Neutral Citation Number: [2011] IEHC 38

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 946 J.R.]

BETWEEN

OREOLU OLUWABUANMI SEMILORE JEDIDIAH LOFINMAKIN (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND AKINTOLA LOFINMAKIN) AND EGEBUN–OLUWAMOTUNOLA PEACE ORE–OLUWA LOFINMAKIN (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND AKINTOLA LOFINMAKIN) AND AKINTOLA LOFINMAKIN AND RACHEL YINKA AMONUSI

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Cooke delivered the 1st day of February 2011

1. The third and fourth named applicants are husband and wife and the parents of the two minor applicants. The parents are natives of Nigeria. The minors are Irish citizens having been born to the fourth named applicant in the State respectively on 18th May, 2000, and 17th March, 2003. The mother, the fourth named applicant, arrived in the State in December, 1999. She currently has permission to reside in the State with her children under the IBCO5 scheme.

2. The third named applicant, ("Mr. Lofinmakin") says he is a businessman who took up residence in Germany in 1996, where he lived and worked for more than ten years. He claims to be entitled to permanent residence in Germany although some doubt exists in this regard, because he may have forfeited that entitlement due to his having been absent from that country for more than six months.

3. Mr. Lofinmakin claims to have visited his wife in Ireland on a frequent basis since her arrival here in December 1999. These visits were made on foot of temporary entry permits until the expiry of the last relevant permission on the 1st June, 2007, since when he has remained illegally in the State.

4. An application on his behalf on the 23rd May, 2007, for an extension to that last permission was refused by the respondent on the 30th May, 2007. A somewhat tentative application for residence as the spouse of an EU citizen was also made and refused upon the ground that he was not the spouse of an EU citizen. Mr. Lofinmakin has thus been present in the State illegally since June 2007. He is not therefore an asylum seeker. When his current illegal presence in the State commenced he had been in the country for three months (2nd March, 2007 to 1st June 2007,) and at the time his children were respectively seven and four years old.

5. In response to a letter under s. 3 of the Immigration Act 1999, proposing to deport Mr. Lofinmakin, representations were made on his behalf on the 13th October, 2008. These were considered but rejected and on the 20th August, 2009, a deportation order was made. It is against this order ("the Contested Decision") that an application is now made for leave to apply to the High Court for an order of *certiorari* to quash the decision to make that order.

6. Upon the hearing of the application for leave two matters were before the Court. The first was the application by the applicants for leave to seek judicial review of the Contested Decision and the second was a motion brought on behalf of the respondent to dismiss the proceedings as frivolous and/or vexatious or an abuse of process. The latter motion was based upon the proposition that since the making of the deportation order, the applicants' solicitors had requested that it be not implemented pending clarification with the German authorities of the question as to whether the residence entitlement of Mr. Lofinmakin was still valid. This request was treated by the respondent as an application to revoke the deportation order under s. 3(11) of the Act of 1999. It was submitted that the validity of the deportation order had thus been acknowledged by the request that it be revoked. The request was rejected by the respondent on the 3rd November, 2009. Having heard submissions on this issue the Court refused the respondents' motion, essentially on the ground that it would be unnecessarily oppressive of the applicants to construe the letter of the 14th September, 2009, as acknowledging the validity of the deportation order when, twenty four hours later, the present judicial review proceedings had been commenced. It is not, as has happened in many other cases, an instance in which a failed asylum seeker has first exhausted an attempt to have deportation revoked and then belatedly sought to challenge the validity of the deportation order. Having regard to the fact that Mr. Lofinmakin did once indisputably have an entitlement to residence in Germany, the attempt to postpone implementation of the deportation order ought not to be construed as forfeiting an entitlement to challenge the lawfulness of the order when the appropriate step was taken without delay.

7. In the Statement of Grounds a total of 26 grounds are put forward for the application. At the close of argument and in response to an inquiry by the Court, counsel for the applicant agreed that five of those arguments could not be pursued namely Nos. 5, 7, 19, 21 and 26. In addition, a number of other grounds are so clearly incompatible with the terms of the Contested Decision as to be untenable or are couched in such general and vague terms as to be incapable of constituting the basis for an order of *certiorari*. Thus, Ground 10, alleges that the Contested Decision is "unreasonable and irrational and fails to vindicate the personal rights of the applicants" without specifying why or how. Similarly, Ground 14 alleges that the Minister "erred in law in failing to take the best interests of the infant applicants into account" notwithstanding (see below) the extensive consideration of those interests in the memorandum supporting the decision. Ground 17, alleges that "no proper reasons have been provided for the negative conclusions reached" notwithstanding the fact that conclusions (see below) are extensively indicated. Ground 18, alleges that "insufficient consideration of the third named applicants application in the context of all of the applicants herein and the impact of deportation on

the third named applicant would have on them" without identifying the specific inadequacies relied upon in this regard.

8. The Court would take this opportunity to emphasise that judicial review under O. 84 of the Rules of the Superior Courts is not a form of a forensic hoopla in which a player has at once tossed large numbers of grounds in the air like rings in the hope that one at least will land on the prize marked "*certiorari*". In the judgment of the Court a Statement of Grounds under O 84, is inadmissible to the extent that it fails to specify with precision the exact illegality or other flaw in an impugned act or measure which is claimed to require that it be quashed by such an order.

9. Particularly in the context of an application for judicial review in the asylum list against narrative decisions such as those of the Refugee Applications Commissioner, the Refugee Appeals Tribunal or deportation orders supported by the usual "Examination of file" memorandum, it is inadequate and unacceptable that applications be grounded upon bald assertions that a contested measure is unreasonable, irrational, unlawful, unfair, disproportionate or otherwise flawed without identification of the specific feature, fact or omission in the measure which is alleged to constitute the basis of the proposed annulment.

10. When the case was opened to the Court, counsel on behalf of the applicant made it clear that the primary argument proposed to be raised was that based upon ground No. 12 of the Statement of Grounds to the effect that the applicants were entitled "to an effective remedy under Article 13 of the European Convention of Human Rights" and that recourse to judicial review under Order 84 of the Rules of the Superior Courts did not provide such a remedy because of what are described as the "common law constraints" of judicial review, such that the only procedure available to the applicants under the Immigration Act 1999, fails to comply with the requirements of the European Convention on Human Rights Act 2003.

11. The arguments in support of this ground constituted the major portion of very extensive written legal submissions, running to some 56 pages, lodged by the applicants for the hearing of the application. At the outset of the hearing, however, counsel for the applicants very properly acknowledged that the raising of the ground faced a procedural obstacle based upon the judgment of the Supreme Court in *Carmody v. Minister for Justice, Equality and Law Reform and Another* (Unreported, Supreme Court, 23rd October, 2009, [2009] IESC 71). The problem arises in the following way. Section 5(1) of the European Convention on Human Rights Act 2003 provides that the High Court may "having regard to the provisions of s. 2, on application to it in that behalf by a party of its own motion, and where no other legal remedy is adequate and available, make a declaration . . . that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions". The term "rule of law" is interpreted in s. 1 as including "common law".

12. In the *Carmody* case the Supreme Court held that where an applicant seeks a declaration that a provision of an Act of the Oireachtas is unconstitutional and additionally seeks a declaration of incompatibility under s. 5 of the Act of 2003, in respect of the same provision, the question as to the compatibility of the provision with the Constitution must be determined first. A declaration of incompatibility under s. 5 of the Act of 2003, ought only to be made where "no other legal remedy is adequate and available" and counsel for the applicants acknowledged that the grounds as pleaded in the Statement of Grounds did not include any plea to the effect that the fundamental rights of the applicants alleged to be violated by the deportation order could not adequately be remedied by appropriate reliefs based upon the infringement of their rights under the Constitution or otherwise in national law.

13. Counsel indicated a willingness to apply formally for appropriate amendments to the Statement to enable this procedural obstacle to be overcome, an offer which was, understandably, opposed vigorously by counsel for the respondent. The Court declined to entertain such an application for several reasons.

14. In the first place, the application was made so late in the day that it would be wholly unreasonable to the respondent that it be granted. This judicial review proceeding was commenced in September 2009 and had been the subject of replying affidavits and, as indicated above, the exchange of very extensive written legal submissions in preparation for the hearing. There was no reason why, if Ground 12 was to be advanced at the outset, the basis might not have been laid for it at that time or, at the very least, that the appropriate amendments to the Statement could not have been sought prior to the case being declared ready for hearing. In this regard the Court gladly adopts the approach of Herbert J. in *Guo v. Minister for Justice*, (Unreported 28th April 2010 at pages 20-21.)

15. Secondly, the argument sought to be advanced by reference to Article 13 has already been answered (albeit in a ruling made *obiter*,) by the judgment of Clark J. in *M.B. & Ors v. MJLR* (Unreported, 30 July 2010). In paragraphs 39 to 60 of that judgment Clark J considered arguments very much the same as those raised in the present case including the same jurisprudence of the EctHR and rejected the proposition that judicial review in this jurisdiction fails to fulfill the requirements of Article 13 of the Convention where issues as to an unlawful interference with Convention protections are sought to be relied upon in the context of decisions to deport an individual or family from the State under the 1999 Act. The Court agrees with the reasoning exposed in that judgment and fully adopts it.

16. Thirdly, this Court is in any event satisfied that the arguments proposed to be raised would not give rise to any substantial ground such as would warrant the grant of leave for judicial review in the particular circumstances of the present case even if it is required to treat the *obiter* observations of Clark J as not binding upon it. Although it is not necessary, therefore, in these circumstances to rule again on this issue, in deference to the lengthy legal submissions lodged; to the fact that the case has been argued over three days and the same submissions – suitably refined it would seem since the MB judgment - are put forward in a number of other cases pending in the Court; and by way of explanation for the refusal to permit the amending of the pleading, the Court will outline why it considers the proposed ground to be without substance.

17. The essential argument proposed to be made by reference to Article 13 of the Convention is as follows. Article 13 provides:

> *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

18. The deportation of the third named applicant would, it is said, bring about a grave violation of rights of the applicants protected by the Convention and particularly the right to respect for private and family life under its Article 8. Because a deportation order made under s. 3 of the Act of 1999 can be challenged only by an application for judicial review under O. 84 as required by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, the applicants are deprived, it is said, of a remedy which is "effective" in the sense of Article 13 because of the so called "common law constraints" applicable to the jurisdiction of the High Court in judicial review.

19. While not denying that the jurisdiction of the High Court can be fully effective to set aside by *certiorari* an unlawful decision to deport and, by prohibition or injunction, to restrain the Minister from giving effect to a bad order; it is argued that to be "effective" in the sense of Article 13, the remedy must take the form of what is called an "independent review" of the issue as to whether an applicant ought to be deported or not. Thus the "constraints" invoked as inhibiting the exercise of such a full jurisdiction include the

common law principle that the High Court on judicial review is concerned with the legality of the process by which the decision is reached rather than with its substantive merits; the rule that the Court does not substitute its own view of the merits for that of the administrative decision maker; and the requirement that the validity of the decision falls to be assessed by reference to the information available to or required to be known by the administrative decision maker at the time when the decision was made thus excluding an opportunity to introduce new evidence or information in the challenge.

20. In the judgment of the Court this argument is unfounded in that it both under- estimates the comprehensive and flexible nature of the current jurisdiction of the High Court in judicial review where Constitutional or fundamental human rights are involved and exaggerates or misunderstands the notion of an "effective remedy" under Article 13 as expounded in the case law of the European Court of Human Rights. It is not disputed that the High Court can quash a deportation order on any of the "traditional" grounds of judicial review namely that the decision and the reasons upon which it is based are vitiated by material error of fact, error of law, excess of jurisdiction or as unreasonable or irrational. Furthermore and significantly, as the Supreme Court reaffirmed in its judgments of the 21st January, 2010 in *Meadows v. Minister for Justice, Equality and Law Reform and Another*, the last of these grounds encompasses the concept of "proportionality" where the impugned decision encroaches upon the fundamental rights of an applicant whether under the Constitution or the Convention. The judgment of Fennelly J. contains the following passage at para. 71:-

> *"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."*

21. The Supreme Court has also made it clear in cases such as *Dimbo v. Minister for Justice, Equality and Law Reform* [2008] IESC 26 and *Oguekwe v. Minister for Justice, Equality and Law Reform* [2009] 3 I.R. 795, that where the Minister is considering whether to make a deportation order in circumstances where its effect will impinge upon fundamental rights of the applicant and his or her family members, he has an obligation to consider a wide range of matters (the "factual matrix",) including the personal and family circumstances of the persons concerned and the potential interference with their rights. (See, in particular para. 85 of the judgment of Denham J. in *Oguekwe*). The Minister must have a substantial reason for making the deportation order and all relevant factors and principles must be weighed in a fair and just manner so as to arrive at a reasonable and proportionate decision. That is the test of the validity of the decision to make the deportation order. While the High Court on judicial review does not substitute its own view as to whether a deportation order ought to be made or not, it can consider its lawfulness by reference to that test and set it aside if the result achieved in balancing those considerations is so clearly lacking in proportionality as to render it unreasonable or irrational. The so called "common law constraints" do not therefore preclude the High Court in the exercise of its judicial review function from assessing the substantive lawfulness of the decision in that regard.

22. The proposition that judicial review is inadequate for the purpose of Article 13 is based, in effect, upon a series of cases in the Strasbourg Court in which the analogous remedies of judicial review in the United Kingdom were considered with differing results.

23. It has not been suggested that in the literal sense the reliefs available in the forms of order that the Court can make under O. 84, RSC cannot provide an effective remedy to an applicant who claims that a deportation order unlawfully infringes some protection afforded by the Convention. In principle, were such an unlawful encroachment on rights protected under the Convention (or, for that matter, under the Constitution) to be established the Court can quash the deportation order by *certiorari*, thereby annulling the power of any agency to remove the individual applicant from the State; and it can by injunction or prohibition prevent the order being implemented. In a case where the established illegality is shown to be permanent (for example, if the applicant had been wrongly considered not to be an Irish citizen), the Court could by perpetual injunction or order of prohibition prevent the Minister making any new order in respect of that individual. In an appropriate case, the Court could by order of *mandamus* compel the Minister to entertain and decide an application to revoke an existing order under s. 3(11) of the Act of 1999, where it is clear that new evidence or intervening events had so changed the circumstances of the case as to raise the possibility that implementation might have become unlawful even if the validity of the original order was not thereby vitiated. The "effectiveness" of a judicial remedy must thus be considered in the context in which it is sought and in the case of s. 3 of the Act of 1999 that includes the availability of ss. (11) as a means of having the Minister reconsider the order in the light of new events or new evidence together with the ability of the Court to compel him to do so should he wrongly refuse. The obligation to consider an application to revoke is primarily designed to ensure that new events or new evidence coming to light since the original decision was made are not such as to render the implementation of the otherwise valid order unlawful. It does not permit a deportee the sort of reopening of the original decision contended for on a basis that, having considered the reasons given the applicant seeks to make a new and better case to a different decision maker. As the Supreme Court has reaffirmed, the object of giving the prospective deportee notice of the proposal to deport and an invitation to make representations against it, is to afford him or her an opportunity of putting before the Minister all relevant facts, information, evidence and reasons which he is asked to consider. (See the quotations from Denham J. in *Oguekwe* at paragraph 46 and Fennelly J. in *Meadows* at paragraph 47 *infra*). Thus the "rule" which confines the Court's examination of the legality of a decision to the material before the decision maker does not, in the case of a deportation order mean that *certiorari* is an ineffective remedy when the particular legislative context of s.3 of the Act of 1999 is fully considered. As indicated in the quotation from the CG case in paragraph 28 *infra* it is the aggregate effect of remedies provided at national level which must be considered.

24. In reality, the argument put to the Court is not that the reliefs available under O. 84, are not effective in providing a remedy, but that Article 13 of the Convention as interpreted by the Strasbourg court does indeed require the Contracting States to have in place a judicial procedure which provides a remedy in the form of a second level appeal or independent review of the administrative decision which is capable of re-adjudicating the merits of deportation as such and in so doing to admit new evidence or information whether related to events subsequent to the taking of the administrative decision or to information or evidence previously available but not relied upon by the persons concerned. In other words, it is contended that Article 13 requires the contracting States to provide by way of "effective remedy" a system of appeal by way of re-hearing *de novo*.

25. The Court considers this proposition unfounded. It is not, in the judgment of the Court, supported by any ruling in the case law of the ECtHR. The argument put to the Court appears to be inspired particularly by cases in which the ECtHR has considered judicial review procedures in the United Kingdom with differing results and by the dissenting opinion of the then Irish member of that Court in one of those judgments.

26. It is important, in the first place, to bear in mind a number of basic points. First, Article 13 of the Convention is not a "stand-alone" right. Its invocation is dependent upon the existence of an arguable case that some substantive protection afforded elsewhere by the Convention has been infringed and that the legal system of the Contracting State in which the infringement is alleged to have occurred fails to provide an effective means of redress. (See for example *Muminov v. Russia* [11 December 2008]

27. Secondly, the case law of the Strasbourg court does not prescribe in general terms any set of criteria or model judicial procedure as either the optimum or the minimum basis for compliance with Article 13. That court considers the specific circumstances of each case in which such a claim is raised in order to determine whether the national procedure in question (where it has been availed of) has adequately remedied the complaint raised as to the arguable existence of an infringement of a substantive Convention protection (*Swedish Engine Drivers' Union v. Sweden* [1976] ECHR 2 (6 February 1976) at paragraph 50).

28. Thus, in the case of *C.G. and Others v. Bulgaria* (24th April, 2008), the ECHR held:-

> *"Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although the Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. In certain circumstances the aggregate of remedies provided by national law may satisfy the requirements of Article 13."* (see para. 55*).*

29. That was a case in which a Turkish national challenged an order expelling him from Bulgaria upon the ground that his removal constituted an unlawful infringement of the protection afforded to himself and his Bulgarian wife and daughter under Article 8. The order had been made on the ground that the applicant presented a threat to national security and under the particular legislation in force, the factual basis for that assertion was covered by state secrecy and therefore not open to examination or question in the judicial review proceedings taken before the Bulgarian Court. Thus, the ECtHR held that there had been an infringement of Article 13, not because an appeal against or judicial review of such an expulsion order was unavailable, but because the material facts which formed the basis for the order could not be examined or questioned by the Court:

> *". . . according to the Court's established case-law, the effective remedy required by Article 13 is one where the domestic authority examining the case has to consider the substance of the Convention complaint. In cases involving Article 8 of the Convention, this means that this authority has to carry out a balancing exercise and whether the interference with the applicants' rights answered a pressing social need and was proportionate to the legitimate aims pursued, that is, whether it amounted to a justifiable limitation of their rights*
>
> *. . . As the approach taken by the national Courts in the instant case – refusing to scrutinise the measures taken against the first named applicant in the light of the kind of factors relied upon by the Court in the context of Article 8 of the Convention – fell short of these requirements, the Court finds that the judicial review proceedings did not amount to an avenue whereby the applicants could adequately vindicate their right to respect for their family life. . . . They did not therefore constitute an effective remedy within the meaning of Article 13 on that account either."*

30. As already mentioned, having regard to the common origins of judicial review in this jurisdiction and in the United Kingdom, the cases in which the latter procedure has been considered by the ECtHR are clearly of particular interest.

31. In *Soering v. U.K.* [1989] 11 E.H.R.R, 439, the applicant challenged his extradition to the United States of America where he might have faced the death penalty as a breach of Article 3 of the Convention and claimed that judicial review of the extradition decision did not permit the national court adequately to consider the basis of the extradition order so as to provide an effective remedy. This claim was rejected by the Strasbourg court which held that the UK could have examined under judicial review the strength of the claim of a violation of Article 3 and concluded that the decision to extradite was irrational on the basis of their being a real risk of infringement of Article 3.

32. In *Vilvarajah v. United Kingdom* [1991] 14 EHRR 248, the case particularly referred to by the present applicants in reliance upon the dissenting judgment of Walsh J., the United Kingdom as the respondent Contracting State was also successful in standing over the adequacy of judicial review for the purpose of Article 13. The case concerned a number of applicants claiming asylum as Tamil refugees from Sri Lanka. Their applications were unsuccessful and they were removed to the country of origin but in the meantime applied to the ECtHR invoking infringements of Articles 3 and 13. The majority judgment found that the judicial review available in the United Kingdom did provide an effective remedy. Reiterating its approach in the *Soering* judgment the court said that it was:-

> *"…satisfied that the English courts could review the 'reasonableness' of an extradition decision in the light of factors relied on by the applicant before the Convention institutions in the context of Article 3. In particular it noted that in judicial review proceedings a court may rule the exercise of executive discretion unlawful on the ground that it is tainted with illegality, irrationality or procedural impropriety and that the test of 'irrationality' on the basis of the 'Wednesbury Principles' would be that no reasonable Secretary of State could have made an order for surrender in the circumstances. Further, according to the United Kingdom government, a Court would have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take. The Court does not consider that there are any material differences between the present case and the Soering case, which would lead it to reach a different conclusion in this respect. It is not in dispute that the English Courts are able in asylum cases to review the Secretary of State's refusal to grant asylum with reference to the same principles of judicial review as considered in the Soering case and to quash a decision in similar circumstances and that they have done so in decided cases. Indeed the Courts have stressed that they have done so in decided cases. Indeed the Courts have stressed their special responsibility to subjective administrative decisions in this area to the most anxious scrutiny where the applicant's life or liberty may be at risk (para. 91 above). Moreover the practice is that an asylum seeker will not be removed from the United Kingdom until proceedings are complete, once he has obtained leave to apply for judicial review. While it is true that there limitations to the powers of the Courts in judicial review proceedings (see paras. 89 – 92 above) the Court is of the opinion that these powers, exercisable as they are by the highest Tribunal in the land, do provide an effective degree of control over the decisions of the administrative authorities in asylum cases and are sufficient to satisfy the requirements of Article 13".* (paras. 123 – 126)

33. It is to be noted, therefore, that the majority judgment in that case in the closely analogous context of removal from a Contracting State of individuals not having any settled right of residence, held that judicial review notwithstanding its jurisdictional

limitations, did constitute a remedy which satisfied the requirements of Article 13. There is thus no suggestion that Article 13 required provision of a remedy by way of *de novo* rehearing.

34. The present applicants, as already mentioned, rely strongly upon the approach adopted by Walsh J. (joined by Russo J.). He expressed the opinion, in essence, that the limitations of the "Wednesbury Principles" were such that "in English law judicial review controls only the procedure and not the merits of the impugned decision". He said:

> *"Judicial review could not have entered into any examination of the merits for the purpose of deciding on the merits. . . . The national authority envisaged by Article 13 of the Convention is one before which an effective remedy can be obtained for a violation of the rights and freedoms set forth in the Convention. Judicial review cannot grant any relief simply on the grounds that the facts on any given case disclose a breach of the Convention. . . . The English Courts will not review a decision by reason only of the fact that the deciding authority failed to consider whether or not there was a breach of the Convention."*

35. It will be noted, of course, that this last observation is made prior to the enactment in the United Kingdom of the Human Rights Act 1998, which has, subject to parliamentary sovereignty, enabled British judges to give effective remedies for breaches of fundamental rights.

36. The approach of the ECtHR to the adequacy of judicial review in the United Kingdom as an effective remedy under Article 13 was again followed *in Bensaid v. U.K.* (33 E.H.R.R. 10), where the applicant had claimed that he risked inhuman and degrading treatment in violation of Article 3 if expelled to Algeria and argued that in judicial review the Court could not reach findings of fact on disputed issues, thereby depriving him of an effective remedy. The ECtHR said that it was satisfied that the UK courts "give careful and detailed scrutiny to claims that an expulsion would expose an applicant to the risk of inhuman and degrading treatment". It was "not convinced therefore that the fact this scrutiny takes place against the background and criteria applied in judicial review of administrative decisions, namely, rationality and perverseness, deprives the procedure of its effectiveness".

37. In the case of *Smith and Grady v. U.K.* (29 E.H.R.R. 493) on the other hand, the applicants were successful in persuading the ECHR that judicial review before the United Kingdom courts failed to provide an effective remedy in respect of an argued violation of right to respect for private life under Article 8. The applicants challenged a decision to discharge them from the Royal Navy on foot of a policy on the part of the British Ministry of Defence to exclude homosexuals from the armed forces. The United Kingdom courts had refused to quash the impugned decisions upon the basis that "the policy could not be said to be beyond the range of responses open to a reasonable decision maker and accordingly could not be considered to 'irrational'". The ECtHR found that the "*threshold at which the High Court and the Court of Appeal could find the Ministry of defence policy irrational was placed so high that it effectively excluded any consideration by the domestic Courts of the question of whether the interference with the applicant's rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Courts analysis of complaints under Article 8 of the Convention."* (see para. 138)

38. It seems to this Court that the important point of this case was that it was not concerned with an alleged violation of Article 8 based on a challenge to the factual basis of a decision-maker's assessment. That had been the judicial review limitation which had concerned Walsh J. in the passage quoted above from the *Vilarajah* case. The *Smith & Grady* case was concerned with a challenge to an armed forces policy and the issue turned upon the compatibility of that policy with the conditions upon which an interference with Article 8 protection can be justified under its paragraph 2. In the view of the Court, that is a materially distinct issue as compared with the complaint that judicial review is ineffective to control the lawfulness of a specific deportation decision in respect of a particular individual by reference to the actual Article 8 circumstances of the persons concerned.

39. In the judgment of this Court, this case law does not give any support to the proposition that the only "effective remedy" in the sense of Article 13 of the Convention in respect of the deportation order which was argued to impact unlawfully upon the protection of private and family life afforded by Article 8 is a judicial remedy amounting to a review by way of *de novo* re-adjudication of the merits of the deportation in question and that such a remedy is impossible for the High Court within the constraints of Order 84. On the contrary, even in what the Court would consider to be the more restricted and pre-1998 condition of the judicial review remedies of the United Kingdom courts, that has not been so found by the ECtHR. Secondly, as already pointed out earlier in this judgment, the Supreme Court in *Meadows* has confirmed the entitlement and duty of the High Court in reviewing the lawfulness of a deportation order which encroaches upon the constitutional rights and Convention protection of a deportee and his family members, to examine the substantive reasons put forward by the Minister in justification of the balance sought to be struck between those personal rights and the aims or interests of the State sought to be safeguarded and to satisfy itself that the resulting decision is not unreasonable or irrational because the balance struck is disproportionate in its encroachment on those rights. It is true that in cases such as *Soering, Vilvarajah* and *Bensaid* the ECtHR pointed out that where an applicant's right to the protection of life and liberty were involved, the United Kingdom courts exercising judicial review subjected administrative decisions to "anxious scrutiny" or "careful and detailed scrutiny" and that this latter concept has been rejected as a test by the Supreme Court in *Meadows.* This Court does not consider that the judgments in *Meadows* were intended to be or can be construed as depriving the High Court of an entitlement and responsibility to exert no lesser diligence in assessing the legality of such administrative decisions for reasonableness and proportionality.

40. Thus, if it ever was the case in this jurisdiction, in the judgment of the Court it is not now the position that, in the words of Walsh J above, this Court in judicial review of an impugned deportation order cannot "grant relief simply on the grounds that the facts on any given case disclose a breach of the Convention". If the material facts upon which the stated reasons for a deportation order are based are disputed by the deportee as wrong, the High Court can try that issue and if it finds in the applicant's favour it can quash the decision upon the basis that the mistake of fact has led the Minister to make an order which could not have been made intra vires. If the material facts are not disputed but it is demonstrated that, correctly appraised, they establish a violation of a Convention protection, the Court can quash the decision for irrationality on the basis that the conclusion reached did not follow from the factual premise.

41. It must be borne in mind that none of these considerations can arise, as pointed out above, unless it is first established that national law and constitutional law in particular, is incapable of vindicating the rights thus sought to be asserted. Having regard to the fact that since at least the judgment of the Supreme Court in *East Donegal Co-Op v. AG* [1970 I.R. 317] it has been settled law that an administrative decision can be reviewed for legality by reference to rights guaranteed by the Constitution, it is therefore only in the probably rare instance where acts or measures alleged to violate fundamental personal rights of an individual or family fall outside the scope of Constitutional protection that it may fall to the High Court to have to consider the issues thus raised in relation to Article 13.

42. The Court is therefore satisfied that nothing in the case law of the ECtHR requires or implies that an administrative law procedure

for the control of the legality of expulsion decisions in respect of non nationals present in the Contracting State (and particularly those illegally present,) is inadequate or ineffective for the purpose of Article 13. It is not a necessary ingredient that the judicial authority charged with the review of such administrative decisions be empowered to substitute a new decision of its own, rather than be limited to annulment of an unlawful decision which is remitted for reconsideration by the administrative decision maker. As this Court observed in J.B v. MJLR [2010] IEHC 296,

> *"…. 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 the 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 European Union."*

43. This general answer to the ground raised by reference to Article 13 is not altered, in the view of the Court, by a number of other particular arguments raised by counsel and to which, for the sake of completeness, the Court will respond.

> (1) It is argued that in order to assess the proportionality of the decision the Court must be able to review the reasons given for it and the "relevant evidence" in order to determine if the decision has a reasonable basis in supporting facts. No rule of law going to the jurisdiction of the Court in judicial review precludes this being done. As the judgments in the *Meadows* case make clear, where the decision has the potential to encroach upon constitutional or Convention rights, the High Court has a duty (and therefore, necessarily, the competence), to examine the reasons given for the decision and assess their factual validity and their adequacy in support of the aim which is pursued as justifying the encroachment. In the "non exhaustive" list of matter s relevant for the Minister's consideration set out in the judgment of Denham J. in *Oguekwe* (see para. 85) it is made explicitly clear that the making of a valid deportation order requires consideration:
>
> - Of the circumstances of each case . . . as to the facts and factors affecting the family; (point 1)
>
> - Where a parent of an Irish citizen child is to be deported while the other parent is not. "the relevant factual matrix (including) the facts relating to the Irish born citizen child and the family unit". (point 3)

It must necessarily follow that if upon examination it is shown that a fact material to the valid consideration of a case is wrong and has been relied upon in the reasons given in justification for the encroachment, the Court is competent to quash the decision as flawed in law.

> (2) It was next suggested that in providing an effective remedy the Court was required but was precluded from examining the validity of certain observations, judgments or findings included in the reasons given by the Minister in the supporting file note:
>
> - The statement that regard was had to the impact of not deporting the first named applicant on the health and welfare systems of the State;
>
> - The view that the minor applicants were of "an adaptable age"; the applicants were not told what considerations were taken into account in this regard;
>
> - The assertion that the future separation of Mr. Lofinmakin by deportation would not have the same impact as if he had been residing with family continuously having regard to his prior separation from them in 2003 – 2007;
>
> - The assertion that there was no less restrictive course available to the Minister to maintain the integrity of the immigration system;
>
> - The claim that the Minister failed to act in the best interest of the citizen children.

The points thus made are not such as to create any issue as to the absence of an effective remedy in such cases. It must be borne in mind that, having followed the guidelines indicated in the *Oguekwe* list, the Minister has provided a narrative statement of reasons in which he identifies a substantial reason for the deportation; he addresses *seriatim* the statutory considerations of s. 3(6) of the Act of 1999; he takes account of the particular representations and humanitarian considerations put to him; and then assesses all the facts, circumstances and factors relating to the individuals concerned and the family unit in the life of their constitutional and Convention rights and expressly sets out the basis upon which it is decided that a reasonable and proportionate balancing of those opposing interests requires that the deportation should take place. Contrary to the claim made, the Court is not precluded from considering whether the matters identified above have been wrongly considered or disproportionately evaluated when appraising the alleged unlawful unreasonableness of the balance struck. These are all factors which go the the reasonableness and proportionality of the conclusion arrived at in evaluating and balancing the particular circumstances and facts put forward in representations when weighed against the substantial reason given for deciding that the aim or interest pursued by the State should prevail. As regards the complaint that the Minister "failed to act in the best interests of the children", as pointed out earlier (see paragraph 7 supra,) the ground originally proposed in the Statement of Grounds was that the Minister failed to "consider" their best interests. The argument later advanced in argument that the Minister was obliged "to act" in the best interests of the children is, in the view of the Court misconceived. The Minister has clearly an obligation to take account of the interests of the citizen children as the judgments in the above cases make clear but as the same judgments make equally clear in emphasising that the constitutional right to reside and be reared in the State is not an absolute right which binds the State to a choice of residence made by non-national parents, the Minister has no obligation in law to act, in the sense of act only, in the best interests of the children.

44. It must also be emphasised as already mentioned above, that the consideration leading to the making of the decision is not a purely unilateral exercise on that part of the Minister. As Denham J. pointed out at Item 2 of the above list:

> *"Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by an on behalf of the applicants and which are on the file of the Department. The Minister is not required to inquire outside the documents furnished by or on behalf of the applicant, except in exceptional circumstances".*

45. In the same vein Fennelly J. (para. 71 of the judgment) in *Meadows* pointed out that when applying the test of proportionality to the substantive grounds of a decision which encroaches upon fundamental rights:

> *"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."

46. Where a prospective deportee receives a notice of intention to make a deportation order under s. 3(3)(a) of the Act, and is invited to make representations against it, (and particularly where the person has the assistance of a legal representation), it is incumbent upon the person to place before the Minister any "relevant evidence" information or facts sought to be invoked in support of the contention that deportation would bring about an unlawful encroachment on any fundamental rights of any persons affected. This necessarily includes any facts or contentions relating to any aspect of family circumstances. In cases where the spouse and parent of Irish citizen children has acquired a right of residence, it is clearly of particular relevance for the Minister to be informed whether that spouse and the children intend to remain in the State or would feel compelled to relocate to the country of origin concerned.

47. These considerations are particularly relevant to a further argument sought to be raised to the effect that the Minister "failed to identify and consider the private rights (sic) of any of the applicants other than the third-named applicant". Much reference is made to case-law as to the meaning of the term "private life" in Article 8 of the Convention but no reference whatsoever is made to any specific facet of the private lives of any of those applicants which it is said the Minister might or ought to have identified. Almost by definition, the incidents of "private life" will be personal to the individuals concerned and cannot be "identified" by a Minister unless they are brought to his attention. In the representations made to the Minister under s.3 (6) of the Act of 1999 no particular circumstance of the individuals in question was identified on that basis and no consideration was invoked apart from those advanced by reference to the life of the family as such.

48. The Court also rejects as without substance the attempt to invoke Article 24 of the Charter of Fundamental Rights of the European Union. The provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union and apply to the Member States "only when implementing Union law" (See Article 51.) The making of a deportation order under s.3 of the Act of 1999 is wholly unconnected with the implementation of Union law. Furthermore, insofar as reliance is attempted to be placed on the opinion of Advocate General Sharpston of 30 September 2010 in Case C-34/09 Zambrano, it must be pointed out that the issue as to whether articles of the EC Treaty referred to by the Belgian referring Tribunal in that case, confer a right of residence upon a Union citizen in the territory of the Member State of which the citizen is a national, is irrelevant to the present case. As a matter of Irish law the two minor applicants as Irish citizens have an unquestioned right to reside permanently in the State. This Court also notes that in her advice to the Court of Justice as to the reply to the referred questions, the Advocate General expresses the view that the relevant Treaty articles which confer the right of residence as a citizen of the Union "…do not preclude a Member State from refusing a derived right of residence to an ascendant relative of a citizen of the Union …. provided that the decision complies with the principle of proportionality." That approach is not materially different from that of Irish law as expounded in the cases already mentioned above, *Dimbo*, *Oguekwe* and *Meadows* and the earlier case law relied upon in those judgments.

49. The remaining arguments raised in the judgment of the Court go no further than to assert an effective disagreement with the evaluation made and the reasons given for the making of the deportation order in the "examination of file" memorandum. The consideration is claimed to be inadequate, the reasons irrational and the resulting decision unbalanced. The Court cannot agree. Having regard to the full background history of the applicants as summarised in the opening paragraphs of this judgment and more extensively considered in the memorandum, the Court does not consider that any case of substance has been made out to the effect that the reasons expressed for making the impugned order could be held to be contrary to common sense or in any sense disproportionate or unreasonable.

50. Insofar as the decision to make a deportation order involved assessing the impact it would have upon the private and family life of the applicants, the essential facts relevant to their personal and family circumstances as put before the Minster were these:-

(a) Both adult applicants were born and brought up in Nigeria and lived there until adulthood. Both are entitled to return there.

(b) In 1991, aged 28 and with a third level education, Mr. Lofinmakin left a career in Nigeria to move to Germany in order to establish himself as a businessman. He carried on that business until 2006 and at the time of the making of the representations, he claimed to be entitled to reside in Germany;

(c) Mr. Lofinmakin married a UK National in Gretna in Scotland in December 1995, but was divorced from her by default on the 2nd October, 2004, in Germany;

(d) The fourth named applicant arrived in the State in 1999 and gave birth to the first named applicant on the 18th May, 2000 and the second named applicant on the 17th March, 2003. A third child was stillborn on the 26th June, 2006. Mr. Lofinmakin is named on the birth certificates of those children as father.

(e) Mr. Lofinmakin first came to the State on the 15th August, 2003, according to official records, but says that he had made a number of visits to his wife and children on unspecified dates;

(f) Upon the expiry of his last visitor visa on the 1st June, 2007, he remained in the State illegally, an extension to that visa having been sought and refused.

(g) Mrs. Lofinmakin had been granted permission to remain in the State on the basis of the children's Irish citizenship.

(h) The adult applicants say that they married in a traditional ceremony in Nigeria 2004 and then married in the State in 2008.

51. It would thus appear that Mr. Lofinmakin's relationship with his wife commenced in 1999, some four years prior to his divorce and it continued on the basis (presumably agreed between them,) that he was resident and carrying on business in Germany, but making occasional visits. That family life was thus entered into in circumstances where Mr. Lofinmakin and his wife both knew that he had no entitlement to permanent residence. The Irish marriage took place a year after the extension to his final visa had been refused and accordingly, at a point when it was known that his continued ability to remain in the State was precarious. This is not a case in which it fell to the Minister to consider the deportation of one parent in a family unit lawfully established and with a settled connection of some duration in the State. It was not an instance, therefore, of the disruption of a family unit with a legitimate expectation of continued, settled existence in the State. Mr. Lofinmakin is not a settled migrant and his presence in the State has been illegal since the 1st June, 2007. His family life prior to that date insofar as it had been conducted in the State had been on the basis of visits on foot of visas of limited duration. In these circumstances the Court is satisfied that no case of any substance can be made that the

Minister's decision not to acquiesce, in effect, in Mr. Lofinmakin's abuse of the immigration rules could be considered contrary to common sense, unreasonable or disproportionate as encroaching upon private or family life to a degree that is unlawful.

52. For all of these reasons leave is refused.