Neutral Citation: [2014] IEHC 533

THE HIGH COURT

JUDICIAL REVIEW

[2014 No.176 JR]

BETWEEN

VICTORIA KHAN (NEE ASHMORE), JOSHUA LEVIS (A MINOR) AND ARABELLA LEVIS (A MINOR) SUING BY THEIR NEXT FRIEND AND MOTHER, VICTORIA KHAN AND MUHAMMAD KHAN

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 14th day of November 2014

Introduction

1. This is an application for an order of *certiorari* quashing the decision of the respondent ("the Minister") notified to the fourth named applicant ("Mr. Khan") on the 16th January 2014 refusing to revoke pursuant to s. 3 (11) of the Immigration Act 1999 a deportation order made in respect of him and for ancillary reliefs. The first named applicant ("Mrs. Khan") is the wife of Mr. Khan and the second and third named minor applicants are her children from a previous relationship. They are aged eleven and ten respectively. Mrs. Khan and her children are Irish citizens and she also possesses UK citizenship. Mr. Khan is a national of Pakistan.

Factual Background

2. Mr. Khan arrived in the State on the 18th February 2007 when he was 22 years of age. He obtained a student visa to enable him to study information technology at the Grafton College of Management Science. He had attended university in Pakistan where he obtained a primary degree in science and went on to study law at postgraduate level. He renewed his visa on four occasions until it finally expired on the 31st January 2009 before he completed his studies. He remained in the State thereafter without permission.

3. On the 26th May 2009, Mr. Khan applied for asylum. On the 4th August 2009, the Office of the Refugee Applications Commissioner recommended refusal of his application. The decision highlighted a number of significant credibility issues and noted that the applicant had waited almost two and a half years after arrival in the State before applying for asylum and said the following:

> "The applicant had renewed his visa numerous times, has a decent standard of English and is well educated. Therefore, it is reasonable to expect him to apply as soon as possible. Due to the considerable length of time between his entry into Ireland and his application for asylum, s. 13 (6) (c) of the Refugee Act 1996 (as amended) applies to this application, that:
>
> *'The applicant without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State.'*

4. The Commissioner's official concluded that Mr. Khan had not established a well-founded fear of persecution. This decision was communicated to him on the 1st September 2009. Mr. Khan appealed to the Refugee Appeals Tribunal ("RAT") where he had the benefit of legal representation by the Refugee Legal Service ("RLS").

5. On the 14th December 2009, the Tribunal affirmed the refusal. In its analysis of the claim, it was again found that there were serious credibility issues arising. Some of the documents submitted by Mr. Khan in support of his account were found to contradict it and other aspects of the account were found to be neither credible nor plausible. The Tribunal found that considering the credibility issues that arose, the documentation was not sufficiently compelling to overturn the Commissioner's recommendation which was affirmed.

6. This decision was notified to Mr. Khan at Flat 2, 10 Lower Rathmines Road, Dublin 6 an address he had furnished to the immigration authorities. It was not thereafter challenged.

7. On the 28th January 2010, Mr. Khan was advised that the Minister proposed to make a deportation order in respect of him and he was advised of his options including the right to apply for subsidiary protection and leave to remain. On the 18th February 2010, the RLS applied on Mr. Khan's behalf for both of those reliefs.

8. In or about June 2010, Mr. Khan met Mrs. Khan for the first time while he was working, it appears unlawfully, at a fast food restaurant in Bagnelstown not far from where she lived in Carlow and they became romantically involved. It appears that in or about January 2011, Mr. Khan was working in a kebab shop in Bray, again unlawfully, where he resided for about a year and a half while dividing his time between there and Mrs. Khan's house in Carlow. Neither address was notified to the immigration authorities. On the 27th May 2011, Mrs. Khan provided a character reference for Mr. Khan in which she said:

> "The purpose of this is to provide a character reference for Mr. Mohammad Khan who has been a good friend for a period of one year.
>
> He wishes to continue his education here in Ireland which would be beneficial towards our future together."

9. On the 11th January 2012, Mr. Khan instructed the RLS *inter alia* that he wanted to marry his Irish fiancée. For reasons that have not been established, this information was never communicated to the Minister. On the 17th July 2012, the Minister's official conducted an examination of the file pursuant to s. 3 of the Immigration Act 1999 (as amended) and recommended that Mr. Khan's

applications for subsidiary protection and leave to remain be refused. The official relied on the RAT findings regarding credibility which were recited in detail and said:

> "In light of the foregoing, I find that the applicant's account is lacking credibility, and it is reasonable to consider that the applicant's statements in relation to his claimed fear of returning to Pakistan are not credible."

10. The report also noted that Mr. Khan was single with no family connections to the State, although this statement was made in ignorance of Mr. Khan's instructions to the RLS referred to above. The report also noted that Mr. Khan had stated that he lived at Flat 2, 10 Lower Rathmines Road, Dublin 6, despite the fact that Mr. Khan's evidence now is that he had not resided at that address for some eighteen months at this juncture. In or around August 2012, Mr. Khan claims he moved in with Mrs. Khan and her children in her house in Carlow.

11. On the 28th September 2012, Mr. and Mrs. Khan made an appointment with the registrar of marriages for County Carlow to formally notify their intention to marry. On the 4th October 2012, Mr. Khan reported a lost Garda National Immigration Bureau ("GNIB") card and gave his address as 10 Lower Rathmines Road. On the same date, he signed a change of address form for the Refugee Applications Commissioner giving the same address.

12. On the 8th October 2012, Mr. Khan was notified that the Minister had refused his applications for subsidiary protection and leave to remain. This decision was not challenged. On the 10th October 2012, the appointment with the marriage registrar took place and on the 19th October 2012, the Minister made a deportation order in respect of Mr. Khan.

13. On the 24th October 2012, it would appear that the couple purchased an engagement ring and on the 1st November 2012, Mr. Khan was notified of the making of the deportation order by registered post at his address at Rathmines. He was instructed to present himself to the GNIB on the 20th November 2012 to facilitate his removal from the State. He received this notice. On the 4th December 2012, the GNIB classed Mr. Khan as a deportation evader after he failed to sign on as he was required to do.

14. On the 11th January 2013, Mr. and Mrs. Khan married. Mr. Khan's address on the marriage certificate is stated to be in Bray, Co. Wicklow. His explanation for this is that his address was taken from his driving licence obtained several years earlier.

15. On the 14th January 2013, Mrs. Khan wrote to the Minister asking him to revoke the deportation order on humanitarian grounds. On the 28th January 2013, the RLS made an application to the Minister pursuant to s. 3(11) of the Immigration Act 1999 for revocation of the deportation order. The RLS based the application on the ground that when the Minister made the deportation order, he was on notice of the fact that Mr. Khan was in a relationship with an Irish citizen whom he intended to marry and the Minister had failed to take these changed circumstances into account. It is now accepted by the applicants that the Minister was not on notice of these facts, although through no fault of Mr. Khan.

16. On the 2nd April 2013, Mr. Khan was arrested by the GNIB at the house in Carlow and detained in Cloverhill Prison. Mr. Khan retained new solicitors to act on his behalf and they wrote to the Minister on the 5th April 2013 making further submissions in relation to the outstanding revocation application. On the 9th April 2013, Mr. and Mrs. Khan commenced judicial review proceedings in this court seeking to quash the deportation order.

17. On the 22nd April 2013, the Minister refused to revoke the deportation order. On the 23rd April 2013, Mr. Khan applied for an injunction to restrain his deportation which application was refused. He was deported the next day, the 24th April 2013, to Pakistan, where he remains.

18. The judicial review proceedings came on for hearing on the 29th July 2013 and were compromised on the 31st July 2013. The terms were reduced to writing and included an agreement by Mr. Khan to make a fresh application for revocation in consideration of which the Minister agreed that Mr. Khan would not be prejudiced by any omission in submitting information regarding his relationship and intended marriage at an earlier time.

19. A new revocation application was duly made on the 21st August 2013 and an examination of file carried out by the Minister's officer on the 5th December 2013, which recommended refusal. The decision ran to some 29 pages. On the 16th January 2014, Mr. Khan was notified that the Minister refused to revoke the deportation order. On the 24th March 2014, McDermott J. granted leave to Mr. Khan to apply for a judicial review of the Minister's decision.

Submissions

20. One of the principal arguments advanced by Mr. Woolfson BL, counsel for the applicants, was that the Minister erroneously considered the import of Article 41 of the Constitution in relation to the rights of a married couple and the family. In the file examination document, the Minister's officer said:

> "With regard to the rights of a non-national married to an Irish national or a person entitled to reside in the State, it is accepted that family rights under Article 41 of the Constitution arise. However, these rights are not absolute and may be restricted. As found by the Courts, there appears to be no authority which supports the proposition that an Irish citizen or a person entitled to reside in the State, may have a right, under Article 41 of the Constitution, to reside with his or her spouse in this jurisdiction. Reference is made to the consideration of the position of the couple, as well as rights of the state under Article 8 in the consideration above and the conclusion reached therein."

21. Considerable reliance was placed on the decision of Mac Eochaidh J. in *Gorry v. Minister for Justice and Equality* [2014] IEHC 29, where identical wording was used and found to represent a mistaken view of the law. It was argued that I am obliged to follow this decision and thus to find in favour of the applicants as happened in *Gorry*.

22. It was further argued that there was a failure to adequately consider the representations made on behalf of the applicants, to adequately weigh and consider the best interests of the children, to reach a proportionate decision and conduct a fair balancing exercise of rights under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights which were conflated by the Minister. It was said that the Minister was operating a discriminatory regime for Irish citizens married to non-nationals as compared to EU nationals married to non-nationals. The applicants also argued that the Minister was in error in concluding that there was no less restrictive process available other than affirming the deportation order and he ought to have considered amending it to provide for a temporal limit as well as considering the alternative possibility of imposing conditions on Mr. Khan's residence in the State so as to render a proportionate decision.

23. In summary therefore, the applicants' case was that the balancing exercise of the respective rights of the parties and the State

was carried out erroneously and a disproportionate decision was arrived at.

24. Counsel for the Minister, Ms. McGrath BL, submitted that the applicants' submissions chose to entirely ignore the factual reality of the case. She argued that the court had a limited and clearly defined role in reviewing a decision by the respondent to refuse revocation and the applicants' case in reality was a disagreement with the balance struck by the respondent between the rights of the parties, rather than the decision being demonstrably wrong. She submitted that particularly where the immigration status of one spouse is precarious at the time of marriage, the Minister's discretion to revoke a deportation order could only be reviewed in exceptional cases and this was not such a case.

The Law

25. In *Gorry*, the first applicant, Mrs. Gorry, was a Nigerian national living in the State in respect of whom a deportation order was made in June 2005. She remained in the State for some four years thereafter. In 2006, she met Mr. Gorry and a relationship began. After a number of years, the couple decided to marry and sought advice from the Immigration Office in Dublin who told them that they should marry in Nigeria and Mrs. Gorry should then apply for a visa to enter the State.

26. Further to this advice, the couple went to Nigeria where they married on the 19th September 2009. In December 2009, they applied for revocation of the deportation order and for a visa for Mrs. Gorry to enter the State. This was refused. In March 2010, Mr Gorry suffered a heart attack and had a coronary stent inserted. He was found to have an 80% blockage of one of the coronary arteries. His doctors advised him against travelling to Nigeria because it would have presented a significant health risk for him.

27. In November 2010, Mr. and Mrs. Gorry made a new application for revocation of the deportation order based on the new medical facts in relation to Mr. Gorry. Two medical reports in relation to Mr. Gorry were submitted to the Minister, one of which indicated that it would be ill-advised for him to live in Nigeria. In July 2012, the Minister refused to revoke the deportation order. His decision made no reference to the critical medical report implying that it had not been received despite clear correspondence from Mrs. Gorry indicating that she had sent it. This appeared not to prompt any enquiry by the Minister. This was stated by the court to be of "some significance" (p. 5).

28. The country of origin information supplied by the Gorrys indicated that coronary procedures such as angioplasty, which Mr. Gorry might require if he had a further heart attack, were not available in Nigerian hospitals. The decision maker concluded "...it is not accepted that it has been shown that there are any insurmountable obstacles for Mr. Gorry to settle in Nigeria, or that treatment for his medical conditions would not be available there."

29. The court found that there were two difficulties with this conclusion. First, it applied the wrong legal test, the court holding that there was in fact no such test based on "insurmountable obstacles" as described. Secondly, it was manifestly irrational to conclude that the applicants had not established that treatment for Mr. Gorry's condition would not be available in Nigeria.

30. The court was clearly of the view that both of these errors were fatal to the decision to refuse revocation.

31. Mac Eochaidh J. went on to separately consider the applicants' argument regarding Article 41 of the Constitution. He considered many of the leading cases involving marriages between nationals and non-nationals and said (at p. 22):

> "42. Having reviewed all of these decisions, my view is that an Irish national married to a non-Irish National has a constitutional right to reside in Ireland with that other person, subject to lawful regulation. The right is not absolute. The State is not obliged in every case to accept the country of residence chosen by such a couple. Though I believe such a *prima facie* right exists, not every set of circumstances will engage the right. The couple who marry on a whim in a drive-in church in Las Vegas having met earlier in the evening, may well find that their circumstances do not trigger the respect for marriage reflected in the provisions of Article 41 of the Constitution and the consequential right to reside in the State.
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> 43. Having reviewed the relevant legal principles I now turn to examine the manner in which the assessors reviewed the circumstances of this marital couple. The assessment of the file says:
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> "As found by the Courts, there appears to be no authority which supports the proposition that an Irish citizen or a person entitled to reside in the State may have a right under Article 41 of the Constitution to reside with his or her spouse in this jurisdiction. Reference is made to the consideration of the position of the couple, as well as the rights of the State under Article 8 consideration and the conclusions reached therein."
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> 44. This is a mistaken understanding of the law. The starting point in any consideration where a mixed Irish and non-Irish nationality couple seeks to live in Ireland is that they have a *prima facie* right to do so by virtue of Article 41 of the Constitution. It is recalled that Article 41.3 pledges the state to guard with special care the institution of marriage. The circumstances of the marriage will indicate whether that right is engaged. If engaged, the state is entitled to supervise the right by requiring an entry visa for the non-national, for example. The mere fact that it is engaged does not mean that it cannot be trumped by a lawful countervailing purpose which must ensure that the denial of the right of residence is proportionate to the policy objective sought to be achieved. As Denham J said in *Meadows v Minister for Justice* [2009] IESC 3 " when a decision maker makes a decision which affects rights then, on reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective." In my view, the Minister and the officials erred in failing to acknowledge the rights which the applicants enjoyed. It was wrong to start the analysis of the constitutional position by denying that there were any constitutional rights to reside with one's spouse involved."

32. The applicants here argue that the respondent's decision is similarly tainted and must fall.

33. It is axiomatic that the mere fact of marriage between an Irish citizen and a non-national cannot of itself give rise to any automatic or absolute right for the couple to reside in the State. There are a plethora of authorities supportive of that proposition and Mac Eochaidh J. refers to many of them in *Gorry*. Whilst as he says there may be a *prima facie* right arising, not every set of circumstances engages that right. The drive-in marriage in Las Vegas he instances exemplifies a situation where the right would be unlikely to be engaged. Another example is to be found in the judgment of Fennelly J. in *Cirpaci v. The Minister for Justice Reform* [2005] 2 ILRM 547 at p. 557:

> "At one extreme an Irish citizen might contract a marriage, valid under the laws of a remote jurisdiction, while on holiday there. Could such a person, within days of the marriage, insist, to the point of demanding that the brevity of the marital

> relationship was irrelevant, that his or her new spouse be granted a visa admitting him or her to reside in the State? At the other extreme would be an Irish citizen, who had lived abroad for many years, perhaps for his or her entire working life. Such a person has, as a citizen, an undoubted right to return to reside in Ireland on retirement or earlier. It is not necessary to pose the constitutional question whether that person would have the right to be accompanied by his or her are foreign spouse of many years. For my own part, I have no doubt that such a right exists. It would not, of course, be absolute. The foreign spouse might be a notorious criminal. It is enough to say that, in the most benign of such circumstances, the Minister would be entitled and possibly bound, in exercising the statutory powers applicable to such situations, to give favourable consideration to a claim that such a person be permitted to be accompanied by his or her spouse."

34. It is thus evident that there is a spectrum within which the right may be engaged dependant on the individual circumstances of the case. It would be idle to attempt an exhaustive enumeration of possible factors that might engage the right. They may include those mentioned by Clarke J. in *A.A. v. The Minister for Justice, Equality and Law Reform* [2005] 4 IR 564 at p. 573:

> "29. It, therefore, seems clear that in a case where a valid deportation order has been made and where the first respondent is requested to revoke a deportation order by virtue of the existence of new circumstances in the form of family rights (under the Constitution) or rights deriving from a permanent relationship (under the Convention) the first respondent is obliged to consider the rights of all concerned. Indeed, it would appear that it is possible that, in certain circumstances, for the reasons outlined by the Supreme Court (Fennelly J) in Cirpaci the first respondent may even be obliged in some cases to come to a conclusion in favour of acting so as to permit the parties to reside together in the State.
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> 30. However, it is equally clear that the first respondent is entitled and obliged to take into account a variety of factors in coming to his view. Those factors can include the duration of the marriage or relationship concerned, the circumstances in which it commenced and the status of the non-national at that time and a variety of other factors identified in the authorities." (Emphasis supplied).

35. Once the right has been engaged, the Minister has to conduct the balancing act cognisant of its engagement. In *S(P) and E(B) v. The Minister for Justice, Equality and Law Reform* [2011] IEHC 92, Hogan J. considered the Minister's duty:

> "23. In this regard, the task of the Minister is to balance potentially competing interests in a proportionate and fair manner. It is true that there is a considerable public interest in deterring illegal immigration and the Minister must naturally be prepared to act to ensure that the asylum system is not manipulated and circumvented. Nevertheless, the requirement that the Minister must balance competing rights necessarily involves a recognition that, important as the principle of maintaining the integrity of the asylum system undoubtedly is, it must sometimes yield - if only, perhaps, in unusual and exceptional cases - to countervailing and competing values, one of which is the importance of protecting the institution of marriage."

36. In *Ugbelese v. The Minister for Justice and Equality* [2010] IEHC 371, Clark J. confronted this issue:

> "49. The Court also rejects the applicants' argument that insufficient weight was accorded to the wife's rights under the Constitution. It is frequently forgotten in arguments relying on the considerable constitutional protection afforded to the family under Article 41 that social order and the welfare of the State are part and parcel of the respect afforded to the family and the role played by the family in upholding that social order and the common good of the citizens of the State. The rights of the family cannot detract from social order and the common good and are, like other strongly protected rights, not absolute. The competing rights of the State to serve the common good and the welfare of the nation in preserving a fair and effective immigration policy are not set at nought by family rights, When a decision to deport is being considered, family rights must be weighed against the competing interests of the State. Neither the Constitution nor the Convention guarantees that the marriage between an Irish citizen and a foreign national gives that couple an automatic right to live together in Ireland and defeat immigration policies."

37. As the judgment makes clear, these are not new principles but have long since been a feature of our law. Clark J. pointed out that couples from different countries and backgrounds that marry are frequently faced with difficult choices and have to make those choices without necessarily seeking solutions in constitutional rights which are not absolute. She followed the earlier decision of Gannon J. in *Osheku v. Ireland* [1986] I IR 733, which concerned the validity of the deportation of a non-national husband married to an Irish citizen with whom he had an Irish citizen child. Gannon J. considered the facts which had obvious parallels to this case and said (at p.742):

> "For the purpose of considering the reliefs claimed by the plaintiffs the following facts established by the evidence are fundamental.
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> 1. Mr. Osheku is not a citizen of Ireland.
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> 2. Mr. Osheku is, and at all times has been, an alien to whom the Aliens Act, 1935, and the statutory orders made thereunder apply and have applied.
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> 3. On the 11th June, 1979, Mr. Osheku was permitted to land and remain in Ireland for one month on condition that while in Ireland he would not take up employment.
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> 4. The conditions for his entry and limited stay in Ireland were known to, clearly understood by, and accepted by Mr. Osheku at the time of his entry into Ireland.
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> 5. In breach of the conditions of his lawful entry into Ireland Mr. Osheku remained without lawful authorisation in Ireland after the 11th July, 1979.
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> 6. In breach of the conditions of his lawful entry and permitted presence in Ireland Mr. Osheku engaged in employment in the State.
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> 7. After the 11th July, 1979, Mr. Osheku's presence in Ireland was to his knowledge in breach of the conditions accepted by him.

8. Save in respect of the periods from the 11th June, 1979, to the 11th July, 1979, and the period between the 15th March, 1983 and the 30th April, 1983, Mr. Osheku's continued presence in Ireland was to his knowledge contrary to law.

9. Mrs. Osheku is an Irish citizen who while still a minor was married with Mr. Osheku in Dublin on the 26th June, 1981.

10. A son, the third plaintiff, was born to Mr. and Mrs. Osheku in Dublin on the 4th June, 1982, and he is an Irish citizen.

11. On the 26th June, 1981, and at all times subsequent, including the 4th June, 1982, Mr. Osheku's presence in Ireland was in breach of the conditions to which he submitted and was without lawful authority to his knowledge.

12. Mr. Osheku's continued presence in Ireland subsequent to September, 1981, was known to Mrs. Osheku to be in breach of the conditions of his lawful entry and permitted presence in Ireland.

I am satisfied upon the evidence that at all times material to the issues in this action Mr. Osheku:-

(a) was aware of the nature of the legal requirements for his lawful entry into and continued residence in the State;

(b) knew that he was acting in breach of the law by taking employment in the State and continuing to reside, without authority, in the State whether in employment or not;

(c) knowingly took the risk that he might at any time lawfully be deported from the State;

(d) prior to consulting his solicitor he endeavoured by deceit to avoid what he expected would be the legal consequences of his unlawful actions. At all material times subsequent to the 11th July, 1979, and more particularly subsequent to the 30th April, 1983, Mr. Osheku was liable to and lawfully could be deported from Ireland."

38. Gannon J. went on to say (at p. 747):

"[Mr Osheku] cannot, in my opinion, by a marriage within the State recognised as lawful, acquire a status of citizenship or immunity from the sanctions of the law. […] In my opinion, the prosecution of Mr. Osheku for offences committed contrary to the provisions of the Aliens Act, 1935, or his deportation pursuant to the powers conferred on the Minister for Justice, if such be his determination in the exercise of his discretion, would not constitute an infringement of any of the constitutional provisions for the protection of marriage and the family".

39. He went on to follow the views of Costello J. in *Pok Sun Shun v. Ireland* [1986] ILRM 593.

40. This appears to be consonant with European jurisprudence as discussed by the United Kingdom Supreme Court in the judgment of Lord Phillips of Worth Matravers MR in *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 WLR 840 in which he said:

"43. Laws LJ has already referred to passages in *Abdulaziz, Cabales and Balkandani v. United Kingdom* 7 EHRR 471. That case involved decisions in relation to three married couples. In each case the wife was permanently and lawfully resident in the United Kingdom with the right to remain indefinitely. In each case the husband had been refused the right to remain in the United Kingdom. The United Kingdom Government contended that there was no obstacle to the couples living together respectively in Portugal, the Philippines and Turkey, the countries of origin of the husbands. In each case the couples contended that, while this was true as a matter of law, the proposed removals from the United Kingdom would involve serious practical difficulties.

44. The European Court of Human Rights made the following observation at p.497:

'Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.'

45. The Court went on to attach significance to the fact that, at the time of each marriage, the wife had been aware that the husband was unlikely to be granted leave to remain in the United Kingdom.

46. In these circumstances, the Court went on to hold that there was no 'lack of respect' for family life and, hence, no breach of Article 8 taken alone.

47. *Poku v United Kingdom* (1996) 22 EHHR CD 94 involved an application to the Commission in respect of a decision to deport Ama Poku, a citizen of Ghana, who had overstayed her leave to remain. She was joined in her application to the Commission by six members of her rather complex extended family, all of whom had a right to reside in the United Kingdom. These included her second husband, her three children, one of whom, Michael, was by a previous marriage, and Sarah, a daughter of her second husband by a previous marriage. They all complained that the deportation of Ama Poku would interfere with their right to their family and private lives under Article 8. The arguments of the applicants and the reaction of the Commission appear in the following passages from the report, at pp CD 97-CD 98:

'The applicants emphasise that they are all British citizens or have a permanent right to reside in the United Kingdom, save Ama Poku. Previous cases relied on by the Government involved the situation where neither parent had the right to remain and were being deported. Further, it is not reasonable to expect the applicants to continue their family life in Ghana since the older children are well settled into the educational system; Michael will lose regular contact with his father; Samuel Adjei will lose his legal residence rights in the United Kingdom and also lose contact with Sarah, his daughter by a previous marriage.

The Commission recalls according to its established case law that, while Article 8 of the Convention does not in itself guarantee a right to enter or remain in a particular country, issues may arise where a person is excluded, or removed from a country where his close relatives reside or have the right to reside…

However the Commission noted that the State's obligation to admit to its territory aliens who are relatives of persons resident there will vary according to the circumstances of the case. The Court has held that Article 8 does not impose a

general obligation on States to respect the choice of residence of a married couple or to accept the non-national spouse for settlement in that country (*Abdulaziz, Cabales and Balkandali* judgment (1985) 7 E.H.R.R. 471, para. 68). The Commission considers that this applies to situations where members of a family, other than spouses, are non-nationals. Whether removal or exclusion of a family member from a Contracting State is incompatible with the requirements of Article 8 will depend on a number of factors: the extent to which family life is effectively ruptured, whether there are insurmountable obstacles in the way of the family living in the country of origin or one or more of them, whether there are factors of immigration control (e.g. history of breach of immigration law) or consideration of public order (e.g. serious or persistent offences) weighing in favour of exclusion…

As regards her husband, Samuel Adjei and their two children, Jason and Jermaine, the Commission notes that there are no obstacles effectively preventing them from accompanying Ama Poku and establishing their family life in Ghana. The Commission has had regard to the adaptable ages of the children, aged four and one respectively. As regards however Samuel Adjei's relationship with his daughter Sarah by another marriage, the Commission observes that if he decides to accompany Ama Poku, his wife, this will interrupt the frequent and regular contact which he enjoys with Sarah who lives with her mother in the United Kingdom. The Commission recalls however that Samuel Adjei and Ama Poku married in August 1994 when she had already been subject to immigration proceedings and a deportation order had been served. He must accordingly be taken to have been aware of her precarious immigration status and the probable consequential effects on his other family relationships by the enforcement of the deportation order. While his daughter Sarah may also claim that her family life is affected and cannot be said to be in the same position as her father, the Commission consider that her situation also flows from the choice exercised by her father rather from any direct interference by the State with her family relationships…

The Commission finds that there are no elements concerning respect for family or private life which in this case outweigh the valid considerations relating to the proper enforcement of immigration controls. It concludes that the removal does not disclose a lack of respect for the applicants' rights to family or private life as guaranteed by Article 8(1) of the Convention.'

41. *Mahmood* was considered by the Supreme Court in *Oguekwe v. Minister for Justice* [2008] 3 IR 795 which again concerned the deportation of the non-national parent of an Irish citizen child. In delivering the unanimous judgment of the five member court, Denham J. (as she then was) said (at p.812):

"46. In [*T.C. v Minister for Justice* [2005] 4 IR 109] a marriage took place in Romania between an Irish citizen wife and a Romanian citizen husband just over three months after the deportation of the husband from the State. The Minister refused to revoke his deportation order so as to enable the parties live together in the State, which decision was upheld by the High Court and this court.

47. The competing and conflicting considerations which may arise in such decisions were summarised by Lord Phillips of Worth Matravers M.R. in [*Mahmood*]. Fennelly J found them very useful in [*T.C.*], as do I. In the summary, at p.861, Lord Phillips M.R. states:-

'From these decisions I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration controls:

(1) A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.

(2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.

(3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.

(4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.

(5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.

(6) Whether interference with family rights is justified in the interests of controlling immigration will depend on (i) the facts of the particular case and (ii) the circumstances prevailing in the State whose action is impugned.'

The above summary is addressed primarily to the issue of family re-unification, whereas this case is centred on the issue of the Irish born child's rights, but the principles overlap and are helpful to the analysis."

42. The court went on to cite with approval dicta of the ECHR in *Abdulaziz* and *Poku* above referred to.

43. The same approach is to be found in the judgment of the ECHR in *Rodrigues da Silva v The Netherlands* [2007] 44 EHRR 34, where the court said:

"39. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of them was such that the persistence of that family life within the host State would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Art 8."

44. In *Sivsivadze v. Minister for Justice and Equality* [2012] IEHC 244, Kearns P. considered the Minister's jurisdiction under s. 3(11) to be well settled. He reviewed the relevant authorities and said:

> "62. […] In speaking of the power available to the Minister under s.3(11) of the Act, Fennelly J. in *T.C. v. Minister for Justice* [2005] 4 IR 109 stated at para. 26:
>
> 'On its face, this provision confers a broad discretion, to be exercised in accordance with general principles of law, interpreted in the light of the Constitution and in accordance with fair procedures.'
>
> 63. The exercise of this power does not strike me as the making of a 'policy' decision but rather involves the exercise of a margin of appreciation related to the facts of individual cases. That discretion was clearly left by the Oireachtas to the Minister.
>
> 64. As Keane C.J. stated in *Baby O. v. The Minister for Justice Equality and Law Reform* at p. 184:-
>
> 'It was entirely a matter for the first respondent to determine whether the circumstances relied on were such that he was obliged to revoke the deportation order already made. I was satisfied that neither the High Court nor this court on appeal had any jurisdiction to interfere with the first respondent's determination that the change of circumstances referred to would not justify him in revoking the deportation order.'
>
> 65. In the more recent case of *Irfan v. The Minister for Justice and Equality* (Unreported, High Court, 23rd November, 2010) Cooke J. stated:-
>
> 66. 'In effect the power of the Minister under s. 3(11) to revoke an order exists in order to permit the Minister to accommodate circumstances which have arisen since the making of the order and which give rise to a material change such that it becomes either illegal (by reason of the intervention of one of the prohibitions on refoulement) or inappropriate on humanitarian grounds or otherwise to implement the valid order. The obligation of the Minister in dealing with an application to revoke an order has been dealt with in a number of cases and is well settled at this stage. (See for example the judgment of O'Neill J. in *Dada v. Minister for Justice, Equality & Law Reform* (Unreported, High Court, 3rd May, 2006); of MacMenamin J. in *Akujobi and Anor v. Minister for Justice, Equality & Law Reform* [2007] I.E.H.C. 19; and *O.O. & Anor. v. Minister for Justice, Equality & Law Reform* [2008] I.E.H.C. 325). This court summarised the position as gleaned from that case law in a judgment of 17th December, 2009 in *M.A. v. Minister for Justice, Equality & Law Reform* :-
>
> 'When an application to revoke is made to the Minister under s.3(11) of the Act, the Minister has, in effect, two duties. He is required to consider carefully and fairly the reasons that are put forward for revocation; and he must also verify that since the deportation order was made, no change of circumstance has occurred, either so far as concerns the applicant or the situation in the country of origin, which would bring into play any of the statutory prohibitions on the return of a failed asylum seeker to the country of origin… Otherwise … in dealing with an application to revoke, the Minister is not obliged to embark on any new investigation or enquiry; nor is he obliged to enter into any exchange of observations and replies or into any debate with the applicant or the applicant's legal representatives or even perhaps to supply any extensive narrative statement of his reasons for refusal. Once it is clear to the court that the Minister has properly discharged those two functions, a decision to refuse to revoke a valid order of deportation will not be interfered with."
>
> 67. Therefore, the Minister's obligation under s.3(11) is 'to accommodate circumstances which have arisen since the making of the order' and his jurisdiction in this regard to do so may be considered to be 'well settled'."

45. The applicants complain on a number of grounds that the decision under challenge lacks proportionality and in particular that other alternatives to deportation were not considered which ought to have been considered. It was argued for example that no adequate consideration was given to the possibility of imposing conditions on Mr. Khan's remaining in the State or amending the deportation order so as to provide for a temporal limit. It was also argued that the rights of the children were not afforded the requisite primacy.

46. In *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701, the Supreme Court considered the duties of the Minister in weighing the factors set out in s. 3 (6) of the Act before making a deportation order. Murray CJ said (at p. 734):

> "101. This is quintessentially a discretionary matter for the Minister in which he has to weigh competing interests and only the Minister, who has responsibility for public policy in this area, is in principle in a position to decide where that balance lies. One cannot rule out that there might be exceptional circumstances in which the principle of proportionality might arise but as a general rule the principle of proportionality would not arise for consideration in such cases and in any event the appellant has not shown that there is any basis for considering that there was any lack of proportionality in the decision taken by the Minister in this particular respect."

47. In *SO & OO v. Minister for Justice, Equality and Law Reform* [2010] IEHC 343, a case concerning the deportation of a non-national father of three Irish citizen children, Cooke J. referred to the observations of the Chief Justice in *Meadows* and said:

> "65. Accordingly, if on an application for leave made on notice to the decision-maker, a substantial ground for the grant of leave is to be made out based upon an alleged lack of proportionality it is insufficient, in the judgment of the court, merely to disagree with the balance struck in the impugned decision; or to assert that the result is untenable because greater weight or significance should have been given to some factors or less to others. It is at least necessary to demonstrate the existence of some specific factor which was material to the balancing exercise made which is demonstrably wrong or absent; or to identify some consideration which has been relied upon as material and which is irrelevant or has been improperly considered".

48. Earlier in the judgment, Cooke J. dealt with a criticism by the applicants that the deportation decision was disproportionate:

> "46. In the judgment of the Court it is not sufficient in order to raise a 'substantial ground' in this context merely to allege in the face of a statement of reasons such as that contained in the File Note that the Contested Order is unreasonable because its consequence is disproportionate or that the analysis is unsatisfactory; or that the consideration of the representations was inadequate. The burden of establishing a specific illegality remains with the applicant."

49. The function of the court in reviewing deportation orders is thus limited, a fact emphasised by Mac Eochaidh J. in *M.R.J. v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 22nd January, 2014, *ex temp*), again concerning the deportation of a non-national father of an Irish citizen child where he said (at paras. 31-32):

> "The role of the court in reviewing a balancing exercise which has happened is limited…if one is to say that the balancing exercise offends the principle of proportionality, one has to make a careful argument as to how this happened. Even if one manages to mount to such a careful and detailed argument indicating what the particular flaw is, it seems to me that the court's jurisdiction in reviewing the balancing exercise that did happen must be at the limited end of things. It must be something akin if not the same as *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 test which requires the court to ask whether the balancing of the rights and the result achieved once that balancing took place flies in the face of common sense and offends reason. In my view I could only interfere with the balancing exercise that did happen if I found that it absolutely offended logic or was something which I felt no reasonable decision maker could ever conclude."

50. In *Sivsivadze*, Kearns P. said:

> "71. Insofar as the most recent decision of the Minister not to amend or revoke is concerned I am satisfied that it was one made in accordance with constitutional principles. It withstands any test of proportionality in that the Minister when exercising his power under s.3(11) did, along with all other factors in the case, give due weight to the fourth applicant's altered family circumstances when considering the application. Notwithstanding those circumstances the fact remains that the applicant was at all times unlawfully within the State and his stay had been prolonged by fraud and deception in which the first applicant was also implicated from at least the time they became married. Both parties knew their circumstances were precarious when they did marry. The marriage was contracted in the full knowledge that the fourth applicant had no entitlement to be in Ireland."

Analysis of the Issues

51. The applicants identify a single sentence in the decision under challenge which was found in *Gorry* to contain an error of law which vitiated the decision and submit that the same result must ensue here.

52. Rights do not exist in a vacuum and the court cannot ignore the factual matrix within which such rights are said to arise. In *Gorry*, although Mrs. Gorry was the subject of a deportation order, she and her husband sought advice from the immigration authorities as to how they might regularise their situation before proceeding to marry. Having taken that advice, Mrs. Gorry followed it and voluntarily left the jurisdiction. She and her husband married in Nigeria and subsequently sought a visa which was refused. Thereafter, Mr. Gorry became seriously ill and his medical condition clearly constituted changed circumstances to which the Minister had to have regard in considering an application to revoke the deportation order.

53. The facts here are very different. Unlike *Gorry*, Mr. and Mrs. Khan voluntarily elected to bring about the changed circumstances which are now claimed to bestow rights which the Minister has failed to respect. I do not believe that the Minister can be expected to be blind to the fact that at virtually every turn, Mr. Khan chose to ignore the law.

54. He came to Ireland as a student and when his visa expired, he remained unlawfully in the State until he eventually and very belatedly sought asylum on grounds which were found to be manifestly not credible. He then sought subsidiary protection and leave to remain and failed on largely the same grounds. He challenged none of these findings.

55. He continued to work unlawfully in the State throughout this process. He furnished an address to the immigration authorities where he now says he did not live and offers the explanation in his affidavit that he maintained this address because he was living between Bray and Carlow in a temporary arrangement. This temporary arrangement lasted some eighteen months according to Mr. Khan and he then moved in permanently with his future wife in Carlow. Yet, months later, he again told the authorities that he was living in Rathmines and it appears that registered mail addressed to Mr. Khan was received and signed for by someone at this address. This mail ultimately made its way to Mr. Khan at a time when he says he was long since living in Carlow.

56. This appears to admit of only two possibilities. Either Mr. Khan was living in Rathmines and not in Carlow as he claims or alternatively he was deliberately seeking to mislead the authorities as to his whereabouts to evade potential deportation. Either way it seems to me somewhat unreal to criticise the Minister for viewing the facts alleged by the applicants with some scepticism and for placing too much emphasis on Mr. Khan's precarious immigration status in coming to his conclusions.

57. Even taking the applicants' case at face value, at the time their relationship commenced, Mr. Khan was a failed asylum seeker who was liable to deportation but had a subsidiary protection and leave to remain application pending. It is difficult to conceive that Mr. Khan would not have known, or been so advised by his lawyers, that his chances of success were slim at best having regard to the unchallenged credibility findings already made against him in the asylum application. It must be remembered that Mr. Khan is highly educated, has studied law at post-graduate level and came from an affluent background.

58. Therefore, Mr. and Mrs. Khan embarked on a relationship which they must have known from the outset was potentially liable to end in permanent separation particularly as Mrs. Khan made clear throughout that she never had any intention of leaving Ireland with her children who were deeply rooted here. Although Mr. Khan apparently instructed the RLS in January 2012 that he wanted to marry his Irish fiancée, a further year elapsed before the marriage took place at a time when he was actively evading a deportation order long since in the offing.

59. It seems to me that the facts in this case do not bear comparison to the facts in *Gorry*. Whilst on one view it might be said that the comments of Mac Eochaidh J. regarding the error of law in the sentence complained of were not necessary to dispose of the matter having regard to his earlier findings, I readily accept and respectfully agree with his analysis of the Article 41 rights that arose in that case.

60. Whilst the same error is replicated in this case, it does not seem to me on the facts to be such an error as to invalidate the balancing exercise undertaken by the Minister here. He was still entitled to come to the view that even where Article 41 and Article 8 rights arose and were engaged, the countervailing interest of the State in maintaining the integrity of the immigration process ought to prevail over those rights.

61. As to the issue of possible discrimination against the applicants vis-à-vis other EU nationals living lawfully in the State, I can see no relationship between such a scenario and the facts of this case, as Mr. Khan was not lawfully in the State at the time of his

marriage. The applicants suggested further that the Minister erred in failing to adequately address the country of origin information and properly consider whether it was reasonable to expect Mrs. Khan and her children to relocate to Pakistan. However, it seems to me that this criticism is somewhat hollow in circumstances where Mrs. Khan made it clear from the outset that she never contemplated relocating, because her family and extended family all lived in the locale, her children were firmly settled in local schools and had regular contact with their father here as well as their grandparents, cousins and aunts and uncles. Therefore, relocating was never on the agenda for Mrs. Khan and there seemed little point in the Minister considering it further than he did.

62. The applicants also argue that the Minister failed to consider the possibility of amending the deportation order to provide for a temporal limit and that coupled with the possibility of imposing conditions on Mr. Khan's residence in the State meant that the Minister fell into error in concluding that there was no less restrictive process available than a deportation order being in effect a life long ban on entering the State. Even if the Minister has the power to amend the order in the manner contended for, which must be open to considerable doubt in the light of the dicta of Hogan J. in *M.A.U. v. The Minister for Justice, Equality and Law Reform* [2010] IEHC 492 (at paras.12-13), he was entitled to conclude in his absolute discretion that it was neither necessary nor appropriate to do so.

63. Insofar as conflation of Article 41 and Article 8 is concerned, both were separately considered and a conclusion arrived at which appears to me to be within jurisdiction.

Conclusion

64. There was no evident irrationality here and the Minister's conclusion was, in my view, fairly supported by the evidence before him. This case could not be categorised as falling into the exceptional class referred to in many of the authorities already mentioned and it seems to me that the Minister acted well within his discretion.

65. The applicants carry the onus of establishing that there was patent and clear error in the Minister's decision and in my view they have not discharged that burden. In the final analysis, it seems to me that the applicants' complaints are in reality that the Minister attached too much weight to some factors and too little to others. Those are areas exclusively for the Minister's discretion into which the court cannot and should not stray.

66. I will accordingly dismiss this application.