THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1148 J.R.]

Between

DESIREE O'LEARY, DIARMAID O'LEARY, MARGARET LEMIERE AND LEON LEMIERE

APPLICANTS

AND

The Minister for Justice, Equality and Law Reform

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 24th day of February 2012

1. By order of the Court (Hogan J.) of the 5th day of July, 2011, liberty was granted to the above named applicants to seek judicial review of the decision by the respondent of the 29th July, 2010, made under s. 4(7) of the Immigration Act 2004, whereby he refused to grant the third and fourth named applicants ("the Lemieres") permission to reside in the State. The grounds upon which leave was thus granted were set out in that order as follows:

> 1) The decision by the respondent to refuse to extend the third and fourth named applicants' permission to reside in the State pursuant to s. 4(7) of the Immigration Act 2004 ("the contested decision") is a disproportionate interference with the applicants' rights under Article 41 of the Constitution.
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> 2) The contested decision was not based upon a fair and reasonable assessment of the underlying facts and considerations in the case.
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> 3) The contested decision is in breach of the applicants' rights under Articles 8 and 14 of the European Convention of Human Rights.
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> 4) The contested decision fails to properly vindicate the applicants' rights under Article 41 of the Constitution because it provides less protection for their family rights than the protection afforded to other citizens of the European Union under Directive 2004/38/EC.

2. The background out of which the application for judicial review arises has been set out in considerable detail by Hogan J. in his judgment ("the leave judgment") granting leave of the 30th June, 2011, so that it is sufficient to summarise the essential details here. The first and second named applicants ("the O'Learys") are husband and wife and Irish citizens. The first named applicant ("Mrs O'Leary") is originally from South Africa and became an Irish citizen on marriage to the second named applicant. The remaining applicants are her father and mother who are nationals of South Africa. Her father is in his early 70s and her mother is a few years younger. The O'Learys are settled residents in Ireland with two adult daughters. She is a university lecturer and Mr. O'Leary is an engineer.

3. As explained in greater detail in the judgment of Hogan J., the Lemieres, as they advanced in age in recent years, experienced increasing difficulties, both financially and in terms of health and personal security in South Africa. Their income was insufficient to support them, especially where health insurance and medical expenses were concerned and their house was subjected to repeated burglaries and vandalism. They both had severe health problems which required hospital treatment and left them unable to fend for themselves upon discharge. In recent years, the Lemieres have had to rely for financial support upon their three children who reside in Europe and particularly upon the O'Learys in this country. Over the years, they have made frequent visits to their children in the United Kingdom and in this country.

4. As South African nationals the Lemieres do not require a visa to visit their daughter and son in law in Ireland. When they arrived in February 2009, they were, accordingly, given permission to enter and stay which was subsequently extended, but they were eventually required to leave the State by the 31st May, 2009. Following the various exchanges described in the judgment by Hogan J. at paras. 11 - 14 the Lemieres left and then returned to the State in June 2010, where they have been residing since. The respondent has refused to extend their permission to be within the State since the end of July 2010.

5. The Lemieres want to remain here with their daughter and her Irish family for the rest of their lives. The O'Learys wish to have them here and to look after them. The issues raised by the grounds upon which the Minister's refusal is sought to be challenged go to the basis upon which that refusal to permit them to do so can be contested as unlawful.

6. There can be no doubt, of course, that the Lemieres, as third country nationals have no entitlement to demand to remain in the State. To do so they require the permission of the respondent under s. 4 of the Immigration Act 2004, and the Oireachtas has conferred upon the respondent Minister the exclusive discretion in exercise of the sovereign competence of the State to decide whether they should be permitted to remain. Even where interference with family life is concerned, it is well settled that the rights of the family under both Article 41 of the Constitution and Article 8 of the Convention are not absolute and will not necessarily preclude the State deporting the non-national parent of even a minor citizen child in appropriate circumstances. (*Pok Sun Shum v Minister for Justice* [1986] I.L.R.M. 593, *Lobe v Minister for Justice* [2003]1 I.R. 17, *Oguekwe v Minister for Justice* [2008] 3 I.R. 795, *Alii (a minor) v Minister for Justice* [2010] 4 I.R. 45: See also for example the case of Boultif cited in para 15 below at paras 39 to 48.))

7. The crucial primary issue raised by ground 1) in this application, however, does not concern any entitlement on the part of the Lemieres to enter and remain, but is directed at the constitutional entitlement of Mrs. O'Leary as an Irish citizen to require that she be permitted to look after her father and mother within the State as members of her "family".

8. It is important to make a preliminary remark. As is invariably emphasised in judgments of the High Court in judicial review, its jurisdiction is confined to the examination of the legality of the decision or measure sought to be impugned and particularly of the legality of the process by which it has been made. It is not directed at the merits of the measure or the question as to whether the decision was the right or wrong decision. This remains the jurisdictional position of the High Court, even where the reasonableness (including the proportionality) of the conclusion reached in an impugned decision is at issue. In that regard, in the circumstances which arise in the present case as sympathetically summarised by Hogan J. in the leave judgment, it is important not to confuse the legal issue as to the reasonableness or proportionality of the decision with subjective considerations of empathy or compassion. The Oireachtas has entrusted to the Minster the function of exercising judgment in matters of empathy and compassion where humanitarian considerations arise in the grant or refusal of a visa to enter or permission to reside. The Minister dispenses the State's compassion towards non-EU nationals: the jurisdiction of the Court is confined to ensuring that he does so within the tern1s of the discretionary power that the Oireachtas has conferred.

9. In the view of the Court, accordingly, this challenge to the contested decision falls to be assessed for its legality, not from the perspective of the Lemieres as foreign national s seeking to reside in the State, but from the perspective of their daughter and her family as Irish citizens who seek to have the State permit them discharge the moral obligation they consider they have to support and care for the Lemieres in their old age and reduced circumstances.

10. Article 41 describes the family as a "moral institution possessing inalienable and imprescriptible rights". Although, as it happens, most of the cases in which the implications of this description have been considered concern the more immediate family relationship of parents and minor children and touch upon questions of adoption, custody and guardianship of children, this Court agrees with the learned exposition of Hogan J. in the leave judgment, that the core value enshrined in Article 41 is the entitlement of the family to order its own internal life and affairs without interference from the State, unless such interference is objectively justified in the interest of individual members of the family or necessary in the overriding public interest. (See in that regard the cases cited by Hogan 1 at paragraph 23 of the leave judgment.)

11. Counsel for the respondents however, has submitted that the rights protected by Article 41 are not in issue in this case. It is argued that the concept of "family" in Article 41 does not extend beyond the so called "nuclear family" so as to include the relationship between adults who are themselves parents and their own parents. Reliance is placed particularly upon a passage from the judgment of O'Sullivan J. in *Caldaras v. Minister for Justice* (Unreported, High Court, 9th December 2003), where he says:-

> "Having reread the judgments in the [*0 and L v. Minister for Justice and Law Reform and Osayunde v. Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 23rd January, 2003)] cases I cannot see in them any warrant for extending the concept of "family" as considered in those judgments to include grandparents within the concept of 'family' as guaranteed by Article 41 of the Constitution or indeed otherwise."

12. That judgment followed the judgment of Smyth J in *Olenczuk v Minister for Justice* (Unreported High Court 25 January 2002,) which in turn had taken account of earlier judgments in which the notion of "family" had been considered in the context of the Rent Restrictions Acts and notably those of Kingsmill Moore J in the Supreme Court in *Jordan & Anor v 0'Brien* [1960] T.R. 363 and of Murnaghan J in *McCombe v Sheehan* [1954] I.R. 183. The latter case concerned the interpretation of the word "family" as used in s. 39(3)(a) of the Rent Restrictions Act 1946 and it was held that it bore the same meaning as in Article 41 of the Constitution. It is relevant to note however that the issue there arose in the context of a claim by a landlord to recover possession of a "controlled dwelling'" from the niece by marriage of the deceased controlled tenant and the primary issue was whether upon that death the niece was in occupation under an implied contractual tenancy or under the provisions of those Acts. It was held that it was a statutory tenancy and the issue then arose as to whether the niece by marriage was a "member of the family" of the late tenant within the undefined sense of that expression in that sub section. Murnaghan J. in attributing to the term the same meaning as in Article 41 described it as referring to "parents and children" and so the niece was not a protected tenant. The observation was made however in the context of assessing the relationship between the aunt and the niece of her late husband and not the relationship between three generations in the same line. Clearly, had the statutory tenant been residing in the dwelling with her own child or grandchild, the surviving occupant would have come within the definition and the decree for possession would not have been made.

13. In *Jordan v 0'Brien* however the Supreme Court considered the same issue in the context of a claim by the surviving sister of the deceased tenant to be entitled to the statutory tenancy as a member of his family. The case came before that Court as a case stated on the question by Murnaghan J. notwithstanding his own ruling in the McCombe case. The earlier judgment was over ruled and the word "family" in the Act was held not to have the narrow meaning of "parents and children". In his judgment Kingsmill Moore J pointed out that the word can bear different meanings or have different scope depending on the context in which it is used. He said:

> "There is no definition of family, a word which has a variety of meanings. It i s used in a narrow sense to denote children e.g. "Have you a family?," in a wider sense to denote ascendants and descendants in a direct line, and in a still wider sense to include collaterals. It may also include adopted children and relations by marriage. It may even include servants of the household."

14. Whatever about the meaning and scope of "family" in the former Rent Restrictions Acts, having regard to the fact that *McCombe* was overruled, it does not appear to the Court that the observation of Murnaghan J can now be relied upon as an authoritative statement as to the interpretation of the concept in Article 41. For these reasons, in addition to those expressed by Hogan J. in the leave judgment, the Court does not consider that the word as used in Article 41 is never capable of encompassing three generations of a family and that it can only ever mean the "nuclear family" of parents and dependant minor children contended for by counsel for the respondent. Quite apart from the fact that the notion of the "nuclear family" would have been unknown to the population of the State when adopting the Constitution in 1937, it would seem to fly in the face of that population's own experience of family life, at least until very recent times, as suggested by Hogan J. in his judgment in *R.X v Minister for Justice* (2010] I.E.H.C. 446

15. The real issue here is not one of definition but of proportionality. The Lemieres are Mrs. O'Learys parents: they always have been. They did not cease to be her parents when she was 18 or 21 years old; or when she married; or when she had her own children; or when she came to live in Ireland. The fact that the Lemieres are also grandparents does not alter the nature of their relationship with their own daughter.

16. For the purpose of assessing the protection to be afforded by Article 41, what is important is the context in which the family relationship falls to be assessed, not how it is defined. For the State to intervene to remove a new-born child from its mother and father is clearly a potentially serious interference in that newly created family relationship requiring compelling justification. For the State to intervene justifiably to prevent, on the other hand, the reunification of an adult with his or her parents, falls to be assessed differently from the point of view of the proportionality of that interference. All three generations are related as members of the family: they are ascendants and descendants in the direct line in the words of Kingsmill Moore J. The legality of the State's

intervention depends upon the evaluation of the matrix of the circumstances of the individuals concerned in each case and the State's justification for its intervention.

17. This general approach to the concept of outside State intervention in family life is perhaps more clearly demonstrated by the case law of the European Court of Human Rights under Article 8 of the Convention, than by the relatively limited case law of these Courts in relation to Article 41. Both sets of case Jaw demonstrate that the rights to be protected in respecting family life from interference are not absolute. The legality of any infringement is dependent upon the justification for the intervention as against the quality of the family life interfered with, having regard especially to the degree of the family relationship, the ages and circumstances of the family members involved and, where separation or deportation is in issue, the settled status of the relationship and whether it is a relationship which has subsisted lawfully or unlawfully. (See for example: *Boultif v Switzerland* [2001] E.H.R.R. 50, *Uner v The Netherlands* [2005] E.C.H.R. 464, *Gul v Switzerland* [1996] E.C.H.R. 5, *Rodrigues da Silva v The Netherlands* [2006] E.C.H.R.86 and *Omoregie v Norway* [2008] E.C.H.R. 261)

18. It is clear to the Court, accordingly, that the O'Leary family is not precluded from asserting that Mr. and Mrs. Lemiere are members of their "family" and that they have a stateable entitlement to seek permission to discharge the moral obligations which they feel they owe to them and to do so on the basis of Article 41 of the Constitution. The central issue in this case, therefore, is whether the reasons given by the Minister for refusing to permit them to do so constitute a lawful exercise of the Minister's discretion under s. 4 of the Immigration Act 2004, or whether, on the other hand, the decision is vitiated by illegality in that it is unreasonable, disproportionate or inadequately explained having regard to the basis upon which the permission was sought.

19. As already indicated, the application for permission to reside in the State was rejected by a letter of the 29th July, 2010. The reasons for the rejection were contained in a memorandum of 27th July 2010 entitled "Application for renewal of permission (pursuant to s. 4(7) of the Immigration Act 2004)" which was sent with that letter. This memorandum is clearly a considered and detailed answer to the extensive submissions that had been made in the application for residency as supplemented by further correspondence throughout 2009 and the first half of 2010. It takes the form of six specific "points for consideration" together with a further paragraph headed "Additional facts" followed by a "Conclusion". (It should be noted that immediately following receipt of the letter of the 29th July, 2010, further representations and objections were raised and these were replied to by letter of the 26th August, 2010, by the same officer who had written the letter of the 29th July, 2010. The legality of the refusal decision, however, depends upon the reasons given in the memorandum referred to above).

20. The "Points for consideration" outlined in the n1emorandum and the replies made can be summarised as follows:-

> (1) This addresses the submission made that the Lemieres are dependent on their family in Ireland and that they have been supported physically and mentally by the O'Learys. Mrs. Lemieres name had been added to the credit card account of Mrs. O'Leary and credit card statements and bank statements had been submitted to demonstrate the degree of this support. This assertion of "dependency" is rejected in these terms:
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> > "They stress their perilous financial situation in South Africa, but this is not a unique situation for elderly persons in many parts of the world. While the O'Learys have shown that Mrs. Lemieres name was added to Mrs. O'Learys credit card in 2003, I do not consider that this is adequate proof of providing financial support. I should have thought that sending financial assistance to elderly family members/relatives abroad is a fairly standard practice for persons who are enjoying a good standard of living as the O'Learys do. However, I am not sure that this alone could be used as proof of establishing financial dependency on their daughter in Ireland."
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> (2) Here the decision maker considers the personal circumstances of the Lemieres with particular reference to their health problems and difficulties of personal safety in South Africa due to crime levels. The assessment is made:
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> > "While feeling sympathetic towards the Lemieres, I do not believe that being elderly and having age-appropriate health issues constitute a valid argument for remaining in Ireland. Of more concern is the fact that, according to the Lemieres crime level s are high in South Africa and the elderly are particularly vulnerable to break-ins and random violence. However, is this not concern of elderly persons living alone in many communities. While this latter point is of most concern to me, I feel that it should more properly be addressed by Repatriation Division than ourselves. This would involve the issuing of as. 3 letter and would afford the Lemieres the opportunity to explore this argument further.
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> (3) Under this heading the decision maker considers the submissions made by reference to Article 40.1, Article 41 and Article 45.1 of the Constitution and Articles 1 and 8 of the European Convention on Human Rights. The answer given is as follows:
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> > "The *Wang* case [*TM v Minister for Justice* (Unreported, Edwards J. 23 November 2009.)] resulted in a determination that the refusal of an extension to permission to remain did not breach the applicants' rights under Article 8 ECHR and Article 41 of the Constitution, as these rights had not been engaged and to demonstrate such engagement, the application should produce evidence of Ms. Wang's dependency on her Irish national daughter and son in law. While the O'Learys have produced evidence of providing some financial support since 2003, and while I am sure that it was extremely welcome to the Lemieres, I am not convinced that it was essential for their support. In addition, there is no express provision in Irish legislation currently for an Irish national to apply on behalf of a non national who is their dependent to join them in the State. It appears that the Lemieres have travelled over and back from South Africa on a number of occasions on short term visits to see their daughter, son in law and grandchildren. In the Wang case, the judge found that while the applicant might perhaps wish to live with her family Ireland she had not been allowed to settle here, and *de facto* she had not been living with her Irish based family on any permanent, semi permanent or even long term temporary basis. Just because the applicants have an Irish citizen daughter, son in law and grandchildren, does not confer an absolute right to reside in the State."
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> (4) Under this heading a further submission by reference to the ECHR is considered namely that the refusal would impact on the lives of Irish citizens, namely the O'Leary family. The decision maker says:
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> > "The points at 3 above are applicable here. To state that a refusal to grant residency would impact on a number of Irish citizens lives, ie. the O'Learys and their children are overstating the fact. Up until last year from the information available, it seems the Lemieres had visited Ireland but for the most part lived in South Africa. I fail to see how a refusal will impact dramatically on the Irish citizens' lives particularly, as the O'Leary grandchildren are no

longer children and one of them, Siobhan had by May 2009, moved away from home and was living in Dublin. I can only presume that, until last year, they only saw their grandparents at holiday time."

(5) This addresses the submission that more favourable rights are accorded to other EU citizens as opposed to Irish citizens in the State. This was, in effect, a submission based upon alleged reverse discrimination namely, that the O'Learys as Irish citizens are treated less favourably as compared with EU citizens who are nationals of another Member State and exercise their right of free movement by coming to work in the State, bringing with them a non national parent. The decision maker rejects the argument on the basis of the judgment of Edwards J. in the *Wang* case.

(6) The submission made here was that it is not contrary to the common good to allow the Lemieres to reside in Ireland as they are of good character and have no criminal convictions. The response is given:

"While the Lemieres seem to be of good character, it appears that they have attempted to circumvent and manipulate the immigration system to their own ends. From an initial request for ex tension of holiday conditions, they now want the guarantee of permanent permission to remain. This can be seen from the fact that they had let their house for one year prior to leaving South Africa, indicating that they did not intend to return in the foreseeable future. They have now sold their house, leaving them with no residence to return to in South Africa. This last action appears to be somewhat precipitate, not to mention imprudent, given that their immigration status is so uncertain. Also, despite refusals of extensions to their permission to remain, it appears that the Lemieres are not going to leave the State if it does not suit them. This point has been emphasised in the various letters from their solicitors. It seems then, that the Lemieres only intend obeying immigration law if it suits them, and while they may have no criminal convictions, this does not reflect well on them from the perspective of good character."

21. Under the heading "Additional facts" the decision-maker refers to the fact that the Lemieres were refused a visa to enter the United Kingdom for a ten day holiday in March 2009, when the UK authorities apparently gave a number of reasons, including the fact that they have previously been refused an EEA family permit to enable them to reside in the UK, their financial status, and the fact that they had applied for residency to live in Ireland and that application had not been determined. The decision maker then observes: "One could infer from this that the Lemieres are 'shopping around' for a country to live in and that they have no particular affinity with Ireland and could just as easily live in any other EU country as in Ireland. On that basis it might be argued that they are not dependent on Mrs. O'Leary alone for physical and mental support".

22. Finally, under the heading "Conclusion" the decision maker summarises the basis for the refusal:

"In summary, the Lemieres ostensibly entered the State for a holiday, which subsequently changed to an extension of permission to remain and then to long term residency. I feel that the Lemieres have been disingenuous in many of their dealings with the Department and entered the State with the express intention of remaining in Ireland for as long as they chose. Furthermore, I feel it would not be consistent with the findings of the Wang case to grant further residency in this case as I do not believe the Lemieres have established dependency in the sense set out by Edwards J.. I believe it is important to maintain the integrity of the immigration system, and also to be consistent with other persons in similar situations who have been asked to leave the country or who have been deported. Accordingly, I am refusing the request and extension of permission to remain in the State".

23. The Court has set out the content of the refusal decision almost in full because, while the individual answers and observations expressed by the decision maker might separately be considered pertinent and not obviously unreasonable, the Court finds it difficult to avoid the impression given by the cumulative effect of the reasons as stated, that the decision maker was more concerned with finding and articulating grounds which would support a refusal rather than seeking to give an overall assessment of the merits of the application in a balanced and objective manner. In particular, the Court is struck by the manner in which the decision-maker appears inclined to rely upon two facets attributed to the application namely, the absence of a relevant legislative provision or administrative procedure and of any absolute right on the part of the applicants to obtain the permission they seek; and secondly, an element of bad faith which, on the face, of it would appear to be at variance with the openness of the candid pleas made to the Department in the very extensive correspondence that was exchanged.

24. One of the basic points made by decision maker dealing with the submission set out at para. 20 (3) above, is that the Irish citizenship of Mrs. O'Leary does not confer upon her parents "an absolute right to reside the State". That is undoubtedly true and does not appear to have ever been contested. In addition, however, the decision maker says"...there is no express provision in Irish legislation currently, for an Irish national apply on behalf of a non EU national who is their dependent to join them in the State". This statement may also be literally true in the sense that the Immigration Acts generally and the Immigration Act 2004 in particular, do not contain a specific section or subsection providing for an application procedure peculiar to the circumstances of this case and there is no prescribed form equivalent, for example, to the form prescribed for use in applying for a residence card under the European Communities (Free Movement of Persons) (No.2) Regulations 2006 (SI No. 656/2006). (See Regulation 7(1)(b) and Schedule 2 prescribing the particulars to be furnished in such an application.) That statement of the obvious statutory position does not, however, constitute a valid answer to the submission that is addressed in that subparagraph. The true statutory provision is that contained ins. 4 of the Act of 2004, whereby an immigration officer, on behalf of the Minister, may give to any non national a permission authorising the non national to land or be in the State. Thus, subject only to the more detailed provisions of that section of the Act, the Minister, through his immigration officer has a general discretion to permit any non national to enter and reside in the State and, in accordance with subs. (6), to attach to the permission such conditions as to duration of stay, engagement in employment, business or profession as may be thought fit. Furthermore, under ss. (7) any such permission may be renewed or varied by the Minister or an immigration officer on application and it was precisely on that basis that the application in this case was dealt with as is clear from , *inter alia*, the letter of 26 August referred to above (see paragraph 19,) which points out that there is no appeal from a decision made under that sub section. It is to be noted that under subs. (3) the immigration officer is entitled but not necessarily obliged, to refuse to give a pem1ission only where the officer is satisfied that one of the circumstances or conditions identified in that subsection applies to the non national. Accordingly, even if it is true that there is no tailor-made application procedure for the particular circumstances of a case such as this, it is manifestly the case that under s. 4, the Minister has power in his discretion to extend any permission to be in the State granted to a non national and to prescribe a condition as regards duration which justly and reasonably meets the exigencies of the case.

25. A second dominant consideration which appears to have influenced the decision-maker is, as mentioned, the apparent attribution of a lack of good faith on the part of the applicants in their dealings with the Department. They are described as having attempted to "circumvent and manipulate the immigration system to their own end" and, in effect, to have sought to enhance the urgency of the application by an imprudent sale of the house in South Africa, when they must have known that their immigration status was

uncertain. They arc described as having been disingenuous in their dealings with the Department and to have engaged in "shopping around" for somewhere to reside as between this country and the United Kingdom.

26. While it lies entirely with the administrative decision-maker and not with the High Court to make judgments on the merits, including the bona fides, of an application of this kind, it is part of the function of the Court to en sure, where a decision-maker is required to arrive at a balanced and proportionate conclusion in circumstances where the process is administrative and on paper without any personal interaction with an applicant, that a negative conclusion reached which relies upon improper motive or lack of good faith, is very clearly sustained by the content and tenor of the material before the decision-maker. In the judgment of the Court it is highly questionable whether the motives attributed to the applicants in this decision are consistent with the relevant material.

27. It is not disputed that South African nationals arriving in the State do not require a visa. It is also clear from the evidence that since Mr. and Mr. O'Leary returned to live in Ireland in 1996, when their two daughters would have been three years and twelve years old respectively, the grandparents have been regular visitors to the country. Mrs. O'Leary took up employment in St. Vincent's Hospital and in every one of the years from 1996 to 2003 and again in 2005, Mrs. Lemiere came to Ireland during the summer holiday period for three months to look after the two girls while their mother was working. Her father and younger brother visited in 1999, 2003 and 2005.

28. In February 2009, the Lemieres arrived in the State with a return flight booked for August 2009. Mrs. Lemiere was given permission to remain for six months, while Mr. Lemiere was given the standard 30 day permission to remain and asked to report to the Garda National Immigration Bureau. Shortly afterwards the applicants made contact with the Irish Naturalisation and Immigration Service (INIS) by telephone and then went to the offices of the GNIB on the 12th March, 2009, in order to make an application for extended permission to remain. They there spoke with a named immigration officer Det. Insp. Phillip Ryan and the applicants say that they were told by him that he would extend permission to remain up to six months if provided with evidence that the Lemieres had health insurance in the State. This conversation does not appear to be denied on behalf of the respondent. The O'Learys immediately arranged for insurance cover to be taken out with the VHI. According to Mrs. O'Leary, they then went back with this policy to the GNIB the following week, but a different immigration officer was unwilling to extend the permission.

29. In an affidavit by way of reply on behalf of the respondent, William O'Dwyer, a principal officer in the Department, says that during the visit to the GNIB on the 12th March, it was discovered that the permissions granted at Dublin Airport had been granted in error and the permission was amended for both Mr. and Mrs Lemiere to a permission until the 31st May, 2009. The applicants then consulted solicitors.

30. On the 29th April, 2009, Messrs Brophy, solicitors, wrote to Det. Insp. Ryan confirming the taking out of health insurance for the Lemieres and saying: "In circumstances where the applicants shall not need recourse to public funds and have a clean immigration history of visits to Ireland, we would ask you to exercise your discretion pursuant to s. 4(7) of the Immigration Act 2004, and grant an extension of permission to remain on visitors conditions to the applicants". On the 30th April, 2009, Det. Insp. Ryan replied saying that it was not a matter for the GNIB and that the correspondence had been forwarded to the General Immigration Division of the Department. The requested extension was refused by letter of the 21st May, 2009 and the Lemieres were required to leave the State by the 31st May, 2009. No reason was given for the refusal other than to say that "your clients' position does not warrant an extension of permission to remain in the State".

31. On the 29th May, 2009, Messrs Brophy, with some formality, submitted an "application for residency on behalf of Mrs. Margaret Lemiere and Mr. Leon Lemiere" and also requested that they be granted "temporary residency or extend the applicants visitors conditions while the substantive application is being considered." They added "our clients are most concerned about the applicants being undocumented for whatever short period as they are law abiding individuals". The application for residency was expressed as being based "on the fact that the applicants are dependant on their family in Ireland". There followed detailed information as to the circumstances of both the Lemieres and the O'Learys outlining the family history and the family relationships and giving detailed information as to the financial, health and personal security circumstances of the Lemieres in South Africa.

32. On the 18th June, 2009, the applicants' solicitor spoke with another named representative of the respondent, Ms. Amanda Byrne, of the General Immigration Division to discuss the application. The solicitor was informed that the Officer was prepared to extend the temporary permission until September 2009, because this was the length of the original permission granted at the airport but that there were no exceptional circumstances for granting residency. Ms. Byrne apparently explained:

> "This is because up to August 2007, non visa required persons could just stay on and change their status and it was being abused. Since then a change of policy has been introduced and it is no longer possible when the person has 'visitor' stamped on their passport. They should ensure that 'to reside/live with relatives' is stamped on the passport."

33. The solicitor and the officer then discussed the options available to the family and Ms. Byrne says that it was agreed that when the temporary permission was extended until September, the Lemieres would leave the State and come back so as to ensure that when they re-entered they would have the appropriate stamp put on their passports. Once they had re-entered they would then make the application to reside to General Immigration. The replying affidavit of Mr. O'Dwyer appears to accept at para. 11 that this conversation took place and does not deny that Ms. Byrne discussed the options available in those terms. On the strength of these advices, the Lemieres returned to South Africa on the 11th August, 2009, and returned via Frankfurt on the 26th August, 2009, where Mrs. O'Leary met them so as to accompany them to Dublin Airport.

34. At Dublin Airport they spoke to another named immigration officer, Mr. John Coakley and told him that the Lemieres were returning for the explicit purpose of seeking entry with a view to applying for residency. He apparently advised that there was no stamp he could use which would record this purpose but that he would note it on the computer. On the 7th September, 2009, Messrs Brophy wrote to Ms. Byrne and recorded what had happened at the airport requesting that the application for residency now be progressed.

35. By letter of the 17th September, 2009, a Ms. Eileen O'Reilly of the General Immigration Division refused the application saying that "currently under Irish immigration legislation there is no provision for an Irish national to bring in a non-EU national as their dependent to reside in the State". She added "it should be noted that there is no provision in Irish immigration legislation for the granting of permanent residency".

36. This, of course, is the same key factor which appears to have influenced the decision-maker in the contested decision as already referred to in the context of the submission addressed under the heading of para. 3 of the decision and quoted in para. 20(3) above. To the extent that it purports to be the statement of the reason in law as to why the request for permission for the Lemieres to remain in the State on an extended basis was outside the competence of an immigration officer and the respondent, the Court is satisfied that it is both an inadequate response to the very detailed request that had been made and is mistaken in law for the reason

given in para 24 above. It seems abundantly clear from the content and tenor of the very extensive correspondence exchanges which had taken place that had permission been granted to the Lemieres for a duration of, say, ten years or even five years, it would have been gratefully accepted.

37. The Court has set out in some detail the exchanges which took place between the applicants and the different immigration officers and agencies of the Department, because it is clear that the picture which emerges as to the attitude and approach of both the O'Learys and the Lemieres is markedly at variance with the view expressed in the memorandum of the 27th July, 2010 namely, that they were dealing with the Department in a manner which sought to manipulate the immigration system to their own ends and that they had been disingenuous in their approach because they had the express intention of remaining in Ireland as long as they chose.

38. It may well be that the Lemieres can be criticised as imprudent for selling their house in South Africa when their status in this country was uncertain but it seems to the Court that a fair-minded third party would baulk at characterising the act as evidence of a manipulative intent if regard is had to the circumstances in which the decision was made as described in the letter of 26 January 2010 and later correspondence. They had let the house in 2009 so that it was occupied in their absence and had it protected by a security firm. The tenants broke the lease and left. The house was vandalised and in one attack a security guard was tied up and beaten and the security firm abandoned the job as dangerous. They returned to South Africa in February 2010 both for medical treatment and to try to deal with the house. They found i t impossible to let because of the security situation and considered they had no option but to sell it. This is not a picture of a manipulative strategy but of an elderly couple attempting to deal with a crisis in their lives.

39. Thus, the picture that emerges is one of the 0'Learys being extremely concerned at the plight of the grandparents and perhaps desperate to find a solution to the family dilemma. The correspondence summarised above indicates that the O'Learys were open and candid in their efforts to find a way of having the grandparents permitted to remain in Ireland so that they could be looked after. They arranged health insurance as had been suggested and even arranged for the Lemieres to leave the country and return in order to obtain the stamp they had been told would enable them to make the application for long term residency which they had openly asked for. In effect they encountered divergent responses and advice from different divisions and different immigration officers. They were confronted with the somewhat Kafkaesque situation in which the Lemieres could enter the State only on foot of a short-term holiday permission but could not then apply to change their status and obtain long term permission because of an apparent policy change in 2007 arising out of abuses of the system. On the other hand, they were precluded apparently from seeking openly to make an application for permanent residency consistent with their requirements before arriving, because "there is no express provision in Irish legislation" which currently covered the position.

40. In the judgment of the Court these two principal considerations, namely the erroneous view that the legislation could not accommodate the type of permission which the applicant sought combined with the unjustified attribution of improper motive and lack of good faith to the applicants, are sufficient grounds to warrant the quashing of the decision of the 29th July, 2010, and require that the application be given fresh consideration. As indicated in this judgment, the Court considers that the conclusion reached in the memorandum of the 27th July, 2010, as to the reasons justifying rejection of the application is unsound in law, because the decision-maker appears to have been influenced by the two factors immediately referred to above, combined with an excessively narrow view of the extent of the family relationship entitled to potential consideration under Article 41 of the Constitution. While it is correct in law to say that the rights of the family protected by that Article are not absolute and that there is no absolute right on the part of an Irish citizen to have a non national family member reside in the State, it nevertheless remains the position in law, in the view of the Court, that adult citizens and their own citizen children are entitled to rely upon that Article when seeking the State's intervention by the grant of permission which will enable them to discharge a moral obligation towards non national family members, including in particular, grandparents who have need of their support and care.

41. For the sake of completeness and to avoid any misunderstanding in any reconsideration of the application, the Court would make the following additional comments on some of the other reasons given in the memorandum of 27 July 2010.

42. As quoted in para 20(1) above, the claim that the Lemieres were "dependent" on their Irish family was rejected because the very extensive and detailed financial information given was "inadequate proof of financial support". To the extent that the notion of dependency in this context can obviously include financial reliance, this appraisal appears to the Court to be unsound. It might be possible to say that without the payments in question the Lemieres would not have been destitute. Having regard however to their obviously distressed circumstances and the security and health difficulties with resulting expenses, it is clear that the monies provided went beyond what was merely "extremely welcome" but non-essential support.

43. More importantly however, the Court considers that the decision-maker erred in treating the application as based and as required to be based, primarily upon financial considerations. She appears to have approached the assessment of the application as if it was an application under Regulation 5 of the above Regulations of 2006 by an EU citizen to bring into the country a "permitted family member" where a detailed examination of the nature and extent of the dependence of the member is carried out. Precisely because there is no equivalent tailor-made provision and form when an application is considered under s.4 (7) of the Act of 2004 the information furnished falls to be assessed by the respondent under his general and unfettered discretion such that the quantum of financial support is not by itself a determining factor. This application was clearly made on the basis of a far wider claim to dependence on the part of the Lemieres including their physical and emotional reliance on their daughter by reason of their age, infirmity and their basic inability to look after themselves in South Africa. Clearly an important element in that regard was the fact that when they were seriously ill and hospitalised in South Africa in 2008, Mrs O'Leary (and her sister residing in England) had to take leave of absence from her post to travel to South Africa for an extended period to care for them.

44. As indicated in para 20 (2) above, the issue of personal security in South Africa, while conceded to be of "most concern", was disposed of as a matter to be addressed not by the decision-maker under s.4 (7) but by the Repatriation Unit and by the issue of a proposal to deport the Lemieres under s.3 of the Act of 1999. This appears to the Court to be both an abdication of the duty to take it into account as a factor in the claim to dependence and a draconian over-reaction to the application as made and was no doubt influenced by the view taken that the applicants were manipulating the immigration system and were intent on remaining in the State as long as they chose. It suggests that the decision-maker was expecting to treat the Lemieres as illegally present in the State even though the applicants had expressly and repeatedly insisted that they had no wish to find themselves in an unlawful position and had pleaded to have a decision made before their permissions expired. (See for example the opening paragraphs of the letter of application of 29 May 2009 quoted at para 31 above.)

45. Finally, in any reconsideration of the applicants' request for permission for the Lemieres to remain in the State it will, in the view of the Court, clearly be necessary to give a more careful and balanced consideration to the information available as to the personal dependence of the Lemieres upon Mr. and Mrs. O'Leary and to do so particularly in the light of the information available as to the involvement of the Lemieres in the lives of the O'Learys including the O'Leary children in Ireland since 1996. It is, in the judgment of

the Court, an unbalanced approach to these issues to isolate the financial aspect of such dependency and say the money advances are not big enough as though dependency was only relevant as an answer to outright destitution. Furthermore, to judge that the Lemieres have "no particular affinity with Ireland" may attribute undue weight to the distance between Ireland and South Africa and the fact that until 2009, the Lemieres lived most of each year in South Africa. It is possibly not an uncommon family experience that the relationship between grandchildren and grandparents who live at considerable distances away is of a different quality as compared with that of grandparents who live close by. The latter may be visited far more frequently, but for hours at a time or at weekends. The foreign grandparents, as in the case of Mrs. Lemiere as described above, come to stay for weeks or months at a time and thereby enter into the daily routine of their family life and thus belong to the family in the minds of children in a different way. As illustrated by the cases referred to above in the context of Article 8 of the Convention, this is the sort of factor which falls to be taken into account when assessing the nature and quality of the "family life" invoked.

46. If the mistaken and unsound reasons given for the refusal of the application and identified above are excluded, the remainder of the decision fails, in the judgment of the Court, to constitute an adequate and rational explanation as to why, when the family has undertaken that the Lemieres will not be a financial burden on the State or on its public health services, the maintenance of the integrity of the immigration system should prevail over the moral interests and obligations of this family.

47. In conclusion, the Court would reiterate the preliminary remark made at the outset. This judgment is not concerned with expressing a view on the merits or upon the balancing judgment that requires to be made in the case. It is no doubt possible that a reconsideration of the application in the light of the rulings thus made by the Court m ay still lead to a reasonable and proportionate decision on the application to the same effect. At this point, however, the Court is satisfied that ground (2) of the order of the 5th July, 2011, has been made out and that there has been an inadequate consideration given to a proportionate balancing of the interests of the State in maintaining the integrity of the immigration laws as against the entitlement of the first and second named applicants to invoke the protection of their family interests under Article 41 of the Constitution. It is unnecessary therefore to consider more extensively the other grounds and arguments that have been advanced.

48. The Court will accordingly grant the relief by way of an order of certiorari sought at para 4.1 of the Statement of Grounds dated 6 Jul y 2011 quashing the decision of the respondent dated 29 Jul y 201 0.

Approved: Cooke, J