in *T.K.* and *J.S.* The court is satisfied that the rationale for the decision under s. 5 is clear from the terms of the decision.

36. The respondent also contends that, if the rationale of the decision is not reasonably discernible from the examination of file, it may be readily inferred from the rejection of the strange and wholly unlikely story told by the applicant in the course of his asylum and subsidiary protection applications. In particular, the respondent points to the fact that the same officials considered exactly the same facts and materials when preparing the submission for the respondent on the subsidiary protection application, which was refused. A degree of caution must be exercised in too readily applying findings in previous decisions to an application in respect of s. 5 as was pointed out in *T.K.* and *J.S.* However, the findings in this case are not open to the implication that the credibility of the applicant's claim was implicitly accepted as in *J.S.,* and that consequently, he may be the subject of threats to his life in Nigeria. *In J.S.*, the court having made such a finding felt obliged to conduct a forensic analysis of the examination of file in order to ascertain why the opinion had been reached that the deportee faced no risk of life or person on repatriation, contrary to the prohibition under section 5. This case is entirely different to *T.K.* and *J.S.* in that the claim made has no basis in reality, commonsense or logic. This is clear from the statement of facts in the examination of file and is rendered more obvious by a reading of the evidence and materials submitted in the course of the asylum and subsidiary protection applications. This makes it more understandable why no submissions were made in respect of s. 5 in the application for leave to remain. The court is, therefore, satisfied that it is in the circumstances of this case appropriate to have regard to the previous decisions on asylum and subsidiary protection to contextualise the s. 5 decision reached by the respondent. If it is thought that the underlying rationale cannot be properly or reasonably deduced from the decision as evidenced by the examination of file, the order and the letter, I am satisfied that the previous decisions and the materials upon which they are based give a clear understanding of the reasons for the making of the s. 5 decision when read in the context of the materials and conclusions set out in the examination of file.

37. As in *J.E.*, the court is satisfied that there is nothing in the information put before the Minister in the course of this application or recorded in the examination of file which could constitute a basis for an opinion that repatriation of the applicant to Nigeria would violate the prohibition on refoulement. This distinguishes the present case from *T.K.*, *J.S.* and *Meadows* in which the applicants had put forward arguable reasons that they were at risk of serious assault, or torture.

38. The court is, therefore, not satisfied that the rationale or reasons for the s. 5 determination in this case are not to be found in the body of the decision or to be inferred from its terms and context. (See also *A.A. (applicant) v. The Minister for Justice, Equality and Law Reform & Ors (respondents)* (Unreported, High Court, Dunne J., 8th July, 2011).

39. Furthermore, the court is also satisfied that even if the court accepted that the statement of reasons was defective in respect of the s. 5 conclusion, the information submitted to the respondent in the application together with that recorded in the examination of file when considered with the absence of any specific submission in respect of s. 5 by the applicant to the respondent, could not constitute a basis for a conclusion that the repatriation of the applicant to Nigeria would violate the prohibition in section 5. In those circumstances it would not be appropriate to quash the deportation order and the court would exercise its discretion not to do so.

Section 3(11) Application

40. A declaration was originally sought that M.O.'s deportation prior to the consideration of the application to revoke the order made on 25th January, 2010, would be unlawful, together with an injunction restraining his removal from the state. That injunction was refused and the applicant was deported. The court notes that the s. 3(11) application set out in more detail what were referred to as "new facts" concerning M.K.'s family history. It referred for the first time to the age of the children L.K. and T.K., and the fact that her former partner, J.K., exercised rights of access to the children regularly, including overnight and at weekends. The submission complained that the respondent did not take account of the existence of the children and the reality that if M.K. were obliged to travel to Nigeria her children would be effectively denied the care and company of their natural father. It was likely that J.K. would strongly object to the removal of the children to Nigeria. A complaint that these matters were not taken into account in the examination of file prior to the making of the deportation order is entirely unjustified having regard to the failure of the adult applicants to take any steps to inform the respondent of any facts concerning the existence or wellbeing of the children. It is not for the court to consider the merits of the s. 3(11) application and the court is satisfied that the applicants are not entitled to any relief in relation to that aspect of the claim.

Conclusion

41. The court is satisfied that the applicant has established a substantial ground upon which to grant leave to apply for judicial review of the deportation order on the basis of the suggested failure by the respondent to give reasons or clearly state the rationale for the s. 5 determination. However, for the reasons set out above, the court is not satisfied that the applicant has discharged the onus of establishing that the decision was fundamentally flawed on that basis, having considered the respondent's statement of opposition, the evidence adduced and the submissions of counsel. The applicant is not entitled to relief on any of the other grounds advanced. The application is refused.