Neutral Citation Number: [2011] IEHC 214

THE HIGH COURT

2009 329 JR

BETWEEN

SUNDAY EFE, TEMITOPE EFE, BAMIDELEMI OLUKAYODE

(A MINOR SUING BY HER STEP-FATHER AND NEXT FRIEND SUNDAY EFE),

AYOMIDE OLUKAYODE (A MINOR SUING BY HER STEP-FATHER AND NEXT FRIEND SUNDAY EFE),

ESSE-OGHEME EFE (A MINOR SUING BY HER STEP-FATHER AND NEXT FRIEND SUNDAY EFE)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

ATTORNEY GENERAL AND IRELAND (No. 2)

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on 7th June, 2011

1. In these proceedings the applicants seek to challenge a decision of the Minister where he sought to deport the first named applicant, even though the effect of that decision would be effectively to rupture - more or less permanently - his family ties with his two Irish citizen step-children. In a reserved judgment delivered on 25th February, 2011, I concluded that the applicants had established substantial grounds for contending that the Minister had not conducted a full and fair assessment of their case by reason, *inter alia*, of the fact that the file analysis had minimized the potential impact which the deportation of their step-father would have on such children. Leave to apply for judicial review of that decision was granted accordingly. It should also be noted that the couple also have a younger Irish born child and the issue as to whether the child is also an Irish citizen may also feature in the main proceedings.

2. At this stage of the proceedings the applicant now contend that the common law rules of judicial review are unconstitutional in that it is contended that these rules are basically ineffective to secure the protection of the fundamental rights which are engaged by the asylum and deportation process. It is further contended that in the event that these rules are found to be constitutional, the applicants are nonetheless entitled to a declaration of incompatibility pursuant to s. 5(2) of the European Court of Human Rights Act 2003 on the ground that their right to an effective remedy under Article 13 ECHR has been violated. As the pleadings were originally constituted there was no constitutional challenge. In the companion decision, *S. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 31, I ruled that the applicants were not entitled to seek a declaration of incompatibility without having first exhausted their constitutional remedies. Leave to amend was accordingly granted in that case, this case and the other companion cases, *Oboh v. Minister for Justice, Equality and Law Reform, Fashade v. Minister for Justice, Equality and Law Reform* and *Alli-Balugon v. Minister for Justice, Equality and Law Reform* in order to allow the parties to plead the constitutional issue. The other three cases all present similar facts and issues. This judgment also governs the constitutional and ECHR issues raised in the latter three cases so far as the adequacy of the common law judicial review rules are concerned.

3. Before proceeding further, it is probably important to state exactly what is embraced in this description of the common law rules of judicial review. The applicants do not challenge the basic procedural rules (such as the requirements as to leave, filing of affidavits and amendment of pleadings) contained in Ord. 84 RSC. Nor do they challenge the special requirements governing applications involving the asylum and immigration process prescribed by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, this matter having in any event already been conclusively determined by the Supreme Court in its decision in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 2000* [2000] 2 I.R. 326. Instead, the applicants rather challenge the constitutionality of what might be termed the substantive common law rules of judicial review, namely, reasonableness, rationality and so forth on the ground that these rule do not provide an adequate remedy. In line with the proper sequence of issues indicated by the Supreme Court in *Carmody v. Minister for Justice, Equality and Law Reform* [2009] IESC 71, [2010] 1 I.R. 635 and *McD v. L.* [2009] IESC 81, [2010] 2 I.R. 199, I will first deal with the constitutional issues. It is only in the event that the applicants fail to secure a declaration of unconstitutionality that I will then proceed to consider the question of a declaration of incompatibility and the ECHR.

The guarantees contained in Article 40.3.1 and Article 40.3.2

4. I do not propose to dwell on what is, strictly speaking, the first question which might otherwise be thought to arise, namely, whether the Constitution (and particularly Article 40) serves to guarantee litigants an effective remedy. Of this there can be absolutely no doubt. As I pointed out in my judgment in *S. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 31 the combined effect of Article 34.1, Article 34.3.1, Article 40.3.1 and Article 40.3.2, coupled with a wealth of corresponding case-law, is to demonstrate that the Constitution provides litigants with such a right:-

> "These examples - which are certainly by no means exhaustive - all share one common theme, namely, that the courts will ensure the remedies available to a litigant are effective to protect the rights at issue and that our procedural law (including all legislation restricting or regulating access to the courts) respects basic fairness of procedures and is neither arbitrary or unfair. Article 34.3.1, Article 40.3.1 and Article 40.3.2 thus reflect the same basic premise as that contained in Article 13 ECHR, i.e., the guarantee of an effective remedy. That, after all, is the

> central premise of what the express words of Article 40.3 - the vindication of rights in the case of injustice done - are all about."

5. It is true that, unlike Article 13 ECHR, Article 40 does not actually use the term "effective remedy", but rather addresses itself to the concept of vindication of rights. It is, of course, merely a truism to observe that constitutional rights cannot be vindicated in the absence of an adequate remedy, as the wealth of constitutional case-law on the point amply demonstrates.This difference in approach is simply a question of verbal style - or, if you will, semantics - but it certainly amounts to the same thing. Adapting, therefore, the language of Finlay P. in *The State (C.) v. Frawley* [1976] I.R. 365, 374 the Constitution guarantees such a right "even if there never had been a European Convention of Human Rights, or if Ireland had never been a party to it".

6. It might also be observed that in his judgment in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701, 721 Murray C.J. commented that it was "the task of the Courts to ensure that where rights are wrongfully breached that remedies are effective". These comments are all the more pertinent given that they were uttered in the context of the appropriate test of review in judicial review cases challenging the reasonableness of a ministerial deportation order. The Chief Justice also made similar comments in *Carmody* ([2010] 1 I.R. 635, 668) in the context of that plaintiff's constitutional right to legal aid:-

> "[The plaintiff] is entitled to have that constitutional right vindicated. Article 40.3 of the Constitution imposes on the organs of government of the State the duty to defend and vindicate the personal rights of the citizen. As this Court has frequently pointed out, and as Henchy J. repeated in *The State (Healy) v. Donoghue* [1976] I.R. 325, this court is one of the organs of government. In exercising its judicial functions it must seek to vindicate such rights."

7. A similar issue also arose in *Albion Properties Ltd. v. Moonblast Ltd.* [2011] IEHC 107, albeit in a very different context. Here the question was whether this Court had the jurisdiction to grant a mandatory interlocutory injunction to require a commercial tenant - who was manifestly in default with regard to rental payments - to yield up possession. I rejected the argument that there could be any such jurisdictional bar, saying:-

> "Any supposed jurisdictional bar which prevented the court from granting injunctive relief in an appropriate case to require a defaulting tenant to yield up possession of a commercial tenancy would be at odds with duty imposed on the courts by Article 40.3.2 of the Constitution to ensure that the property rights of the plaintiff landlord are appropriately vindicated in the case of injustice done. The courts are under a clear constitutional duty to ensure that the remedies available to protect and vindicate these rights are real and effective: see, e.g., the comments of Kingsmill Moore J. in *The State (Vozza) v. O'Floinn* [1957] I.R. 227 at 250; those of Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3 and the authorities set out in my own judgment in *S v. Minister for Justice, Equality and Law Reform* [2011] IEHC 31."

Against that background, we can now proceed to consider the constitutional question. The applicants contend, first, that these common law rules fail to provide an effective means of vindicating constitutional rights in the present case in that the High Court cannot itself decide whether the deportation order trenches on constitutional rights and, second, that this Court cannot receive and act upon new evidence not otherwise available to decision-maker. At the outset I have to record some unease in the manner in which I am being invited to decide this issue, since in some respects at least it is akin to conducting an abstract review of this question, almost in the manner of an Article 26 reference. It is not clear to me, for example, that the applicants can clearly point to some aspect of the application of these common law rules which in and of itself bars their path to what would otherwise be a successful challenge to the validity of the deportation decision. In some respects, at least, it might have been preferable to await the outcome of the substantive challenge to the validity of the decision itself. But I recognize that there is no straightforward procedural sequence governing the resolution of these issues which is completely satisfactory. In view of this and given that the applicants clearly satisfy the basic *locus standi* tests prescribed by *Cahill v. Sutton* [1980] I.R. 269 and given further that all sides have urged me to resolve this issue, I have decided to determine these questions.

First ground of constitutional challenge: Review for reasons of rationality and reasonableness: the appropriate test

8. It is probably unnecessary here to conduct an exhaustive review of the appropriate test for reasonableness and rationality. It would be churlish not to acknowledge that judicial attitudes to this question in this jurisdiction have waxed and waned over the last fifty years or so. In *Re O'Laighleis* [1960] I.R. 93 the Supreme Court indicated that the courts could only examine the reasonableness of a ministerial decision where something akin to bad faith was established. Over twenty years later that decision was overruled by the Supreme Court in *The State (Lynch) v. Cooney* [1982] I.R. 337. That case concerned the reviewability of a ministerial decision under the Broadcasting Acts to the effect that a particular broadcast "would be likely to promote, or incite to, crime or would tend to undermine the authority of the State".

9. The Court held that it was, with O'Higgins C.J. saying that a ministerial decision of this kind ([1982] I.R. 337, 361):-

> "must be one which is *bona fide* held and factually sustainable and not unreasonable."

10. If *Lynch* suggested that the courts had to be satisfied that administrative decisions of this kind had to be factually sustainable and reasonable, the subsequent decision of the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 held that the courts could not review on grounds of reasonableness a decision of the planning authorities save where it was clear that there was "no evidence" on which the decision could have been based. Finlay C.J. observed ([1993] 1 I.R. 39, 70):-

> "I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it *no relevant material* which would support its decision."

11. For some reason *Lynch* was not referred to in *O'Keeffe*, despite the former's seminal status as an absolutely critical decision dealing with the reviewability of ministerial and, by extension, administrative decisions. Perhaps it is for this reason that in some respects these two decisions cannot be easily aligned. If the former decision required that a ministerial decision must be shown to be factually sustainable before the opinion of the Minister could be upheld, this seems at odds with the latter decision inasmuch as it decided that the courts could not interfere - at least in the specialist sphere of planning law - with an administrative decision save in the "no evidence" type cases. This point was made by McKechnie J. in an important judgment, *Neurendale Ltd. v. Dublin City Council* [2009] IEHC 588 which was delivered virtually on the eve of the Supreme Court's judgment in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701. In *Neurendale*, McKechnie J. observed:-

> "Thus, although Henchy J. stated in *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642

> that the only circumstances in which logic came into play in applying the test for unreasonableness was if the conclusion reached did not flow from the premises, the decision of the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 qualifies this to some extent and requires that in order to satisfy the court of this fact the applicant must show that the decision-making authority had *no relevant material* before it which would support its decision."

12. The decision in *O'Keeffe* gave rise to - or, at least, inspired - two other developments. The first development was the subsequent articulation of a heightened standard of judicial review whereby the courts could only quash for unreasonableness or irrationality in quite special or - perhaps it would be more accurate to say - extraordinary cases. This development reached its apotheosis with the judgment of O'Sullivan J. in *Aer Rianta cpt v. Commissioner for Aviation Regulation* (High Court, O'Sullivan J., 16th January, 2003) where he enunciated the relevant test for review in the following terms:-

> "the kind of error that produces invalidity is one which no rational or sane decision maker, no matter how misguided, could essay. To be reviewably irrational it is not sufficient that a decision maker goes wrong or even hopelessly and fundamentally wrong: he must have gone completely and inexplicably mad; taken leave of his senses and come to an absurd conclusion. It is only when this last situation arises or something akin to it that a court will review the decision for irrationality."

13. The effect of this particular decision was that, as Gilligan J. noted in *Byrne v. Judge O'Leary* [2006] IEHC 412 "the unreasonableness standard has been heightened even further in recent times". Yet such development did not meet with universal approval: thus, for example, in his judgment in *Neurendale* McKechnie J. observed that he would not endorse *Aer Rianta,* saying that it was not possible "to have as a requirement of unreasonableness insanity before the courts may intervene." One would also have to observe candidly that if *Aer Rianta* remained the test, this would be tantamount to saying that a decision of this kind could be challenged on reasonableness grounds only where something akin to bad faith had been established, an extremely difficult test to surmount. It would be hard to see how such a principle could be aligned with the classic re-statement of the law articulated by O'Higgins C.J. in *Lynch*. We must, however, break off this part of the narrative to take account of the second development of which we have just spoken.

14. The second development - itself also illustrated by the thinking in *Aer Rianta* - was deference to specialized bodies. Quite independently of the appropriate presumption of validity which decisions taken by administrative agencies and government departments properly enjoy "by virtue of the respect which one great organ of the State owes to another" (*Buckley v. Attorney General* [1950] I.R. 67 at 80, per O'Byrne J.), it is quite clear that decisions which emanate from agencies or persons with proven and established technical and administrative skills enjoy a special degree of deference.

15. We have perhaps forgotten that this is far from a relatively new concept. In *Philadelphia Storage Battery Co. v. Controller of Industrial and Commercial Property* [1935] I.R. 575 Kennedy C.J. said - admittedly in the context of a statutory appeal – of the decisions of a specialist administrative official such as (what was then described as) the Controller of Industrial and Commercial Property ([1935] I.R. 575, 593):-

> "The Courts in England have, however, indicated very strongly that they will pay great attention to the decision of a specialist officer like the Controller. No doubt the degree of such attention will vary with the length of time he has held his office and his consequent experience, and the qualifications and the known ability of the officer. If the English courts went to the extent of accepting his view as the exercise of a judicial discretion by which the Court should be bound, we could not follow them in this country, as that would, in my opinion, be contrary to a constitutional principle which binds us, and which we must be jealous to maintain. In my opinion, therefore, while we read the views of the Controller with respect and in the present case with admiration of the clarity and ability of his statement of them, we are quite free to form our own opinion untrammelled by them."

16. The question of deference to decisions of specialist bodies was, of course, also present in *O'Keeffe* where Finlay C.J. stressed ([1991] 1 I.R. 39, 71):-

> "Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board which are expected to have skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters."

17. This principle of deference was then applied in a series of important cases where the decision-maker plainly enjoyed such expertise. Examples here include *M. & J. Gleeson Ltd. v. Competition Authority* [1999] 1 I.L.R.M. 401, *Orange Communications Ltd. v. Director of Telecommunications Regulation (No.2)* [2000] 4 I.R. 159, *Carrickdale Hotel v. Controller of Patents* [2004] 3 I.R. 410, *Ashford Castle v. Labour Court* [2007] 4 I.R. 70 and *Rye Investments Ltd. v. Competition Authority* [2009] IEHC 140.

18. Quite independently of questions of technical expertise, there are naturally certain types of issues which do not admit of easy resolution if ordinary legal standards and principles or even conventional legal reasoning are to be employed. Thus, in the sphere of planning and development, the resolution of questions involving technical engineering assessments, sustainability, aesthetics and even taste probably admit of limited judicial involvement. This is, as Denham J. pointed out in *Meadows*, quintessentially the kind of decision attracting the specialized deference which the Supreme Court had in mind in *O'Keeffe*. But this approach would have a much more limited (if, indeed, any) application in many other spheres of the planning process. At the other end of this spectrum, for example, the question of whether the compulsory acquisition of land was objectively necessary in the public interest squarely engages the substantive protection of property rights and as Geoghegan J. so carefully explained in *Clinton (No.2)*, these rights would not be adequately protected by a test which was satisfied by showing that there was a reasonable basis for the decision.

19. So far as asylum and immigration decisions are concerned, much might depend, in the words of Kennedy C.J. in *Phildadelphia Battery*, on the experience and expertise of the particular decision-maker in the context of the decision at hand. One can occasionally, for example, encounter issues of credibility in the asylum area where the underlying facts present issues arising from complex societal and group behaviour, the dimensions of which outsiders struggle to understand: issues arising from Albanian blood feuds are, perhaps, a good case in point: see, *e.g., ML v. Refugee Appeal Tribunal,* High Court, 21st January, 2011. The resolution of these questions would undoubtedly benefit from decision-makers possessing specialist knowledge and understanding of the society and behaviour in question. If, in this sort of unusual case, the decision maker were shown to have this type of expertise, then, of course, the courts should generally defer to it.

20. There might well be other cases where, for example, the decision maker had lived for some time in the foreign country in question and was thoroughly familiar with its own particular cultural, social, political and religious norms and where such deference was possibly warranted. But where, as in the general run of things, the decision maker has not even visited the country in question and is, for example, entirely reliant on country of origin information to assist with a credibility assessment, any doctrine of curial deference would seem misplaced. If, for example, an African administrator was to claim a specialist knowledge of contemporary Irish political, social and cultural history based solely on his or her having read and consulted US State Department country of origin information regarding Ireland, this would be justly viewed here with some scepticism, not to speak of outright incredulity. Why should the position be viewed any differently in the case of those Irish decision-makers whose knowledge of the political and social affairs of specific African countries is derived almost exclusively from similar sources?

21. At all events, the present case is not one where the decision maker is called upon to make a judgment about the plausibility of an asylum claim by reference to specific internal events within the country of origin. Rather, what is fundamentally at issue here in the present proceedings is the likely effect of the deportation on the applicant's family in general and children (including step-children) in particular and, by extension, whether it is realistic in the circumstances to expect the remainder of the family to travel to Nigeria were such an order to take effect. It cannot be said that administrative decision-makers enjoy a specialist knowledge or expertise in relation to such matters. Besides, these decisions engage fundamental rights under Article 41 of the Constitution, the protection of which is the solemn duty of this Court. Any rule of law which purported to constrain this Court from protecting these rights in circumstances where it could only interfere where there was "no evidence" to justify a factual conclusion reached would simply be at odds with these constitutional obligations. A test of this nature in the sphere of constitutional rights would thus fall to be condemned as unconstitutional in the light of the obligations imposed on the State by Article 40.3.1 and Article 40.3.2 to vindicate these constitutional rights.

22. It follows, therefore, that whatever be the parameters of the curial deference doctrine, it has no relevance in the present case. While the decisions under review are presumed to be valid unless and until quashed and are fully entitled to the respect which is rightfully due, it cannot be said that any doctrine of heightened deference is applicable.

23. Returning now to the narrative regarding the general standard of review, all of these questions were comprehensively examined by the Supreme Court in *Meadows*. In this case the Court concluded that the general proportionality applied to judicial review of administrative decisions. But as Mr. Maurice Collins SC, counsel for the Minister, so aptly noted in his submissions, the decision in *Meadows* did not simply drop out of the sky. It is perfectly clear that for quite some time there was increasing judicial unease with the manner in which *O'Keeffe* had come to be applied in practice. Any number of instances of this judicial unhappiness could be cited, but it perhaps suffices to refer three representative examples of a trend which had been welling up prior to the decision in *Meadows.*

24. The first decision is that of McKechnie J. in *Holland v. Governor of Portlaoise Prison* [2004] IEHC 208, [2004] 2 I.R. 573. In this case the applicant prisoner challenged the validity of a prison policy which restricted his access to the media. McKechnie J. first indicated why he considered that *O'Keeffe* had modified the *Keegan* test:-

> "In the context of reviewing a decision of An Bord Pleanála, the Supreme Court, through the judgment of Finlay C.J., in *O'Keeffe* added, what appears to be quite an important additional element to the above quoted formulation of this principle. The learned Chief Justice said that for an applicant to succeed in quashing a decision of that authority on this ground, he would have to establish 'to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision.'"

25. McKechnie J. then continued:-

> "It seems to me that both *Keegan* and *O'Keeffe,* but in particular the latter, were based in a factual context totally distinguishable from the present case, which case raises issues of the impugned decisions being invalid as either being outside the scope of rr. 59 and 63 [of the Prison Rules 1947] and/or as constituting a violation of the applicant's constitutional rights. If *O'Keeffe* was to apply, it would mean that this court should ask itself whether or not the Governor had before him any relevant material which would support its decision. I do not believe that when the exercise of a fundamental right such as the right to communicate is at the core of an application that this test is either proper or appropriate. Accordingly, I do not propose to decide this case on either the basis of *Keegan* or *O'Keeffe*."

26. The next example is supplied by *I. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 180, [2008] 1 I.R. 208. This concerned a case like the present one - namely, an application to quash on reasonableness grounds an immigration decision - McGovern J. stated:-

> "Since the purpose of the [Refugee Act 1996], is, *inter alia,* to give effect to the Geneva Convention and other related conventions on the treatment of refugees I think the test of "anxious scrutiny" is one which the courts should use as well as the *O'Keeffe* principles when considering matters of this kind. Of course if a decision is made on irrational grounds it will be susceptible to legal challenge. But there may be cases which might not come within the *O'Keeffe* definitions of irrationality but might legitimately fall to be reviewed by the courts. It seems to me that this could arise in circumstances of manifest error disclosing a reasonable possibility on the facts that the original decision was wrong."

27. Finally, in *Clinton v. An Bord Pleanála (No. 2)* [2007] IESC 19, [2007] 4 I.R. 701, 741 Geoghegan J. observed:-

> "It is axiomatic that the making and confirming of a compulsory purchase order to acquire a person's land entails an invasion of his constitutionally protected property rights. The power conferred on an administrative body such as a local authority or An Bord Pleanála to compulsorily acquire land must be exercised in accordance with the requirements of the Constitution, including respecting the property rights of the affected landowner (*East Donegal Co-Operative v. Attorney General* [1970] I.R. 317). Any decisions of such bodies are subject to judicial review. It would insufficiently protect constitutional rights if the court, hearing the judicial review application, merely had to be satisfied that the decision was not irrational or was not contrary to fundamental reason and common sense."

28. At all events, all of the pre-existing case-law must now be reviewed in the light of the seminal decision in *Meadows*. While it is, perhaps, too early to evaluate the precise significance of the decision, two things emerge clearly. First, it is plain that a majority of the Court was prepared to apply a general proportionality test in respect of all decisions affecting fundamental rights.

29. Second, it is equally clear that the *O'Keeffe* test has been re-interpreted and clarified to take fuller account of the earlier

judgment of Henchy J. in *Keegan*: see generally Delany and Donnelly, "The Irish Supreme Court inches towards proportionality review" (2011) *Public Law 9*. In *Keegan* Henchy J. had stressed that the courts could intervene to quash on reasonableness grounds where the conclusion simply did not follow from the original premise. As Fennelly J. put it ([2010] 2 I.R. 701 at 827):-

> "I prefer to explain the proposition laid down in the *Keegan* and *O'Keeffe* cases, retaining the essence of the formulation of Henchy J in the former case. I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word, 'substantive', to distinguish it from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of the decision-maker. This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J. The applicant must discharge that burden by producing relevant and cogent evidence.
>
> This does not involve a modification of the existing test as properly understood. Rather it is an explanation of principles that were already implicit in our law."

30. While the difference is, in some respects, a question of semantics - as Fennelly J. acknowledged ([2010] 2 I.R. 701, 825) - there is nonetheless a clear difference in principle between saying on the one hand that a decision is unreasonable because there is "no evidence" for the conclusion reached, while on the other quashing a decision because it does not flow from the original premises of the decision maker - the very point which McKechnie J. had made in both *Holland* and *Neurendale*. It will be a rare case indeed where there is absolutely no evidence to support a particular proposition. By contrast, there may well be many instances where there is *some* evidence to justify a particular decision, but where the ultimate conclusion simply does not flow from the original premise (*Keegan*) or but nonetheless falls to be quashed for lack of proportionality (*Meadows*).

31. In any event, post-*Meadows* this is a debate which scarcely matters, at least in those cases where - as here - the decision engages and affects constitutional rights, such as the family rights protected by Article 41 and, by extension, Article 8 ECHR. In this regard it would be difficult to improve on the succinct and comprehensive summary of the present law contained in the judgment of Cooke J. in *ISOF v. Minister for Justice, Equality and Law Reform (No. 2)* [2010] IEHC 457. Here the question was whether it was necessary for this Court to give a certificate of leave to appeal to the Supreme Court under s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 in order to clarify aspects of *Meadows.*

32. Cooke J. concluded that the law in this regard had been settled "with sufficient clarity" by the decision in *Meadows* so that a certificate was unnecessary. Having referred to the passage from the judgment of Fennelly J. just quoted, Cooke J. continued:-

> "Where the validity of an administrative or quasi judicial decision comes before the court on judicial review, the Court's starting point is the decision itself; the basis upon which it has been reached and the process by which it has been decided. It does not have before it an appeal against the decision, much less a merits-based appeal by way of re-adjudication of the original issue. Its jurisdiction is based upon the content of the decision and the law applicable thereto. Where the challenge to the decision is based upon the assertion that it has the effect of intruding disproportionately upon the fundamental rights of those affected by it, it is the duty of the court to assess whether the applicant demonstrates that it is disproportionate in the sense of being irrational or unreasonable according to the *Keegan/O'Keeffe* test. It does so by reference to the evidence, information and documentation available to or procurable by the decision maker at the time. It does not take account of new information or evidence which has become available since the decision was made. (In the case of a deportation order the remedy in that regard lies in an application for revocation under s. 3(11) of the Immigration Act 1999, a decision on which is itself susceptible of judicial review for proportionality where necessary.) In the judgment of the Court no material difference exists between the evaluation of proportionality as regards the interference with "qualified rights" (as in the present case) and "absolute rights" (as in the case of *Meadows*). If constitutional rights are in issue (whether absolute or qualified) it is the function and duty of the High Court to vindicate them. The same can be said for rights entitled to protection under the European Convention of Human Rights and the need for the High Court, in compliance with Article 13 of the Convention, to provide an effective remedy for that protection.
>
> In other words, if the High Court has a constitutional obligation to vindicate personal constitutional rights in the face of administrative or quasi judicial decisions; and if it has by default a statutory duty under the European Convention on Human Rights Act 2003 to ensure protection under the Convention for rights not otherwise guaranteed by the Constitution, so be it. The remedy of judicial review under O. 84 of the Rules of the Superior Courts is sufficiently comprehensive and flexible in the exercise of the jurisdiction of the High Court to ensure that both of those objectives are met. The mistake is to confuse the jurisdictional rules and procedural incidents of the judicial review remedies with the manner which the criteria for the review fall to be applied.
>
> The common law remedies of judicial review and judicial practice in their application have, in the view of this Court, evolved differently in the constitutional framework of this State (and particularly under the influence of the judgment of the Supreme Court in *East Donegal Co-Operative Ltd. v. Attorney General* [1970] IR 317), as compared with other common law jurisdictions and particularly that of the United Kingdom both before and since the enactment there of the Human Rights Act 1998. Nevertheless, the potential for evolution of the criteria can be seen as reflected in, for example, judgments such as that in which the House of Lords in the United Kingdom held in the context of judicial review procedures in that jurisdiction involving the application of the criterion of proportionality under the Convention that , "…no shift to a merits based review" is required but "the intensity of review is greater than was previously appropriate , and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence*…" and thus goes "beyond that traditionally adopted to judicial review in a domestic setting." (See the speech of Lord Bingham of Cornhill in *R(SB) v Governors of Denbigh High School* [2007] 1 A.C. 100, 116).
>
> In this jurisdiction the Supreme Court has, of course, rejected the need to alter the "intensity" or the level of review applied by the Court in judicial review in this way. It remains the case however, as illustrated by the passage cited from the judgment of Fennelly J. [in *Meadows*] that judicial practice in the exercise of the judicial review function is capable of adapting to accommodate the need to examine the substantive content of a decision having

> impact on fundamental rights in order to evaluate the lawfulness of its encroachment on those rights without thereby supplanting the administrative decision with a new decision of its own.
>
> Thus, while the judicial review remedies remain unchanged – although significantly more flexible and comprehensive in the reform of Order 84 in 1986 – and the procedural and evidential rules for their application are constant; the criteria by which they are applied are capable of evolving in order to accommodate rights to protection such as those created by the Constitution or the Act of 2003. By examining the substance of the effect of an interference brought about by an administrative decision on fundamental rights of an applicant for judicial review in order to assess whether it goes beyond a lawful encroachment, the Court is not substituting its own view of what the decision ought to be but is testing it by reference to what is objectively reasonable and commonsense."

33. To this might be added the observation that the courts will also quash a decision which is vitiated by material error of fact: see, *e.g., Hill v. Criminal Injuries Compensation Tribunal* [1990] I.L.R.M. 36; *A.B.-M. v. Minister for Justice, Equality and Law Reform,* High Court, 23 July 2001; *AMT v. Refugee Appeal Tribunal* [2004] 2 I.R. 607; *L. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 362; *ML v. Refugee Appeal Tribunal*, High Court, 21st January 2011 and *HR v. Refugee Appeal Tribunal* [2011] IEHC 151.

Conclusions on the first constitutional issue

34. In summary, therefore, it is clear that, post-*Meadows* at any rate, it can no longer be said that the courts are constrained to apply some artificially restricted test for review of administrative decisions affecting fundamental rights on reasonableness and rationality grounds. This test is broad enough to ensure that the substance and essence of constitutional rights will always be protected against unfair attack, if necessary through the application of a *Meadows*-style proportionality analysis: see, *e.g.,* decisions as such as *Holland, Clinton (No. 2)* and *S. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 92. This, after all, was a feature of the promise of Walsh J. in *East Donegal*: see [1970] I.R. 317, 349:-

> "A person exercising his constitutional right to litigate may be assured that the resources of the Courts established under the Constitution are not so limited that they could facilitate, or that they would be exercised in any way which would facilitate, the concealment of an infringement of constitutional rights or the masking of injustice."

35. Against that background, it is clear that the common law rules of judicial review satisfy the constitutional requirements of Article 40.3.1 and Article 40.3.2 in that they must in particular provide an adequate remedy to vindicate constitutional rights.

Second constitutional issue: The admission of new evidence

36. The second objection to the adequacy of the judicial review process relates to the admission of new evidence. It is contended that in order for the remedy of judicial review to be effective this Court ought to be to receive new evidence which (generally speaking) post-dates the decision and act itself on that evidence.

37. It is important, however, to bear in mind the reason for the rule that, generally speaking at any rate, the court in judicial review proceeding will not receive new evidence. So far as asylum claims are concerned, Article 28 of the Constitution assigns the executive power to the Government. As the Supreme Court made clear in *Laurentiu v. Minister for Justice, Equality and Law Reform* [1999] 4 I.R. 26, deportation and cognate immigration questions squarely involve the executive power, albeit that the exercise of this power is regulated by the Immigration Act 1999. Given that decisions regarding asylum involve the exercise of executive power, it would not be constitutionally permissible to assign the exercise of such powers to the judicial branch: see *TD v. Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 287. The practical effect of this is that the actual decision whether to deport or not must remain with the executive branch, albeit, of course, that a decision to deport might in practice be prevented by a judicial decision.

38. It was at one stage rather faintly argued that in order to have an effective remedy this meant that the ultimate decision on the deportation question would have to be taken by this Court itself. That submission is, however, unsustainable for the reasons just advanced, since the judicial branch could not constitutionally be invested with executive powers. This *in itself* does not mean that the Oireachtas could not elect to vest immigration powers in the judicial branch. It is, however, rather to observe that in the event that this were to occur, the judicial branch would be confined to applying *purely* legal principles to determine such questions by reference to standards prescribed by law by the Oireachtas. Any attempt to vest the judicial branch with functions in the immigration sphere akin to the determination and application of purely policy questions would, however, represent an unconstitutional violation of the separation of powers, as it would be tantamount to vesting the judicial branch with decision making powers of a type, style and nature which Article 28 reserves to the executive branch.

39. If, however, this Court could receive and act upon new evidence it would cross a borderline between review and appeal. If the Court acted upon new evidence, then it would no longer be simply reviewing the decision already taken, but it would be acting on foot of new information of which the decision-maker never stood possessed. Subject to the reservations just expressed with regard to reposing executive style powers and functions on the judiciary, there could be no objection in principle to vesting the judicial branch with an appellate function in respect of immigration decisions. In such circumstances, it might well be open to the court to receive new evidence and even to act on it: see, *e.g.,* the judgment of Lynch J. in *Balkan Tours Ltd. v. Minister for Communications* [1988] I.L.R.M. 101.

40. Nevertheless the fact that the court in judicial review cannot receive new evidence is simply an incidence of the nature of the proceedings. If new evidence could be received, they could cease to be in the nature of a review, but would then partake of the character of an appeal. The fact that judicial review does not admit of this does not *of itself* mean that the State has thereby failed to vindicate the applicants' constitutional rights given that there exists a flexible and powerful remedy whereby such rights are protected and the rule of law upheld.

41. Given that, subject to limited exceptions, immigration decisions can be challenged only by way of judicial review under s. 5 of the Illegal Immigrants (Trafficking) Act 2000, I agree that if there were no mechanism whereby material facts which post-date the initial decision could not be acted on by the executive such a lacuna would have represented a failure by the State to provide a procedure whereby applicants' constitutional rights could be adequately vindicated. Had there been such a lacuna, then in line with the Supreme Court's decision in *Carmody*, in these circumstances the applicants would in principle have been entitled to a declaration to this effect.

42. The need for a mechanism whereby new facts can be assessed might be especially true in the general sphere of family rights under Article 41, where fresh developments such as marriage, the birth of children and the increasing extent to which Irish born children had integrated into the school system might all be intensely relevant to the Minister's decision in any given case.

43. But, as it happens, there is such a mechanism. In the immigration sphere, the applicants have a tailor-made remedy which can

address new post-decision facts, namely, the power to revoke the deportation order under s. 3(11) of the 1999 Act. Should, for example, the Minister fail to revoke the deportation order in the light of new material facts, then this Court could quash that decision in an appropriate case: see, *e.g., S. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 92.

44. For these reasons I cannot accept that the remedy of judicial review must be regarded as an inadequate method of vindicating constitutional rights by reason of the fact that new evidence is not admissible in judicial review proceedings once regard is had to the fact these applicants can avail in appropriate cases of the protections contained in s. 3(11) of the 1999 Act so that new, material evidence can be considered by the Minister.

Whether the common law rules of judicial review satisfy the requirements of Article 13 ECHR
45. It remains to consider the compatibility of these rules with Article 13 ECHR, given that the applicants have also sought a declaration of incompatibility under s. 5(2) of the European Court of Human Rights Act 2003. This is a matter which has already been considered by this Court in *B. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 296 where Cooke J. stated:-

> "….the jurisdiction of the High Court in the review of administrative decisions including deportation orders is at least as ample by way of effective remedy as that of the administrative courts of continental jurisdictions or, for that matter, the Court of Justice of the European Union under Article 263 of the Treaty on the functioning of the Union. Furthermore, insofar as the concept of 'effective remedy' extends to an entitlement to compensation where a right or freedom has been violated, the High Court has jurisdiction in the exercise of its judicial review function to award damages. Thus the scope of the jurisdiction of the High Court in reviewing the legality of a decision made under s. 3 of the 1999 Act clearly fulfils the criteria established by the case law of the Strasbourg Court for the provision of an effective remedy before a national authority in accordance with Article 13. The High Court is independent and its orders in judicial review are binding and enforceable. Furthermore, as is made clear by the judgment of Denham J. in the Supreme Court in the *Oguekwe* case, the High Court in reviewing the validity of a deportation order is not only entitled but obliged to ensure that the order has been validly made in the light of any substantive arguments raised based upon alleged violation of Convention rights and freedoms."

46. I respectfully agree with these views. I would merely add that this issue was subsequently addressed by the European Court of Human Rights in *Kay v. United Kingdom* [2010] ECHR 1322. Here the Court held that the fact that the applicants were not entitled to challenge a decision of the local authority to repossess a dwelling on the basis that it constituted a disproportionate attack on their right to family life was itself a breach of Article 8. The Court added that it welcomed:-

> "…the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds in the light of Article 8. A number of their Lordships in *Doherty [v. Birmingham City Council* [2008] UKHL 57, [2009] 1 AC 307] alluded to the possibility for challenges on conventional judicial review grounds in cases such as the applicants' to encompass more than just traditional *Wednesbury* grounds (see Lord Hope at paragraph 55; Lord Scott at paragraphs 70 and 84 to 85; and Lord Mance at paragraphs 133 to 135 of the House of Lords judgment). However, notwithstanding these developments, the Court considers that at the time that the applicants' cases were considered by the domestic courts, there was an important distinction between the majority and minority approaches in the House of Lords, as demonstrated by the opinions in *Kay* itself. In *McCann,* the Court agreed with the minority approach although it noted that, in the great majority of cases, an order for possession could continue to be made in summary proceedings and that it would be only in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue (see *McCann,* cited above, § 54). To the extent that, in light of *Doherty,* the gateway (b) test set out by Lord Hope in *Kay* should now be applied in a more flexible manner, allowing for personal circumstances to be relevant to the county court's assessment of the reasonableness of a decision to seek a possession order, the Court emphasises that this development occurred after the disposal of the applicants' proceedings.
>
> In conclusion, the *Kay* applicants' challenge to the decision to strike out their Article 8 defences failed because it was not possible at that time to challenge the decision of a local authority to seek a possession order on the basis of the alleged disproportionality of that decision in light of personal circumstances. Accordingly, for the reasons given in *McCann,* the Court concludes that the decision by the County Court to strike out the applicant's Article 8 defences meant that the procedural safeguards required by Article 8 for the assessment of the proportionality of the interference were not observed. As a result, the applicants were dispossessed of their homes without any possibility to have the proportionality of the measure determined by an independent tribunal. It follows that there has been a violation of Article 8 of the Convention in the instant case."

47. In other words, the European Court held in *Kay* that the UK had been in breach of Article 8 (and, by implication, Article 13) because at the time a full blown challenge to the validity of an administrative decision on proportionality grounds simply was not permitted as the law in the United Kingdom then stood. Of course, in this jurisdiction this step was had been already anticipated by *Meadows*.

48. But what is perhaps a more significant aspect of *Kay* is that it clearly signals that judicial review providing for a proportionality analysis of administrative decisions affecting fundamental rights will fully satisfy the Convention's requirements. Whatever might have been the case prior to *Meadows*, it is obvious in the wake of that decision that in this respect the scope of review articulated by our courts in cases such as *Meadows* and *ISOF (No.2)* clearly meets this standard.

49. It follows, therefore, that there is no basis for contending that these common law rules of judicial review - certainly as interpreted by *Meadows* - fails to satisfy the ECHR's requirements with regard to an effective remedy.

New evidence and Article 13 ECHR
50. It remains to consider the question of the reception of new evidence and whether the inability of the courts to receive such evidence in judicial review renders that remedy basically ineffective to protect the rights of applicants in such cases. At the outset, it is probably important to recall my observations in *Albion Properties* where I pointed out in connection with Article 13 ECHR that:-

> "the courts are not an "organ of the State" for the purposes of s. 3(1) of the European Convention of Human Rights Act 2003, with the result that the courts are not, apparently, as such under any direct statutory obligation to perform their functions in a Convention compatible manner. The question of whether the courts are under any duty *independently of the constitutional considerations which I have just mentioned* to re-fashion or re-shape existing remedies in order to secure compliance with Article 13 ECHR is a matter which must await an appropriate case for resolution."

51. But independently of this, this Court could, of course, nonetheless grant a declaration pursuant to s. 5(2) of the 2003 Act that the failure to provide an adequate remedy amounted to a breach of Article 13 ECHR were this to be warranted in any given case.

52. It is plain, however, from the decision of the European Court of Human Rights in *Maslov v. Austria* [2008] ECHR 546 that such a declaration would not be warranted in present case. In *Maslov* one of the questions was the extent to which Contracting States were obliged to take account of events which post-dated a deportation decision. On this point the Court observed (at para. 93):-

> "In this connection the Court would point out that its task is to assess the compatibility with the Convention of the applicant's actual expulsion, not that of the final expulsion order. *Mutatis mutandis*, this would also appear to be the approach followed by the European Court of Justice which stated in its *Orfanopoulos and Oliveri* judgment that Article 3 of Directive 64/221 precludes a national practice whereby the national courts may not take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters which occurred after the final decision of the competent authorities *….Consequently, in such cases it is for the State to organise its system in such a way as to be able to take account of new developments.* This is not in contradiction with an assessment of the existence of "family life" at the time when the exclusion order becomes final, in the absence of any indication that the applicant's "family life" would have ceased to exist after that date ….. Even if it had done so, the applicant could still claim protection of his right to respect for his "private life" within the meaning of Article 8…"(emphasis supplied)

53. As we have already noted in connection with the constitutional issue, the Oireachtas has in fact provided via s. 3(11) of the 1999 Act such a mechanism for reviewing new facts. It is clear from *Maslov* that all that it necessary that Contracting States provide such a remedy, albeit that the details of the mechanism are quintessentially matters for the state in question. So far as this State is concerned, s. 3(11) is the designated remedy for this purpose.

54. Since the Oireachtas has accordingly provided an adequate remedy whereby new facts in deportation cases such as the present can be taken into account, it follows that the State is not in breach of Article 13 ECHR and no question of a declaration of incompatibility therefore arises.

Conclusions

55. In summary, therefore, I have concluded as follows:-

> A. Article 40.3.1 and Article 40.3.2 of the Constitution require the State to vindicate constitutional rights. This of necessity requires the State to provide a mechanism where such rights are adequately vindicated by means of an adequate remedy and, where appropriate, the courts will take on the task of fashioning such a remedy.
>
> B. Any rule of law which purported to constrain this Court from protecting constitutional rights in circumstances where it could only interfere where there was "no evidence" to justify a factual conclusion reached by a decision-maker would simply be at odds with these constitutional obligations. A test of this nature in the sphere of constitutional rights would thus fall to be condemned as unconstitutional in the light of the obligations imposed on the State by Article 40.3.1 and Article 40.3.2 to vindicate these constitutional rights.
>
> C. In the wake of the Supreme Court's decision in *Meadows* it can no longer be said that the courts are constrained to apply some artificially restricted test for review of administrative decisions affecting fundamental rights on reasonableness and rationality grounds. This test is broad enough to ensure that the substance and essence of constitutional rights will always be protected against unfair attack, if necessary through the application of a *Meadows*-style proportionality analysis.
>
> D. In the light of the decision in *Meadows,* it is clear that constitutional rights - including the family rights protected by Article 41 at issue here - are adequately vindicated by the common law rules of judicial review.
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> E. In judicial review proceedings it is not permissible for this Court to receive and act on new evidence, since to do so would be to cross a border between appeal and review. If there were no mechanism whereby material new facts which impacted significantly on constitutional rights emerged after the relevant administrative decision could be reviewed, then such a lacuna would amount to a failure to vindicate constitutional rights for the purposes of Article 40.3 and the Court might have to give a declaration to this effect.
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> F. As it happens, however, there is such a mechanism, in that s. 3(11) of the 1999 Act allows the Minister to revoke a deportation order. In these circumstances, there is no basis for granting a *Carmody*-style declaration in respect of any legal lacuna and still less is there any basis declaring the common law rules of judicial review to be unconstitutional on this account.
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> G. It is clear from the decision of the ECHR in *Kay v. United Kingdom* that *Meadows*-style judicial review satisfies the requirements of Article 13 ECHR. So far as the receipt of new evidence is concerned, is likewise clear from *Maslov v. Austria* that all that is necessary that there is a mechanism whereby new material evidence can be evaluated by administrative decision-makers. As we have noted, there is such a procedure provided by s. 3(11) of the 1999 Act.
>
> H. For these reasons, there is no basis for granting a declaration of incompatibility pursuant to s. 5(2) of the 2003 Act.