Neutral Citation: [2017] IEHC 372

THE HIGH COURT

JUDICIAL REVIEW

[2015 /375/ JR]

BETWEEN

PATRICIA HART NWOSU AND JAMES NKODE

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 10th day of March, 2017

1. This is an application for a judicial review seeking, *inter alia*, an order of *certiorari* to quash the decision of the respondent to refuse the grant to the second named applicant of a visa to join his spouse (the first named applicant) in the State.

2. The first named applicant is a health care worker and an Irish citizen. The second named applicant is a business owner and a Nigerian citizen. The first named applicant was born in Nigeria but moved to Ireland in 2002. In 2008, she was granted three years permission to remain in the State. In her grounding affidavit, the first named applicant avers that she met the second named applicant in 2009 when she went to Nigeria on holiday. During that time they became romantically involved. After she returned to Ireland they maintained their relationship by way of electronic communication. The first named applicant returned to Nigeria to visit the second named applicant on numerous occasions thereafter. In 2011, the first named applicant's permission to remain in this State was renewed for a further three years. On 27th June, 2014, the applicants were married in a registry office in Lagos. The first named applicant remained in Nigeria until July, 2014. On 20th September, 2014, she became an Irish citizen.

3. In or about February, 2015, the second named applicant applied to the respondent for a visa to join the first named applicant in Ireland. This application was refused by the respondent by decision dated 8th April, 2015.

4. On 19th May, 2015, the applicants, through their solicitor, applied for a review of the respondent's decision. By letter dated 11th June, 2015, the second named applicant was informed of the respondent's decision to refuse the application for a review. In summary, the reasons for the refusal were the same as those which were set out in the first instance refusal, namely that the granting of the visa "may result in a cost to public funds" and "may result in a cost to public resources". The applicants were informed that their appeal had been examined in accordance with the "Policy Document on Non– EEA Family Reunification" (the Policy Document) which, the applicants were informed, had been prepared "in accordance with public policy and in observance of the constitutional, ECHR and other rights of the parties and of society in general" and that such rights had been examined in the particular circumstances of the second applicant's case including the correspondence dated 19th May, 2015 from the applicants' solicitor and all supporting documentation. The Appeals Officer's decision is more particularly set out elsewhere in the judgment.

5. Leave was granted to the applicants to challenge the decision by Order of Mac Eochaidh J. dated 13th July, 2015.

6. The grounds of challenge are as follows:

> (i) The respondent erred manifestly in law and acted unreasonably and irrationally and fettered her own discretion in solely applying the terms of her Policy Document in order to refuse the application. The respondent applied the said Policy Document to the application in respect of the finances of the first named applicant and refused the application as a result without also and simultaneously considering and weighing in the balance, the rights of the applicants pursuant to the European Convention on Human Rights (the Convention) and the Constitution. The proportionality exercise undertaken by the respondent was unlawful as the visa was refused based solely on financial considerations and prior to any assessment of the individual rights in question.
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> (ii) The respondent erred manifestly in law and acted unreasonably and irrationally and fettered her own discretion in applying strictly the terms of her Policy Document in order to refuse the application. The respondent acted unreasonably and irrationally in applying the strict and rigid policy in all of the circumstances and acted unreasonably and irrationally in failing to consider at all the first named applicant's current and future income and employment status in the State. This was so in circumstances where there was evidence before the respondent that the first named applicant's financial position had altered dramatically since the original application.
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> (iii) The respondent acted unreasonably and irrationally in determining that the claim for family reunification was not "a strong one". The said conclusion was unreasonable and irrational as it was based upon irrelevant matters and had been arrived at without lawful regard for the constitutional, private and family life rights of the applicants.
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> (iv) The respondent erred manifestly in law and acted unreasonably and irrationally in applying a test of "exceptional circumstances" within a proportionality exercise.
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> (v) The respondent erred manifestly in law and acted unreasonably and irrationally in reaching a decision on the application in a manner entirely contrary to the provisions of Article 41 of the Constitution which provides for a prima facie right of the applicants to reside together in the State. The respondent erred manifestly in law and acted unreasonably and irrationally and contrary to the provisions of the Constitution in arriving at a decision that was not proportionate in all of the circumstances and it was fundamentally irrational insofar as it failed to consider / make any allowance for, within the proportionality exercise conducted, the up to date position in respect of the first named applicant's finances.
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> (vi) The respondent erred manifestly in law and acted unreasonably and irrationally in upholding the first instance decision to the effect that there was "no less restrictive process available which would achieve the legitimate aims of the State to safeguard the economic well being of the country" without considering any other processes. This was in circumstances where the applicants had stated that the second named applicant was prepared to accept a visa that would disallow

recourse to public funds, to which no consideration was given by the respondent.

The applicants' submissions

7. In aid of ground (i) of the statement of grounds, it is submitted that the Appeals Officer erred in adhering strictly to the provisions of the Policy Document in order to determine the appeal without any significant or proper identification of or consideration of the applicants' constitutional rights. The respondent is not permitted as a matter of law to operate a rigid policy in respect of the financial status of persons without at the same time operating a policy which would take into account the individual rights of the parties concerned, in particular those rights under the Constitution. It is submitted that the respondent in this case fell into error in reaching the decision to refuse the visa based on the financial considerations in her Policy Document without conducting a simultaneous proportionality assessment having regard to the rights at play. What is clear from the decision is that every assessment made of the applicants' circumstances, including their Art. 8 ECHR and constitutional rights, was approached only from the perspective of financial considerations.

8. Counsel submits that the decision does not in any way reflect the significance of the first named applicant's Art 41constitutional rights. Such rights merit only one line in the first instance decision, as adopted by the review decision-maker. Thus, the decision-maker acted irrationally and disproportionally in relying only on financial circumstances and in following the Policy Document to refuse the application. Counsel submits that this approach is contrary to established jurisprudence, especially *Gorry v. Minister for Justice* [2014] IEHC 29 and *Ford v. Minister for Justice* [2015] IEHC 720. It is submitted that the approach of Eager J. in *Ford* is particularly apt to the applicants' circumstances.

9. Counsel contends that, on appeal, the respondent essentially dealt with the question of constitutional rights only as an afterthought to the decision in fact reached, and without commencing the consideration from the standpoint of there being a *prima facie* right to reside in the State. The question of constitutional rights was dealt with in the context of there being nothing in the decision already reached by the Visa Officer that would violate the Constitution. It is submitted that this was an entirely irrational conclusion in that the balancing exercise which was required was not carried out. The applicants' rights under the Constitution were essentially dealt with as an appendix to the decision already arrived at. The Appeals Officer adopted only the findings arrived at in the first instance decision which included a finding that the second named applicant has lived in Nigeria all his life and has never visited Ireland and that the parties' relationship was one which was capable of continuing in the same manner in which it developed without the grant of a visa to the applicant. It is submitted that this was not a rational balancing exercise and does not engage at all with the *prima facie* right of the applicants to reside in the State, as expressed by MacEochaidh J. in *Gorry*. Accordingly, the significance of the first named applicant's Art. 41 rights were not acknowledged by the Appeals Officer and were not properly weighed or balanced against the rights of the State, particularly in circumstances where the decision-maker did not make a finding that the first named applicant could move to Nigeria.

10. It is submitted that the respondent fell into error similar to that identified by Eager J. in *Ford*, namely by failing to acknowledge the true nature of the rights in question and then in failing to duly balance them as against the rights of the State. Counsel submits that a balancing exercise which states as its reasoning the fact that the couple can simply live apart as they have to date is entirely irrational and unreasonable. Counsel submits that, essentially, the applicants are being punished for acting in accordance with the immigration rules and applying for a visa, as opposed to the second named applicant travelling to the State either unlawfully or as a visitor and making the application from within the State. In the case of the second named applicant, there was never a suggestion that he breached immigration rules or that he would be a threat to the State either on security or on public policy grounds.

11. In aid of grounds (ii) and (v), counsel submits that, while the respondent was entitled to have an immigration policy, she must reach decisions in a proportionate fashion and with due consideration and respect for the rights of the persons concerned. Furthermore, there was no assessment of what would be the position of the second named applicant, were he to be granted a visa. It would appear that even if the second named applicant had been a millionaire, the Policy Document places the onus on the first named applicant as the sponsor resident in the State. It is submitted that the second named applicant was a skilled welder. Yet, the assumption appears to be that he was someone who could not contribute to the economy and who would be dependent on social welfare. There was no acknowledgment in the decision that the second named applicant could contribute to the economy of the State. Additionally, in the appeal submissions, the first named applicant had offered an undertaking that the second named applicant would not access social welfare services, which was not considered in the decision.

12. It is submitted that the respondent fettered her own discretion by failing to have regard to the evidence presented by the applicants which was to the effect that the first named applicant's earnings for 2015 were in excess of the yearly amount required to achieve the three years cumulative earnings of €40,000 as set out in the Policy Document. No regard was had to this important consideration which, it is submitted, was vitally important for the assessment of the first named applicant's financial position from a forward-looking perspective.

13. In aid of ground (iii), counsel submits that the suggestion in the decision that the claim "is not a strong one" was speculative and irrational, particularly having regard to the provisions of Art. 41 of the Constitution. Their claim was as strong as any that might be made and the respondent acted unlawfully in arriving at a conclusion that the marriage entered into in this instance was one which was somehow less protected by the Constitution than another. The reliance on the fact that the couple were married at a time when they both lived elsewhere and that the State gave no assurances that they would be allowed to reside together is irrational. The finding that the relationship has always been "long distance in nature" is unlawful as it fails to consider the fact the applicants, as a married couple, have rights over and above those which existed before the marriage.

14. Furthermore, in *Ford*, Eagar J. took cognisance of the fact that a marriage can be maintained via modern technology. Therefore, there can be no basis for saying that the applicants claim was not a strong one. The applicants have a strong relationship and a real marriage: as such their circumstances cannot be compared to those in S.A. v. Minister for Justice [2015] IEHC 226. Nor was their marriage a Vegas type marriage or the type of marriage of holiday marriage discussed by Fennelly J. in *Cirpaci v. The Minister for Justice* [2005] IESC 42. The applicants had put over sixty pages of telephone records before the Appeals Officer. It is also submitted that Eagar J.'s finding that the respondent had failed to acknowledge the strength of the constitutional rights of the couple in that case stands apart from the particular facts of the *Ford* case. In any event, the only factual difference between *Ford* and the present case was that a letter which was sent in by the first named applicant in *Ford* was not considered.

15. In aid of ground (iv), it is submitted that the decision-maker erred in applying a test of "exceptional circumstances" which is the wrong test and which has no rational place within a proportionality decision, in accordance with the jurisprudence of the Irish courts.

16. In aid of ground (vi), counsel asserts that the conclusion that there was no less restrictive process available to the applicants

other than to refuse the visa was irrational. The applicants had in fact suggested less restrictive processes to the respondent. If the second named applicant was granted a visa which would not allow any recourse to public funds, then many of the considerations to which the respondent had regard in refusing the visa would be redundant. Thus, it was irrational and in breach of the principle of *audi alteram partem* to simply state that there were no less restrictive processes available where there clearly were but which were not considered.

17. It is submitted that the effect of the review decision is to condemn the applicants to live apart which is contrary to law. In this regard, counsel relies on the *dictum* of Hogan J. in *S (P) and E (B) v. Minister for Jus*tice [2011] IEHC 92. The Appeal Officer's emphasis was entirely on financial matters, to the exclusion of all other relevant considerations. This was in circumstances where the Policy Document itself refers repeatedly to the fact that Art. 41 and Art. 8 considerations must also take place. Thus, it is clear that financial circumstances must not be the sole determining factor, particularly in circumstances where the first named applicant was on the way to meeting the financial threshold set by the respondent.

The respondent's submissions
18. In answer to ground (i), counsel submits that it is noteworthy that while the applicants contend that the respondent fettered her discretion, they do not make any attack on the Policy Document itself or on the €40,000 income threshold set out therein. What the applicants want in this case is for the respondent (and/or the court) to rewrite the Policy Document for their own benefit, an approach which is entirely inappropriate. Contrary to the applicants' arguments, the Appeals Officer clearly identified and assessed the applicants' constitutional rights. In any event, it is not required that there has to be an acknowledgement of Art. 41 rights in the decision once it is clear that there has been an assessment of such rights. This has been made clear by Mac Eochaidh J. in *S.A. v. Minister for Justice*.

19. In as much as the applicants contend that there had to be an assessment of the second named applicant's financial circumstances that is not what the Policy Document requires. In any event, the second named applicant did not put forward any such information and that being the case, there was no requirement on the respondent to engage in speculation in this regard.

20. In circumstances where the applicants' constitutional rights were considered, the assertion that the respondent erred in law and acted unreasonably and irrationally and fettered her own discretion in solely applying the terms of the Policy Document is erroneous. In answer to the applicants' argument that the decision in *Ford* is directly relevant to the within proceedings, counsel submits that the facts of *Ford* are eminently distinguishable from those of the within proceedings. In the instant case, the first instance decision-maker observed that, save for photographic evidence of the wedding, "[n]o evidence of the phone calls, social media messaging have been submitted in support of this claim". Yet, on appeal, only telephone bills were submitted as evidence of family circumstances. In any event, there was an assessment of family circumstances by the Appeals Officer. There was an acceptance that the applicants were married and the evidence of the telephone communications submitted with the appeal was duly noted, as is evident from the decision. However, it was concluded that the evidence of family circumstances, as submitted, was not of such magnitude as to disturb the first instance conclusion.

21. Additionally, the Appeals Officer went on to assess the applicants' constitutional and Art. 8 rights by way of incorporating the assessment done at first instance, as made clear by the appeal decision. Accordingly, the Appeals Officer did in fact identify the starting point as per *Gorry*. However, while the starting point is a *prima facie* right, one has to look at the spectrum of the family circumstances. There was nothing in the appeal submissions which was deemed to usurp the first instance finding with regard to the applicants' constitutional and Art. 8 rights.

22. Ultimately, the family circumstances, combined with the first named applicant's financial circumstances, meant that the applicants' *prima facia* right to reside in the State was outweighed by the rights of the State. Such a conclusion was not irrational or disproportionate.

23. Insofar as the applicants placed reliance on *Gorry*, it is submitted, in the first instance, that Mac Eochaidh J. was dealing with submissions by the State that *Gorry et al* did not have a *prima facia* right to reside in the State, an argument which was rejected by the Court.

24. Furthermore, it is clear from *Gorry* that Mac Eochaidh J. had regard to the factual matrix in that case, in particular the advice which was given to the applicants by the immigration officer in Dublin that they should marry in Nigeria and that they should then apply for a visa for the non-national applicant in *Gorry* to enter the State. Additionally, in *Gorry*, there was evidence before the decision-maker to the effect that the Irish citizen husband in that case would be ill-advised on medical grounds to live in Nigeria, a factor which Mac Eochaidh J. found was not considered in the decision. He also found that there had been no effort by the decision-maker to evaluate the seriousness of the second named applicant's heart condition.

25. All of the foregoing, counsel submits, comprised the factual backdrop to Mac Eochaidh J.'s overview of the Art. 41 assessment conducted by the decision- maker in *Gorry*. Furthermore, insofar as the applicants rely on the decision of Hogan J. in *S(P) and E(B) v. Minister for Justice* , the context for that judgment has to be borne in mind, namely, the compelling nature of the facts of the case, most notably the Mr. S's (the first named applicant's) medical history and dependency on Ms. E, his distress at Ms. E's imprisonment for a number of weeks while awaiting deportation prior to securing an injunction, Mr. S's inability to accompany Ms. E to Nigeria, if she were to be deported, in light of his financial circumstances and disability. In view of the factual situation, Hogan J. found that there was an "*entirely unrealistic and totally unbalanced*" assessment by the Minister that Mr. S."*'lives independently' and 'travels freely'*" and that he could accompany Ms. E to Nigeria.

26. Counsel submits that the present case does not constitute an "*unusual and exceptional*" case such as should have been deemed to prevail over the principle of maintaining the integrity of the immigration system. In the instant case there were no "special facts", unlike the situation which arose in *S(P).* Equally, the applicant's circumstances do not equate with those considered by Hogan J. in *X.A. v. Minister for Justice [*2011] IEHC 397 (as referred to in *Ford*).

27. In answer to grounds (ii) and (v), counsel submits that there is no merit in these grounds. It is submitted that it is clear in the appeal decision that the Appeals Officer took the entire up-to-date financial information into account. Ultimately however, it was determined that the first named applicant fell well short of the financial guidelines in the Policy Document. The visa system is a means of, *inter alia*, assessing the position of persons who wish to enjoy residency in the State. The respondent has a duty to safeguard the public purse and is entitled to adopt policy measures to strike a balance between the rights of individuals and the common good. While the applicants evidently disagree with the decision of the Appeals Officer, it cannot be said to fly in the face of fundamental reason and common sense. The respondent is entitled to adopt a policy and it is not for the first named applicant to reformulate it to her own benefit. The applicants do not dispute the Appeals Officer's factual assessment of their financial circumstances.

28. Contrary to what is alleged at ground (iii), the respondent's conclusion that the applicants' claim was not a strong one is not irrational; nor is it speculative. The Appeals Officer upheld the first instance finding and was satisfied that no additional information submitted on appeal concerning the nature of the applicants' relationship disturbed the conclusion that their application was not a strong one. The tenor of the applicants' submissions is that once persons in their position are married they have an absolute right to reside in the State. That is not the case. In the premises of this case, the Appeals Officer found that the circumstances of the applicants' relationship, together with the limited financial resources available to them, constituted sufficient reasons to refuse a visa on this occasion. It was in that context that their claim was deemed not to be a strong one. This was a qualitative assessment and does not fly in the face of fundamental reason and common sense as per the test in *Meadows v. Minister for Justice* [2010] 2 I.R. 701. It is rather unusual that the applicants contend that the finding that the claim was not a strong one (which was based on empirical evidence) was speculative and irrational when it is the applicants themselves who contend that the visa officer should have engaged in speculation as to the earning capacity of the first named applicant based on her current earnings in light of a "forward looking" assessment.

29. It is contended that there is no merit in ground (iv). The Appeals Officer did not solely apply a test of "exceptional circumstances". What was in mind was a consideration of the applicants' circumstances under the Policy Document wherein it is recognised (at para. 1.12 thereof) that the respondent may exercise her discretion to grant a visa on humanitarian grounds, albeit that an application on its face does not meet the requirements of the Policy Document. Accordingly, it was not applied within the proportionality test, as alleged by the applicants.

30. It is further submitted that there is no merit in ground (vi). The second named applicant's statement that he was prepared to accept a visa that would disallow recourse to public funds was noted and considered by the Visa Officer (and the Appeals Officer). As stated in the appeal decision, no explanation was forthcoming from the first named applicant as to how she might support herself and the second named applicant if she was to forego her rent supplement payments of €150.46 per week. Therefore, there was nothing to displace the conclusion in the first instance decision that "without state supports the applicants' presence in the State would likely place pressure on the family's financial resources, that this, in turn, may result in a cost to public funds and public resources".

Considerations

31. The issues which arise for determination in this case are:

- Did the respondent solely apply the monetary requirements of the Policy Document in refusing the visa application such that she fettered her discretion;

- Did the respondent act irrationally and/or unreasonably in failing to consider that the first named applicant's financial position had altered dramatically since the original visa application;

- Did the respondent act irrationally and/or unreasonably in applying a test of "exceptional circumstances" within a proportionality exercise;

- Did the respondent act irrationally and/or unreasonably in finding that there was no less restrictive process other than a refusal of the visa in achieving "the legitimate aim of the State to safeguard the economic well-being of the country";

- Did the respondent act irrationally and/or unreasonably in determining that the claim for family reunification "was not a strong one" and;

- Was there proper recognition of the applicants' constitutional rights and a proper balancing exercise between those rights and the competing rights of the State.

32. The applicants' principal contentions are that the respondent fettered her discretion by undue reliance on the Policy Document and that this was done without simultaneously assessing and weighing in the balance the applicants' rights, in particular those under the Constitution. They also contend that even if the court were to find that the review decision correctly identified that the first named applicant had failed to reach the financial threshold as set by the Policy Document, it remains the case that the first named applicant was not even given credit for having achieved the applicable threshold for 2015 and that other salient factors such as the first named applicant's ability to ensure that her spouse would not become a burden on the State were not properly considered.

33. It is apposite at this juncture to set out the decision under challenge. It was preceded by appeal submissions which, *inter alia*, spoke to the findings made by the first instance decision-maker regarding the first named applicant's financial ability to sponsor her spouse. With their appeal, the applicants submitted P60s for 2012-2014 (as previously furnished to the first instance decision-maker), together with P60s for 2010 and 2011 and wage slips for the first quarter of 2015, bank statements for 2015, evidence of the first named applicant's employment and details pertaining to her receipt of rent allowance from March 2014. It was submitted, *inter alia,* that the first named applicant's "current wage slips are a more accurate barometer of [her] current and future capacity to provide for her spouse that the p60s which reflected a much lower income threshold in the years up to 2014."

34. In the "Assessment of Financial Considerations", the Appeals Officer concluded that the first named applicant's earnings for "three-Quarters of 2012 …all of 2013 and 2014, and the first Quarter of 2015", which totalled €26,920.40, was "significantly less than the figure of €40,000 mentioned in para. 17.2 of the Policy Document." The Appeals Officer was satisfied that nothing had been submitted which would disturb the first instance finding that the first named applicant had not shown how she would be able to genuinely "fulfil the responsibility of a sponsor to provide for the visa applicant". The Appeals Officer noted the first named applicant's submissions that her income for 2015 was twice that of someone on Jobseekers Allowance; that she would have no difficulty if her spouse were restricted to a Stamp 3 permission (which would entail no entitlement to State benefits); the first named applicant's willingness to undertake that neither she nor the second named applicant would seek recourse to public funds; and the submission as to the speculative nature of the first instance decision-maker's findings. Against this, the Appeals Officer noted that para. 17.2 of the Policy Document reflected a balancing of interests and a preference towards Irish citizens and that the income threshold of €40,000 gross earnings over a three year period was "significantly less than the figure that would be required of a similarly situated non-national sponsor" (€30,000 per annum). Noting the first named applicant's willingness to undertake that neither she nor the second named applicant would seek recourse to public funds, the Appeals Officer nonetheless found that it had not been explained how the first named applicant would forego the supplement benefits of which she was already in receipt or how she would support not just herself but a second adult in the State. The Appeals Officer was:

> "satisfied that nothing has been submitted which would render unreasonable the conclusion drawn by the visa officer in the decision letter dated 8th April, 2014 that there existed: 'a reasonable concern that without State supports the applicants' presence in the State would likely place pressure on the family's financial resources, and that this, in turn, may

result in a cost to public funds and public resources'."

35. In the "Assessment of Family Circumstances", the Appeals Officer noted the evidence of telephonic communication which had been submitted on appeal and went on to state:

> "The Appeals Officer is satisfied that it remains the case that:
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> > '…the applicant and the reference began a relationship and were married at a time when they both lived in separate countries and that at no stage were the couple given any assurances by the State that the applicant would be granted a visa allowing him to travel to Ireland or that he would be granted any right of residence in the State.'
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> And that:
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> > '…the couple could not have been unaware of the precarious nature of [the second named applicant's] potential immigration status should he seek to apply for a visa to travel to Ireland and / or seek some right of residency in Ireland. Indeed it would have been known to the couple at the time of their wedding that the applicant had no automatic entitlement to reside in Ireland.'
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> And that:
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> > '[the second named applicant's] relationship to his spouse in Ireland has always been long distance in nature and that will not change if this application is refused'."

The Appeals Officer upheld the Visa Officer's finding that the claim for family reunification was not a strong claim. The Appeals Officer was satisfied that the additional information concerning the nature of the applicants' relationship, as submitted on appeal, was "not of such a magnitude as to disturb this conclusion."

36. Under the heading "Assessment in light of the Policy Document", the Appeals Officer stated:

> "Having considered the submissions made, both at the initial application stage and on appeal, the Appeals Officer is satisfied that the visa application ought to be refused because the claim to family reunification is not a strong claim and because the cost to the State of allowing the application would be disproportionate to any benefit to the family. In addition, the Appeals Officer is satisfied that no exceptional circumstances have been disclosed such as would require that the exercise of the decision maker's discretion in favour of granting this visa application."

37. The "Assessment in light of Article 8 ECHR and the Constitution" was set out in the review decision as follows:

> "The Appeals Officer notes the submissions made in regard of Article 8 ECHR and the proportionality of the refusal. For the reasons set out above (see under 'Assessment of Financial Considerations') the Appeals Officer is not satisfied that it has been demonstrated that the considerations in relation to "the economic well being of the country" are ill founded.
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> The Appeals Officer has reviewed the assessment of rights arising under the ECHR and the Constitution contained in the decision letter dated 08 April, 2015…and, having reviewed the information submitted both at the initial application stage and on appeal, the Appeals Officer is satisfied that the refusal of this current visa application would violate neither Article 8 ECHR nor the Constitution."

38. In the first instance decision, the first named applicant's constitutional rights were assessed, *inter alia*, as follows:

> "The visa officer has considered the rights of [the first named applicant]. The visa officer has considered the fact that the applicant has been living in Nigeria all his life, and that he has never visited Ireland.
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> In considering the nature of the relationship between the applicant and the reference it is noted that this particular relationship has almost entirely been long-distance in nature and that is a relationship which is capable of being sustained in the same manner in which it was developed, whether by way of visits, and telephonic and electronic means of communication, without the grant of a visa to the applicant."

The "conclusion" reads:

> "All factors relating to the position and rights of the family have been considered and these have been considered against the rights of the State. In weighing these rights, the visa officer is satisfied that the factors relating to the rights of the State are weightier than those factors relating to the personal rights of the applicant. In weighing these rights, the visa officer is satisfied that a decision to refuse the visa application is not disproportionate as the State has the right to uphold the integrity of the immigration system in order to control the entry, presence, and exit of foreign nationals, subject to international agreements and to ensure the economic well-being of the State and to protect the rights and freedoms of others."

39. With regard to the complaints concerning the findings made as regards the first named applicant's financial capacity to look after the second named applicant in this State, the first thing to be observed is that it could not have come as a surprise to the applicants that the first named applicant's financial capacity would fall to be assessed. The published Policy Document advises all Non-EEA Family Reunification applicants of the requisite financial guidelines which the respondent has set. In *Li and Wang v. Minister for Justice* [2015] IEHC 638, Humphreys J. described the Policy Document as "*important for the promotion of the principle of equality before the law, and for bringing about greater certainty and consistency in administrative decisions*" and that "*it is entirely commendable that the Minister would adopt and publish broad policy statements of the circumstances in which applications will, in general, be favourably considered or otherwise*." The Policy Document itself notes:

> "Economic considerations are thus a very necessary part of family reunification policy. While it is not proposed that family reunification determinations should become purely financial assessments the State cannot be regarded as having an obligation to subsidise the family concerned and the sponsor must be seen to fulfil their responsibility to provide for his/her family members if they are to be permitted to come to Ireland.

> It is intended however, that family reunification with an Irish citizen or certain categories of non-EEA persons lawfully resident will be facilitated as far as possible where people meet the criteria set out in this policy although of course each case must be considered on its merits. It is considered as a matter of policy that family reunification contributes towards the integration of foreign nationals in the State…"

40. Insofar as it is suggested that the Appeals Officer's conclusions that the second named applicant's presence in the State was likely to put pressure on the family's financial resources with the likelihood of a cost to public funds and public resources was irrational or unreasonable, I cannot agree with this submission. The conclusions arrived at were within the parameters of reasonableness having regard to the income threshold set out in the Policy Document and the facts presented.

41. While they acknowledge that the first named applicant's factual income was properly assessed, the applicants nevertheless contend that there was a failure to take account of or give the first named applicant credit for the fact that her income for 2015 was €19,400.00 per year (based presumably on the first quarter of 2015 earnings of 4,865.44), a figure which the applicants say was well above the €13,300.00 per year which is required to reach the €40,000.00 threshold over three years, as set by the Policy Document. They assert that the Appeals Officer's failure to give credit for this was also against the backdrop where the first named applicant's income for 2014 was only €400.00 or so short of the €13,300.00 per year requirement and where it had been shown that the first named applicant's income was increasing on a yearly basis. In this context, their complaint is that the first named applicant was given no credit for how near she was to meeting the requisite financial threshold by reason of her projected income for 2015. The applicants say that this was particularly unfair.

42. I find that there is no basis in fact for the assertion that the Appeals Officer did not take into account the up-to-date financial position in circumstances where the very latest earnings of the first named applicant were included in calculations, as set out in the decision in a comprehensive fashion. The conclusion arrived at by the Appeals Officer was, to my mind, open to the decision-maker, particularly in circumstances where the requisite income threshold as set out in the Policy Document refers to the requirement to show "over the three year period *prior* to application" "a cumulative gross income over and above any State benefits of "not less than 40K." (emphasis added)

43. It was also suggested in oral submissions that the Appeals Officer did not consider the first named applicant's undertaking that neither she nor the second named applicant would access social welfare if the second named applicant was allowed into the State. However, it is clear that the Appeals Officer did consider this undertaking as it is referred to in the review decision. The Appeals Officer in considering same noted that the first named applicant was in receipt of €150.46 per week by way of rent supplement but that it had not been explained in the review submissions how those benefits would be foregone. It seems to me that the lack of an explanation in the review submissions as to how this supplement could be foregone by the first named applicant was a factor to which the Appeals Officer could reasonably have regard.

44. The review decision is also criticized on the basis that there was no acknowledgment of the contribution which the second named applicant could make to the economy of the State. While the case is made in these proceedings that the second named applicant is a skilled welder, the Appeals Officer cannot be faulted for failing to address this as the submissions furnished on appeal did not avert to the second named applicant's skills or qualifications. Nor, as far as this court can ascertain was there a reference to same in the first instance decision to which it could be said the Appeals Officer should have had regard. In all the circumstances, I am not persuaded that this particular challenge to the decision as set out in ground (iv) has been made out.

45. It is also contended on the applicants' behalf that the Appeals Officer erroneously applied a test of "exceptional circumstances" and that this test has no rational place in a case where it behoved the decision-maker to ensure that the decision arrived at was proportionate, in accordance with established jurisprudence pertaining to constitutional and Convention rights.

46. I find no merit in this particular argument. When assessing "Financial Considerations", the Appeals Officer states as follows: "To the extent that the submissions made in relation to [the first named applicant's] earnings speak to the exercise of the decision-maker's discretion, the Appeals Officer will consider same in the light of the family circumstances (below)".

47. By referring to the decision-maker's discretion, the Appeals Officer was alluding to para. 1.12 of the Policy Document which provides, at p.15:

> "While this document sets down guidelines for the processing of cases, it is intended that decision makers will retain the discretion to grant family reunification in cases that on the face of it do not appear to meet the requirements of the policy. This is to allow the system to deal with those rare cases that present an exceptional set of circumstances, normally humanitarian, that would suggest that the appropriate and proportionate decision should be positive."

48. The Appeals Officer does no more than acknowledge the discretion which the respondent retains not to apply the terms of her Policy Document (itself only guidelines in any event) when circumstances warrant such an approach. Indeed, had the question of whether there were any circumstances which might merit a positive decision not been considered, I have no doubt but that omission could have been subject to challenge by the applicants on the basis that the respondent fettered her discretion by not enquiring as to whether there were any exceptional circumstances which might prevail notwithstanding that the financial threshold was not met. Whatever the merits of the balance of the within challenge, the review decision-maker cannot be faulted for alluding to the "exceptional set of circumstances" guidelines in the Policy Document. This acknowledgement by the Appeals Officer does not negate the requirement to consider the applicants' constitutional and Convention rights (and indeed such other rights as may be provided for by law). If the review decision had only averted to whether or not there were "exceptional circumstances" and not addressed the applicants' constitutional and /or Convention rights, then the applicants would have had cause for complaint. However, for the reasons set out elsewhere in this judgment, I am satisfied that that was not the approach adopted by the Appeals Officer in this case. The challenge to the decision on the "exceptional circumstances" ground (ground (v)) is not made out.

49. The challenge that the review decision-maker did not properly assess or weigh the applicants' rights under the Constitution or otherwise fettered her discretion (grounds (i), (ii) and (v)), now falls to be considered together with the challenge (ground (iii)) that the finding that their claim "was not a strong claim" was speculative and irrational. The applicants also argue that the finding that their marriage was "long distance in nature" was unlawful as it failed to consider that post their marriage they had rights over and above those which existed prior to the marriage.

50. As is clear from the review decision, the refusal of the visa pertained to issues arising from the common good and not to any finding about the bona fides of the applicants' marriage. There is no suggestion in the first instance decision or the review decision that the applicants' marriage is other than genuine.

51. In *Gorry v. Minister for Justice* [2014] IEHC 29 Mac Eochaidh J. addressed the manner in which the constitutional rights of a mixed Irish and non-Irish nationality couple must be addressed in cases such as the present:

> *"The starting point in any consideration where a mixed Irish and non-Irish nationality couple seeks to live in Ireland is that they have a prima facie right to do so by virtue of Article 41 of the Constitution. It is recalled that Article 41.3 pledges the State to guard with special care the institution of marriage. The circumstances of the marriage will indicate whether that right is engaged. If engaged, the State is entitled to supervise the right by requiring an entry visa for the non-national, for example. The mere fact that it is engaged does not mean that it cannot be trumped by a lawful countervailing purpose which must ensure that the denial of the right of residence is proportionate to the policy objective sought to be achieved. As Denham J. said in Meadows v. Minister for Justice [2009] IESC 3 "When a decision-maker makes a decision which affects rights then, on reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective.' In my view, the Minister and his officials erred in failing to acknowledge the rights which the applicants enjoyed. It was wrong to start the analysis of the constitutional position by denying that there were any constitutional rights to reside with one's spouse involved."*

52. In *X.A. v. Minister for Justice* [2011] IEHC 397 Hogan J. addressed the Minister's obligation in the following terms:

> *"21. the Minister's decision must always respect the essence and substance of the right of the married couple under Article 41. A decision which, in practice, compels the couple to life more or less permanently apart is, by definition, a very significant interference by the State with a core principle valued and protected by Article 41. Such a decision is one which, quite obviously, requires compelling justification: see, e.g., my own judgment in S. v. Minister for Justice, Equality and Law Reform [2011] IEHC 92. While the necessity to uphold the common good and the integrity of the asylum system may well supply that justification, it is nonetheless imperative that the respective rights of the applicants and the interests of the State must be fairly weighed by the Minister."*

53. In *Ford v. Minister for Justice* [2015] IEHC 720, Eager J. reprised the current jurisprudence in the following terms:

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

54. On behalf of the applicants, it is acknowledged that the case is not being made that their circumstances were similar to the facts in *Gorry* which gave rise to an insurmountable obstacle to the Irish national's ability to travel to Nigeria. Nor is it suggested that the applicants' circumstances were of the type of compelling facts as found by Hogan J. in *S (P) and E (B).* It is submitted however that the principles enunciated in those cases nevertheless are applicable to the applicants. In particular, the principle of the *prima facie* entitlement of the first named applicant to have her spouse reside with her in Ireland is a stand-alone principle. The court is satisfied that that is undoubtedly the case having regard to the authorities set out above. The applicants contend that reality of the Appeals Officer's decision will keep them apart. Accordingly, they say that this interference with their rights was required to be properly balanced, which, it is contended, was not done. Of particular note, the applicants say, is that no finding was made that the first named applicant could go to Nigeria. Furthermore, they submit that the financial aspect of the applicants' circumstances was only one aspect of their situation. The principal tenet of the applicants' case is that their Art. 41 rights were not sufficiently identified in the review decision. As such, they contend that it cannot be said that these rights have been properly weighed in the balance.

55. The respondent points to the fact that at first instance it was found that the first named applicant did not meet the financial guidelines set out in the Policy Document. It was consequently determined that the second named applicant's presence in the State might result in a cost to the State in terms of public funds and public resources. It is asserted that notwithstanding this finding, the applicants' rights pursuant to both the Constitution and the Convention were considered and a proportionality exercise was undertaken. The respondent asserts that a review of the first instance decision was carried out by the Appeals Officer, as expressly stated in the appeal decision. The respondent further asserts that it is also clear that by incorporating the first instance determination into the review decision, the Appeals Officer clearly took cognisance of the applicants' *prima facie* right to reside in the State.

56. Counsel for the applicants makes the case that there was no reference in the first instance decision to the applicants' *prima facie* rights. He submits that all that is recited in the first instance decision is that "[a]ll matters concerning the Irish citizen…in so far as they have been made known, have been considered above." It is contended that this does not meet with the respondent's obligation to consider the applicants' constitutional rights. The thrust of the applicants' submission in this regard is that given that the first instance decision-maker's assessment was deficient, a similar deficiency attaches to the review decision.

57. I do not accept the proposition that the extent of the first instance decision-maker's consideration of the applicants' *prima facie* rights is solely encompassed in the above quoted extract. It is expressly acknowledged in the first instance decision that the first named applicant is an Irish citizen with rights under Arts. 40 and 41 of the Constitution. It is clear that in the first instance assessment of rights, the relevant passage from the decision in *Gorry* was specifically set out, namely that the "*starting point*" for a decision-maker, where a couple are of mixed Irish and non-Irish nationality, is their *prima facie* right to live in the State and, once that right is engaged, if the right is to be "*trumped by a lawful countervailing purpose*" "*the denial of the right of residence*" must be "*proportionate to the policy objective sought to be achieved*". I am satisfied that the reference to *Gorry* was not done in a vacuum and that the reference clearly acknowledged the existence of the applicants' prima facie rights and the balancing exercise that was required to be undertaken.

58. It is the case that, unlike the first instance decision, the Appeals Officer does not cite *Gorry* or specifically identify the applicants' constitutional rights. That in itself is not fatal. In *S.A.*, Mac Eochaidh J. found no fault "*in the absence of an expressed acknowledgement that (the) married couple enjoyed a prima facie right to live together*" once satisfied that constitutional rights were assessed in the decision. I have no reason to disagree with that view. The question to be determined here is whether the Appeals Officer did in fact assess the applicants' constitutional rights and whether the necessary balancing exercise was engaged upon. I am satisfied that such as assessment was carried out and that the Appeals Officer was cognisant of and duly acknowledged the applicants' Art. 41 rights. The Appeals Officer specifically asserts that the first instance assessment of Art. 41 and ECHR rights has been reviewed on appeal, together with all information which had been submitted on appeal. There is reference in the review

decision to the section of the first instance decision which contains the Art.41 assessment. Effectively, therefore, the factors being considered by the Appeals Officer are those which are set out in the first decision, which include a specific acknowledgement of the first named applicant's constitutional rights. Furthermore, I am satisfied that the requisite proportionality exercise was embarked upon by the Appeals Officer. What were the factors which required to be weighed for this exercise? It goes without saying that the fact that the applicants were a married couple where one partner was an Irish citizen had to be a *prima facie* consideration. I am satisfied for the reasons set out above that this was acknowledged. Secondly, the applicants' individual factual circumstances at the time the marriage was entered into and following the marriage were a factor, including the long distance nature of the second named applicant's relationship with the first named applicant. The sixty pages of telephone communications submitted with the appeal were also required to be weighed. This was done, albeit that such evidence did not sway the decision-maker in coming to a conclusion favourable to the applicants. All of this is specifically averted to in the review decision. A further factor was the uncertain nature of the second named applicant's immigration status should he seek to apply for a visa upon marriage and the couple's knowledge that there was no automatic entitlement for the second named applicant to reside in Ireland following the marriage. This was alluded to in the decision. Undoubtedly, the decision-maker also had regard to the factual findings as regards the first named applicant's income. This was assessed in the context of the less onerous income threshold for Irish citizen sponsors (as opposed to other sponsors), as set out in the Policy Document, was noted. Ultimately, the Appeals Officer was not satisfied that the applicants had demonstrated that the first instance decision-maker's considerations in relation to "the economic well being of the country" were ill-founded. Overall, whilst they might have been worded more elegantly, it is apparent that the Appeals Officer's conclusions were the product of the balancing exercise which was required to be carried out.

59. As can be seen, the proportionality exercise involved a consideration of financial considerations. The Appeals Officer says as much. Counsel for the applicants submits that this must be taken to mean that the applicants' *prima facie* right to reside in the State was ignored. I do not find that to be the case. The clear import of the review decision is that the economic well-being of the country was found to prevail over the applicants' *prima facie* right to reside in the State as a married couple. That the economic well-being of the State was found to prevail was undoubtedly informed by the findings already made by the Appeals Officer as to the likelihood that the second named applicant's presence in the State may result in a cost to public funds and public resources and the finding, effectively, that the claim for family reunification was not a strong one.

60. As was made clear in *Gorry*, a mixed Irish and non Irish nationality couple "*do not have automatic rights to reside together in Ireland simply by virtue of marriage and that the State is not obliged to respect the residence choices made by such couples*". (Para.38) Mac Eochaidh J. further states, referring, *inter alia*, to *A.A. v. Minister for Justice Equality and Law Reform* [2005] 4 I.R., that "*it is clear…the courts have ruled in favour of the State's entitlement to refuse Irish residency to non-Irish persons married to a citizen*." (Para.40)

61. In *S (P) and E (B)* Hogan J., while emphasising the "*the State's obligation contained in Article 41.3.1 of the Constitution 'to guard with special care the institution of marriage'*", nevertheless acknowledges that "*the imperative need to uphold the integrity of the asylum system"* may provide a justification for the competing interests of the State to prevail over constitutional rights. He goes on to state:

> *"The task of the Minister is to balance potentially competing interests in a proportionate and fair manner. It is true that there is a considerable public interest in deterring illegal immigration and the Minister must naturally be prepared to act to ensure that the asylum system is not manipulated and circumvented. Nevertheless, the requirement that the Minister must balance competing rights necessarily involves a recognition that, important as the principle of maintaining the integrity of the asylum system undoubtedly is, it must sometimes yield - if only, perhaps, in unusual and exceptional cases - to countervailing and competing values, one of which is the importance of protecting the institution of marriage. The rights conferred by Article 41 of the Constitution are nevertheless real rights and must be regarded as such by the Minister. They cannot be treated as if, so to speak, they were mere discards from dummy in a game of bridge in which the Minister as declarer has nominated the integrity of the asylum system as the trump suit."*

62. In summary, I find nothing in the submissions advanced on behalf of the applicants that convinces me that in balancing the respective competing rights, the Appeals Officer failed to take into account the *prima facie* right of the applicants to reside in the State or that there were factors which were not weighed. Reliance was placed by the applicants on the decision of Eager J. in *Ford*. However, I find that that case can be distinguished from the applicants' circumstances. It is clear that in *Ford*, in concluding that the decision was unlawful, Eager J. took particular cognisance of the fact that a letter which set out, *inter alia*, details of the media outlets which were utilised to effect an ongoing relationship between Ms. Ford's younger children and her husband, and which described the relationship which was developing between him and the children, was not considered by the decision-maker. Eager J. found that there was "*an onus and an obligation*" on the decision-maker to consider the letter and its contents, which was not done. In the present case, there was no aspect of the applicants' appeal submissions which was not considered, unlike *Ford*. Nor do I find that the Appeals Officer failed to identify any factors of an unusual and exceptional nature (as was the case in *S.B. and E. B. and Gorry*) such as might have compelled the Appeals Officer to conclude that the countervailing value of protecting the institution of marriage must, in light of the applicants' circumstances, prevailed over the perceived likelihood that the granting of a visa to the second named applicant would result in a cost to public funds and public resources.

63. In all the circumstance, I find that the decision is proportionate.

64. I am also not persuaded that the review decision-maker's approach was either irrational or unreasonable. At both first instance and on appeal, the applicants' position was considered in light of their rights under the Convention and the Constitution. Accordingly, I am satisfied that the Appeals Officer did not slavishly follow the financial requirements of the Policy Document. There is thus no basis for the contention that the respondent fettered her discretion.

65. In all the circumstances I am not persuaded that the challenges in grounds (i) (ii) and (v) have been made out.

66. Over and above the complaint that their constitutional rights were not assessed or properly weighed in the balance the applicants contend (ground (iii)) that the Appeals Officer's finding that the claim to family reunification "was not a strong claim" was irrational or unreasonable. The finding was rationalised by the review decision-maker in the terms set out earlier in this judgment. As the decision shows, the Appeals Officer considered the additional information which had been supplied but was not convinced that it was such as to disturb the first instance finding. That was a qualitative assessment which is a matter for the decision-maker. While this court might well come to a different conclusion, that is not the test on judicial review: the test is whether it can be said to be unreasonable or fly in the face of fundamental reason and common sense *as per Meadows v. Minister for Justice*. I do not find that to be the case. Accordingly, I find that the challenge on ground (iii) has not been made out.

Summary

For the reasons set out in the judgment, I am not satisfied that the challenges to the decision have been made out in this case and the relief sought in the Notice of Motion is denied.