Neutral Citation Number: [2010] IEHC 371

THE HIGH COURT

JUDICIAL REVIEW

2009 201 JR

BETWEEN

H. U., S. W. U. AND D. U. (AN INFANT, SUING BY HIS FATHER AND NEXT FRIEND H. U.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENT

JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 29th day of September, 2010

1. The applicants are a husband and wife and their infant son. The husband *HU* is a national of Nigeria and a failed asylum seeker while the wife *SWU* and son *DU* are Irish citizens. They challenge the validity of the refusal by the Minister for Justice and Law Reform ("the Minister") to revoke a deportation order made in December 2008 against *HU*, the husband. This was the second application to revoke the deportation order and these are the second set of proceedings challenging a refusal to revoke. By order of Cooke J. dated the 15th February 2010 the applicants were granted leave to challenge the second refusal to revoke decision of January 2010.

2. In March 2010 this Court grant an interlocutory injunction restraining the deportation of *HU* pending the determination of these proceedings. The substantive hearing took place on the 6th and 7th May 2010. Ms Sunniva McDonagh, S.C. with Ms Patricia Brazil, B.L. appeared for the applicants and Ms Sinéad McGrath, B.L. for the respondent.

Background

3. The first applicant *HU* claims to have arrived in Ireland in mid June 2008 and he claims to have applied immediately for asylum. His history as presented to the asylum authorities was that he was born in 1987 and was a Catholic. He was raised by his father in a named village in Delta State. He claimed little formal education but trained as an electrical mechanic for five years before coming to Ireland. He claimed to fear persecution at the hands of his step-brother who was a member of a militant group (the name of which *HU* did not know) and who made a living by kidnapping people and holding them for ransom in violent circumstances. *HU* reported these activities to the police and when his step-brother was arrested, other gang members pursued him, shot at him and killed his father in reprisal. He spent three months in hiding with an aunt in the capital city of Delta State and two further months in Lagos before coming to Ireland. He was aided by a pastor who made all the travel arrangements with a white man who accompanied him and held all of his documents when passing through immigration.

4. Upon arrival in Ireland *HU* moved in with his uncle who is lawfully resident with his Irish wife in Cork. That uncle completed his asylum questionnaire on his behalf. On the 7th July 2008 *HU* attended for interview with the Commissioner where he described himself as single and made no mention any relationship with any woman or of his intention to marry. By letter dated the 14th July 2008 the Commissioner notified him that he was making a negative recommendation in his case. The appended s. 13 report outlined various inconsistencies in *HU*'s account and also found that he did not fear persecution for a Convention reason.

5. The applicant says in his affidavit that sometime in July 2008 he met the second applicant *SW* who subsequently became his wife. Little information is provided about *SW* apart from the fact that she is an Irish citizen and a friend of his uncle's wife in Cork. According to *HU*'s affidavit they fell in love and prior to the 15th July 2008 – that is, within one month of his arrival in Ireland and a week after his interview with the Commissioner and around the same time that *HU* was notified of the Commissioner's negative recommendation and s. 13 report – they notified the Registrar that they intended to marry. *HU* appealed the Commissioner's negative recommendation to the Refugee Appeals Tribunal and his appeal hearing took place on the 10th September 2008. No mention was made at the appeal hearing of his notified intention to marry. By letter dated the 25th September 2008, *HU* was notified that the Tribunal had affirmed the Commissioner's negative recommendation. Notwithstanding the notification that his permission to remain was now fragile, *HU* married *SW* on the 15th October 2008. *SW* is described on their marriage certificate as a *domestic worker* born in 1988.

6. On the 24th October 2008 and one month after the notification that the appeal had failed, the Minister informed *HU* that he had decided not to grant him refugee status and proposed to deport him. As is usual when sending such a letter, the Minister invited *HU* to make representations within 15 working days of the date of the letter setting out the reasons as to why he should be permitted to remain in Ireland. No such representations were made by or on behalf of *HU* and the Minister proceeded to examine his file on the basis of know facts. A deportation order was made against him on the 4th December 2008 and was notified to *HU* on the 23rd December 2008.

7. Meanwhile by letter dated the 4th December 2008, the applicants' solicitors informed the Minister of the fact of *HU*'s marriage to *SW* on the 15th October 2008 and stated that the couple was cohabiting at a stated address in Cork. The Solicitors sought residency rights for *HU* on the basis of his marriage to an Irish citizen. They furnished a copy of the passports of the husband and wife, a utility bill in the name of the wife and the couple's marriage certificate to establish the marriage and cohabitation. The Minister was informed that "Ms W. is anxious that her husband be granted residency in the State". The Minister replied by informing the applicants that as a deportation order had already been made, such representations could only be considered in the context of a revocation application.

Revocation Application 2009

8. On the 15th January 2009 the applicants' solicitors requested the Minister to revoke the deportation order. The narrative of alleged persecution as presented to the asylum authorities was repeated, it was noted that *HU* had now been in the State for seven months and it was submitted:-

"Mr [U] is now married to an Irish citizen Ms [SWU] and is currently residing at […] Cork. They couple are looking towards the birth of their first child and we submit that the family unit should not be interfered with when such interference would be disproportionate given the circumstances that exist."

9. It was stated that the husband is anxious not to be dependent on social welfare, is highly motivated and is determined not to be a burden on the State. It was argued that the Minister "*must bear in mind Ireland's obligations under the European Convention on Human Rights particularly in the light of the Belfast Agreement and the subsequent incorporation into Irish law*." It was submitted that to return the husband to Nigeria would breach Article 3 of the ECHR and s. 5 of the Refugee Act 1996. It was generally argued that Ireland should honour its humanitarian obligations by not returning people to countries where they do not enjoy full rights to liberty and security and it was contended that the Minister should exercise his discretion in a fair manner and in accordance with law and with natural justice. Finally it was suggested that the Minister would act disproportionately in issuing a deportation order against the husband "*especially because of the rights which adhere to her under the Constitution and particularly article 41 as well as International Law*."

10. The Minister's agents examined the file in the light of those submissions and in February 2009 the Minister declined to revoke the deportation order. The representations made on behalf of the applicants were summarised and it was noted that *HU* had been in the State for almost eight months, "*a relatively short period of time*". When considering the husband's Article 8 rights it was observed:-

"Mr. [U] recently married an Irish national, Ms [SJW] on 15/10/2008. The couple's marriage certificate and each of their passports were received on 08/12/2008. The couple are residing together in Cork. There is no information on file as to when their relationship commenced. No representations were made to the Minister under Section 3 before he made the deportation order 04/12/2008. Mr. [U] was given an opportunity by letter dated 24/10/2008 to make representations. The Minister was not informed prior to making the deportation order of Mr. [U]'s impending marriage or of his relationship with Ms. [W]".

11. The examination of file then went on to consider the jurisprudence of the European Court of Human Rights on the deportation of the spouse of a person legally in a Contracting State and on the issue of respect for the choice by married couples of their country of matrimonial residence. It was found that:-

"Article 8 does not import on a state any general obligation to respect the choice of residence of a married couple.

In the present case, the couple married when they were aware that the status of Mr. [U] was precarious. They must have known that Mr. [U] had no legal basis for residing in the State and therefore may be required to leave the State.

As a result of the facts outlined above, it is submitted, therefore, that in affirming the deportation order in respect of [HU], there is no lack of respect for family life and therefore no breach of Article 8.

[...] Mr. [U] married Ms. [SJW], an Irish citizen, on 15/10/2008 and it is accepted that the couple constitute a family within the meaning of Article 41 of the Constitution. According to their marriage certificate, they have been residing together in Cork.

With regards to the rights of a non-national married to an Irish citizen or a person entitled to reside in the State, it is accepted that family rights under Article 41 of the Constitution arise. However, these rights are not absolute and may be restricted. As found by the Courts, there appears to be no authority which supports the proposition that an Irish citizen or a person entitled to reside in the State may have a right under Article 41 of the Constitution to reside with his or her spouse in this jurisdiction."

12. In February 2009 the Minister informed the applicant of his decision not to revoke the deportation order. The applicants challenged the Minister's refusal by way of judicial review [see 2009 No. 201 J.R.]. The applicants failed in their challenge and have lodged a Notice of Appeal to the Supreme Court. A decision is pending on their appeal.

Revocation Application 2010

13. On the 5th January 2010 the applicants' solicitors made a further revocation application to the Minister relying on the marriage and the birth of their Irish citizen son *DU* in May 2009. They requested that these submissions would be considered in conjunction with all previous submissions. The core of the representations was that the couple was happily married and looking forward to remaining in Ireland with their child. The full extent of their submissions was as follows:-

"We submit that the applicant has considerable rights under the European convention insofar as Mr. [U], Ms. [SW] and Mr. [DU] constitute a family unit.

We submit that the applicant has substantial entitlements to remain in the Sate under the Irish Constitution and we believe that it would be a disproportionate act for the Minister to execute the deportation order against our client given the consequences which would befall his wife and child as well as the applicant. We believe that the best interests of the child Master [DU] would be served by the child being parented in the State by both parents. It would be a considerable diminution of master [U]'s right to be education in Ireland were he to be forced to leave the State so as to join his father in Nigeria.

Similarly it would be a considerable diminution of Ms. [SW]'s rights for her to be forced to leave Ireland and establish herself in Nigeria where significantly lower social standards exist as compared to Ireland.

Our client is anxious to take up employment in the State and would greatly appreciate an opportunity to do so."

14. The inescapable import of those submissions is that once a foreign national (whatever his immigration status) marries an Irish national and starts a family, the foreign national has an automatic right of residence in Ireland on the basis of the protection afforded to the family within marriage by Article 41 of the Constitution and further that the deportation of such spouse would constitute a breach of those constitutional rights and a breach of the family's rights under Article 8 ECHR.

15. In any event the Minister's agents reconsidered *HU*'s file, including his immigration history, in the light of his marriage to *SWU* and the birth of *DU* and the citizenship rights of each family member. The representations which had been made in 2009 and 2010 by the applicants' solicitors were summarised fully and accurately. In considering the husband's Article 8 right to respect for his *family life*, it was recorded that he had married an Irish national and that they had an Irish citizen son. It was stated that under the Nigerian

Constitution, *DU* was entitled to citizenship of Nigeria. It was accepted that the affirmation of the deportation order would constitute an interference with the family's right to respect for family life, but it was found that the proposed interference would not be unlawful in accordance with Article 8(2) as it was:-

> 1. "*In accordance with Irish law* – Section 3 of the Immigration Act, 1999, as amended, specifically provides for the making of a deportation order.
>
> 2. *Pursues a pressing need and a legitimate aim* – i.e. the legitimate aim of the State to safeguard the economic wellbeing of the country and to maintain control of its borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. It is consistent with the Minister's obligations to impose these controls and is in conformity with all domestic and international legal obligations.
>
> 3. *Is necessary in a democratic society, in pursuit of a pressing social need and proportionate to the legitimate aim being pursued within the meaning of Article 8(2)."*

16. The *proportionality* of the decision to affirm the deportation order was then considered in the context of the legitimate aim pursued in accordance with Article 8(2), in the following way:

> *"In* R (Mahmood) v. Home Secretary *[2001] 1 W.L.R. 840, the U.K. Court of Appeal found, inter alia, that the removal or exclusion of one family member from a State where other members of the family are lawfully resident, will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family. The meaning of 'insurmountable obstacles' was set out in the ECHR case* of Boultif v. Switzerland *(Application no. 54273/00), where the Court considered that the* "seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion*".*
>
> *This is the test applied when determining whether family life can be established elsewhere. In particular, to be considered when determining whether there are any 'insurmountable obstacles' to establishing family life elsewhere is whether, where an obstacle exists, realistically or reasonably, it is an obstacle which is able to be surmounted.*
>
> *Mr. [U] is a Nigerian national. His wife, Ms. [SW] is by virtue of the Nigerian Constitution 1999, s. III, 25(1) (c), also entitled to Nigerian citizenship. Furthermore his son [DU], by virtue of the Nigerian Constitution 1999, s. III, 25(1) (c), is also entitled to Nigerian citizenship. Mr. [U] has stated that he wishes to remain in Ireland with his wife and son. However, it is submitted that the Minister is not obliged to respect the choice of residence of Mr. [U]. The jurisprudence of the European Court of Human Rights has established that a State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.*
>
> *With regards to Mr. [U]'s wife, Ms. [SW], it is submitted that she is an Irish citizen. She has been married to the applicant for the past 1 year and 2 months at the time of writing this submission. No information has been provided as to whether Ms. [W] is working in the State or how she supports herself.*
>
> *Mr [U]'s son, [DU], was born in the State on 31/05/2009 and is an Irish citizen. [DU] is only 7 months of age at the time of writing this submission. It is submitted that Mr. [U[and his wife look forward to remaining in the State together with their child. It is further submitted that it would be a considerable diminution of [DU]'s rights to be educated in Ireland were he forced to leave the State so as to join his father in Nigeria. "*

17. The examining officer then referred to various passages from a U.K. Home Office COI report on Nigeria of January 2010 which relate to the security forces / police; avenues of complaint; human rights institutions, organisations and activists; education; health and welfare and medical issues. The officer summarised the COI report and submitted that *DU* would be able to have an education and integrate into society in Nigeria. It was noted that Nigeria has ratified the Convention on the Rights of the Child (CRC) and other international instruments affecting the rights of the child and regional instruments such as the Africa Charter on Human Rights; that a number of domestic and human rights groups operate in Nigeria, some dedicated to protecting children's rights; and that there is an established, functioning police force and health care system. It was stated:

> *"Case-law has found that aliens who are subject to expulsion cannot claim any entitlement to remain in the territory of a contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State. For an exception to be made where expulsion is resisted on medical grounds the circumstances must be exceptional. However, it is not accepted that there are any exceptional circumstances in this case."*

18. Next, consideration was given to *HU*'s employment prospects by reference to recent employment / redundancy and exchequer figures. It was concluded that his chances of obtaining employment are currently poor and it was noted that:-

> *"In light of the rising level of unemployment in Ireland and its knock-on effect on the welfare system with the pressure being placed on other State service providers by the economic downturn, consideration is also given to the impact of granting permission to remain to Mr. [U] on the health and welfare systems in the State and how such a decision may lead to similar decisions on other cases."*

19. Under the heading "*Balancing of Rights*", it was stated:

> *"I have considered the right of [DU], Mr. [U]'s Irish citizen child to reside in the State. I have taken into consideration the best interests of the Irish citizen child which undoubtedly involves having the care and company of the father.*
>
> *I have considered that Mr. [U], his wife, and their sons are eligible for Nigerian citizenship and therefore have the right to return and live in Nigeria as a family unit. There is nothing to suggest that there are any insurmountable obstacles to the family being able to establish family life in Nigeria.*
>
> *I have considered the young adaptable age of [DU] along with the fact that he is eligible for Nigerian citizenship. I have considered these facts and how they would make moving back to Nigeria with his family, easier for [DU]. I have also considered that he would receive an education and would be able to integrate into society in Nigeria if he were to go there with his father.*

It is submitted that there is no general obligation on a State to respect the choice by married couples of the country of matrimonial residence and that Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple. Furthermore, there is nothing to indicate that it would be unreasonable to expect that Mr. [U], his wife and son could establish family life in Nigeria, where they are all eligible for citizenship. Furthermore, Mr [U] has not submitted evidence of any obstacles that would hinder him returning to Nigeria and living with his family.

I have also considered the fact that given the current economic recession in Ireland and the short term forecasts of further substantial economic contraction, along with the growing unemployment in the economy and its possible effects on migrants living in Ireland, Mr [U]'s chances of obtaining employment in the current economic climate are poor. Furthermore, as already stated in this submission, in light of the rising level of unemployment in Ireland and its knock-on effect on the welfare system along with the pressure being placed on other state service providers by the economic downturn, consideration is also given to the impact of granting permission to remain to Mr. [U] on the health and welfare systems in the State and how such a decision may lead to similar decisions on other cases."

20. Next, consideration was given to the *Constitutional rights of the Irish citizen child*, as follows:

"[DU] is an Irish citizen and has personal rights under Article 40 of the Constitution, as well as rights under Articles 41 and 42 of the Constitution. These rights include the right of [DU] to reside in the State, to be reared and educated with due regard to his welfare, to the society, care and company of his parents, as well as protection of the family, pursuant to Article 41. Factors relating to the individual position of the Irish citizen child have been expressly considered above.

However, these Constitutional rights of the Irish born child are not absolute and must be weighed against the rights of the State. The rights of the State include the right to control the entry, presence and exit of foreign nationals, subject to the Constitution and to international agreements. To be considered are issues of national security, public policy, the integrity of the Immigration System, its consistency and fairness to persons and to the State, as well as issues relating to the common good. Factors relating to the rights of the State have also been considered above.

It is acknowledged that as an Irish citizen, [DU] had rights of residence in Ireland, the right to be reared and educated with due regard to his welfare, the right to the society, care and company of his parents, as well as the protection of the family pursuant to Article 41. However, as the Supreme Court in Lobe and Osayunde *[2003] IESC 3, it does not flow from the rights of the child that the family or parents and siblings of Irish children have the right to reside in Ireland. The Minister may determine to deport the immigrant family, notwithstanding the effective removal of the Irish citizen child, without violating that child's rights. While there is an obligation on the Minister to consider each case on its individual merits, he is entitled to take into account the consequences of allowing a particular applicant to remain in the State where that would inevitably lead to similar decisions in other cases. If the Minister is satisfied for good and sufficient reason that the common good requires that the non-national parent should be removed from the State, even if that means that in order to preserve the family unit the Irish citizen child must also leave the State, then that is an order he is entitled to make".*

21. Then, consideration was given to the *Constitutional rights of the Irish citizen wife*, as follows:

"Mr. [U] married Ms. [SW] an Irish citizen on 17/04/2009 and it is accepted that the couple constitute a family within the meaning of Article 41 of the Constitution. They have been residing together in Cork.

As found by the Courts, there appears to be no authority which supports the proposition that an Irish citizen may have an absolute right under Article 41 of the Constitution to have their non-Irish national spouse reside with them in this jurisdiction. Reference is made to the consideration of the position of the couple as well as the rights of the State under Article 8 consideration above and the conclusions reached therein."

22. The examining officer then repeated the section entitled "*Balancing of Rights*" set out above at paragraph 19 verbatim. Finally, it was stated that:

"Mr. [U] has been given an individual assessment and due process in all respects. Having weighed and considered all of the factors outlined above in relation to the family, and in particular [DU], an Irish citizen child, and Ms. [SW], an Irish citizen, as well as factors relating to the rights of the State, and in particular the fact that there is no less restrictive process available which would achieve the legitimate aims of the State to safeguard the economic well being of the country and to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. It is in the interests of the common good to uphold the integrity of the asylum and immigration procedures of the State. The State has the right to control the entry, presence and exist of foreign nationals, subject to the Constitution and international agreements.

These are substantial reasons associated with the common good which requires that the deportation order made in respect of [HU] be re-affirmed."

23. The recommendation to the Minister was that there was nothing to warrant the revocation of the deportation order and that the deportation order should be re-affirmed. The Minister accepted that recommendation and informed the applicants of his decision to re-affirm the deportation order by letter dated the 27th January 2010. That decision is challenged in these proceedings.

The Issues in the Case

24. The applicants accept that the deportation of *HU* raises no issues under s. 5 of the Refugee Act 1996, s. 4 of the Criminal Justice (UN Convention Against Torture) Act 2000 or under Article 3 of the ECHR. Their challenge relates primarily to the quality of the Minister's analysis of the applicants' rights under the Constitution and Article 8 of the ECHR. Specifically, it is argued that the Minister:

(i) Failed to adequately consider the rupture to the family and thereby failed to reach a proportionate decision;

(ii) Failed to adequately consider the constitutional rights of the wife; and

(iii) Acted in breach of fair procedures by relying on the need to maintain immigration control.

(i) Proportionality
25. The applicants contend that inappropriate weight was afforded to the rupture to family life which would follow if the husband were to be deported in that the Minister acted on the assumption that the mother and son would accompany the father to Nigeria. This assumption was incorrect as the mother had indicated a preference to remain in Ireland. In addition, the Minister's finding that there was no impediment to the family "returning" to Nigeria was criticised as this, it was contended, indicated that the Minister considered this family to be an immigrant family returning to their country of origin when in fact, neither the mother nor the child has ever been to Nigeria.

26. The applicants contend that the absence or presence of insurmountable obstacles to the wife and their child following the husband to Nigeria was not the sole consideration and what the Minister should have considered in the light of *Meadows v. The Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 21st January, 2010); *Oguekwe v. The Minister for Justice, Equality and Law Reform* [2008] 2 I.L.R.M. 481; *Berrehab v. The Netherlands* (1989) 11 E.H.R.R. 322 and *Poku v. United Kingdom* (1996) 22 E.H.R.R. CD94 was whether it was reasonable to expect the wife and child to move to Nigeria.

27. The respondent contends that the impugned decision was reasoned and balanced and must be assessed in the light of the applicants' representations. There was nothing whatever before the Minister to suggest that it would be unreasonable to expect the wife and son to relocate to Nigeria. The wife had never stated that she would not go to Nigeria and had merely expressed a wish to raise her child in Ireland. The situation was that the applicants put a certain case to the Minister which was considered in full and upon which he reached rational conclusions. Any rupture caused to the family life of the applicants will be the result of a choice made by the wife not to follow her husband to Nigeria. The respondent relies on *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 E.H.R.R. 471; *Omoregie v. Norway* (Application No. 265/07, decision of 31st July, 2008); *R (Razgar) v. Secretary of State of the Home Department* [2004] 2 A.C. 368 and *Huang v. Secretary of State for the Home Department* [2007] 2 W.L.R. 581.

(ii) The Wife's Constitutional Rights
28. The applicants contend that as an Irish national and a citizen the wife, unlike the foreign national wives of failed asylum seekers as in *Alli and Asibor v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clark J., 2nd December, 2009), has an irrevocable right to remain in Ireland. While the Minister may have had little information before him, the burden of proof in relation to proportionality lay with him. The basis for this proposition was to be found in *AB (Jamaica) v. Secretary of State for the Home Department* [2008] 1 W.L.R. 1893 where the Court of Appeal outlined a variety of difficulties that would be faced by a British citizen accompanying her Jamaican husband to his country of origin and which should have been considered by the Secretary of State before making a deportation order against the husband The applicants in this case argued that the Minister should, as with the UK Secretary of State, have anticipated difficulties which would be faced by an Irish woman in Nigeria if she were forced to move to Nigeria to enjoy married life with her husband. The wife was faced with two choices: if she goes to Nigeria she would be deprived of her right to live in Ireland but if she chooses to remain in Ireland, she would be deprived of her family rights as her husband would be removed.

29. The respondent argued that if *AB (Jamaica)* is interpreted as requiring the Minister to exercise his imagination as to the obstacles that might be faced by an Irish citizen in Nigeria, it ought not to be followed. The respondent reminded the Court that the applicants had access to legal representation at all relevant times and they had every opportunity to put facts before the Minister which would establish that it would be unreasonable to expect her to move to Nigeria, but no such evidence was ever furnished notwithstanding two applications to revoke. The emphasis placed on the rights of wife in the present proceedings was out of all proportion to the submissions which had been made. The applicants have not identified the personal constitutional rights of the wife which would be infringed by the proposed deportation. The Minister quite correctly focussed on the family rights of the applicants instead of on the wife's personal rights in the light of the deficit in the information before him in relation to the wife.

(ii) Reliance on Immigration Control
30. Finally, the applicants argued that because the Minister acquiesced in the first revocation application in 2009, it was irrational for him to identify the necessity to operate an immigration system as a "pressing social need" requiring the deportation of *HU*. This was an irrelevant consideration which he ought not to have considered. If he wished to rely on procedural aims, he ought to have notified his intention to *HU* to afford him an opportunity address it. If *HU* had known that procedural requirements of immigration control would be held against him, he might have returned to Nigeria and applied from there for a visa to join his spouse in Ireland instead of seeking to revoke the deportation order as he did. In the circumstances, the Minister acted unfairly and disproportionately.

31. The applicants contend that the fact that *HU* will not have an immediate, post-deportation opportunity to apply for re-admission to Ireland distinguishes this case from *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840. In that case, the deportation was enforced to prevent queue-skipping and the husband would have had an immediate opportunity to apply to join his wife. In *Chikwamba v. Secretary of State for the Home Department* [2008] 1 W.L.R. 1420, the House of Lords held that while the maintenance and enforcement of immigration control was a legitimate aim of the Secretary of State's policy in relation to Article 8 family life claims, an Article 8 appeal should not be dismissed routinely on the basis that it would be proportionate and more appropriate to apply for leave from abroad.

32. The respondent noted that in October 2008 the Minister informed *HU* of the options that were open to him – including the option to leave the State voluntarily. *HU* made no representations during the 15 days allowed to him at that time. His file was examined and a deportation order was made in December 2008. Even if the Minister had informed him in advance of the revocation applications in 2009 and 2010 that he intended to rely on immigration control, this could not have benefited *HU* because there was an extant deportation order. It was not open to him to return to Nigeria at that time and to apply from there to be re-admitted to Ireland on the basis of his marriage as a revocation application was first necessary.

THE COURT'S ASSESSMENT
33. The Court is *not* satisfied that the applicants have established that the Minister was in error in the manner asserted.

(i) Proportionality
34. This issue is frequently relied on since the decision of the Supreme Court in *Meadows* as if it were an entirely new concept in refugee law. The contrary is the case: proportionality has long been a feature of Irish constitutional and Convention case law. The following approach adopted by Murray C.J. is reflective of the views expressed in each of the majority judgments:-

> *"… The principle [that is, proportionality] requires that the effects on or prejudice to an individual's rights by an administrative decision be proportional to the legitimate objective or purpose of that decision. Application of the principle of proportionality is, in my view, a means of examining whether the decision meets the test of reasonableness."*

35. It has always been the case that decisions which have a great import on a person's rights and freedoms must be reached by balancing the effect of that decision with the object of the decision. In cases involving deportation, the personal circumstances of

the proposed deportee must be examined and the effect of such deportation on him and his family must be considered and balanced against the objective of maintaining an orderly and fair immigration policy and other similar State interests. Both sides must be viewed and balanced. Once there has been a weighing and balancing exercise and a conclusion drawn rationally from that exercise on the evidence available, the decision achieved could not be said to be unreasonable in the *O'Keeffe* sense. The Minister would then be entitled to make a deportation order even if its effect is not welcomed by the subject of the order.

36. *Meadows* did not change the law of reasonableness; it simply affirmed the role played by proportionality in reasonableness. The law is not and has never been that the Minister cannot deport the foreign national spouse of an Irish citizen or the foreign national parent of an Irish citizen. If that spouse has no legal right to remain in the State when he marries an Irish citizen or when he fathers an Irish citizen, the fact of his marriage or his fatherhood does not entitle him to a correction of his unlawful presence in the State. The case-law of the Supreme Court and a body of decisions by the High Court and the European Court of Human Rights supports that view.

37. The applicants here have placed an almost artificial emphasis on the constitutional rights of the wife which bears no relation to the huge information deficit and minimal facts placed before the Minister. It is argued that it would be unreasonable to expect the wife as an Irish national to accompany her husband to Nigeria and that deportation of the husband would thus and for that reason only be disproportionate. No other reason was given for why this should be so. An applicant is required to establish the illegality of an administrative decision challenged on the basis of a want of reasonableness or lack of proportionality. The decision of the Court of Appeal in *AB (Jamaica)* does not affect this requirement. That decision did not raise or establish such a proposition and the case was essentially concerned with the failure to apply domestic Home Office policy no. 3/96 which has no equivalent in this jurisdiction.

38. The relevant facts pertinent to the refusal of the Minister to revoke the deportation order is that the wife married a Nigerian national who according to the husband's affidavit she only met at most four months before they married. It must be assumed that she was aware of his very recent arrival in the country and of his undetermined right to remain indefinitely in this State. The husband was certainly aware that his refugee claim had failed when he married. He lived with his Nigerian uncle who had filled in his asylum questionnaire so the uncle must certainly have been aware of his nephew's precarious legal position when he married. It must have been within the contemplation of the wife that she might have to consider life with her husband in his own country Nigeria if he were refused a declaration of refugee status. It must be assumed that if, as asserted by the husband, the couple met and fell in love and chose to marry and start a family so soon after they met, their affection for each other would extend to living in Nigeria and that the marriage was not confined to living in Ireland.

39. The Court has been impressed by the extensive consideration by the Minister's agents of the husband's second application to revoke the deportation order made shortly after the couple's marriage. That consideration noted every one of the relevant matters insofar as they were known to the Minister. These matters included the speed at which the couple married, the short period which had elapsed since and the fact that when they married they were aware of the husband's precarious immigration status. *DU*'s young age and adaptability and the absence of anything to suggest that there were any particular obstacles to the wife and child moving to Nigeria were all considered. The Minister observed the weighty rights enjoyed by the applicants under the Constitution and under the Convention and crucially, the fact that those rights are not absolute. In the circumstances, the Court cannot identify any relevant matter that was not expressly taken into account and weighed in the balance in arriving at a decision that was reasonable and proportionate.

40. The jurisprudence of the European Court of Human Rights in relation to exclusion orders and deportation of a spouse or partner in a family unit is clear. The rights protected by Article 8 are not absolute and Contracting States enjoy a wide margin of appreciation in the manner in which immigration control is exercised. The break up of family life brought about by immigration control will almost always be lawful if the provisions of Article 8(2) are met. Those provisions are:

> *"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."*

41. The ECtHR has stated on innumerable occasions that Contracting States are not obliged to respect the choice of residence of a married couple.

42. In this regard the Minister referred to the seminal case of *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 E.H.R.R. 471 where the Strasbourg Court considered the situation of three wives who were lawfully and permanently settled in the UK but whose husbands who lived abroad were refused permission to remain or join them in the UK. The Strasbourg Court held:

> *"67. The Court recalls that, although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life. However, especially as far as those positive obligations are concerned, the notion of 'respect' is not clear cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals. In particular, in the area now under consideration, the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved. Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.*
>
> *68. The Court observes that the present proceedings do not relate to immigrants who already had a family which they left behind in another country until they had achieved settled status in the United Kingdom. It was only after becoming settled in the United Kingdom, as single persons, that the applicants contracted marriage. The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country." (*Emphasis added)

43. The Court found in *Abdulaziz* that there was no "lack of respect" for the wives' family life and no violation of Article 8 because the wives had not shown that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them. In addition, at the time of their marriages:-

"(i) Mrs. Abdulziz knew that her husband had been admitted to the United Kingdom for a limited period as a visitor only and that it would be necessary for him to make an application to remain permanently, and she could have known, in the light of draft provisions already published, that this would probably be refused;

(ii) Mrs. Balkandali must have been aware that her husband's leave to remain temporarily as a student had already expired, that his residence in the United Kingdom was therefore unlawful and that under the 1980 Rules, which were then in force, his acceptance for settlement could not be expected.

In the case of Mrs. Cabales, who had never cohabited with Mr. Cabales in the United Kingdom, she should have known that he would require leave to enter and that under the rules then in force this would be refused."

44. A similar approach was taken in *Rodrigues da Silva v. The Netherlands* (2007) 44 E.H.R.R. 34, where the ECtHR held:

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

45. In *Boultif v. Switzerland* (2001) 33 E.H.R.R. 1179, the ECtHR noted that the test was whether the applicants could show *"a serious impediment to establishing a family life*" elsewhere. The Court clarified its position more recently in *Mawaka v. The Netherlands* (App. No. 29031/04, decision of the 1st June 2010) where it held that the *"the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life" but only "exceptionally, if there is a valid reason why it could not be expected of them to follow the person concerned."* In that case, the Court found that no arguments been submitted to the effect that the applicant's ex-wife and son were unable to return to the DRC, to which he was to be returned. There was therefore no breach of Article 8.

46. In this case, notwithstanding that this was a second application to revoke and notwithstanding a failed earlier legal challenge, the applicants put forward no reason why it would be unreasonable to expect the wife and child to follow the husband to Nigeria. Nothing whatsoever was put before the Minister about the wife's personal circumstances such as her educational background, her employment status, how they were surviving economically, her employment prospects in Nigeria, her religious beliefs, her standard of living in Ireland, her family ties here, her experience of travel abroad or of any relationship with her in-laws. All that the Minister knew of the wife was that she was born in 1988, is an Irish citizen and a domestic worker, was a regular visitor to the house of *HU*'s uncle, that she agreed to marry *HU* within one month of their first meeting in 2008 and that she gave birth to their son some seven months after their marriage.

47. In the absence of relevant information the Minister was not required or indeed entitled to speculate on the wife's circumstances. He could only act on the information that he was given and one of the assumptions he was certainly entitled to make was that the couple's child then less than a year old could adapt to life in Nigeria.

48. In marked contrast to the lack of information furnished, the Minister gave deep consideration given to the circumstances of this young family. No attempt was made by the applicants to identify any obstacles which would make it unreasonable to expect the wife and child to relocate to Nigeria and few concrete considerations were furnished which could be weighed in the balance by the Minister when arriving at a proportionate decision. The Court is therefore satisfied that the Minister's assessment of proportionality under Article 8 was both rational and comprehensive, that he took account of all relevant matters and properly excluded irrelevant considerations.

(ii) The Wife's Constitutional Rights

49. The Court also rejects the applicants' argument that insufficient weight was accorded to the wife's rights under the Constitution. It is frequently forgotten in arguments relying on the considerable constitutional protection afforded to the family under Article 41 that social order and the welfare of the State are part and parcel of the respect afforded to the family and the role played by the family in upholding that social order and the common good of the citizens of the State. The rights of the family cannot detract from social order and the common good and are, like other strongly protected rights, not absolute. The competing rights of the State to serve the common good and the welfare of the nation in preserving a fair and effective immigration policy are not set at nought by family rights. When a decision to deport is being considered, family rights must be weighed against the competing interests of the State. Neither the Constitution nor the Convention guarantees that the marriage between an Irish citizen and a foreign national gives that couple an automatic right to live together in Ireland and defeat immigration policies. This is clear from such authorities as *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593, *Osheku v. Ireland* [1986] I.R. 733 and *A.O. and D.L. v. The Minister* [2003] 1 I.R. 1. These authorities establish that a foreign national who marries an Irish citizen does not acquire the rights of an Irish citizen. If that foreign national is unlawfully in the State when he marries, his status is not cured by his marriage. This was made quite clear by Gannon J. in *Osheku* when he noted the inherent right of the State to control immigration in the interest of the common good, and held at p. 746:-

"It seems to me to follow that the personal rights guaranteed under the Constitution are not so absolute as to be capable of being considered entirely independently of the overall provisions of the Constitution. […] It must be in the interests of social order and the common good from time to time in individual cases to restrict the freedom of movement of a citizen within the State, as for instance by imprisonment or hospitalisation. This necessity may prevail over the related constitutional rights of members of the family of the individual concerned notwithstanding the recognition in the Constitution of the family as "the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and inprescriptible rights, antecedent and superior to all positive law …" *and* "as the necessary basis of social order and as indispensable to the welfare of the Nation and the State." *— see Article 41, s. 1, sub-sections 1 and 2.*

The right to reside in a particular place of the individual's choice is not a fundamental or constitutional right of a citizen whether he be married or single. The maintenance of social order, by imposing the sanctions of the law in the administration of justice, is a fundamental right of the State and of the body of its citizens. The right, if such there be

as claimed in this case, of an individual citizen by reason of marriage or family bonds to have a place of residence of his or her choice within the State, is not one that could or should prevent the imposition of the sanctions of the law in the administration of justice."

50. Gannon J. concluded at p. 748:-

"The constitutional guarantees for the protection of the marriage and the family are relied upon by all three plaintiffs, by the second and third plaintiffs by virtue of their citizenship, as the basis for their challenge to the authority conferred on the Minister for Justice by the legislature in his discretion to deport the first plaintiff. The Constitution does not impose on the citizens a duty or obligation to remain resident within the State, nor does it impose on the State a duty to provide a place of residence within the State for every citizen."

51. In *F.P. and A.L. v. The Minister* [2002] 1 I.R. 164, Hardiman J. held at p. 177:

"The State's obligation to protect with special care the institution of marriage and protect it against attack cannot, in my view, be invoked to limit the respondent's discretion in relation to an individual applicant whose application for asylum has been refused."

52. It is clear from these authorities that the family rights protected by the Constitution are not absolute and the weight to be accorded to those rights will vary depending on the circumstances *including* the duration and stability of the marriage, the family situation and the personal circumstances of the foreign national including his past conduct and future job prospects. As Geoghegan J. held at p. 170 of *A.O. and D.L.*, the Minister is not required to consider the fundamental constitutional rights of a family in a vacuum but rather, "*with particular reference to the actual facts of the particular case before him*". In addition, the Minister is entitled to take account of the possible consequences of a precedent set by a decision to grant permission to remain.

53. The circumstances of this family are that when the deportation order was made, the fact of the very recent marriage and the wife's pregnancy (then in its early stages) had not been made known to the Minister. Their marriage was fourteen months old when the Minister considered their second application for revocation in February 2010. The applicants entered into their marriage in the full knowledge of the husband's precarious immigration status and, as previously stated, must have considered the possibility of enjoying their marriage in Nigeria.

54. The only submission made on the wife's behalf at the revocation stage was that it would be "*a considerable diminution of Ms. [SW]'s rights for her to be forced to leave Ireland and establish herself in Nigeria where significantly lower social standards exist as compared to Ireland".* As previously observed, no information was provided as to her social standards and the only information on *SW* was gleaned from passports and the marriage certificate furnished. The Minister weighed that information against the interests of the State and found that the balance weighed in favour of the deportation of her husband. 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.

(iii) Reliance on Immigration Control

55. The applicants' final argument is that as the Minister acquiesced in the making of the first revocation application, it was unfair for him then to refuse to revoke the second revocation application based on the procedural requirements of immigration control. The Court cannot accept this argument. What the Minister in fact did was to inform the applicants that the factual circumstances grounding their request for residency rights for the husband following his marriage to an Irish citizen could only be considered by an application to revoke as the deportation order had already been made. The Minister had previously informed the husband pursuant to s. 17 of the Refugee Act 1996 that he was accepting the recommendation made by the Commissioner and affirmed by the Tribunal and had decided not to grant him a declaration of refugee status. The Minister informed the husband in the same letter that he proposed making a deportation order against him and informed him of the options open to him – he could leave the State voluntarily, in which case no deportation order would be made against him; he could remain in the State and consent to the making of a deportation order; or he could apply for subsidiary protection and / or leave to remain in the State for humanitarian reasons. The husband was informed that if he wished to exercise the third option, he should do so within 15 days.

56. There is no suggestion that the husband did not receive the said "3 options" letter or that he could not understand the letter. He did not act upon the letter during the 15 days allowed to him and after the 15 days had elapsed, the Minister proceeded to examine the husband's file and decided to make a deportation order. It was only after this had occurred that the applicants' legal representatives applied for residency on his behalf. It was at this stage that the Minister informed the applicants that his application for residency based on his marriage could only be considered in the form of a revocation application because the deportation order had already been made. The Minister did not suggest that the marriage would automatically cause him to revoke the deportation order.

57. The applicants contend that the Minister ought to have informed the applicant at that time that he would not revoke the decision because he intended to rely on immigration control matters. They argue that the Minister should have told them that if the husband wished to join his spouse in Ireland, it would be more appropriate to return voluntarily to Nigeria and apply for a "join spouse" visa. This is not a weighty argument nor is there any substance to it. When the Minister wrote to the applicants in response to their request for residency rights for the husband, the Minister had no previous information of the existence of any citizen wife. This could hardly be surprising considering the very short time the applicant was in the State and his assertion in previous documents and interviews that he was single. As the Minister knew nothing of the circumstances of the marriage apart from its having taken place to *SW*, the appropriate and fair path to follow was to invite a revocation application so that all facts could be provided and then considered to achieve a reasonable decision on whether to uphold or revoke the deportation order. When the Minister did receive the revocation application he gave every fact due consideration, weighed them against the interests of immigration control and found in favour of immigration control. He was entitled to do so and in this case, did so in accordance with law. He did not refuse to revoke because the applicant had breached time limits relating to a possible leave to remain application.

Conclusion

58. The Court is satisfied that the applicants have ***not established*** that the Minister's refusal to revoke the deportation order made against the husband *HU* should be quashed and the application is therefore refused.

59. In supplementary affidavits filed in these proceedings, the husband and wife attempted to provide additional information about themselves and their relationship. As this information was not before the Minister when he was considering their revocation application the Court has taken no account of those affidavits.