Neutral Citation: [2014] IEHC 193

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1453 J.R.]

BETWEEN

D.O.M. (A MINOR ACTING BY HIS FATHER AND NEXT FRIEND, D.M.) AND D.F.M. (A MINOR ACTING BY HER FATHER AND NEXT FRIEND, D.M.) AND D.I.M. (A MINOR ACTING BY HIS FATHER NEXT FRIEND, D.M.) AND D.M.

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 8th day of April, 2014

1. The fourth named applicant is a Nigerian national who arrived in the state on 30th August, 1999, and applied for refugee status the following day. He stated that his wife was deceased and that he had three sons who resided in Nigeria. Very little detail was provided in respect of his relationship to, or role in, the upbringing of these children during the subsequent asylum and immigration process.

2. On 12th September, 1999, the fourth named applicant was stopped while driving from Belfast by taxi. He had been collected at the port at Larne and was in possession of a false Dutch passport in the name of Friday Ayeni Moses, a national insurance number and various documents in the same name and others in the names of David Birdoff and Michael Aborode. In the course of his s. 11 interview he offered no sensible explanation for his possession of these documents. His application for refugee status was declared to be manifestly unfounded and it was concluded that:-

> "It appears that this applicant is a commuter from the UK where he uses the name "Friday Moses". If the documents which were found on him on his way back into this State from Larne are anything to go by, he may well be using other names there also (see documents in A4 envelope opposite). He was detected on his way back into the state a mere thirteen days after first arriving in this department to claim asylum."

3. An appeal was filed in relation to this determination on 17th November, 2000, with legal assistance. In the meantime the applicant commenced a relationship with another asylum seeker, C.B. The applicant and C.B. had a son, the first named applicant, D.O.M., born in the state on 17th February, 2001. They withdrew their respective applications for refugee status on 20th March, 2001, and applied for residency in the state on the basis of their Irish born citizen child. On 16th January, 2002, the fourth named applicant was granted permission to remain in the state for a period of one year. The letter stated:-

> "This permission is being granted on the basis that you are living in the same household as the Irish child and discharging the role of parent to that child. Your permission to remain will be reviewed at the end of this period in the light of all relevant circumstances and is conditional on you remaining in compliance with Irish law in every respect during that period."

The couple had two further children, the second named applicant, D.F.M., born 26th April, 2005 and the third named applicant, D.I.M., born 9th November, 2006. All three are Irish citizens.

4. The permission was continued from time to time until in or around September, 2008 when the respondent became aware that the applicant had been arrested by the Police Service of Northern Ireland (PSNI) in Market Hill, County Armagh on 31st July for a series of alleged driving and fraud offences. He was remanded in custody on that date on charges of driving without insurance, possession of an article for use for fraud, fraudulent use of an insurance certificate, obstructing police, possession of a false instrument with intent and obtaining property by deception together with a number of charges concerning unlawful charitable collection. These offences had been committed over a period from 1st May, 2006 to 31st July, 2008. The fourth named applicant pleaded guilty to these offences on 23rd December, 2008, when Armagh Magistrates Court imposed a sentence of six months imprisonment suspended for a period of three years and banned the applicant from driving for three years. The applicant was thereafter released from custody and re-entered the state. His permission to remain in the state was due for renewal on 26th January, 2009, but at that stage his file was under investigation by the respondent in the light of the information that had been received in respect of his arrest and prosecution.

5. On 5th March, 2009, the applicant wrote to the Garda National Immigration Bureau (GNIB) seeking a renewal of his permission to remain in the state. On the same date a request was made to the GNIB by the respondent seeking clarification regarding the applicant's residency and whereabouts in the state, his domestic circumstances and details of his convictions and sentences in this or any other jurisdiction. A request was made that the inquiry be treated with urgency. The request was repeated on 24th June.

6. On 11th December, 2009, the applicant's solicitors wrote to the respondent requesting a decision concerning an extension of his permission to remain and threatening to take judicial review proceedings. The respondent replied by letter of 15th December, stating that the matter was under "active consideration" and that an update would be provided in early January, 2010. On 17th December, the applicant's solicitor stated that an application would be made to the High Court in the event that a decision was not issued by 31st January, 2010. Arising from this correspondence, the respondent granted temporary leave to remain in the state to the applicant until 11th April, 2010. I am satisfied, as explained by Ms. Laurena Gradwell, in her affidavit, that this letter issued to the respondent on 8th January, 2010, in order to regularise his status pending the completion of the inquiries which it was clearly stated were continuing. It was reiterated in the letter that before his application for a renewal of permission to remain in the state could be finalised, the respondent required additional information and/or documentation in respect of his parenting role to the three children and evidence from C.B. that he was fulfilling a requirement of a maintenance order made in respect of the children.

7. On 27th April, 2010, an examination of the applicant's file was completed by Mr. Gareth Hargadon, which was submitted then to Ms. Gradwell, an Assistant Principal Officer, who agreed with the conclusion that the fourth named applicant's temporary permission to remain in the state not be renewed. It was recommended that the Minister inform him of this recommendation and give him the opportunity to make comments, observations or representations in relation to the matter.

8. In the examination of file the applicant's 45 convictions recorded in Northern Ireland were chronicled and a further conviction in this jurisdiction for non-display of an NCT certificate, in respect of which he had received a fine of €150. Documentation was submitted by his legal representatives on 4th September, 2009, which included copies of a maintenance order, and an order varying that order of 20th April, 2009, in respect of the children. Copies of bank statements were also submitted indicating outgoing payments of €10 in respect of child support for C.B. The applicant had separated from C.B. in December, 2008. He claimed that he visited the children once a week and that they came to visit him at his house every Sunday.

9. The recommendation was made on the basis that the applicant had committed a substantial and significant number of offences outside the jurisdiction over a two year period while he possessed legal residency in the state. He was also outside the state for a period of four months while awaiting trial from 31st July, 2008 to 23rd December.

10. By letter dated 30th April, 2010, the applicant was informed that the Minister proposed not to grant him any further permission to remain in the state and invited him to make representations as to why the permission should be renewed. The letter sought an explanation in relation to the commission of offences over the two year period in Northern Ireland which indicated that he had travelled there on a number of occasions during the commission of the offences. Clarification was sought as to whether he had been for any period resident in Northern Ireland.

11. The respondent's solicitors replied by letter of 13th May. The respondent was informed that the applicant resided at an address in Cavan which he had purchased in 2008. He had been living there since 1999, but was living apart from his partner and three children. He wished to be able to provide for them, but at that time did not have access to his children. An application for access was pending before the courts. The respondent was informed that the short term nature of the permission which had been granted to him affected his employment prospects. Furthermore, the District Court had varied the maintenance payment payable in respect of his children to nil, with effect from 20th April because of his financial position. It was stated that he had put aside some money which he hoped to apply for the benefit of his children. He outlined his employment prospects as a window cleaner.

12. A further examination was completed on 14th May, 2010, by Mr. Hargadon and reviewed by Ms. Gradwell. It was noted that no submission was made by the fourth named applicant's solicitors as to whether he had at any time been resident in Northern Ireland or in respect of the criminal activities for which he had been convicted. His family and employment history were accurately recorded and his solicitors submissions were fully considered before a final recommendation was made that the temporary permission should not be renewed. It was also recommended that he should be issued with notification under s. 3 of the Immigration Act 1999, that the Minister proposed to make a deportation order against him.

13. A letter informing the fourth named applicant that the respondent proposed to consider his deportation under s. 3 issued on 11th June, 2010. The applicant made representations as to why he should not be deported, but following an examination of file deportation was recommended and an order was made on 20th October.

14. The fourth named applicant was deported to Nigeria on 7th February, 2011.

The Challenge

15. The applicants seek an order quashing the deportation order on eight grounds which may be summarised as follows:-

> (1) the failure to properly consider the family circumstances of the applicants and, in particular, the children as Irish citizen children and their needs and rights in respect of access to their father when refusing to extend the permission of the fourth named applicant to reside in the state;
>
> (2) the examination of file did not adequately consider:-
>
> > (i) the consequences of permanent separation of the fourth named applicant from the children or their rights under Article 40.3 of the Constitution;
> >
> > (ii) the weight given to the fourth named applicant's convictions was disproportionate and did not represent a threat to the rights and freedom of citizens of the state such as to outweigh the private and family life rights of the applicants under Article 8 of the Convention;
> >
> > (iii) there was no specific consideration of the best interests of the children;
> >
> > (iv) there were no compelling reasons for refusing the fourth named applicant permission to reside in the state;
> >
> > (v) the fact that it was not possible for the children to travel to Nigeria to visit their father.
>
> (3) deportation was not necessary to prevent disorder and crime or protect the rights and freedoms of citizens of the state;
>
> (4) the respondent failed to consider the full facts surrounding the fourth named applicant's convictions;
>
> (5) there were alternatives which were less restrictive of the applicant's rights under Article 8 than an order which was permanent in its effect.

16. A number of these matters have already been canvassed in other decisions of this Court and the Supreme Court. Many of the complaints raised relate to the merits of the case. This is not a court of appeal from the decision. It has been repeatedly stated by the courts that the decision to deport is an executive determination in which all of the relevant facts must be considered in accordance with fair procedures and the applicable law. On an application for judicial review this Court is only concerned with issues relevant to the application in accordance with the principles set down in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, as subsequently interpreted and applied.

The Examination of File
17. The examination of the applicant's file upon which the decision to deport is based addressed a number of important issues. The respondent was obliged to consider the factors set out in s. 3(6) of the Immigration Act 1999. These include, the duration of the applicant's residence in the state, his family and domestic circumstances, his connection with the state and employment record. His character and conduct were also considered, together with humanitarian considerations, representations made by or on his behalf and issues concerning the common good, including the upholding of the asylum and immigration procedures of the state. No concern arose that his return to Nigeria involved any threat of persecution or danger under s. 5 of the Refugee Act 1996, and his return was considered not to be contrary to s. 4 of the Criminal Justice (United Nations Convention against Torture) Act 2000. The examination also contained a detailed consideration of the affect of deportation on the applicants' constitutional rights and rights to private and family life under Article 8 of the European Convention on Human Rights and the interests of the state.

The Constitutional Rights of the Children
18. D.M. is separated from his partner since December, 2008. The three children are Irish citizen children. It is clear that they have a constitutional right under Article 40.3 of the Constitution to the care, support and society of their parents. D.M. as the natural father, applied for an order under s. 6(A) of the Guardianship of Infants Act 1964, and was appointed a joint guardian of the children on 17th July, 2007, though the children remained pursuant to that order in the primary care and control of their mother, C.B. There were difficulties concerning the father's access to the children after the break up of the relationship. The following facts were considered to be relevant to the exercise by the children of their constitutional rights, vis-à-vis, their father:-

> "D.O.M., D.F.M. and D.I.M. are Irish citizens and have personal rights under Article 40 of the Constitution. These rights include the right…to reside in the state and to be reared and educated with due regard to their welfare.
>
> D.M. has not provided any information regarding the personal or educational circumstances of his three children. It is not known at what stage any of D.M.'s children are at in their education or whether or not any or all of them have entered into the Irish education system. D.M. has not provided any evidence to show what if any family life his children have enjoyed with him in the state.
>
> It is also noted that D.M. has been separated from his former partner, C.B., for a period of time and no longer lives as part of the family with C.B. and their three children. D.M. has not indicated for how long he has been living separately from his ex-partner and the three children. However, (he) was recently granted weekly access to his children by the Circuit Family Court on 16th July, 2010. D.M.'s solicitors previously confirmed in their correspondence dated 13/5/2010 that D.M. did not at that time have access to his children.
>
> D.M. does submit that two of his three children have been diagnosed as autistic and as such require considerable parental support and care. He states that he believes that he would be able to make a positive contribution to the care and upbringing of his children in conjunction with his former partner. However, no documentary evidence has been submitted by D.M. in respect to his claim that two of his children are autistic. Furthermore, D.M. does not name or specify which of his children are in fact the children he claims to have been diagnosed as autistic."

19. The examination also states that it was unknown whether D.M. had any contact with his children while on remand in custody between 31st July and 23rd December, 2008. He complains that due to the breakdown of his relationship with his children's mother he will not be able to see them again if forced to leave Ireland, as she was not willing to allow them to travel to Nigeria to see him. Though the court now understands that the separation occurred in December, 2008 it had not been indicated to the decision maker how long they had been living apart at the time the deportation order was made.

20. It was appropriate for the decision maker to consider that the children were part of a stable and established relationship and nurtured from birth by both parents prior to their separation. The father has been appointed a guardian under s. 6(A), which was also taken into account in the examination. The constitutional rights of the children to the care, support and society of their parents must be assessed against the reality of the actual relationships and strength of bonds existing between the parents and children and the degree of participation and interest demonstrated by the father on the evidence in the case. The court is satisfied that the examination of file contains an assessment of the extent and character of the relationships in this family. It was dependent on the submissions and material produced by D.M. to establish these matters and clearly reached a conclusion in that respect based on the evidence furnished, though recognising the limited nature of the evidence provided. (See *K.I. & Ors v. The Minister for Justice and Equality & Ors* (Unreported, High Court, McDermott J., 21st February, 2014).

21. Having considered the examination of file and the materials submitted, the court is satisfied that the respondent did not fail to consider the family circumstances of the applicants and, in particular, the children as Irish citizen children or their needs and rights in respect of access to their father. It is also clear that the nature and extent of the separation of D.M. from his children and its affect on them, were considered to the extent possible on the basis of the information furnished. The family was already separated for a number of years. D.M. had been permanently separated from them for three months whilst in custody. The level of contact was clearly not as extensive as if the family unit were still together. The best interests of the children were considered, and again one must have regard to the reality that D.M. failed to supply even the most basic details in relation to which of the children suffered from autism and to what extent. It is clear that financially it would be difficult for the children to travel to Nigeria, but physical separation and difficulties of that nature arise in most deportation situations and this factor was clearly acknowledged and considered in the examination of file.

22. The court is satisfied that the constitutional rights of the child applicants were fully and appropriately considered in the examination of file in accordance with the principles applied in *O.E. & A.H.E. v. Minister for Justice* (Unreported, High Court, Irvine J., 4th March, 2008), *Yang v. Minister for Justice* (Unreported, High Court, Charleton J., 13th February, 2009), *Falvey & Ors v. Minister for Justice, Equality and Law Reform* [2009] IEHC 528, *S.O. & O.O. & Ors v. Minister for Justice, Equality and Law Reform* [2010] IEHC 343 and *F.E. & Ors v. The Minister for Justice and Law Reform* [2013] IEHC 93. The *Zambrano* issue was separately considered by the respondent and is not part of this application.

Previous Convictions and State Interests
23. The examination of file also contains a consideration of a number of state interests. The nature and seriousness of the offences committed by the applicant over a two year period were held to demonstrate that "Mr. M had shown flagrant disregard for the law in this jurisdiction and in a neighbouring jurisdiction, giving rise to the legitimate aim of the state to prevent disorder and crime". In addition, D.M. was not permitted by law to work in the state, but had submitted that he had engaged in a number of different jobs during his time here. The impact of granting permission to remain on the health and welfare system of the state was also considered.

24. It is submitted that the offences committed by D.M. were of a very minor nature as indicated by the penalty imposed in that

though there were some 46 offences, an analysis of the charges indicated that there were two charges for each of 14 collection boxes dealt with by the court by the imposition of a suspended sentence. They were sample charges for offences committed over a two year period. It was contended that the offences were not of such a nature that they could be regarded as a substantial reason upon which to base the making of a deportation order. The court is satisfied and it is well established, that the commission of criminal offences may in certain circumstances amount to a substantial reason for the making of an order on the basis that it is necessary for the prevention of disorder or crime and in the common good. However, the criminal convictions and, indeed, the rights of the children, though relevant factors to be considered are not the only factors. Furthermore, the significance to be attached to the convictions may vary from case to case. It may be reasonable to conclude that a relatively small number of minor offences committed over a period of time may indicate a flagrant and continuous disregard to the criminal law sufficient to warrant the consideration of the making of an order (*Falvey*). It may be that one serious offence may be sufficient to justify such a conclusion (*F.E.*), or that a single minor offence may not (*H.L.Y. & Ors v. Minister for Justice, Equality and Law Reform* [2009] IEHC 96). The circumstances of the offences committed by a proposed deportee must be carefully considered in the context of the other circumstances and factors in the case. In this case I am satisfied that the decision maker was entitled to conclude that the commission of the offences described was capable of justifying the making of a deportation order and give rise to a substantial reason based on the common good and the prevention of disorder and crime. Although the commission of the offences was a very significant element in the making of the decision to deport, other important factors were also considered.

Article 8

25. It was claimed that the deportation of the applicant amounted to an unlawful interference with his rights to private and family life under Article 8 of the European Convention on Human Rights. These claims were considered in detail in the examination of file and some of the considerations overlap with those taken into account in respect of the children's rights under Article 40.3 of the Constitution. It was clear that the interference with these rights was in accordance with Irish immigration law. The remaining question was whether the removal of D.M. was necessary in a democratic society in the interests of the prevention of disorder or crime or the economic wellbeing of the country and if so, whether it was proportionate to its purpose. D.M.'s criminal convictions featured prominently in the assessment made. His commission of offences was in this respect considered to be "directly related to the legitimate aim of the state to prevent disorder and crime", which was deemed to be a substantial reason associated with the common good which required his deportation. His family and employment history were given extensive consideration, but it was determined that the factors relating to the rights and interests of the state outweighed those relating to his rights to respect for private and family life. In the course of this assessment the convictions incurred by D.M. were said to be significant in number over a two year period and to demonstrate a flagrant disregard for the law in this and the neighbouring jurisdiction.

26. The relevant principles applicable to this aspect of the examination of file are those set out in *Boultif v. Switzerland* [2001] 33 EHRR 1179 in which the European Court of Human Rights stated that the Convention did not guarantee the right of an alien to enter or to reside in a particular country, but that the removal of a person from a country where close members of his family were living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. The removal must meet the requirements of Article 8(2) and a fair balance must be struck between the relevant interests at stake namely, the applicant's right to respect for his family life and the prevention of disorder and crime. A number of guiding principles were established:-

> "48. …in assessing the relevant criteria in such a case, the court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during the period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the court will also consider the seriousness of the difficulties which the spouse will be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion."

27. In *Uner v. The Netherlands* [2007] 45 4 EHRR, the European Court of Human Rights in applying the criteria set out in *Boultif* stated that it wished to make explicit two further criteria which may be implicit in those identified in the *Boultif* judgment: namely:-

> "(1) the best interests and wellbeing of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
>
> (2) the solidity of social, cultural and family ties of the host country , the country of destination."

28. The application of these principles was considered by this Court in *F.E. & Ors v. The Minister for Justice and Law Reform* [2013] IEHC 93.

29. The facts relevant to family life were largely the same as those which are outlined above in respect of the children's constitutional rights under Article 40.3 with the additional element that all the applicants were considered to be a family having rights under Article 8 by reason of the wider application of family rights to "*de facto*" families under Article 8 than that which applies to families based upon marriage under Article 41 of the Constitution. It is clear that this wider context was taken into account in the examination of file and, in particular, the extent to which D.M. was involved as a father in the lives of his children. It is clear that since the relationship was formed some time in 2000, the applicant developed a family life with C.B. and the children which endured until 31st July, 2008, when he was incarcerated in Northern Ireland. Since his release in December, 2008 he was separated from C.B.. This caused physical separation from the family unit and he did not gain access to see his children until July, 2010. He was deported on 7th February, 2011. His access opportunities between July, 2010 and his deportation were limited to Sunday visits, though his rights as the natural father had been recognised by an order made under s. 6(A) of the Guardianship of Infants Act 1964, in 2007.

30. The respondent was entitled to consider the nature and seriousness of the offences committed by the applicant and the number of crimes committed over an extended period. The Minister was also entitled to have regard to the fact that during this period he was the beneficiary of permission to remain in the state which was expressly subject to a condition that he comply with the law.

31. It is suggested that the best interests and wellbeing of the children were not considered in the course of the adjudication. The court is not satisfied that this is so. There is extensive consideration of the best interests of the children insofar as that was made possible by the information submitted. It is clear from the materials submitted to the court that D.M. offered very scant evidence in relation to the education and difficulties suffered by children at any stage of the process, notwithstanding the fact that there was a continuing family law proceeding in relation to access to the children which must have raised issues relevant to their health, wellbeing and disabilities. The conclusions reached in the examination of file were entirely reasonable on the basis of the evidence adduced in

respect of their best interests which demonstrated that they were in the custody of their mother who was their primary carer, and for whatever reason had not seen very much of their father since July, 2008.

32. It is clear that the applicant spent 28 years of his life in Nigeria where his three sons remain. His initial application for asylum failed and though an appeal was filed, this was withdrawn when he and his partner sought residency in the state on the basis of their first born Irish citizen child which was granted on 16th January, 2002. Within four years the applicant had commenced the spree of offences in respect of which he was convicted in 2008. I am not satisfied that he is to be regarded as a long term migrant at the time the deportation was made, or that his case is in any way comparable to the decisions of the European Court of Human Rights involving, for the most part, young offenders who have been the subject of deportation orders, notwithstanding the fact that they have lived since childhood in the countries which sought to expel them.

33. This case is somewhat similar to that of *S.O. and O.O. v. The Minister for Justice and Equality* [2010] IEHC 343 in which the applicant, a Nigerian national and father of three Irish citizen children, was estranged from his South African wife. However, he was involved in the upbringing of his children and supported them with weekly payments. The leave to remain granted on the basis that he was the parent of Irish citizen children was revoked because of convictions for possession of a false passport and possession of drugs for sale and supply. He received a sentence of six months imprisonment. A deportation order was made on the basis that it was necessary for the prevention of disorder and crime and the protection of the economic wellbeing of the country which constituted substantial reasons associated with the common good requiring his deportation. This was challenged as disproportionate on grounds similar to the challenge made in this case. This was rejected by Cooke J. who determined that there was no reasonable or tenable basis in these circumstances for asserting that such conclusions do not flow from their premises or are fundamentally at variance with common sense. They were logical conclusions based upon facts and factors pertaining to the circumstances of the applicant which were not in dispute. As Mac Eochaidh J. stated in *M.R.J. v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 22nd January, 2014):-

> "The role of the court in reviewing a balancing exercise which has happened is limited…if one is to say that the balancing exercise offends the principle of proportionality, one has to make a careful argument as to how this happened. Even if one manages to mount to such a careful and detailed argument indicating what the particular flaw is, it seems to me that the court's jurisdiction in reviewing the balancing exercise that did happen must be at the limited end of things. It must be something akin if not the same as *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 test which requires the court to ask whether the balancing of the rights and the result achieved once that balancing took place flies in the face of common sense and offends reason. In my view I could only interfere with the balancing exercise that did happen if I found that it absolutely offended logic over something which I felt no reasonable decision maker could ever conclude."

34. The court must be satisfied that the decision is not disproportionate in the sense considered in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 as applied by Cooke J. in *Isof v. Minister for Justice, Equality and Law Reform (No.2)* [2010] IEHC 457 as follows:-

> "Where the challenge to the decision is based upon the assertion that it has the effect of intruding disproportionately upon the fundamental rights of those affected by it, it is the duty of the court to assess whether the applicant demonstrates that it is disproportionate in the sense of being irrational or unreasonable according to the Keegan/O'Keeffe test. It does so by reference to the evidence, information and documentation available to or procurable by the decision maker at the time. It does not take account of new information or evidence which has become available since the decision was made. (In the case of a deportation order the remedy in that regard lies in an application for revocation under s. 3(11) of the Immigration Act 1999, a decision on which is itself susceptible of judicial review for proportionality where necessary)… If constitutional rights are in issue (whether absolute or qualified) it is the function and duty of the High Court to vindicate them. The same can be said for rights entitled to protection under the European Convention on Human Rights and the need for the High Court, in compliance with Article 13 of the Convention, to provide an effective remedy for that protection."

The learned judge added that the court should by examining the substance of the effect of an interference on constitutional or Convention rights brought about by an administrative decision, assess whether it goes beyond lawful encroachment, but in doing so the court should not substitute its own view of what the decision ought to be but test the decision by reference to what is objectively reasonable and common sense.

35. I am satisfied that the respondent has considered extensively the facts and materials submitted in this case and that the applicants have failed to establish that the decision made is fundamentally flawed as contrary to reason or common sense or disproportionate in the sense indicated. The respondent has carried out a balancing of rights and an examination of the proportionality of the decision which is in accordance with the principles laid down in the case law and summarised by Denham J. (as she then was) in *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795.

36. I am, therefore, satisfied that this application must be refused.