Neutral Citation: [2014] IEHC 29

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 859 J.R.]

BETWEEN

IFEYINWA GORRY AND JOSEPH GORRY

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 30th day of January 2014

1. Decisions to remove or exclude from the state non-nationals married to Irish nationals require the balancing of the public interest in maintaining immigration control and the private interests of the individuals to live together in Ireland. There are many decisions, from the common law jurisdictions and international courts which have described the balancing exercise required to be undertaken and the principles which apply to this exercise. Ultimately, as Bingham L.J. said in *E.B. (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41 [12]:

> "The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 [ECHR] requires."

2. While these comments were made in respect of the balancing of rights arising under the Convention, the same can readily be said in respect of the balancing of rights arising under the Constitution.

3. The applicants and the respondent agree that marital, family and private life rights are not absolute, in that frequently such rights must surrender to the countervailing right of the State to assert immigration control and permit serious interference with those rights. The issue for decision in this case is whether the State authorities lawfully engaged in a balancing exercise of the competing rights which resulted in a refusal to revoke the Deportation Order made in respect of the first named applicant.

Background

4. The first named applicant is a Nigerian woman who was refused asylum in Ireland and in respect of whom a Deportation Order was made in June 2005. She lived in Ireland without permission for four years. In 2006, she met the second named applicant who is an Irish citizen. After a number of years they decided to marry.

5. The applicants say (and this is not denied) that they received advice from the Immigration Office in Dublin that they should marry in Nigeria and then apply for a visa for the first named applicant to enter the State. The applicants went to Nigeria on 15th September 2009, and were married there on 19th September 2009. The first named applicant applied for a visa to enter the state and applied for the revocation of the Deportation Order in December 2009. This was refused on 3rd February 2010.

6. In March of the same year, the second named applicant went to Nigeria to visit his wife. He found the visit very difficult because of the heat and humidity in Lagos. He returned to Ireland on 20th March. On 23rd March, the second named applicant suffered a heart attack. He has averred that he was treated by angioplasty and that a coronary stent was inserted in St. James's Hospital in Dublin. He has also averred that he was told that he had an 80% blockage in one of his coronary arteries.

7. The second named applicant elaborates upon the difficulties presented by his heart disease as follows:

> "I say that due to my heart condition (as well other unrelated kidney problems) [sic] I was unable travel to Nigeria to see my wife. I was advised by my doctors that I shouldn't fly, let alone go to live in Nigeria for any length of time. My family doctor, Dr. Fergus Purcell, told me that he has travelled to Nigeria himself and that it would be very risky for me to go there due to the lack of sufficient medical treatment if I were to suffer a further attack. The medications I am taking for my heart condition are not even available in Nigeria. I retired from work due to ill-health, but being sick at home on my own made me miss my wife even more. I became very depressed about our separation."

8. The second named applicant contacted his local T.D. to seek help and advice. The T.D. contacted the respondent's office and they indicated that it was open to the first named applicant to make a further application for revocation of the Deportation Order based on the new medical facts. On 2nd November 2010, the first named applicant reapplied for revocation of the Deportation Order. In relevant part, the application states as follows:

> "On 5th March 2010, my husband visited me for the second time in Nigeria, he left after two weeks on 20th March 2010, only to have a heart attack on 23rd March, barely two days on arrival in Ireland, by the mercy of God and also for the good medical care in Ireland, he survived an operation but was warned by the doctor not to travel by air, for now, since he has 80% blockage in his heart and stand at a risk for further attack. If this attack had happened to him while in Nigeria, it could have been a different story."

9. The first named applicant sent a reminder by email of 19th January 2011, repeating the assertion as to the illness of her husband. On 21st March 2012, she sent a letter by way of further reminder in which she said:

> "He cannot come and live in Nigeria because of his health condition. All the medical report for the heart attack surgery has been sent and should be in my file."[sic]

10. It is averred that a hand written note from Dr. Fergus Purcell which is dated 22nd April 2010 was attached to the application. This note is exhibited and it says:

> "Mr. J. Gorey is post-myocardial infarction and post-stenting, he still has 80% blockage in left circumflex [artery] - his cardiac status is such that he would be ill-advised to live in Nigeria,
>
> Sincerely
>
> F. Purcell"

11. In addition, the statement of a locum consultant physician, Dr. Hamad, from the Midland Regional Hospital at Portlaoise was also said to be attached to the application which was in the following terms:

> "[Mr. Joseph Gorry] was an in-patient in Portlaoise Hospital from 24/03/10 to 26/03/10. He was admitted with a non-ST segment elevation MI. He was transferred to St. James's Hospital for an urgent angiogram during this time and returned to Portlaoise Hospital. He will attend cardiac rehabilitation here in Portlaoise Hospital."

12. In addition to the short medical reports, information explaining stenting and angioplasty was also submitted. These too have been exhibited. A letter was also attached to the application which invited the second named applicant to attend the Cardiac Diagnostics Clinic on 17th April 2010. As the second named applicant also suffers from kidney disease, a short medical report from a consultant neurologist was submitted. Numerous photographs were also submitted which show the couple in each other's company at their wedding and in other places. The second named applicant submitted a letter in support of the application to revoke the Deportation Order but did not keep a copy of it and he does not refer to its contents. The respondent has not exhibited this letter.

13. By letter of 20th July 2012, the Irish Naturalisation and Immigration Services (INIS) informed the first named applicant that the Minister refused to revoke the Deportation Order. Attached to the letter was a "Consideration of Application". This assessment of the revocation application was conducted by an Executive Officer in the Repatriation Unit and endorsed by a Higher Executive Officer and by a Principal Officer.

14. It is of some significance that the assessment of the application refers only to the short medical report of Dr. Hamad in respect of the second named applicant's cardiac incident but does not refer to the short but detailed note from Dr. Purcell. The assessment says:

> "No further [i.e. other than Dr Hamad's report] medical reports have been received by the Department to date in respect of Mr. Gorry's current health status."

15. However, the evidence of the second named applicant is that his wife's application for revocation was accompanied by two short medical reports. The report not mentioned goes much further than the report referred to in the assessment. Dr. Purcell's report, it will be recalled, referred to the fact that the applicant had a heart attack, that a stent was inserted in his coronary artery, that he had an 80% blockage in the other coronary artery and that he should not live in Nigeria. In addition, it will be recalled the first named applicant wrote a reminder to the respondent saying that:

> "All the medical report for the heart attack surgery has been sent and should be in my file."

16. It is a peculiar feature of this case that though the first named applicant says in her second reminder letter that she has already sent a medical report dealing with the question of a heart attack and surgery, this report is not referred to in the assessment. If the report was missing from the file, it seems to me that the respondent's officials ought to have investigated this matter, given that the applicant said in her original application letter that the second named applicant had suffered a heart attack on 23rd March, that he was warned not to travel and that he had an 80% blockage in his heart. For reasons which will become apparent later, the information supplied by the applicant was an important factor in assessing whether the second named applicant could relocate to Nigeria.

17. The assessment of application is then considered under Article 8 of the European Convention on Human Rights. It is well to recall the terms of that provision as follows:

> "***Article 8 – Right to respect for private and family life***
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

18. The respondent accepts that family life within the meaning of Article 8 ECHR arises between the first and second named applicant. In this connection, the Assessment of File describes the decisions of the European Court of Human Rights in *Abdulaziz, Cabales and Balkandali v. The United Kingdom* [1985] 7 EHRR 471, and the decision of the Court of Appeal of England and Wales in *R. (Mahmood) v. Secretary of State for Home Department* [2001] 1 W.L.R. 840, in the following terms:

> ". . . [these] courts found, *inter alia*, that it is relevant whether there are obstacles to establishing the marital home elsewhere, in the country of the spouse or in the applicant's country of origin or whether there are any special reasons why they should not be expected to do so, and that the 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."

19. The Assessment of File then proceeds to examine country of origin information (from the UK Home Office Country Report on Nigeria) with regard to the health services in Nigeria. In general terms, this information indicated that the public health service was degraded and that delays in treatment are frequent. Private hospitals are available which differ in quality. Drugs are available but they may be expensive. The doctor from the National Hospital in Abuja quoted in the report indicated that: "in general, Nigerian hospitals suffer from poor funding, a lack of qualified medical staff, a lack of drugs and a lack of medical equipment. The Federal governments

and State governments do not provide free medical services but the new National Health Insurance System which started in January 2007, will help to take care of health expenses for many people."

20. In another section of the country of origin information, reference is made to the conclusion that "Despite the limitations of Nigeria's healthcare system, a large number of diseases and conditions can be treated, including heart conditions, high blood pressure, Polio, Meningitis, HIV/Aids, Hepatitis, Sickle Cell Anaemia, Diabetes, Cancer and Tuberculosis". With respect to heart disease, the country of origin information is as follows:

> "There are no specialist cardiovascular or cardio-thoracic centres in Nigeria but treatment is available for a wide variety of cardiovascular conditions and diseases, including congenital heart conditions. People suffering from coronary heart disease or people who have had heart attacks can be treated, in general, but coronary artery bypass and angioplasty operations are not available in Nigerian hospitals. In general, invasive heart operations are not available but heart valve defects, heart septal defects and aneurisms can be treated."

21. The conclusion reached by the assessors is as follows:

> "It is accepted that Joseph Gorry has been receiving treatment in the State for a heart condition and also for a kidney complaint and that he may have difficulty accessing the same level of medical treatment for his condition in Nigeria as he is currently receiving in Ireland. However, having considered all of the above information, 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. In this regard, however, it is entirely Mr. Gorry's decision whether he wishes to remain in the State and it is beyond question that this is a decision he is entitled to make."

Insurmountable Obstacles

22. The assessors referred to *R (Mahmood) v. Secretary of State for the Home Department (ibid),* where Lord Philips in the Court of Appeal summarised the principles which emerged from the European Court of Human Rights, in a passage frequently referred to by Irish decision makers. He listed six principles, the third one being:

> "(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 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."

23. Consideration of these remarks inspired a critical part of the conclusion reached by the assessors as follows:

> "However, having considered all of the above information, 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."

24. The phraseology used by the decision maker reveals that the respondent is of the view that the applicants were required to show that there were no insurmountable obstacles to the second named applicant settling in Nigeria and that he was required to show that there was no treatment available in Nigeria for his medical condition. The applicant makes two criticisms of these related findings. The first is that the conclusion is based on the wrong legal test and the second is that the criticism of the failure of the applicant to show that there was no medical treatment available in Nigeria is unreasonable having regard to the evidence submitted by the applicants as to the second named applicant's heart condition and the content of the country of origin information on the availability of treatment for heart disease in Nigeria.

25. It is clear that the two conclusions are linked. The respondent is of the view that there is a burden on an applicant to demonstrate an insurmountable obstacle to moving to Nigeria and where the obstacle is said to be the illness of the person who might move to a new country, it must be shown that there is no treatment available for that illness and the absence of such treatment constitutes the insurmountable obstacle.

26. Since the decision of the Court of Appeal in *Mahmood* in 2001, the Superior Courts of England and Wales have brought further clarity to the *dicta* of Philips L.J. I have already referred to a passage from a decision of the House of Lords in *E.B. (Kosovo).* I wish to refer to a more extensive passage at para. 12 of the judgment, where Lord Bingham, addressing the theme of family rupture caused by immigration requirements, said:

> "Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse *and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal*, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case."[Emphasis added]

27. What is noteworthy in this passage is that there is no mention of any test of insurmountable obstacles before a spouse can successfully resist an invitation that he or she follow the removed or excluded spouse to another country. I also pay particular attention to the emphasis placed by Lord Bingham on the requirement that the decision maker make a careful and informed evaluation of the facts. For reasons which will become apparent, I am concerned that this did not happen in this case.

28. Shortly after the decision of *E.B. (Kosovo),* the Court of Appeal had a further opportunity to consider the appropriate approach to the question of whether family rupture can be avoided by family reunification in the country of the removed or excluded person.

29. In *V.W. (Uganda) and A.B. (Somalia) v. The Secretary of State for the Home Department* [2009] EWCA Civ. 5, the Court of Appeal addressed a complaint that an inferior tribunal had made a material error of law by using an "insurmountable obstacles" test. Sedley L.J., having quoted the passage I have set out at para. 28 and using the same italicisation said as follows:

> "19. The words which I have italicized lay to rest an issue which has troubled decision makers and advocates at least since the decision of this court in *R. (Mahmood) v. Home Secretary* [2001] 1 WLR 840, because of the use by Lord

> Phillips MR, in the course of giving the second judgment, of the phrase 'insurmountable obstacles' in the context of art. 8. This court sought, in the later case of *LM (DRC) v. Home Secretary* [2008] EWCA Civ 325 to explain the contextual significance of the phrase. Ms Busch adopts what I said in ss.11-14 of my judgment in that case. But for the present, at least, the last word on the subject has now been said in *EB (Kosovo).* While it is of course possible that the facts of any one case may disclose an insurmountable obstacle to removal, the inquiry into proportionality is not a search for such an obstacle and does not end with its elimination. It is a balanced judgment of what can reasonably be expected in the light of all the material facts."

30. Sedley L.J. went on to say:

> "24. *EB (Kosovo)* now confirms that the material question in gauging the proportionality of a removal or deportation which will or may break up a family unless the family itself decamps is not whether there is an insuperable obstacle to this happening but whether it is reasonable to expect the family to leave with the appellant. It is to be hoped that reliance on what was a misreading of *Mahmood*, as this court had already explained in *LM* (DRC) [2008] EWCA Civ 325 (and as Collins J had previously done in *Bakir* [2002] UKIAT 01176, s. 9), will now cease."

31. I fully agree with the decisions of the House of Lords and the Court of Appeal of England and Wales that the proper test to decide the contest between State rights and family rights, and in particular, to decide whether a national of a deporting or excluding State should join his or her partner in a third country is not assessed by reference to an insurmountable obstacles standard, but rather by applying the age-old and most reliable of legal standards in administrative law: is it reasonable to expect a spouse to join the removed or excluded spouse in his or her country of residence? Thus the respondent erred in law because he refused to revoke the Deportation Order on the basis of the failure to demonstrate the existence of an insurmountable obstacle to the second named applicant's emigration to Nigeria to take up his family life with his wife. There is no such test.

32. Closely connected with this failure is an error of law demonstrated by the respondent's statement that the applicants failed to show that there was no treatment available for his medical condition in Nigeria. The respondent's second conclusion follows inexorably from the first and where the first is condemned, so too is the second. I do not detect any effort by the respondent to evaluate the seriousness or the nature of the heart disease suffered by the second named applicant. As is indicated by the country of origin information, there are many sorts of heart disease, but even a layman could detect from the amount of information supplied by the applicants (even assuming that that Dr. Purcell's report had not been submitted) that the second named applicant has heart disease caused by significantly blocked coronary arteries. Again, it is common knowledge that treatment for this disease involves angioplasty or heart bypass surgery and it was indicated in the country of origin information that these procedures are not available in Nigeria. Thus, even if the applicants were required to show that the second named applicant had a medical condition for which there was no treatment available, in my view, it would be irrational to say that they failed to so demonstrate.

33. I wish to emphasise that my conclusion on this point is that having regard to the basis upon which the revocation application was advanced *i.e.* the medical condition of the applicant, it was incumbent on the respondent to make clear findings as to what that medical condition was (based on the information which had been supplied) and then to carefully assess whether treatment would be available in Nigeria to a retired man on a relatively modest income such as the second named applicant. It is regrettable that the respondent did not at least contact the applicants to say that they had received only one medical report which made no mention of a heart attack or a blocked artery or heart surgery, though these are expressly mentioned by the first named applicant in her application and there is a reference to a medical report detailing heart surgery in the reminder letter. As Bingham LJ said in *EB (Kosovo)* "… there is in general no alternative to making a careful and informed evaluation of the facts of the particular case." In my view the evaluation of the medical facts was suboptimal.

34. In view of debate as to whether the insurmountable obstacles test is a correct approach in cases such as these, it seems appropriate that I should have regard to the decision of Clark J. in *Alli and Alli v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595. It is of some significance that in the *Alli* case, counsel for the respondent Minister agreed that the House of Lords in EB (Kosovo) and other cases clarified that the ultimate question in cases such as these is whether the family cannot reasonably be expected to enjoy their family life elsewhere. Clark J. explains that Lord Philips in *Mahmood* used the phrase "insurmountable obstacles" based on the jurisprudence of the European Court of Human Rights. Clark J said:

> "The applicants in these two cases have sought to equate 'insurmountable obstacles' with a mountain that cannot be climbed whereas the reality is that the jurisprudence of the ECtHR views an 'insurmountable' problem as being no more than a significant difficulty which cannot easily be overcome. Minor or significant inconvenience is not seen as an obstacle that would render deportation impermissible under Article 8 of the ECHR. The ECtHR jurisprudence shows that it would normally be considered unreasonable for a family to go to great lengths to be able to continue family life together."

35. The learned judge rejected the argument that *EB (Kosovo)* somehow overruled the decision in *Mahmood*. I understand the views of Clark J. to have been that when Lord Philips was referring to insurmountable obstacles, he was borrowing the language of the jurisprudence of the European Court of Human Rights and as that jurisprudence indicates that the true test is whether or not it is reasonable to ask a person to follow his or her excluded partner to a third country, it cannot therefore be said that that *EB (Kosovo)* overrules *Mahmood*. I agree with the leaned judge but I think it fair to add that the proper meaning of the words 'insurmountable obstacle' has been definitively pronounced in the manner indicated.

36. I have considerable sympathy for decision makers in the Minister's office or in inferior tribunals who seek to track the many statements by judges in numerous jurisdictions about the correct approach to proportionality in these circumstances. It is not surprising that some decision makers have mistaken the words of Lord Philips in *Mahmood* as an expression of a pure test, whereas, in fact, it is derivative language which can only be understood in the context of all of the cases from which it is derived. It is language best avoided in performing a proportionality exercise.

Article 41 of the Constitution

37. A further complaint is pursued by the applicants in these proceedings. The assessors considered the revocation application by reference to the Constitution. The assessment begins with the following phrase:

> "With regard to the rights of a non-national married to an Irish citizen 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."

38. The applicants and respondent agree that this statement is correct in law. It is noteworthy that the applicants did not challenge the first revocation application which followed immediately upon the couple's marriage in Nigeria. Though the decision in that matter is

not before the court, I can safely assume that the only new circumstance advanced in favour of revocation was the simple fact that the couple had married. Numerous decisions have indicated that an Irish and non-Irish married couple do not have automatic rights to reside together in Ireland simply by virtue of marriage and that the State is not obliged to respect the residence choices made by such couples (see *A.A. v. The Minister for Justice, Equality and Law Reform* [2005] 4 I.R. 564 at p.570: "It is clear that parties such as the applicants do not have an absolute right to reside in this jurisdiction as a family, notwithstanding the constitutionally recognised family rights which they hold as a married couple" *per* Clarke J.). In *Fitzpatrick v. The Minister for Justice* [2005] IEHC 9 (Unreported, High Court, Ryan R. 26th January 2005), the trial judge reiterated the definition of the rights of such married parties as being "less than absolute". In *Cirpaci v. The Minister for Justice* [2005] IESC 42, a Deportation Order was sought to be quashed to enable the parties to live together in the State. The marital couple were an Irish citizen wife and a Romanian citizen husband who had married in Romania some months after the deportation of the husband. Fennelly J., at p. 557, made the following remarks in respect of constitutional rights to reside in Ireland of Irish and non-national marital couples:

> "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 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."[Emphasis added]

39. Looking back on this case law, Clarke J. in *A.A. v. The Minister for Justice (supra)* said at p. 573 as follows:

> "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 that 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 v. Minister for Justice* [2005] IESC 42, [2005] 2 I.L.R.M. 547 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.
>
> 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."

40. It is clear from these judgments that the courts have ruled in favour of the State's entitlement to refuse Irish residency to non-Irish persons married to a citizen. It is also clear from the jurisprudence that marriage between a national and a non-national may engage the right of residence in the State which could only be denied for countervailing proper purpose. Fennelly J. instanced the difference in treatment between a 'holiday marriage' and a long standing marriage where the couple had resided in a third country but wished to retire in Ireland, saying that the latter should surely result in the grant of a right of residence to the non national, whereas the former could result in a refusal. To this jurisprudence must be added more recent remarks of Hogan J. in *S(P) and E(B) v. The Minister for Justice, Equality and Law Reform* [2011] IEHC 92, who emphasised that rights conferred by Article 41 of the Constitution must be respected. He said as follows:

> "22. In these circumstances, the practical effect of the Minister's decision would be to condemn this couple to live apart, more or less permanently. It is very hard to see how such a decision would conform to the State's obligation contained in Article 41.3.1 of the Constitution 'to guard with special care the institution of marriage', absent some compelling justification. Of course, the imperative need to uphold the integrity of the asylum system could - and often does - provide such a justification.
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> 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. The rights conferred by Article 41 of the Constitution are nevertheless real rights and must be regarded as such by the Minister. They cannot be treated as if, so to speak, they were mere discards from dummy in a game of bridge in which the Minister as declarer has nominated the integrity of the asylum system as the trump suit."

41. A case which has stood the test of time, at least on the issues in suit, is *Pok Sun Shun v. Ireland* [1986] ILRM 593. The father of a Chinese family was required to leave the State. His wife sought a declaration that she was "normally entitled to the society of [her husband] within the State". Costello J. said "that is so and I don't think it needs any declaration of the court for that to be made clear". This remark expresses the same view of the law as that described by Fennelly J. in *Cirpaci*. Later in the judgment, the learned judge said:

> "Mr. Gaffney submitted on behalf of the plaintiffs that because of the very entrenched provisions of the family rights in the Constitution, that these could not be trenched upon, in any way, by the State and, in particular, by the Aliens Order. He went so far as to answer a question I put, to say that if an alien landed in the State on one day and married the next day to an Irish citizen in the State, the State was required, by the Constitution, to safeguard the rights which were given to the family, and these could not be taken away by the Aliens' Act. In other words, the order made under the Aliens' Act was unconstitutional. I cannot accept that view. I do not think that the rights given to the 'family' are absolute, in the sense that they are not subject to some restrictions by the State, and, as Mrs. Robinson has pointed out, restrictions are, in fact, permitted by law, when husbands are imprisoned and parents of families are imprisoned, and, undoubtedly, whilst protected under the Constitution, these are restrictions permitted for the common good on the exercise of its rights. It seems to me that the Minister's decisions and the Act and Orders made under it are permissible restrictions and I cannot hold that they are unconstitutional." (See pages 5 and 6 of the Unreported judgment).

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 a consequential right to reside in the State.

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 File says:

> "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 above and the conclusions reached therein."

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 his 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.

45. Insofar as the consideration of the couple's Article 41 rights were made referable to the consideration of the couple's rights under Article 8 of the European Convention on Human Rights, I have already indicated that the incorrect test was used to assess those rights and therefore that error is infused into the consideration of the couple's constitutional rights.

46. The conclusion reached in the Assessment of File is as follows:

> "It is submitted that there are no new exceptional circumstances presented beyond those previously considered by the Minister which would warrant the revocation and the Deportation Order signed in respect of [the first named applicant]."

47. The person seeking revocation of a Deportation Order is required to advance new circumstances to justify the revocation. I am not aware of any rule which requires the circumstances to amount to what is referred to in the passage quoted as 'exceptional new circumstances'. It must be said that the conclusion is ambiguous. Is the assessor saying that no new exceptional circumstances have been identified? If so, then the husband's serious heart disease constitutes new circumstances and even if the law required exceptionality, I cannot see how these medical facts would not be so regarded by an objective assessor. Such a conclusion "plainly and unambiguously flies in the face of fundamental reason and common sense" contrary to the dicta of Henchy J. in *State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642. If, on the other hand the conclusion means that exceptional new circumstances have been identified but these are not sufficient to warrant revocation then such conclusion is unlawful. Though a reason is not offered with these words, it is apparent from earlier passages in the assessment of file that the assessors believe that the second named applicant can receive treatment for his heart disease in Nigeria. As indicated earlier in this judgment such a conclusion has been reached without proper consideration of all the relevant facts, especially all the medical facts, and is consequently irrational. That such a decision must fall is confirmed by O'Higgins C.J. in the *State (Lynch) v. Cooney* [1982 I.R. 337, at p. 361 where he said , in respect of a discretionary power given to a Minister by statute, '…. Any opinion formed by the Minister thereunder must be one which is bona fide held and *factually sustainable* and not unreasonable" [emphasis added]

Discretion

48. Counsel for the respondent has requested the court to consider the poor immigration history of the first named applicant. It will be recalled that she appears to have been living in the State without permission for four years, and that prior to the institution of these proceedings, she re-entered the country unlawfully. The respondent says that this conduct disentitles the applicants from the reliefs and that the proceedings are an abuse of process and should not be entertained by this court.

49. Reference is made to *Smith v. The Minister for Justice and Equality* [2013] IESC 4 in this regard. Mr. and Mrs. Smith were Nigerian nationals who arrived in the State in 2002. They had four children one of whom was an Irish national and three of whom have been granted permission to reside in the State. Mr. Smith left the State in 2002 and travelled to the United Kingdom. He was convicted of serious criminal offences and sentenced to seven years imprisonment. He was deported to Nigeria in July 2005, having served part of that sentence. He re-entered the State in 2006. The Minister made a Deportation Order against Mr. Smith and one of his sons which was not challenged. Two unsuccessful revocation applications were made by Mr. Smith. He was eventually deported in March 2012. The proceedings were taken by the six-member family, saying that the deportation violated their family rights. Leave to seek judicial review was refused in the High Court on the basis that no significant new circumstances had arisen which would have justified the revocation. It was found that there had been a correct balancing of rights under Article 8 of the European Convention and Article 7 of the European Charter. However, the High Court decided that had a stateable case been made out, Mr. Smith's history of immigration violation amounted to "compelling reasons why the court should exercise the discretion to refuse to entertain the application".

50. Though the Supreme Court agreed with what Cooke J. said about discretion to refuse reliefs, the Supreme Court's approach is markedly different. Clarke J. said:

> "6.1 It is important to carefully identify the role of discretion in the context of judicial review applications such as that with which the court is now concerned. In so doing, it is important to emphasise that the term 'discretion' does not mean that a judge can override, in any way, the law. Nor can a judge, by the exercise of discretion, interfere with the rights of any individual as such. Indeed, in that context, it might be suggested that the term 'discretion' is apt to mislead. What, in truth, the term implies is that there may be a range of factors which can properly be taken into account by the court, as a matter of law, in determining whether an applicant is entitled to a remedy and if so what remedy."

51. Clarke J. then proceeds to describe Mr. Smith's poor immigration record, the serious criminality, his absence from the family

(whose rights are asserted in the intended proceedings) and his actions which appear to be in total disregard of family rights. Clarke J. concluded:

> "…On the facts of this case, there is, therefore, no reality to the asserted position of Mr. Smith in respect of his family. He has repeatedly left the jurisdiction and not tended to the needs of his family. The failure is, therefore, directly connected with the very rights now sought to be asserted.
>
> 6.5 When coupled with Mr. Smith's other wrongdoing in respect of the immigration system as outlined by the trial judge, it seems to me that this is the kind of case where, on the facts, there could only be one answer if the matter was referred back to the Minister. The Minister would be almost certain to, and would be well justified in, concluding that, even if there were new circumstances, same could not outweigh the extraordinary weighty balance against revoking Mr. Smith's deportation, which stems from his own reckless disregard of the rights of his own family members."

52. In *Smith*, the proposed deportee sought to rely on family rights to revoke the Deportation Order. Once the Supreme Court had found that Mr. Smith had scant regard for such rights in reality, it was held that even if legal error infected the Minister's decision, relief could therefore be refused.

53. The situation of the present applicants is not comparable. The applicants themselves acknowledge that there has been a breach of immigration law. There is no question of non-immigration related criminality or any disregard for the family and marital rights sought to be asserted. If anything, the first named applicant demonstrates devotion to her husband, and as a couple they demonstrate commitment to their marriage and thus to the rights which they seek to assert. It should also be recalled that the first named applicant eventually complied with the Deportation Order and voluntarily left the State. In addition, the couple followed the advice of the INIS that they should marry in Nigeria.

54. I reject the contention that these proceedings constitute an abuse of process. No litigation misconduct has been demonstrated. The unlawful behaviour of the first named applicant does not seem to me to be of the order which would attract the exercise of discretion such as to disentitle her from reliefs. I also bear in mind that the second named applicant is guilty of no wrongdoing. It is essentially his circumstances which were central to the Minister's decision.

55. In those circumstances, it would be wrong to excuse the unlawful decision by the Minister and his officials concerning the circumstances of the couple, and in particular, of the second named applicant by reference to the misconduct of the first named applicant. The unlawful entry to the State might never have happened had her *bona fide* revocation application been assessed lawfully. I decline the invitation of the respondent to exercise the discretion to refuse reliefs.

56. In these circumstances, I make an order of *certiorari* quashing the decision of the respondent to affirm a Deportation Order made against the first named applicant on 20th July 2012. I grant a declaration that the legal and constitutional rights of the applicants have been infringed by the failure to acknowledge, weigh and consider those rights.