Neutral Citation Number: [2011] IEHC 99

THE HIGH COURT

2009 1025 JR

BETWEEN

T. K.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 9th February 2011

1. The net issue in these judicial review proceedings is whether the respondent Minister for Justice, Equality and Law Reform gave any or any adequate reasons to support the conclusion that it would not be contrary to the prohibition on *refoulement* contained in s. 5 of the Refugee Act 1996 ("the 1996 Act") to deport the applicant. The answer to this question turns in many ways upon a consideration of what the Supreme Court actually decided in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, the implications of which I will presently consider.

2. The deportation order in the present case was signed by the respondent Minister on 20th August 2009 and it contains the standard recitals ("…whereas the provisions of section 5 (prohibition of *refoulement*) of the Refugee Act 1996…are complied with in the case of [T.K.]….") regarding compliance with the requirements of s. 5 of the 1996 Act The file note of August 18, 2009 - which contained the relevant analysis required for the purposes of s.3 of the 1999 Act - set out the background facts and the relevant country of origin information before concluding thus:-

> "Having considered all of the facts of this case, I am of the opinion that repatriating [TK] to Togo is not contrary to s. 5 of the Refugee Act 1996, as amended."

3. The applicant claims to be from Togo. He arrived in Ireland in October 2005 and claimed asylum. The Office of the Refugee Applications Commissioner rejected the application on 15th December, 2005, and this rejection was subsequently confirmed on appeal by the Refugee Appeals Tribunal on 13th April, 2006. These decisions have never been challenged by way of judicial review and both the Commissioner and the Tribunal found against the applicant on credibility grounds.

4. The applicant's case is that he fears persecution and ill-treatment (and worse) if he is returned to Togo. There is no question at all but that the record of the Togolese Government in matters of civil liberties and human rights leaves a very great deal to be desired. The country of origin information shows that while the human rights condition have improved somewhat in recent years, very serious problems remain. The US Department of State's Report for 2009 observed that these problems included:

> "partial inability of citizens to change their government; torture and other abuse of detainees, rape; official impunity; harsh and life-threatening conditions; arbitrary arrests and detention; lengthy pretrial detention; executive influence over the judiciary; infringement of citizens' privacy rights; restrictions on the press, including banning media programs; restrictions on freedom of assembly and movement; corruption; female genital mutilation and violence against women; discrimination against women; regional and ethnic favoritism; trafficking in persons, especially children; child labor, including forced child labor; and lack of workers' rights in export processing zones."

5. The applicant maintains that he and his family have a long standing opposition to the ruling regime in Togo. It appears that Mr. K. left Togo for Nigeria in 1992 and thereafter returned to Togo in 1994. In 1996 he moved to Gabon and thereafter he emigrated to Italy where he stayed between 2001 and 2005. Mr. K. then returned to Togo for a short period in the aftermath of the disputed presidential elections in April, 2005.

6. Mr. K. then contends that when he returned to Togo he became involved in the widespread protests and demonstrations which erupted in Lome following the results of these elections. These included tyre burning, road blocking and stone throwing. When the situation became increasingly violent he decided to go home. Mr. K. then contends that he then met the wife of a relative who told him not to go home because the soldiers of the FAT (*Forces Armées Togolaises*) were at his home looking for him. He then contends that he then met an individual, Etienne, whom he knew he was a member of the Government party, RPT (*Rassemblement du Peuple Togolais*). Etienne agreed to go to Mr. K.'s home to ascertain what the position was. Eitienne met two soldiers just as they were leaving the house who asked him for identity documents. He produced a card showing his membership of the RPT and the soldiers then departed.

7. Etienne was told by Mr. K.'s wife that the soldiers beat her and her father in law (who had been staying with them) when they said that Mr. K. was not at home. Etienne further reported that both were badly bruised and that the soldiers had said to Mr. K's father that he had sent his son out to throw stones at him. Mr. K. then decided not to return home, but said that he used travel documents which had been given to him by the Togolese Embassy in Rome to travel to Ghana from whence he travelled to Ireland via Naples. Mr. K. also said that he spoke with his wife from Ghana who confirmed Etienne's account and that the soldiers were still coming to look for him.

8. If this account were to be believed, it would be capable of grounding a well-founded fear of persecution within the meaning of s. 2 of the 1996 Act. Section 2 defines "a refugee" as meaning:

> "a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it…."

9. In this respect, I cannot agree with the view expressed by the Tribunal member in his decision of 13th April, 2006, insofar as he suggested that the applicant's departure from Togo could never amount to persecution simply because he had never been "arrested, detained or questioned by the authorities during this time". Unfortunately, all too many historical examples could be given of persons who fled to safety from odious regimes who could nonetheless justly claim the protections of the Geneva Convention even though they had never actually been arrested, detained or questioned by the authorities - this was, for instance, the position of many refugees from the German Democratic Republic who had escaped to safety prior to German unification. If Mr. K.'s account is to be believed - and here it must be borne in mind his claim was rejected both at first instance and on appeal on credibility grounds - he could not be expected to have returned to his home to await a beating (and perhaps worse) at the hands of soldiers of the FAT.

10. The question of whether the applicant has a plausible case that the prohibition on *refoulement* is engaged is of some importance, for in those cases where a failed asylum seeker simply relies on purely humanitarian considerations, then there is no obligation on the Minister to set out "detailed reasons as to why *refoulement* does not arise": see *Baby O v. Minister for Justice* [2002] 2 I.R. 169, 183 per Keane C.J. A similar view was also taken by Hardiman J. in respect of the reasons given as to why it was in the interests of the common good within the meaning of s. 3 of the 1999 Act to deport the applicants: see *FP v. Minister for Justice* [2002] 1 I.R. 164 at 174-175.

11. On the other hand, if, as I have found, Mr. K's account was capable of attracting the protections afforded by s. 5 of the 1996 Act, then this potentially brings into play the decision of the Supreme Court in *Meadows*, *even* if this account was previously rejected by the Refugee Appeals Tribunal on credibility grounds in the context of an asylum application. It is thus necessary to examine closely what *Meadows* actually decided. Before doing so, it is probably appropriate that I should first record that I acted as counsel for the applicant in that case.

The Decision of the Supreme Court in *Meadows*

12. The appellant in *Meadows* was a Nigerian national who had who, on her arrival in Ireland applied for refugee status. Her asylum application was turned down at first instance and she later appealed unsuccessfully to the Refugee Appeals Tribunal. In September, 2001 she was informed by letter that the Minister proposed to make a deportation order in respect of her pursuant to s. 3 of the Immigration Act 1999. She made submissions through her solicitors in response. The solicitor's letter referred to her application as "an application for leave to remain in the State on humanitarian grounds. The reasons advanced in that letter in support of that application included the following statement:-

> "May we ask you to know that the applicant has argued as part of her refugee claim that she will be subjected to female genital mutilation shortly after the arranged marriage and further that is part of her decision by the Refugee Appeals Tribunal at appeal stage, the officer of the Tribunal, Ms. Monica Lawlor, stated after receiving evidence on the practice of FGM in Nigeria that, "I accept without question the evidence of Ms D'Arcy that female genital mutilation is an abhorrent practice and amounts to a form of torture".

13. It was contended in the letter that the forcible return of the appellant to Nigeria would amount to a violation of her fundamental right to "life, liberty and security of the person" under both national and international law. The letter continued by arguing that the appellant's case was governed by s. 5 of the Refugee Act 1996, prohibiting *refoulement* where there was a threat to the freedom of a proposed deportee, within the meaning of that section, which in turn was to be distinguished from the *ad misercordiam* matters submitted for the purpose of s. 3(6) of the 1999 Act. The Minister subsequently made known that he had decided to make a deportation order in respect of the applicant pursuant to s. 3 of the 1999 Act and a copy of the order dated 8th July, 2002, was attached. The appellant sought a judicial review of that order. This Court (Gilligan J.) refused leave to apply, but granted a certificate granting leave to leave to appeal under s. 5 of the Illegal Immigrants (Trafficking) Act 2000. The point of law which was duly certified in accordance with s. 5 was as follows:-

> "In determining the reasonableness of an administrative decision which affects or concerns the constitutional rights or fundamental rights, is it correct to apply the standards set out in O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39?"

14. The Tribunal Member, while accepting fully that female genital mutilation ("FGM") was a barbaric practice, had nonetheless rejected Ms. Meadows' claim on credibility grounds, since she did not think that, on the facts, the appellant had presented with a well founded fear of persecution. The appellant did not seek to challenge the decision of the Refugee Appeals Tribunal by way of judicial review.

15. The material before the Minister suggested that FGM was not a practice which was required by or accords with the precepts of any particular religion, but was rather a practice embedded in many countries or regions by custom or tradition. The memorandum submitted to the Minister and dated 19th June 2002 noted:-

> "Although FGM is reputed to take place in Nigeria efforts have been made to stamp out its practice. Governments have publicly opposed FGM and representatives in Parliament have described the practice as "barbaric"… According to country of origin information FGM is considered a 'traditional practice' and there is no support for the practice in Christianity or Islam. However, this does not stop some people from supporting the practice."

16. In July, 2002 the appellant was informed of the Minister's decision pursuant to s. 3 of the 1999 Act. The Minister's decision was stated in the following terms:-

> "I am directed by the Minister for Justice, Equality and Law Reform to refer to your current position in the State and to inform you that the Minister has decided to make a deportation order in respect of you under s. 3 of the Immigration Act, 1999 a copy of the order is enclosed with this letter.
>
> In reaching this decision the Minister has satisfied himself that the provisions of s. 5 (Prohibition of Refoulement) of the Refugee Act 1996 are complied with in your case.
>
> The reasons for the Minister's decision are that you are a person whose refugee status has been refused and, having had regard to the factors set out in s. 3(6) of the Immigration Act, 1999, including the representations received on your behalf, the Minister is satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this State."

17. The s. 3 file note which preceded that decision recited the essential facts on foot of which the appellant claimed that if returned to Nigeria she would be required by her father to marry her friend's son against her wishes and be subjected to FGM. It also referred

to various other matters put forward on her behalf and the finding of the Refugee Appeals Tribunal. All the relevant documentation relating to the various stages at which her application was dealt with were included in the file. The file note concluded thus:-

> "Ms. Meadows also claims that within her culture the act of circumcision is performed on females shortly after their marriage …. Her father wished her to undergo this act after her marriage to Mr. Alhaji Salisu's son …. His death scuppered these plans. Ms Meadows claims that she offered to pay her father the sum of money that the dowry would have brought the family if he were to allow her to attend university and marry whomever she chose …. Again the death of Mr. Salisu's son was to prove fortuitous …. However, the cultural nature of the practice in Nigeria determines that the mothers of young daughters are able to veto treatment if they propose it.
>
> Although FGM is reputed to take place in Nigeria efforts have been made to stamp out its practice. The Government have publicly opposed FGM and representatives in Parliament have described the practice as "barbaric". According to the country of origin information FGM is considered a "traditional practice". There is no support for the practice in Christianity or Islam. However, this does not stop some people from supporting its practice. Muslims, particularly in Northern Nigeria consider the practice pagan and it does not form any part of the marriage process for Muslim girls. Muslim boys are circumcised but mostly from an early age …. Ms Meadows claims that she is a Christian and this act of circumcision was to be performed on her after her marriage to a Muslim man. The act she claimed was part of the Yoruban culture….
>
> Ms Aboscde Oluwatoyin Meadows' case was considered under s. 5 of the Refugee Act, 1996 and under s. 3(6) of the Immigration Act 1999. *Refoulement was not found to be an issue in this case*. Therefore, on the basis of the foregoing, I recommend that the Minister sign the deportation order across." (*emphasis supplied*).

18. A majority of the Supreme Court (Murray C.J., Denham and Fennelly JJ.) allowed the appeal, while Kearns P. and Hardiman J. dissented. While it is true that, strictly speaking, all that the Supreme Court actually decided was that Ms. Meadows had established that there were substantial grounds by which the reasons given for the decision on s. 5 of the 1996 Act could be challenged and that she should therefore be given leave to apply for judicial review, it would be somewhat unrealistic to view the decision purely in that light. Each member of the Court delivered substantial individual judgments, many of them wide-ranging and, in some respects, potentially far-reaching in their import.

19. So far as the majority judgments are concerned, as we shall see, the judgments of both Murray C.J. and Fennelly J. appeared to take the view that the Minister's reasoning on the *refoulement* issue was so inadequate as to be defective, although, perhaps, Fennelly J. was less definitive on this point as compared with the Chief Justice. Moreover, while Denham J. agreed substantially with the judgment of Murray C.J., she was also, perhaps, more equivocal on whether the appellant *must* necessarily succeed at the main hearing.

20. Dealing with the adequacy of the Minister's reasons on the *refoulement* point, Murray C.J. stated:-

> "An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context. Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective. In my view, the decision of the Minister in the terms couched is so vague and, indeed, opaque that its underlying rationale cannot be properly or reasonably deduced.
>
> The recommendation with which the memorandum submitted to the Minister with the file is not helpful and adds to the opaqueness of the decision. That states that "Refoulement was not found to be an issue in this case." This decision is open to multiple interpretations which would include one that refoulement was not an issue and therefore it did not require any discretionary consideration. On the other hand, it may well be that the Minister did consider refoulement an issue and that there was evidence of the appellant in this case being subject to some risk of being exposed to FGM, but a risk that was so remote that being subject to FGM was unlikely: alternatively, he may have considered that while there was evidence put forward to suggest that the appellant might be subjected to FMG that evidence could be rejected as not being of sufficient weight or credibility to establish that there was any risk.
>
> The fact remains that it is not possible to properly discern from the Minister's decision the actual rationale on foot of which he decided that s. 5 of the Act had been "complied with". *Accordingly, in my view, there was a fundamental defect in the conclusion of the Minister on this issue*. In the circumstances I am satisfied that the appellant has established that there are "substantial grounds" within the meaning of that term, for impugning the Minister's decision and I would therefore allow the appeal and grant leave to the appellant to bring a judicial review in relation to that ground only." (Emphasis supplied)

21. Pausing at this point, the language of the Chief Justice ("…there was a fundamental defect in the conclusion of the Minister on this issue…") would seem to suggest that he was of the view that the applicant would of necessity succeed at the full hearing.

22. In her judgment, Denham J. held that the applicant had established that there were substantial grounds for challenging the validity of the deportation decision and she gave leave accordingly:-

> "In this case it was submitted that the fundamental rights of the applicant would be affected by her proposed deportation to a country where she has indicated a fear for her personal safety. However, an aspect of the case was given only a glancing reference. In the letter of the 12th July, 2002, it was stated:-
>
> > 'In reaching this decision the Minister has satisfied himself that the provisions of section 5 (prohibition on *refoulement*) of the Refugee Act 1996 are complied with in your case.'
>
> The Deportation Order stated:-
>
> > 'And whereas the provisions of section 5 (prohibition on *refoulement*) of the Refugee Act 1996 … are complied with…'
>
> I am satisfied that the test in *The State (Keegan) v. Stardust Victims' Compensation Tribunal* should be applied, and in construing whether the decision was reasonable it is part of that analysis to determine whether it was within the implied

constitutional limitation of jurisdiction which affects rights, whether the decision was proportionate.

The applicant has claimed that she is fearful for her personal safety if returned to Nigeria. She has claimed that she is in danger of female genital mutilation. I would apply the factors and the principles, as set out earlier in this judgment, to this case.

(a) In this case the decision-making process being reviewed is that of the Minister.

(b) It is not an appeal on the merits.

(c) The onus of proof rests upon the applicant at all times.

(d) The test is to determine whether the decision of the Minister is fundamentally at variance with reason and common sense.

(e) The nature of the decision and decision-maker are relevant.

(i) The decision in this case is to deport a person in circumstances where she has claimed a fear for her personal safety. Thus the issue of the "implied constitutional limitation", as Henchy J. referred to in *The State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642, at 658, arises. The decision affects the applicant's fundamental rights. The decision-maker has the authority to make deportation orders under the legislation and the policy of the Government, but that process must be seen to be reasonable.

(ii) The Minister is the decision-maker under the legislation and Government policy for deportations. However, it is not an area of technical skill in the sense of the decision in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

(f) The Court should have regard to the implied constitutional limitation of jurisdiction of all decision-makers which affects rights, and whether the effect on the rights of the applicant would be so disproportionate as to justify the court in setting it aside on the ground of manifest unreasonableness.

The Minister made a decision on s. 5 of the Refugee Act 1996, which is indicated both in his letter and order. The Minister stated in his letter of 12th July, 2002, that he "has satisfied himself that the provisions of section 5 (prohibition of *refoulement*) … are complied with …" And, similarly, in the deportation order it is recited that the "… provisions of section 5 (prohibition of *refoulement*) … are complied with ..."

In the circumstances of this case I would distinguish *Baby O v. The Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 169. I agree with the analysis by Murray C.J. of the judgment of Keane C.J. in that case. In all the circumstances of this case it appears that the decisions of the Minister affect constitutional rights and fundamental rights, and thus they fall within the implied constitutional limitation of jurisdiction of a decision which affects rights. It is this aspect of the decision which has caused me concern.

This judgment relates solely to the test to be applied by a court. It is intended to clarify the necessity to consider constitutional rights in the context of the reasonableness test by the use of the principle of proportionality. The Executive has a primary role in relation to policy and immigration. However, the Court has a duty to protect constitutional rights. An aspect of this duty is that a remedy must be effective. The fact that there have been hearings at administrative level does not nullify the Court's duty. The facts and circumstances of the case, the hearings, the nature of the decision, and the policy of the area, are relevant to achieving a constitutional analysis of the reasonableness of a decision.

My conclusion is as follows. In determining the reasonableness of an administrative decision which affects or concerns constitutional rights the standard to be applied is that stated by Henchy J., in *The State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642…..

This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties. *Inter alia*, the decision-maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises *inter alia* from the duty of the courts to protect constitutional rights. 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 all the circumstances I am satisfied that the applicant has established substantial grounds for contending that the Minister's decision conveyed by letter of the 12th July, 2002 on s. 5 (*non refoulement*) was manifestly unreasonable. I would grant an order to the applicant giving her leave to apply for judicial review of the decision of the Minister to deport her, dated the 8th July, 2002, but only on the aspect of the decision which related to her complaint of *refoulement* contrary to s. 5 of the Refugee Act, 1996."

23. At the risk of over-parsing the judgment, it seems to me that Denham J. merely concluded that the applicant had established substantial grounds, without further committing herself on the question of whether the Minister's reasoning was actually defective, even if the above passage does hint at this.

24. Fennelly J. also agreed with the Chief Justice and Denham J. that the appeal should be allowed and leave to apply for judicial review should be granted. On this issue, he said:-

"Section 3 of the Immigration Act, 1999 confers on the Minister the power to make a deportation order, but makes the exercise of that power expressly *"[s]ubject to the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996."* The Minister was bound, by s.5 of the Refugee Act, 1996, not to return the appellant to a country where, in his opinion, her life or freedom would be threatened on account of her race, religion, nationality, membership of a particular social group or political opinion and this included a likelihood of being subjected to a serious assault (including a serious

assault of a sexual nature).

The Minister makes a deportation order at the end of the asylum process. In this case, the appellant had been refused refugee status and the Minister informed her that her right to remain temporarily in the State in accordance with section 9(2) of that Act had expired. At the same time, he informed her of his intention to make a deportation order and of her right to make representations. He was proposing to make the distinct decision which s. 3 of the Act empowered him to make. It is the Minister and not the Refugee Appeals Tribunal that has power to expel a person from the State. ….The appellant had submitted to the Minister that she faced dangers coming within the scope of s. 5 if returned to Nigeria. The question of whether her claims of likely exposure to these risks were well-founded was addressed by the Minister in the form of his statement that the provisions of section 5 (prohibition of refoulement) of the Refugee Act 1996 were "*complied with in her case,*" but not otherwise. The recommendation to the Minister had stated that it was "*found not to be an issue*".

There were two distinct aspects to the Minister's decision. Firstly, he expressed himself "*satisfied……that the provisions of section 5 (prohibition of refoulement) of the Refugee Act 1996 [had been] complied with*" in the appellant's case. Secondly, he explained the general reasons for his decision as being that the appellant was a person whose refugee status had been refused and, that, having had regard to the factors set out in s. 3(6) of the Immigration Act, 1999, including the representations made on her behalf he was satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweighed such features of her case as might tend to support her being granted leave to remain in the state.

I am satisfied that the second and more general aspect of the decision falls within the principle of the decision of this Court in *F.P. v Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164 . The reasons given for the decision of the Minister in that case, which are quoted in the preceding paragraph, were verbatim the same as in the present case. Insofar as the general reasons are concerned, it seems to me clear that the decision in *F.P.* should be followed. There is no ground for making any distinction between the two cases……

However, it does not appear from the judgment of Hardiman J in the *F.P.* case that the appellants made any complaint of a risk of probable subjection to abuse of their personal or human rights on return to their countries of origin. Hardiman J explained that the nature of the decision awaited emphasised that it "*was in the nature of an ad misericordiam application.*" He went on to point out that the matters required to be considered "*were the personal circumstances of the applicant, described under seven sub-headings; his representations (which in practice related to the same matters) and "humanitarian considerations*." The judgment makes no mention of infringements of fundamental rights, of any risk of inhumane treatment or torture on return to the country of origin of the appellants. Allegations of infringement of such rights were necessarily made at earlier stages and, in particular, as part of the asylum process, but they played no part in the judgment of this Court. The judgment contains no discussion of s. 5 or of prohibition of *refoulement.* Since the appellants were Romanian males, no issue arose regarding risk of exposure to FGM.

I have summarised ….the material that was before the Minister in respect of the prevalence of FGM in Nigeria. None of this is referred to in the Minister's decision. As already stated the Minister limited himself to stating that he was "satisfied…… that the provisions of section 5 (prohibition of refoulement) of the Refugee Act 1996 [had been] complied with" in the appellant's case. This statement does not disclose the basis on which the appellant's complaint of risk of subjection to FGM was rejected. The Minister does not disclose whether he believes or disbelieves the appellant or what his views are regarding the extent or the existence of the risk of FGM in Nigeria or whether or not he believes the appellant is subject to the risk, or, if not, why not. It was, of course, for the Minister to assess and to weigh these matters, before making a decision which is his alone. It is clear that the allegations are of a serious character…..*The difficulty posed by the form of the Minister's decision is not merely his failure to provide reason for his decision, though that is undoubtedly the case, but that the decision is defective as a result*. There is a complaint of a serious risk of exposure to what is arguably an infringement of life or freedom (as defined in section 5 of the Refugee Act, 1995) and nothing on the other side, nothing to explain how the Minister came to the conclusion that the appellant should, nonetheless, be deported. The Minister might have had any one of a range of reasons for his decision, but the court simply does not know. [In his dissenting judgment] Hardiman J has discussed the issue of FGM in some detail and has referred to a number of policy considerations. But none of these matters were advanced in explanation of the Minister's decision.

At one point the Minister refers to such features of the appellant's case as might tend to support her being granted leave to remain in this state, but does not state what these are, in particular whether they imply a view about the risk of FGM. In my view, the appellant has established substantial grounds for concluding that the Minister did not address the complaint of the appellant regarding the danger of exposure to breach of her human rights (including FGM) before deciding to deport her.

In these circumstances, I am satisfied that the appellant has satisfied the requirement which rests upon her and that she has established "*substantial grounds*," as required, for contending that the decision of the Minister was so unreasonable, within the meaning of *Keegan* and *O'Keeffe*, that it was invalid or ought to be quashed. In other words, the appellant has crossed the threshold of showing, by evidence, grounds for judicial review which are reasonable, arguable and weighty in the sense used by Keane C.J. in *In the matter of Article 26 of the Constitution and…the Illegal Immigrants (Trafficking) Bill, 1999*……..

For the avoidance of doubt or misunderstanding, it should be clearly understood that this judgment is not intended to express or imply any view as to how the Minister should decide cases involving deportation of persons relying on a risk or a danger of infringement of their human rights. Matters of policy are for the Minister. He has been assigned the responsibility of deciding how the balance is to be struck between the rights of persons subject to being deported and the common good in maintaining the integrity of the asylum and immigration systems. He might, for example decide as the Refugee Appeals Tribunal had done in this case or that the degree of risk to the individual was outweighed by the need to protect the integrity of the system. The Minister would be entitled to take account of the entirety of the problem of which an individual person was merely one example and the feasibility for the State of offering refuge to a large number of people from other countries.

Equally, this judgment implies no view on how the application for judicial review should be decided in the High Court, except insofar as it explains the applicable test for review on the ground of unreasonableness. It will be for the High Court to decide whether the appellant has provided sufficient evidence to discharge the burden which rests on her to show that the decision of the Minister was, recalling once more the words of Henchy J. "fundamentally at variance with reason and

common sense".

I would grant an order to the appellant giving her leave to apply for judicial review of the decision of the Minister to deport her dated 12th July 2002, but strictly limited to that aspect of the decision which dealt with her complaint of *refoulement* contrary to the provisions of section 5 of the Refugee Act, 1996." (Emphasis added).

25. While possibly less definitive on the applicant's ultimate prospects of success than was the case with the judgment of the Chief Justice, the italicised passage nonetheless strongly suggests that Fennelly J. was of the view that the decision should be quashed because the Minister gave no satisfactory reasons for his conclusion. One common theme, however, of all the majority judgments appears to be that in cases of this kind the Minister is obliged to give a coherent reason or reasons justifying the conclusion that the prohibition in s. 5 is satisfied and that this is so even where parallel claims of this kind arising in the asylum process were rejected on credibility grounds. This would seem to be the ultimate ratio of the majority judgments in *Meadows* and, it may be noted, this was one of the principal reasons why Hardiman J. dissented from the majority.

Application of the Meadows Ratio to the Present Case

26. Against this background, we now proceed to apply the *Meadows* reasoning to the present case. To start with, it is irrelevant that both the Commissioner and the Tribunal rejected the applicant's account on credibility grounds, since this was also true of the applicant in *Meadows*. Next, it is relevant that the applicant's account of what happened to him in Togo engages or potentially engages the prohibition on s. 5 of the 1996 Act, since if it were otherwise, then the applicant's submissions on the s. 3 issue could be treated as largely humanitarian in character and the Minister would not be required to give any detailed reasons for his decision for the reasons given by both Hardiman J. in *FP* and by Keane C.J. in *Baby O.*

27. This leads to the most important question of all: did the Minister give satisfactory reasons for his conclusion? In this regard, it is striking that the words actually used by the Minister ("…whereas the provisions of section 5 (prohibition of *refoulement*) of the Refugee Act 1996…are complied with in the case of [T.K.]….") are substantially identical to those which were at issue in *Meadows*. Just as importantly, the language of the file note ("Having considered all of the facts of this case, I am of the opinion that repatriating [TK] to Togo is not contrary to s.5 of the Refugee Act 1996, as amended…") cannot be regarded as materially different from that which was employed in *Meadows* ("..*Refoulement* was not found to be an issue in this case…").

28. Just as with *Meadows*, this reasoning is - at best - ambiguous. It does not disclose the basis on which the appellant's complaint regarding a fear of persecution in Togo was rejected. Adapting the language of Fennelly J. in the latter case, the Minister does not disclose whether he believes or disbelieves the applicant's account or what his views are regarding the extent or the existence of the risk of such ill-treatment or whether or not he believes the applicant is subject to the risk, or, if not, why not. Given the country of origin information regarding Togo and the applicant's account of his necessity to flee that country in 2005 (albeit one which was not accepted by either the Commissioner or the Tribunal), the Minister was obliged to state why the conclusion was reached that repatriation to Togo would not infringe s. 5 of the 1996 Act. Without this information, the applicant was in no realistic position to challenge the Minister's decision by way of judicial review and the failure to supply such reasons meant that, in the words of Murray C.J. in *Meadows*, the applicant's "constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective".

Conclusions

29. Since I am of the view that the applicant's case engaged (or, at least, potentially engaged) the prohibition on *refoulement* contained in s. 5 of the 1996 Act and that the effect of *Meadows* is that the Minister was obliged to give some reasons for his conclusion rejecting the applicant's on this point, I am constrained to hold that the reasons which were given by the Minister were, at best, ambiguous. The reasons thus given do not satisfy the requirements laid down by the majority of the Supreme Court in *Meadows.*

30. It follows, therefore, that for the reasons just stated, I must quash the decision of the Minister of 20th August, 2009, to deport the applicant.