Neutral Citation: [2015] IEHC 720

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 416 J.R.]

BETWEEN

ALISON FORD AND DAVID NWOKE

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 19th day of November, 2015

1. On the 21st July, 2012, the applicants made an *ex parte*application for leave to apply by way of an application for judicial review seeking an order of *certiorari* quashing the decision of the respondent of the 17th June, 2014 to refuse to grant a visa to the second named applicant to enter and reside in the State. On that date McDermott J., granted leave to the applicants to apply by way of application for judicial review for the following relief:

> An order of certiorari quashing the decision of the respondent of the 17th June, 2014, to refuse to grant a visa to enter and reside in the State to the second named Applicant.

Ground for relief

2. The applicants rely in effect on four separate grounds as follows:

> a. The respondent erred manifestly in law and acted unreasonably and irrationally in reaching a decision on the application for a visa in a manner entirely contrary to the provisions of Article 41 of the Constitution which provides for prima facie rights for the applicants to reside together in the State, and provides that the State guards, with special care, the institution of marriage.
>
> b. The respondent erred manifestly in law and acted unreasonably, irrationally and contrary to the provisions of the Constitution in conducting the entire assessment in the applicant's case on appeal from the standpoint that the marriage between the Applicants can be continued without the applicants living together at all and solely on the basis of the first applicant visiting Nigeria.
>
> c. The consideration in the applicant's case is *prima facie* unlawful in circumstances where the fundamental nature of the marital bond has been misunderstood by the respondent.
>
> d. The proportionality assessment carried out by the respondent is unlawful where it does not have as its starting point the requirement that the married couple reside together, and the decision is invalid as a consequence.

Factual history

3. The affidavit of the first named applicant, she set out that she was the spouse of the second applicant. She stated that she is an Irish national born in the State on the 12th May, 1973. She was introduced to the second applicant by a mutual friend in or around 2010. She and the second applicant were in electronic communication (and this Court understands that this related to telephone communications and other social media including Skype). The first applicant met with the second applicant in person in the United Kingdom in January 2011. She stated that he was in the UK to visit, and she flew from Ireland to the UK to see him and they commenced a loving relationship. She says that since that time they have been in a committed relationship and that after the second applicant returned to Nigeria in February 2011, they maintained their relationship by way of electronic communication.

4. On the 1st October, 2013 the first applicant travelled to Nigeria and remained there until the 15th October, 2013. During this time the applicants were married. The first applicant had travelled to Nigeria with the intention of marrying the second applicant. She also set out her description of Nigeria as an extremely dangerous place and that while she was there she was under constant protection from the second applicant and his friends.

5. She accepts that it was her assumption that if she married the second applicant, that there would be no difficulty with them being granted a visa to enter the State. It was also her view that the visa would naturally be granted as the marriage could not subsist otherwise. He was also prepared to come to Ireland to live with her. She has three children and these children are Irish citizens and aged approximately 21, 12 and 6. The two youngest children will be unable, for obvious reasons, to stop attending school and relocate to Nigeria. She had never considered moving to Nigeria as she is of the view that she would not be able to survive there.

6. In or around December 2013 / January 2014 the second applicant applied to the respondent to join the first applicant. This application was refused by the respondent by the decision dated 11th April, 2014. In the course of this judgment I will revert to the decision at first instance by the respondent.

7. Following the refusal, both the first and second applicants applied for a review of the respondent's decision. By letter dated 29th May 2014, from Messrs. Trayers & Co., solicitors for the applicants, a review of the respondent' s decision was applied for. Attached

to the letter from the solicitors was a personal letter from the first applicant addressed "to whom it may concern", and I will revert to that in due course.

8. By letter dated 17th June, 2014 the second applicant was informed of the respondent's decision to refuse the application for review and this letter is exhibited, and I will revert to the letter in due course.

9. The first named applicant said she was surprised by this letter as it says that it was disregarding the previous finding that she could go to live in Nigeria and found that she could visit Nigeria instead.

10. By way of comment in her affidavit, she said that she finds it remarkable that the respondent has concluded that marriage is an institution that can seemingly exist perfectly without the parties being together. She says this is not her understanding of marriage. It is - and always was - her intention to live with her husband, share her home with him, to have children with him, and to live what she and most people in the country would know and describe as normal married life.

11. She says this cannot be done over the phone, on the internet or on the basis of occasional visits. She says, in her view that the respondent has not behaved in a reasonable way.

12. The respondent's statement of opposition was verified by the affidavit of Jackie Hannon, Higher Executive Officer of the Department of Justice and Equality. Ms. Hannon says that the respondent did not make a decision communicated by letter dated 17th June, 2014, to the second applicant "to refuse the said application for a review" as averred by the first applicant at para. 7 of her affidavit sworn 15th July, 2014. She said that the letter dated 17th June, 2014, comprised the notification of the outcome of the second applicant's appeal (which had been made by letter dated 29th May, 2014) and that the said appeal was fully considered and that a full consideration took place and a reasoned decision made. She states that the respondent took all relevant matters into account upon the second applicant's application for a "Join Spouse" visa, and upon appeal, which was determined and notified by letter dated 17th June, 2014, she noted that the first applicant accepts that it's consideration and assessment of the second applicant's application for a visa and subsequent appeal that the respondent "considered the pertinent issues in this case". She said there appears to be no dispute arising on the facts as pleaded save that the respondent does not necessarily accept the characterisation of those facts as averred by the first applicant in her affidavit, and says that as the facts are agreed the matter is one for legal submissions.

The first decision on the application for a visa

13. This document was dated 11th April, 2014 and signed by the Visa Office, Embassy of Ireland, Abuja, Nigeria. It is headed "Consideration under Article 8 of the European Convention on Human Rights" and it states that "the application has been examined in accordance with the Policy Document on Non-EEA Family Reunification ("the Policy Document") published by the Minister for Justice and Equality ("the Minister") which is effective as of the 1st January, 2014. The policy document has been prepared in observance of Constitutional and ECHR rights of the parties and society in general". The letter states that it is accepted that to refuse the Join Spouse (non-EEA / Irish national) visa applications in respect of the second named applicant will engage the right to respect for family life under Article 8 (1) of the ECHR. It is submitted that refusing the Join Spouse (non EEA / Irish national) visa application in pursuance of lawful immigration control does not constitute a breach of the right to respect for his private life under Article 8 (1) of the ECHR.

14. The letter of notification and the examination of the application on behalf of the Minister reads:-

> *"Dear Sir/Madam,*
>
> *I regret to inform you that your application for an Irish Visa has been refused by the Irish Naturalisation and Immigration Service for the following reasons:*
>
> *FM:- There is no automatic right for non-EEA nationals who are (extended) family members of Irish citizens to migrate on a long-term basis to Ireland*
>
> *ID:- Insufficient documentation submitted in support of the application:- Additional documentation requested. All requested documentation has not been provided, namely:*
>
> *• Official marriage certificate. Please note that the current copy marriage certificate is not sufficient. This document is not the standard FRN civil marriage cerficate & does not contain required information such as a certificate number.*
>
> *• The visa reference must also provide evidence that she has not been married before (i.e.) Certificate of Freedom to Marry (this may also be called "Certificate de Coutume" or "Certificate of Nulla Osta"_.*
>
> *PF:- The granting of the visa may result in a cost to public funds.*
>
> *PR:- The granting of the visa may result in a cost to public resources.*
>
> *An assessment under A8 of ECHR has been completed and is attached for your information.*
>
> *This decision can be appealed within 2 months of the date of this letter. An appeal must be submitted in writing, fully addressing all the reasons for refusal to the Visa Appeals Officer to the address shown.*
>
> *Appeals received by email or fax will not be processed.*
>
> *All additional supporting documents should be submitted with your appeal. If you require any original documents returned to you, please also include a photocopy of any such document.*
>
> *Please quote your Visa Reference Number on your appeal.*
>
> *Yours sincerely,*
>
> _____
>
> *Visa Section*

Abuja

Visa Application Reference Number:

Visa Application: 15196602

Visa Applicant: Mr David NWOKE (19/02/1975)

Sponsor: "The first named applicant" (Irish National)

Consideration under Article 8 of the European Convention on Human Rights (ECHR)

The application has been examined in accordance with the Policy Document on Non-EEA Family Reunification published by the Minister and which is effective as of 1 January 2014. The Policy Document has been prepared in observance of constitutional and ECHR rights of the parties and society in general.

Background

Ms. Ford is an Irish National who appears to have resided in Ireland her entire life. Mr. Nwoke is a Nigerian National who has resided in Nigeria his entire life. They married in Nigeria on 07 October 2013. Mr. Nwoke is applying for a Join Spouse Visa.

Ms. Ford has three children from previous relationships, two of whom as under the age of 18 years. Mr. Nwoke has one minor child from a previous relationship. Mr. Nwoke's child has not applied for a visa.

Private Life

It is accepted that to refuse the Join Spouse (non-EEA/Irish National) visa applications in respect of David Nnate NWOKE will engage the right to respect for family life under Article 8(1) of the ECHR.

It is submitted in refusing the Join Spouse (non-EEA/Irish National) visa applications in pursuance of law immigration control does not constitute a breach of the right to respect for his private life under Article 8(1) of the ECHR.

Family Life

It is submitted that Article 8 does not oblige the Minister to respect the choice of residence of a married couple. Some account must also be taken of the circumstances of any family separation and the actual relationship between the parties. In this regard, a family member who has long been separated from a person resident in Ireland or family members who have never lived together may have a weaker claim on reunification than one where the parties have until recent been a close family unit.

Ms. Ford and Ms. Nwoke state they have been involved in a relationship since January 2011. In 3 years they have met on just two occasions for a total of 25 days (21/01/11 to 01/02/11 in UK & 01/10/013 to 15/10/13 in Nigeria). They have never resided together as a family unit. Mr. Nwoke has never met Ms. Ford's minor children.

With regard to financial support, Ms. Ford has provided two Money gram transfer forms. The first is dated 22/01/2014 for an amount of €31 to Mr. David Nwoke. The second is for €158 to 'Ithoan'. A note on the form states this transfer was sent to "David's sister as his passport was in the visa office". It is noted that these forms do not contain any transfer stamps to demonstrate a transfer took place. Nonetheless, even if these forms are both accepted as evidence of transfers to Mr. Nwoke, they do not demonstrate regular financial support from Ms. Ford or that Mr. Nwoke is financially dependent upon Ms. Ford. As outlined in the Policy Document 'dependency' for the purpose of immigration must be of such a degree as to render independent living at a subsistence level by the family member in his/her home country impossible if that financial and social support were not maintained. Financial support must be not just welcomed but must be essential for the on-going support and subsistence. Dependency must be pre-existing and sustained prior to the making of the visa application.

Taking into account the circumstances of the family as outlined above, it is noted the family have never lived together as a family unit. Mr. Nwoke has met with Ms. Ford on just two occasions. There is no evidence of regular financial support from the reference to the applicant or from the applicant to the reference. It is further noted the applicant entered into marriage with Ms. Ford at a time when the applicant did not have any entitlement nor could not have had any expectation of any entitlement to enter into and reside in the State with Ms. Ford. Both the applicant and his spouse would reasonable have been aware of this at the time that they entered into the marriage.

Having considered all of the factors above it is submitted that there is no breach of Article 8 of the European Convention of Human Rights. The same principles apply in respect of Article 41 of the Irish Constitution.

Economic well being of the state

As stated in the policy document (Policy Document on Non-EEA Family Reunification, Irish Naturalisation and Immigration Service, Department of Justice and Equality, December 2013, available at: http://www.justice.ie/en/JELR/Pages/PB13000447: "An Irish citizen, in order to sponsor an immediate family member, must not have been totally or predominantly reliant on benefits from the Irish State for a continuious period in excess of 2 years immediately prior to the application and must over the three year period prior to applicant have earned a cumulative gross income over and above any State benefits of not less than €40k".

Ms. Ford's 2013 P60 demonstrates earnings of €6643. As she had not provided her P60s forms for 2011 or 2012 as requested, it is not possible to establish her total earning for the three year period prior to the visa application. As per payslips submitted, Ms. Ford currently earns €169.54 per week. Her income is supplemented by a lone parent's payment of €247 per week. Ms. Ford states she is applying to amend this to a Family Income Support (FIS) payment as she is now married.

Considering the information provided with the application it is contended that Ms. Ford has failed to demonstrate she has not totally or predominantly reliant on benefits from the Irish State for a continuous period in excess of 2 years immediately prior to the application. She has also failed to demonstrate cumulative gross income of not less than €40,000 in the three year period prior to the application.

Given Ms. Ford's level of documented income, it is asserted she has not demonstrated the ability to provide for another adult without recourse to public monies and services.

Balancing Rights

The application has been examined in accordance with the Policy Document on Non-EEA Family Reunification published by the Minister and which is effective as of 1 Janaury 2014. The Policy Document has been prepared in observance of constitutional and ECHR rights of the parties and society in general.

I have considered the individual family circumstances in this case, and the rights arising. It is noted the family have never lived together as a family unit. Mr. Nwoke has met with Ms. Ford on just two occasions. There is no evidence of regular financial support from the reference to the applicant or from the applicant to the reference. The applicant entered into marriage with Ms. Ford at a time when he did not have any entitlement nor could not have had any expectation of any entitlement to enter into and reside in the State with Ms. Ford. Both the applicant and his spouse would reasonably have been aware of this at the time that they entered into the marriage.

I have considered if there are any insurmountable obstacles to the couple establishing family life in Nigeria. Although it is acknowledged Ms. Ford is not a Nigerian citizen and would probably experience some difficulties and inconvenience in settling in Nigeria, no information has been submitted to show these obstacles are insurmountable. In this regard it is noted Ms. Ford previously attained a Nigerian Visa and travelled to visit Mr. Nwoke in October 2012. In Omoregie V Norway (Omoregie and Others v. Norway, Appl/ No. 265.07), the court found that while the reference may experience some difficulty in developing life in Nigeria, these obstacles were not unsurmountable. The court further noted "In any event, nothing should prevent the second and third applicants from coming to visit the first applicant for periods in Nigeria."

I have considered the Rights of Ms. Ford's minor Irish citizen children – "S" Ford Ashafa, DOB 15/12/01 & "L" Ford Ashafa, DOB 04/07/08. No evidence has bgeen provided to indicate Mr. Nwoke has ever met with these children, provided financial support to them or if he plays any part in their lives. It is therefore reasonable to conclude that the applicant has not established that his children's best interests would be adversely affected by a decision to refuse his visa application.

According to the European Court of Human Rights, 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. The State has a right to pursue immigration control and to ensure the economic well-being of the country. In this regard, consideration has been given to the impact of granting visas to Mr. Nwoke on the health and welfare systems in the State. Also according to information available to the Minister, Ms. Ford has not demonstrated sufficient funds to support the visa applicant without further access to State benefits. Although each case is considered on its individual merits, having regard to the rights of all those concerned, consideration is also given to how a decision to grant visas to Mr. Nwoke may impact on the decisions in other cases.

Having considered the overall facts of this case, it is submitted that the factors relating to the rights of the State are weightier than those factors relating to the rights of the individual family. In weighing the rights of Mr. Nwoke and Ms. Ford against these rights of the State, it is submitted that a decision to refuse the visa applications in respect of the applicants is not disproportionate as the State has the right to uphold the integrity of the State and to control the entry, presence and exit of foreign nationals, subject to international agreements and to ensure the economic well being of the State.

This therefore exists as a substantial reason, associate with the common good which requires the refusal of visa applications in respect of Mr. David Nwoke.

V06

Visa Office

Embassy of Ireland

Abuja, Nigeria

11/04/2014

15. Mssrs. Trayers & Company, solicitors, requested an appeal against the decision to refuse the second applicant's visa to join the first applicant in the State. Enclosed with the solicitors letter was a personal letter from the first applicant: -

"Dear Sirs,

We are instructed to appeal your decision of the 11th April, 2014, refusing Mr. Nwoke a visa to join his Irish citizen spouse (Alison Ford) in the State. We note that the decision sets out the following reasons for refusal:

1. FM: - No automatic right for non-EEA nationals who are (extended) family members of Irish Citizens to migrate on a long-term basis to Ireland.

2. ID: - Insufficient Documentation – No official marriage certificate and no evidence that reference unmarried

3. PF: - the granting of the visa may result in a cost to public funds;

4. PR: - the granting of the visa may result in a cost to public resources;

1. FM: - No automatic right for non-EEA nationals who are (extended) family members of Irish Citizens to migrate on a long-term basis to Ireland.

The applicant and reference are married and as such cannot be described as extended family members. The reference has the care and custody of her 2 minor children. The visa decision maker has erred in fact and in law in concluding that there are no insurmountable obstacles to the reference relocating to Nigeria. It is submitted that it is unfeasible for Ms. Ford to relocate her minor children who are in full time education here or to abandon her children and move on her own to Nigeria.

It is submitted that the matter ought to be considered having regard to the reference's right to have her family life considered by reference to Article 8 of the European Convention on Human Rights, and the principle of proportionality.

Rights under Article 8 of the European Convention on Human Rights (ECHR):

1. Everyone has the right to respect for his private and family life, his home and correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as 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 and morals, or for the protection of the rights and freedoms of others.

In AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801, the Court of Appeal of England and Wales found that while the threshold for Article 8 to be engaged requires the interference with the applicant's right to either a private life or a family life to be real, it is not otherwise an especially high threshold.

It is respectfully submitted that the reference is an Irish citizen, and that she is therefore a long term residence of a European Union Member State, and the effect of denying her husband a permission to reside in Ireland, would require her to leave the EU in order to maintain her family life. This is something that it is not possible for her to do. She is the mother of two Irish Citizen Children who are in full-time education. It is arguable therefore that a refusal to permit the reference's husband to join her in Ireland is in breach of the principles laid down in the Zambrano judgment (in so far as this judgment's principles are not confined to citizen children but extend to residents of EU Member States) in so far as it would preclude the reference from enjoying family unity in the EU, and therefore has the potential effect of depriving the reference of the genuine enjoyment of the substance of her rights attaching to her status as a long term resident of an European Member State.

While it is acknowledged that some consideration has been given to the Reference's Article 8 Rights and rights under the Constitution, appropriate consideration has not been given to the fact that the Reference cannot leave her minor children in Ireland to live in Nigeria. Ireland is not a residence of choice but a residence of necessity.

2. ID: - Insufficient Documentation – No official marriage certificate and no evidence that reference unmarried.

Please find enclosed original marriage documentation including original certificate together with an affidavit from Ms. Ford that she has never previously been married. We would be obliged for the return of original documentation to our office in due course.

3. PF: - the granting of the visa may result in a cost to public funds;

4. PR: - the granting of the visa may result in a cost to public resources;

The Applicant and Reference have confirmed that the Applicant is satisfied to accept Stamp 3 residency in this State as a dependent of the Reference on stamp 3 conditions. If granted, he could not be a burden on the State or a cost to public funds as he would not be entitled to same.

We wish to point out that the reference is a worker in this State. Although she is presently in receipt of FIS, she accepts that he husband will have no entitlements should he be granted Stamp 3. Please find enclosed copy payslips and tax documentations from reference.

The reference has sent money to her husband in Nigeria. This has been done through moneygram and western union and sent either directly to Mr. Awoke or through his friends (as he was not in possession of his national Passport). Personal letters in this regard are enclosed herewith together with copy moneygram transfers.

Please note that although the parties have been in a relationship since January 2011, it has not been possible for the couple to have resided as a family unit. They have been in constant communication by way of telephone and we enclose herewith Ms. Ford's telephone bills as evidence of same. Mr. Nwoke has met Ms. Ford's daughter in the UK and a photograph of same is enclosed herewith. Further personal photographs are enclosed and we could be grateful for the return of same in due course.

Please let us know if you require any further documentation or information in order to determine this matter to the favour of our client or, if there are any other outstanding matters of concern, we would obliged if you would advise us in advance of a decision being reached.

Thank you for your assistance.

Yours faithfully,

_____

Trayers & Company

Solicitors

20th May 2014

To Whom It May Concern

My name is Alison Ford and I'm and Irish Citizen and I'm appealing the decision to deny my husband David a visa to join me here in Ireland. As previously stated, I met David through a mutual friend of ours and after talking for a while, I realize I'm in love with him. After 3 months of communicating, he flew over to the UK where I met him along with a close friend of mine who is originally from the UK and living here in Ireland along with my daughter Carly Ford who at the time was 18 and grown up enough to know if I was being taken for a ride or not.

I can bore you with loads of stories about how we met and all but what I want you to understand is I'm not a naïve little girl who fell in love and being taken for a ride. Firstly, let me tell you a bit of myself. I'm 41 years old and with 3 kids of which one 21 years old which I had to an Irish man, The rest of my kids I had to a Nigerian man who took me for a ride. I was with him for 14 years and I broke up with him after finding out he was cheating on me.

First off, my kids know my husband a lot because they speak on the phone on a daily basis and also use skype as well. My younger daughter asked everyday when Daddy David coming and get upset about it. She calls him Chief and he calls her Double Chief. My young boy needs a role model in his as their dad is unable to such. He needs a man to encourage him on his school as well as his football and boxing. Denying me as well as my children the chance of happiness would be tantamount to saying our lives and feelings as of no concern to you which as of now; I'm beginning to feel is what you are doing to me.

Part of the reason I fell in love with him is the fact that he was the only man who has been honest with me. Him travelling to the UK proved a lot to me. I have never had a man spend his money and time to travel across a continent to be with me for 02 weeks. This was one of the best times of life.

Let me counter a few points you made in the refusal letter. You said the forms were incomplete or not signed. This could have easily been sorted out by me. Sometimes, I have to wait for my husband to send me documents for me to send to you. And also the fact that you said some documents wasn't translated. I'm sure Nigeria is an English speaking country and as such does not need to translate the English language.

On the issue of finance, I know for a fact that I make enough to take care of myself and my family. I have been doing this for more than 21 years and it hasn't been a problem. My husband is not coming here to be a burden on the state. He is a hardworking man. He may not be employed at the moment but I known for a fact that when he arrives in Ireland, he would seek gainful employment. My question now would be: would I not be entitled to be happy because of finance? I have paid my dues to the country and I have never been financially unstable. I think I am entitled to my own happiness with my husband and my families. It's the least I ask for as an Irish Citizen.

Your letter also states that there were no reference in Ireland and no clear links to reference has been shown. Now let me give you a reference. I am married to him I think that's reference enough. And regarding letter of invitation, I did send it to you so I don't see how it could be expired. And I also sent photographs of proof that we were together in the UK. I didn't realize there is a time limit of courtship before a relationship can be deemed legit. I like to think love conquers all. I'm a smart level headed woman that would not just marry somebody on a whim if I didn't think we would be together happily.

I cannot relocate to Nigeria at this time because my kids are still in school. My son Sean is well into sports. He is a gift footballer and a member of the Home Farm football club. He has a lot of potential to progress further to a professional lelve and it would not be fair to uproot him from his current home in a new country and culture. He is also a boxer who has represented Ireland in the UK.

I also have daughter in her first year in primary school and I cannot just take her out of school away from everybody she knows especially families like my parents and her Aunts and Uncles. Also their father would not allow me to take them from the lives they know and understand. He would always be in their lives and he understands that my happiness means the world to me and the kids and he's in support of me getting married as well.

Also I have been to Nigeria and I understand that at this time, it is not a very stable country to be in with the current terrorist attacks and kidnappings going on now especially girls getting kidnapped over their rights to education. I don't think bringing up kids who would be mixed race in Nigeria would be a good idea mainly because they might get kidnapped.

My husband has numerous friends here in Ireland and he would definitely have no problems adapting to the culture and traditions of Ireland. Also that would be helpful for him in finding employment.

I would just like my husband to join me and my family who are so looking forward to his arrival. I want to live happily with him and he would not seek anything of f the state. So please just take into my consideration my happiness and my entitlement to be happy.

I hope this appeal comes through successfully for if not, this is an issue I am ready to give my last drop of blood to. I deserve to be happy and I am going to fight tooth and nail to make it a reality.

During a meeting with my lawyer recently, he informed me that a new directive was put in place from the beginning of the year on family renunification and a certain amount needs to be earned to be able to bring a spouse into the country. I was in shock considering the fact that people from other EU countries do not have to go through this process. That to me is reversed racism and it has no place in New Ireland. I have informed my lawyers that I'm willing to challenge this directive in the highest court known to man. I believe this directive to infringe on my personal human rights regarding my life to family. I don't believe any human being should be denied their right to a happy family life because of how much they earn. No matter the earnings of anyone, we all make this country great in our little contribution. I believe if the lower earner stop contributing to the country, the country would be unsustainable.

I leave you with good tidings.

Yours sincerely,

Alison Ford

16. On 17th June, 2014, the Visa Section of the Minister in Abjuga, Nigeria, wrote to the second applicant indicating that his appeal was not successful in these terms:

> *"Dear Sir,*
>
> *I wish to inform you that your appeal against the refusal of your visa application has been examined by an Appeals Officer from the Irish Naturalisation and Immigration Service.*
>
> *I regret to inform you that this appeal has not been successful.*
>
> *Your application has been re-examined by the Appeals Officer and having taken all documentation and information provided into consideration, it was decided that the original decision to refuse the visa should be upheld.*
>
> *The reasons for refusal are as follows:*
>
> *PF:- The granting of the visa may result in a cost to public funds;*
>
> *PR:- The granting of the visa may result in a cost to public resources;*
>
> *The application was assessed in light of the Policy Document on Family Reunification and in respect of rights arising under the European Convention on Human Rights and Fundamental Freedoms and under the Constitution. That assessment was set out in an addendum the letter dated 11th April, 2014 entitled 'Consideration under Article 8 of the European Convention on Human Rights (ECHR)' (hereinafter the 'Article 8 consideration').*
>
> *I note that by letter dated 29th May, 2014 Trayers & Co. Solicitors refer to the case AG(Eritrea) v. Secretary of State for the Home Department [2007] EWCA Civ 801 to argued that the threshold for the engagement of Article 8 rights 'is not otherwise an especially high threshold'. In the circumstances of this particular case I am satisfied that the decision of 11th April, 2014 recognises this and that the Article 8 consideration goes on to consider whether or not such an interference could be justified by reference to second paragraph of Article 8. In addition, I also am satisfied that the visa officer took into account the best interests of the minor child, as made known to the visa officer.*
>
> *I note that the decision of the 11th April, 2014 refers to their being no 'insurmountable obstacles' to Ms. Ford relocating to Nigeria in order to establish family life elsewhere [1]. I would set aside the Article 8 Consideration notified to the applicant on 11th April, 2014 to the extent that it relies upon an 'insurmountable obstacles' test.*
>
> *To be clear, I do not find that the refusal of your visa application may be justified on the ground that Ms. Ford may relocate to Nigeria. It is important to note that refusing this application in no way impairs the rights of Ms. Ford or Ms. Ford's two minor Irish children in the genuine enjoyment of the substance of their rights attaching to their status as citizen of the European Union. Ms Ford and both children currently live in the State. Refusing your visa application will not obligate them to leave the State. [2]*
>
> *However, it is clear that a reason based on an 'insurmountable obstacles' test was not the only reason the visa officer concluded that a refusal of the visa application was justified in light of Article 8 ECHR and was also in accordance with the Constitution.*
>
> *The Article 8 consideration takes into account the particular circumstances of the family life in existence between Ms. Ford and Mr. Nwoke. The Article 8 consideration refers to the fact that Ms. Ford and Mr. Nwoke had never lived together; that Mr. Nwoke has not established that he is dependent on Ms Ford; that at the time when Ms Ford and Mr Nwoke entered into marriage Mr. Nwoke did not have any entitlement nor could he have had any expectation of any entitlement to enter into and reside in the State.*
>
> *In addition, the Article 8 consideration refers to the case of Darren Omoregie v. Norway where the ECtHR considered that:*
>
> *In any event, nothing should prevent the second and third applicants from coming to visit the first applicant for periods in Nigeria [3]*
>
> *In this regard, it is apparent that the fact that Ms. Ford has visited Mr. Nwoke in the past was in the mind of the visa officer (as noted in the Article 8 consideration: 'Ms. Ford previously attained a Nigerian Visa and travelled to visit Mr Nwoke in October 2013'). The Appeals Officer is satisfied that it is the case Ms Ford has visited Mr Nwoke in the past and that it has not been established, either on the basis of the information submitted with the original application or on appeal that this would not be possible in the future. As such, the Appeals Officer is satisfied that Ms Ford will, in the future, be able to visit Mr Nwoke for periods in Nigeria.*
>
> *In the circumstances of this case the Appeals Officer notes that it is in the interest of the common good to uphold the aim of the State to maintain control of its own borders and operate a regulated system for the control, processing and monitoring of non-national persons in the State. It is consistent with the Minister's obligations to impose those controls and is in conformity with all domestic and international legal obligations and in pursuit of the legitimate aims specific to the facts of this visa application, namely:*
>
> *• the interests of economic well-being of the country; and*
>
> *• for the protection of the rights and freedoms of others.*
>
> *Taking into account the reasons as set out above (including the particular circumstances of family life in this case and the fact that Ms Ford has in the past visited Nigeria, and may do so again in the future) and weighing those against the rights of the State (as set out in the Article 8 consideration) the Appeals Officer is satisfied that the Article 8 consideration was correct in finding that the interference is justified and that a refusal of this application would not*

constitute a violation of Article 8 ECHR.

I note that Trayers & Co. Solicitors submit that:

The Applicant and Reference have confirmed that the Applicant is satisfied to accept Stamp 3 residency in this State as a dependent on the Reference on stamp 3 conditions. If granted, he could not be burden on the State or a cost to public funds as he would not be entitled to same.

I have reviewed the information concerning the income and financial resources available to Ms Ford and her children in Ireland. I am have a very reasonable concern that without State support Mr Nwoke's presence in the State would likely place pressure on Ms Ford's family's financial resources and could respect therefore impact on Ms Ford's ability to meet the financial / material needs of her children. In this respect it is a relevant consideration that Ms Ford's family contains two minor children. The Appeals Officer is not satisfied that such a situation, if it were to arise, would be in the best interests of those children. In any case, regardless of Mr Nwoke's status were such a situation to arise it is t he case that, on the basis that the needs of the minor child were no longer being met, a cost to public funds and public resources could arise (if not directly because of Mr Nwoke's presence, then indirectly). In addition, not all State benefits require the habitual residence conditions be met, for example the Exceptional Needs Payment and Urgent Needs Payment, which are payments under the Supplementary Welfare Allowance Scheme [4].

Having re-examined your application and having taken all documentation and information provided into consideration, I have decided that the original decision to refuse the visa should be upheld for the following refusal reasons:

PF:- The granting of the visa may result in a cost to public funds;

PR: - The granting of the visa may result in a cost to public resources;

The Article 8 Consideration notified to the applicant on 11th April, 2014 has been set aside only to the extent that it relies upon an 'insurmountable obstacles' test. The remainder if the reasoning and the conclusion of the Article 8 consideration, in so far that it finds that a refusal of this application is justified in light of Article 8 ECHR and is also in accordance with the Constitution, has been upheld.

Only one appeal per application is permitted.

Yours sincerely,

_____

VO9

Visa Section

Abuja

17 June 2014"

Submissions on behalf of the applicants

17. Colm O'Dwyer S.C., with Ian Whelan B.L., appeared on behalf of the applicants and made the following points:

a. The decision of the respondent essentially dictates that the marriage may exist from afar and on the sole basis of the first named applicant visiting her husband in Nigeria. The respondent accepts that the first named applicant will be unable to live in Nigeria but refuses to allow the second named applicant to come to Ireland and live with his spouse.

b. Counsel cited the decision of Hogan J., in *X.A. (An infant suing by her mother and next friend, J.P.A.), J.P.A.* and *S.O.A. v Minister for Justice Equality & Law Reform, Ireland and The Attorney General* [2011] IEHC 397. This case involved a decision by the Minister to refuse to revoke a deportation order which had been made in relation to an architectural student who had arrived in Ireland in March, 2009 and made an application for asylum. The application for asylum was rejected and the decision was upheld by the Refugee Appeals Tribunal. An application for subsidiary protection was also refused and the deportation order was originally made in October, 2010. J.P.A is an Irish citizen who has resided most of her life in Ireland. She has a daughter who at the time of the judgment was aged about three years. She was the result of another relationship. The Minister was also made aware that Ms. A was pregnant and that Mr. A. was the father of the child. Mr. A. had failed to report to the Garda National Immigration Bureau and was deported on 7th February 2011. A number of issues were examined by Hogan J., including the right of the unborn child, and then the Court dealt with the rights of Ms. A under Article 41.

c. In this regard, Hogan J. said:-

"There can be no suggestion that the family rights protected by Article 41 are in some way absolute. Yet, at the same time, the rights thereby conferred cannot be regarded as being purely theoretical, the essence and substance of which must be respected at all times."

Hogan J. then quoted the decision of Cooke J. in *Ugbelese* [2010] 4 I.R. 233, 241:-

"In other words, the personal and Convention rights of the child and of the family are not absolute but may be required to yield, or be subordinated to, the public interest of the State in the common good in controlling its frontiers where, after due investigation and consideration, a reasonable and proportionate decision is made that there is substantial reason for interfering with those rights."

Hogan J. then proceeded to consider the relevant factors which must be weighed in the balance to ensure that any such decision is "reasonable and proportionate":-

i. It was said that Mr. A.'s links with Ireland were weak. He was born in Nigeria and lived there for all of his life until he came to Ireland in early 2009 in order to seek asylum. When his asylum application was rejected he could have had no expectation that he would be permitted to remain here. Measured against that, however, is the fact that he is married to an Irish citizen and he is also the father of an Irish citizen.

ii. He also pointed out that Mr. A. got married in September 2010 in circumstances where his immigration status was precarious. This is a factor which he and his wife must have been aware

iii. His wife's links with Nigeria were particularly weak.

iv. He also made the point that a deportation order is in principle permanent in its effects, save only that it may be revoked by the Minister in the exercise of her discretion under s. 3 (11) of the Immigration Act, 1999, and finally he pointed out that the Minister's decision must always respect the essence and substance of the right of the married couple under Article 41.

v. He concluded:-

"A decision which, in practice, compels the couple to life more or less permanently apart is, by definition, a very significant interference by the State with a core principle valued and protected by Article 41. Such a decision is one which, quite obviously, requires compelling justification…

… While the necessity to uphold the common good and the integrity of the asylum system may well supply that justification, it is nonetheless imperative that the respective rights of the applicants and the interests of the State must be fairly weighed by the Minister."

d. He applied these principles to the facts of the case, and said:-

"All of this is to underscore the reality of what is currently proposed, namely, that the A. family will be forcibly separated, more or less permanently. As this very application exemplifies, it is true, of course, that Mr. A. can apply to have the deportation order revoked under s. 3(11) of the 1999 Act. Nevertheless, as things stand, it is not clear to me how this couple could ever realistically have any real inter-personal contact or how their marriage could actually survive what may amount to a permanent separation. It is sobering to reflect that the couple's daughter - who was admittedly born several months after the Minister's decision – might never actually get to see her father during her childhood. Again, this is somewhat different from the decision of the European Court of Human Rights in Omoregie, where the deportation order in question lasted a maximum of five years."

e. He then went on to quote from Clark J. in *U. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 371, which he described as a case whose facts were not dissimilar to the present one. Here Clark J. observed:-

"The choice the wife now faces is whether to remain in Ireland and raise her son here without her husband, or relocate to Nigeria with him and raise their son together there. This is a choice faced by many couples who come from different countries or even different parts of large countries. Married inter-racial or inter-religious couples often face choices which involve compromise and sacrifices in relation to their choice of residence, standards or beliefs. Adults who marry must make these decisions themselves without seeking the answers in constitutional rights which are neither guarantees nor immunities but must be seen in the context of social order and the common good. The Court is satisfied that the applicants have not established that the Minister had insufficient regard to the wife's constitutional rights when deciding not to revoke the deportation order made against her husband."

f. Hogan J. took a different view in *X.A.* and said:-

"it is a pure fiction to say that Ms. A. has a choice worth speaking of. … Yet the matter here is so fundamental and goes to the heart of our system of constitutional protection that, absent a binding Supreme Court decision on the point, I deeply regret that I cannot regard myself as bound by the views expressed by Clark J. in U."

g. He continued that:

"The essential point here is that the Constitution protects the fundamentals of marriage and it insists that the State respects the essence of that relationship. It is not indifferent to the plight of those who have been forcibly separated by State action and, adapting freely the language of a famous Bach chorale, it sees to it that these rights are available to us for our protection in our hours of deepest need. That is the very reason why these rights are deemed to be fundamental and it behoves the judicial branch of government to ensure that these constitutional rights are taken seriously so that, in the words of O'Byrne J. in Buckley v. The Attorney General [1950] IR 67, 81, they are given "life and reality".

Hogan J. quashed the decision of the Minister.

h. Counsel on behalf of the applicants accepted that this involved a deportation order but submitted that the respondent had not assessed the application before her with due regard to the constitutional rights involved, and has not given appropriate weight to the constitutional rights of the applicants. He stated that the decision challenged is the one which upholds the findings of the first instance decision on having regard to the Article 8 rights on the family rights involved but sets aside the "insurmountable obstacles" test employed therein. He suggested that this was prima facie irrational as the entirety of the decision at first instance is predicated on there being no insurmountable obstacles to the first named applicant living in Nigeria. He submitted that the severance of this finding required the undertaking of a new proportionality test, not simply an affirmation of the findings reached on foot of the old one where such a fundamental severance has been deemed necessary. He further cited a decision of Hogan J., *E.A. and P.A (an infant suing by his father and next friend E.A.) v. Minister for Justice and Equality, Ireland and The Attorney General* [2012] IEHC 371. The facts of this case related to an asylum application by a man who had initially stated that he was from Sudan (but was actually from Nigeria), and when this was found to be untrue, he said that his father was from Sudan but in fact the father was also a Nigerian national. An application for subsidiary protection was rejected. He was deported from the State on 28th April 2010 but he re-entered on the 5th December, 2010. Hogan J. identified that one consideration was that Mr. A. had engaged in a manifest deception of the Minister and his officials and his outrageous conduct might have mainly disentitled him to any prospective relief but Hogan J. said that the Court must shut its eyes to his illegal and deceitful conduct in the higher interest of protecting the welfare and interests of the

child. He said:-

> *"While the preservation of the integrity of the asylum system and, indeed, the integrity of the judicial process are of vital importance, in matters of this kind the court must, where possible, give primacy to the constitutional right of the child to the care and company of his parents in the manner envisaged by Article 42.1 of the Constitution."*

He then went on to consider the arguments based on *Ruiz-Zambrano* [2011] E.C.R. I-000. This involved children who were of Belgian origin. The case was taken against Belgium. He then dealt with the constitutional rights of the child. Having reviewed the issues in relation to the child, Hogan J. referred his own judgment in *I. v. Minister for Justice Equality & Law Reform* [2011] IEHC 66 and to X.A. He stated:-

> *"Turning to the substantive issue, it is clear that the constitutional rights of the family are not absolute, for all the reasons set out by the Supreme Court in AO and DL v. Minister for Justice [2003] 1 I.R. 1. Yet it is also clear that the result in that case turned on the fact that the parents in that case had indicated that they would take the young dependent children with them in the event that the parents were deported or, at least, that the Minister had assumed that they would do so…*
>
> *… Yet it seems equally plain that AO and DL does not directly concern a case of the present kind where, of necessity, the effect of the deportation of his father to Nigeria would be to deprive an Irish citizen child of the opportunity of any real personal contact with his father, not least in circumstances where his mother has been given refugee status in this State, so that it would be unrealistic to expect her to travel to Nigeria."*

i. He quoted then from a decision of Clark J, in *O. S. And T. S. (A minor, suing by his mother and next friend O S) v. Minister for Justice, Equality and Law Reform* [2011] 10 JIC 1303].] where Clark J. quashed the Minister's decision. In that case, the applicants were also Nigerian who had married in the state in early 2003. The wife had received status by virtue of the fact that she had given birth to an Irish citizen child. The husband, who had entered the state illegally and had unsuccessfully applied for asylum was suddenly deported a few weeks after the marriage even though the wife was pregnant again. In 2009 the couple applied to have the deportation order revoked. The Minister had refused to revoke the deportation order and Clark J. quashed the Minister's decision, saying:-

> *"The Court is driven to the conclusion that the identification of the constitutional rights involved and the significantly changed circumstances was not followed by a true examination of those circumstances nor did that examination accord with the requirements restated by Denham J. (as she then was,) in Oguekwe v. the Minister for Justice [2006] IESC 25 where she outlined the obligation to " weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision." A fair and just consideration would have included an assessment of the length of time the family had spent in the state and whether the children were at school here. While those facts are not determinative of rights of non-national parents, they are facts to be considered when balancing the constitutional rights of a citizen child with those of the state in order to ensure harmonious interpretation of such rights and to arrive at a proportionate decision. In the language of the Strasbourg Court, a fair balance has to be struck between the competing interests of the individual and of the community as a whole."*
>
> Again this involved the issue of a citizen child and a deportation order.

j. Finally counsel for the applicant referred to the decision of MacEochaidh J. in *Gorry & Anor. v. Minister for Justice & Equality* [2014] IEHC 29, a decision given on the 30th January, 2014. The facts of this case were that the first-named applicant, a Nigerian woman, had been refused asylum in Ireland and in respect of whom a deportation order was made in June 2005. In 2006 she met the second-named applicant who was an Irish citizen and they decided to marry. The applicants said in that case that they received advice from the Immigration Office in Dublin that they should marry in Nigeria and then apply for a visa for the second-named applicant to enter the State. The applicants went to Nigeria on the 15th September, 2009 and were married on the 19th September, 2009. The first-named applicant applied for a visa to enter the State and applied for a revocation of the deportation order in December, 2009. This was refused on the 13th February, 2010. 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 the 20th March, and on the 23rd March the second-named applicant suffered a heart attack. The second-named applicant contacted his local T.D. to seek help and advice. The T.D. contacted the respondent's office, and it was indicated that it was open to the first-named Applicant to make a further application for the revocation of the deportation based on the new medical facts. In that application it was stated that the second-named Applicant could not come and live in Nigeria because of his health condition. However the Irish Naturalisation and Immigration Services informed the first-named applicant that the Minister had refused to revoke the deportation order.

k. MacEochaidh J. then quoted from Article 8 on the European Convention on Human Rights and reviewed the insurmountable obstacles which had been part of the decision. He then reviewed the authorities and stated:-

> *"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?"*

He then cited Article 41 of the Constitution, and said:-

> *"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.)."*

He also quoted from *Cirpaci v. Minister for Justice, Equality and Law Reform* [2005] IESC 42, a decision of the Supreme Court where the decision was given by Fennelly J. Again this involved a deportation order being 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. stated:-

> *"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."*

18. MacEochaidh J. stated that it was 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 its citizens. It is also clear from the jurisprudence that marriage between a national and a non national may engage the rights of residence in the State which could only be denied for contravening proper purpose and he quoted from a decision previously of Hogan J. in *S(P) and E(B) v Minister for Justice and Equality.*

19. MacEochaidh J. then referred to *Pok Sun Shum v Ireland* [1986] ILRM 593 which he described as "a case which stood the test of time". The father of a Chinese family was required to leave the State and his wife sought a declaration that she was "normally entitled to the society of [her husband] within the State".

20. MacEochaidh J. then stated:

> *"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."*

21. MacEochaidh J. also stated:

> *"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."*

He continued that:-

> *"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."*

In those circumstances he made an order quashing the decision of the respondent to affirm the deportation order made against the first named applicant.

Submissions by counsel for the respondent

22. Counsel for the respondent produced a booklet of authorities which included the cases of *Pok Sun Shum v Ireland* [1986] ILRM 593 (Costello J.) and *Osheku v Ireland* 1986 IR 733 (Gannon J.)

23. Counsel for the respondent Ms. Helen Callanan S.C., submitted that it was apparent from the applicants written legal submissions that the principal complaint of the applicants which can be said to apply to the ground advanced in the statement of grounds is that "the respondent does not assess the application before her with due regard to the constitutional rights involved and the laws and has not given appropriate weight to the rights of the applicants." Counsel submitted that this contention is fundamentally flawed while the primary document upon which considerations under Article 8 of the ECHR and Article 41 of the Constitution were based, was identified at the commencement of both the first instance decisions and subsequently the appeal decision as being the primary basis upon which a consideration in respect of both ECHR and constitutional rights were assessed. She quoted the decision of the Supreme Court in *Meadows v The Minister for Justice Equality and Law Reform* [2010] IESC 3 where Murray C.J., stated that:

> *"an administrative decision affecting the rights and obligations of persons should at least disclose the essential rational on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context. Unless that is so then the constitutional right to access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective."*

24. Counsel for the respondent quoted Article 41 and said that there was no express statement in Article 41 of the Constitution to the effect that married persons have a prima facie right to reside together (whether in the State or otherwise) and a specific right to residency sought to be relied upon stems from the jurisprudence of the Superior Courts. Counsel quoted Fennelly J. in *Cirpaci* and noted that the decision involved a challenge to a deportation order but it was submitted the same principles apply to a consideration of the question of whether the interference by the State with any Article 41 family life rights of the non national and an Irish citizen are proportionate to the aims sought to be achieved. She also pointed to the notice of appeal from the second named applicant where the rights under Article 8 of the European Convention on Human Rights were underlined and that there was no suggestion that Article 41 had greater rights.

25. Counsel also submitted that the second named applicant has confirmed that he is satisfied to accept a stamp 3 residency in the State as a dependant of the first named applicant. A stamp 3 is a permission for the person to remain in Ireland on condition that the holder does not enter employment, does not engage in any business or profession and does not remain later than a specified date.

Responses by counsel for the applicant
26. Counsel for the applicant indicated that the second applicant was a qualified welder although this was not in any of the documentation which had been supplied to the Minister. The application at first instance had been refused on two grounds:

1. The insurmountable obstacle,

2. That the granting of the visa may result in a cost to public funds and a cost to public resources.

The decision on appeal held that the granting of the visa may result in a cost to public funds and a cost to public resources and this is the sole reason on which the application was refused for the applicant. Counsel argued that the decision of the appeals officer was not a proper and proportionate exercise of the balancing that must be carried out by the respondent. Counsel argued that the facts of the proceedings were considerably weaker than the circumstances of the applicants in the *Gorry* decision in that the applicant parties did not live together for what might be described as an "appreciable time" either before or after the marriage. The evidence before the Court is that the married couple had not lived together at all and she submitted that the circumstances of the applicants' were at the first point in Fennelly J.'s decision in Cirpaci rather than the latter end.

Discussion
27. Unlike the system in United Kingdom of statutory instruments and immigration rules, the Irish government's approach is one of policy but without legislation. This requires the courts to intervene and interpret the decision of the legislature.

28. It is clear that the policy document on Non EEA Family Reunification was just a policy document. It was accepted by the respondent that to refuse a Join Spouse (Non EEA – Irish National) visa application in respect of the second applicant will engage the right to respect for family life under Article 8(1) of the ECHR. It further submits that in refusing the Join Spouse (Non EEA – Irish National) Visa Applications in pursuance of lawful immigration control did not constitute a breach of the right to respect for his private life under Article 8(1) of the ECHR. Under the heading "Family Life" it was submitted that Article 8 does not oblige the Minister to respect the choice of residence of a married couple. Some account must also be taken of the circumstances of any family separation and the actual relationship between the parties. The visa officer makes the relevant point that a family member who has been long separated from a person resident in Ireland or in this family members who have never lived together may have a weaker claim on reunification than one where the parties have until recently been a close family unit. The officer then indicates that the applicants state that they have been involved in a relationship since January, 2011. In three years they have met on just two occasions for a total of 25 days. They have never resided together as a family unit and the second applicant has never met the first named applicant's minor children.

29. With regard to financial support, the visa officer stated that the first applicant has provided two money transfers, one for €31 to second applicant and the second is for €158. The second transfer was sent to the second applicant's sister as his passport was in the visa office. The officer says that even if these forms are both accepted as evidence of transfers they do not demonstrate regular financial support from the first applicant or that the second applicant is financial dependent upon the first applicant.

30. The officer also stated that it was further noted that the second applicant entered marriage with the first applicant at a time when the second applicant did not have any entitlement nor could have had any expectation of any entitlement to enter into and reside in the State with the first applicant. Both applicants would reasonably have been aware of this at the time they entered into the marriage and the officer said having considered all of the factors above it is submitted there is no breach of Article 8 of the European Convention on Human Rights and says the same principles apply in respect of Article 41 of the Constitution.

31. Economic well being of the State

The visa officer quotes from the policy document:

> *"An Irish citizen in order to sponsor an immediate family member, must not have been totally or predominantly reliant on benefits from the Irish State for a continuous period in excess of two years immediately prior to the application and must over the three year period prior to this application have earned a cumulative gross income over and above any State benefits of not less than €40,000.00."*

32. The officer goes on to note that the first applicant's 2013 P60 demonstrates earnings of €6643.00. As she has not furnished her P60 forms for 2011 and 2012 it has not been possible to establish her total earnings for the three year period prior to her visa application. As per payslips submitted the first named applicant currently earns €169.54 per week, her income is supplemented by Loan Parents Payment of €247 per week. The first named applicant states that she is applying to amend this to a Family Income Supplement Payment as she is now married. The officer contends that the first applicant had failed to demonstrate that she is not totally or predominantly reliant on benefits from the Irish State for a continuous period in excess of two years immediately prior to the application. It also fails to demonstrate the cumulative gross income of not less than €40,000 in the three year period prior to the application. Given the first named applicant's level of documented income it is asserted that she has not demonstrated the ability to provide for another adult without recourse to public monies and services.

33. Balancing rights

The visa officer at first instance indicated that the application has been examined in accordance with the policy document which was prepared in observance of constitutional and ECHR Rights of the parties and society in general. The officer noted;

1. The family have never lived together as a family unit.

2. The first applicant had met with the second applicant on two occasions.

3. There is no evidence of regular financial support from the first applicant to the second applicant or from the second applicant to the first applicant.

4. The second applicant entered into marriage with first applicant at a time when he did not have any entitlement or could have any expectation of any entitlement to enter into and reside in the State with the first applicant.

5. Both the second applicant and his spouse would reasonably have been aware of this at the time they entered into the marriage.

34. He then dealt with the issue of insurmountable obstacles to the couple establishing family life in Nigeria. He quoted from *Omoregie v Norway,* Appl. No. 265/07, Council of Europe: European Court of Human Rights, 31 July 2008, where the European Court of Justice found that while the reference may experience some difficulty in developing life in Nigeria these obstacles were not insurmountable.

35. He also considers the rights of the first applicant's minor Irish citizen children and states that no evidence has been provided to indicate that the second applicant had ever met with these children or provided financial support to them or if he plays any part in their lives. It is therefore reasonable to conclude that "the applicant has not established that his children's best interests would be adversely affected by a decision to refuse to grant his visa application." This appears to make no sense unless the visa officer is referring to the first applicant.

36. In this regard the notice of appeal and the letter from the first applicant accompanying this letter addresses the issues of the children. Clearly as well as telephone calls there were other social media outlets used by the first applicant and her children (as asserted by her) including by way of Skype. The visual image of the second applicant would be available to be seen and to be engaged with by the applicant's children. It is noted that the issue of modern social media has not been addressed in either of the policy documents referred to by the officer.

37. The officer then quotes from the European Court of Human Rights and says:

> *"that as a matter of well established international law and subject to its Treaty obligations a state has a right to control the entry of non nationals into it's territory. The State has a right to pursue immigration control and to ensure the economic well being of the country. In this regard consideration has being given to the impact of granting visas to the second applicant on the health and welfare systems in the State. Also according to information available to the Minister Ms. Ford has not demonstrated sufficient funds to support the visa application without further access to state benefits. Although each case is considered on its individual merits having regard to the rights of all those concerned consideration is also given to how a decision to grant visas to the second applicant may impact on decisions in other cases.*

38. It appears that the Minister is concerned that if the second applicant is granted a visa or visas that this may impact on other cases. Then the officer says that considering the overall facts of the case, that the factors relating to the rights of the State are weightier than those factors relating to the rights of the individual family. The application for the visa was refused, with a cover letter stating that there is no automatic right for non EEA nationals who are (extended) family members of Irish citizens to migrate on a long term basis to Ireland when the granting of a visa may result in a cost to public funds and granting of the visa may result in a cost to public resources. The cover letter also says that an assessment under Article 8 of the ECHR has been completed and is attached.

39. Thus the visa officer refused the application on three grounds:

> a. Insurmountable obstacles,
>
> b. Granting of a visa may result in cost to public funds,
>
> c. Granting of a visa may result in a cost to public resources.

Notice of appeal

40. The notice of appeal from Messrs. Travers & Company, solicitors emphasises;

> 1. That the applicants are married and as such cannot be described as extended family members.
>
> 2. That the visa decision maker had erred in fact and in law in concluding that there are no insurmountable obstacles to the first applicant relocating to Nigeria.
>
> 3. It is submitted that it was unfeasible for the first applicant to relocate her minor children who are in full time education here or to abandon her children and to move on her own to Nigeria.
>
> 4. It is submitted that the matter ought to be considered having regard to first applicant's right to have her family life considered by reference to Article 8 of the European Convention on Human Rights and the principle of proportionality.
>
> 5. That the first applicant is an Irish citizen and she is therefore a long term resident of a European Union Member State, and the effect of denying her husband a provision to reside in Ireland would require her to leave the EU in order to maintain her family life. This is something that is not possible for her to do.
>
> 6. In relation to the granting of the visa resulting in the cost to public funds and public resources, the solicitors for the applicants confirm that the second applicant is satisfied to accept the stamp three residency in the State as a dependent of the first named applicant on stamp three conditions. It is granted on the condition that he would not be a burden on the State or a cost to public funds as he would not be entitled to same.
>
> 7. The letter also notes that although the parties have been in a relationship since January, 2011 it has not been possible for the couple to reside as a family unit. Also the enclosed were a substantial number of telephone bills as evidence of the constant communication by phone.

41. Attached to the notice of appeal was a letter from the first applicant. She asserts in this letter that she is forty-one year old woman and not a "naïve little girl." She has three children one of whom is twenty-one years old. She asserts that her children know the second applicant as they speak on the phone on a daily basis and also use Skype. She also asserts that her young son needs a role model in his life as his father is unable to be such. She says that on the issue of finance she knows that she has made enough to take care of herself and her family and has being doing this for more than twenty-one years. She says that the second applicant is not coming here to be a burden on the State, that he is a hard working man although he is not employed at the moment. She also says that she is entitled to her own happiness with her husband and her families. She also states that she cannot relocate to Nigeria at this time because her kids are still in school. Her son, "S", is a gifted footballer and a member of Home Farm Football Club and could have the potential to progress further to professional level. He is also a boxer who has represented Ireland in the United Kingdom. She confirms that she has been to Nigeria and says that it is very unstable and mentions that girls have been kidnapped over the right of education. She asked the Minister to take into consideration her happiness and her entitlement to be happy.

42. The decision at first instances of the refusal of the visa application was examined by the appeals officer and notified to the second applicant by letter dated the 17th June, 2014. Again the appeals officer indicates that the application was assessed in light of the policy document and in respect of rights under the European Convention of Human Rights and Fundamental Freedom and under the Constitution.

43. The appeals officer says that he is satisfied that the refusal of the visa application constitutes an interference with a right under Article 8 of the ECHR. He is also satisfied that the original decision recognises this and that the Article 8 consideration goes on to consider whether or not an interference could be justified by reference to the second paragraph of Article 8. He is also satisfied that the visa officer took into account the best interests of the minor children, as made known to the visa officer.

44. The details in relation to the minor children were communicated to the appeals officer by way of a letter attached to the notice of appeal from Messrs. Trayers & Co and the visa officer had not got the benefit of the statement of the first named applicant in which she speaks about her minor children's contact via social media with the second name applicant.

45. The appeals officer said that he did not find that the refusal of the visa application could be justified on the grounds that the first named applicant may relocate to Nigeria and then says that the Article 8 consideration takes into account the particular circumstances of the family life in existence between the applicants. The Article 8 consideration refers to the fact that the applicants have never lived together, that the second applicant had not established that he is dependent on the first applicant and that at the time when the first and second applicant entered into marriage the second applicant did not have any entitlement or nor could he have any expectation of any entitlement to enter and reside in the State. He also refers to the case Omoregie. The appeals officer is satisfied that the first applicant will in the future be able to visit the second applicant for periods in Nigeria. The appeals officer notes that it is in the interests of the common good to uphold the aim of the state to maintain control of its own borders and operate a regulated system for the control processing and monitoring of non national persons in the State. It is consistent with the Minister's obligations to impose those controls and is in conformity with all the domestic and international legal obligations and in pursuance of the legitimate aims specific to the facts of this case, namely in the interest of the economic wellbeing of the country and for the protection of the rights and freedoms of others.

46. The appeals officer notes that taking into account the reasons as set out above including (the particular circumstances of family life in this case and the fact that the first named applicant has in the past visited Nigeria and may do so again in the future) and weighing those against the right of the State (as set out in Article 8 consideration) the appeals officer was satisfied that the Article 8 consideration was correct in finding that the interference is justified and a refusal of this application would not constitute a violation of Article 8 ECHR.

Issues
47. He furthers notes that Trayers & Company, solicitors submit that the second applicant is satisfied to accept stamp three residence in Ireland as a dependent. He has reviewed the information concerning the financial resources available to the first named applicant and her children in Ireland. He has a reasonable concern that without state support the second applicant's presence in the State would likely place pressure on the first named applicants family financial resources and could therefore impact on the first applicant's ability to meet the financial / material means of her children. It is a relevant consideration that the first applicant family contains two minor children. He therefore refused the visa application as the granting of the visa may result in a cost to public funds and the granting of the visa may result in a cost to public resources.

48. This Court notes that having regard to the State's membership of the European Union there exists the free movement of workers. The free movement of workers is a fundamental principle of EU law, enshrined in Article 45 of the Treaty on the Functioning of the European Union. An EU national can gain employment in another EU Member State, can work there without needing a permit to reside there for that purpose and stay there, even after the employment is finished and enjoy equal treatments with nationals and access to employment, working conditions and all other social and tax advantages. Further when an EU national is working abroad in another EU country, family members also have the right to reside and work in that country regardless of their nationality. These rights apply to EU citizens who in the context of the free movement of workers, and subject to some exceptions, it is clear that the first applicant could, if she obtained employment in another EU country, would be entitled to seek to have her husband, the second applicant join her in that EU country (other than Ireland).

The Irish Nationality and Citizenship Act 1956 (as amended) provides for both acquisition of citizenship upon marriage. Section 8 of the 1956 Act (as amended) provides that;

> *"(1) A person who is an alien at the date of that person's marriage to a person who is, or who after the marriage becomes, an Irish citizen (otherwise than by naturalisation or by virtue of this section or section 12) shall not become an Irish citizen merely by virtue of the marriage, but may do so by lodging, not earlier than three years from the date of the marriage or from the date on which the person last mentioned became an Irish citizen (otherwise than as aforesaid), whichever is the later, a declaration in the prescribed manner with the Minister, or with any Irish diplomatic mission or consular office, accepting Irish citizenship as post-nuptial citizenship: provided that—*
>
> *(a) the marriage is subsisting at the date of lodgment of the declaration, and*
>
> *(b) the couple are living together as husband and wife and the spouse who is an Irish citizen submits an affidavit to that effect when the declaration is being lodged."*

49. It is clear that the requirement of living together for a three year period prior to acquiring Irish citizenship is a necessary requirement.

The first applicant's letter to the appeals officer
50. As mentioned above, the notice of appeal by Messrs. Trayers and Company, solicitors was accompanied by a very full letter from the first applicant. She describes the daily telephone calls between her and the second named applicant, and this was corroborated by the numerous phone bills. This included phone calls, Facebook contact and in particular Skype contact. Skype contact also involved the first applicant's two younger children and the first applicant in her letter describes the relationship which was developing between the two younger children and the second applicant. This letter and these issues do not appear to have been considered in the appeals officer's decision .The amount of communication is far different from the image in identified in Gorry. That is an image, proffered by MacEochaidh J. of the couple marrying in Las Vegas having met each other the day before. In my view there was an onus and an obligation on the appeals officer to consider not only the letter of appeal from the solicitors but also and in particular the letter written by the first applicant and consider its contents.

No immigration rules
51. In the absence of legislation and statutory instruments the courts are left with the policy documents and have had to construct a jurisprudence.

The jurisprudence of the Superior Courts
52. Some of the earliest judgments of the Court were:

1. *Pok Sun Shum v. Ireland* and

2. *Osheku v. Ireland.*

53. Costello J. in *Pok Sun Shum v. Ireland* said:

> *"It is accepted on the plaintiff's behalf that the court cannot act in any way as a court of appeal for ministerial decisions, but it is accepted by the defendant that the discretion given by the section is not an unfettered one; it is a discretion that must be exercised by the Minister in accordance with the powers granted on him by the Oireachtais and in addition it must be exercised fairly in accordance with the principles of natural justice."*

54. In *Osheku & Ors v. Ireland* Gannon J. stated that the interests and good of the State necessitates that the State should have control of the entry of aliens, their departure, their activities and their duration of stay within the State. The protection of such fundamental rights of the State permits restrictions on the exercise of an individual's personal rights and consequently such rights are not capable of consideration entirely independently of the overall provisions of the Constitution. Accordingly the State's fundamental rights could prevail over the related Constitutional rights of the members of a family. (emphasis added). In each case the issue was one of deportation. These decisions were considered by the Supreme Court in *Cirpaci*. Judgment of the Supreme Court was delivered by Fennelly J. He set out the jurisprudence of the Court as follows:

> *"The legitimate interest of the State in the control of immigration frequently conflicts with claims of migrants based on family reunification. This has been recognised for more than twenty years by the European Court of Human Rights."*

Again the case of Cirpaci involved the refusal to revoke a deportation order. In the course of his judgment Fennelly J. said:

> *"Turning then to the major arguments in the case, I do not think there is an unbridgeable gap between the submissions of the respective counsel regarding the basic considerations affecting the exercise of the Minister's discretion. They are, respectively, the legitimate interest of the State in giving effect to its immigration policy and respect for family interests, whether by reference to the Constitution or the European Convention."*

Later, Fennelly J. says

> *"It is legitimate for the Minister to have regard to the duration of the marriage relationship when weighing in the balance the family rights in question. In the course of argument, a number of hypothetical cases were explored. 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?" (This Court's emphasis).*

For the other extreme Fennelly J. continued:

> *"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."*

Fennelly J. referred to the balancing the competing considerations summarised by Lord Phillips in a passage from *R (Mahmood) v. The Home Secretary* [2001] 1 WLR at p. 840 in which Lord Phillips stated

> *"(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 judgment of Fennelly J. in *Cirpaci* sums up the jurisprudence of the courts in relation to immigration matters.

Article 8 of the European Convention on Human Rights.
55. Complaint is made by counsel for the applicant that the decisions of the respondent were based almost solely on Article 8 of the ECHR. There is barely a mention of the provisions of Article 41 of the Constitution and I now propose to consider these documents.

56. The Constitution is the fundamental law of Ireland. It guarantees certain fundamental rights. Articles 40 to 44 deals with fundamental rights. Article 41 is headed "The Family".

Article 41

> *"1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*
>
> *1.2: The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."*

The European Convention on Human Rights, as amended by number of Protocols, considers that this declaration aims at securing the universal and effective recognition and observance of the rights therein. In considering that one of the aims of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms.

57. Article 8 provides:-

> *"Right to respect of 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."*

58. The European Convention on Human Rights Act 2003 represents the interpretive model of incorporations of the ECHR into Irish law. Section 2 in the interpretation of laws under the interpretation of laws provides:-

> *"2.—(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."*

Section 3 provides:-

> *"3.—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."*

It appears to this Court that in balancing the rights of the State with the rights of the applicants, the respondent must take into account both Article 41 of the Constitution and Article 8 of the European Convention on Human Rights. It appears to me that it is not open to the respondent to consider one only. Whilst mention is made briefly of the constitutional rights of the Constitution in both decisions, the main emphasis is on the provisions of Article 8 of the European Convention on Human Rights. It is interesting that the notice of appeal letter from Trayers & Company, solicitors, also deals with Article 8 of the European Convention on Human Rights.

59. The judicial review proceedings in this case are particularly novel as almost all the decisions in this area are on the issue of deportation. Clearly the second named respondent is not in the same position as a person who has entered the State and been refused asylum or been an "over-stayer".

60. However in considering the task of the Minister in balancing potential competing interests in a proportionate and fair manner I am aware of the provision of the most recent decisions of this Court in *Gorry, X. A. (a minor) & Ors v and EA and PA (an infant suing by his father and next friend BA)*. In each of these cases the Judges of the High Court have emphasised the family rights protected by Article 41 and in particular Hogan J. has emphasised that the rights thereby conferred under Article 41 cannot be regarded as being purely theoretical, the essence and substance of which must be respected at all times. And in particular Hogan J. in X.A states that:

> *"the Minister's decision must always respect the essence and substance of the right of the married couple under Article 41. A decision which, in practice, compels the couple to life more or less permanently apart is, by definition, a very significant interference by the State with a core principle valued and protected by Article 41. Such a decision is one which, quite obviously, requires compelling justification: see, e.g., my own judgment in S. v. Minister for Justice, Equality and Law Reform [2011] IEHC 92. While the necessity to uphold the common good and the integrity of the asylum system may well supply that justification, it is nonetheless imperative that the respective rights of the applicants and the interests of the State must be fairly weighed by the Minister."*

It appears to me that in this case the appeals officer did not pay sufficient attention to, or consider appropriately Article 41 of the Constitution.

Decision
61. The appeals officer:

> 1. Failed to have regard to the letter from the first applicant setting out the contact between herself and her family and second named applicant particularly with regard to the most recent developments of social media
>
> 2. The appeals officer did not consider appropriately the provisions of Article 41 of the Constitution in making a decision which by definition compelled the couple to live more or less permanently apart and which is a very significant interference by the State is with the core principle valued and protected by Article 41.

62. In these circumstances the Court will grant an order of certiorari quashing the decision of the appeals officer to refuse a visa to

the second applicant and direct that the application be considered anew by the appeals officer.

63. It is of course better for the applicants to consider what submissions need to be made to the appeals officer in any new consideration of the application for a visa.

---

1 This matter has considered several times, including by the UK Court of Appeal in R (Mahmood) v. Home Secretary 1 WLR and the European Court of Human Rights in Appl. No. 54273/00 Boulif v. Switzerland 2nd August 2001

2 In this regard it is relevant to note that the couple could not have been aware of the precarious nature of Mr. Nwoke's potential immigration status if he were to apply for a visa and/or some right of residence and that on no occasion were the couple given any assurances that Mr Nwoke would be granted a visa or any right of residence in Ireland.

3 Appl. No. 265/07 Darren Omeregie v. Norway, 31st July, 2008

4 Citizens Information, Exceptional and urgent needs payments, available at: http://www.citizeninformation.ie/en/social_welfare_payments/supplementary_welfare_schemes/exceptional_needs_payments.html (accessed 17th June, 2014)