THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 291 J.R.]

BETWEEN

E. O. AND A. O. AND

C.M. O. (AN INFANT SUING BY HER MOTHER

AND NEXT FRIEND E. O.) AND

C. M.O. (AN INFANT SUING BY HER MOTHER

AND NEXT FRIEND E. O.) AND

C. M. O. (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND E. O.)

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 15th day of November, 2017

1. This is an application for judicial review of the decision of the respondent dated 11th April, 2016, not to grant the second applicant a long stay visa to enter and reside in the State. Leave to challenge the refusal was granted by order of this Court (Faherty J.) on 12th May, 2016.

Background

2. The second applicant is a national of and resident in Nigeria. The first applicant was originally Nigerian. She arrived in the State in 2004 and sought asylum. The third applicant, a child of the first and second named applicants, was born in the State in 2004 and on foot of that the first applicant was granted residency in 2005 pursuant to the IBC05 Scheme operated by the first named respondent at that time. The first applicant was granted a certificate of naturalisation on 13th December, 2012. The fourth and fifth applicants are also the children of the first and second applicants and they are Irish citizens.

3. On 4th June, 2015, the second applicant applied for a long stay visa to enter and reside in the State. This application was made to the Embassy of Ireland Visa Office in Abuja, Nigeria (hereinafter "the Visa Office"). This application was refused on 22nd July, 2015. The second applicant thereafter submitted an appeal of this refusal on 16th September, 2015.

4. The appeal submissions set out that the second applicant was currently residing and working in Nigeria. It was pointed out that the first applicant was unemployed and on lone parents allowance. It was stated that she was unable to work as she found it difficult being a lone parent taking care of three young children. Reference was made to the third applicant's medical difficulties. It was advised that if the second applicant was granted a visa to stay with his family in Ireland he would take up employment as soon as possible in order to take care of them so that they would not have to rely on public funds. It was emphasised that the first applicant found it difficult to live separately from the second applicant and that she wished for him to be more involved in the lives of her and their children. Reference was made to the fact that the second applicant had been granted a short stay visa to enter Ireland in 2004 and that he had complied with all of the conditions attached to the visa. Reference was also made to the second applicant having legally resided in Vienna for a period of time where he worked in a post office. Thereafter, he had returned to Nigeria. It was advised that the second applicant entered France legally in 2009 and that he was convicted in France for a drug offence in 2011, for which he received a sentence of four years in prison of which he served 34 months. It was advised that this was a "first ever conviction" and that the second applicant did not have any previous convictions. The second applicant's instructions were that he was extremely sorry for his actions and had learned from his mistakes. The Appeals Officer was advised that while in prison the applicant had transferred money to support his family and that he had continued to financially assist them. While the second applicant had paid for the family's travel tickets to Nigeria so that they could visit him, it was advised that travel to and from Ireland to Nigeria was not sustainable and was not practical in the long term as it put a financial burden and stress on the family. The loving relationship which the second applicant had with his family was emphasised. Included with the appeal submissions were letters from the first and third applicants, other evidence of written and telephone communication between the second applicant and his family, evidence of money transfers from the second applicant to the first applicant and family photographs.

5. An "invitation to comment" (hereafter referred to as "the draft decision") on the appeal was drawn up by the Appeals Officer and it issued to the second applicant on 26th January, 2016.

6. The draft decision advised that the Appeals Officer was minded to uphold the Visa Office's original decision to refuse the visa, albeit for different reasons to those first advised in the refusal of 22nd July, 2015. The Appeals Officer went on to state that in order to protect the second applicant's right to fair procedures, she was setting out her reasoning and inviting the second applicant to comment. She went on to state that the reasons given in the draft decision were not fixed and that any comments the second applicant or his legal advisors had would be taken into consideration before a final decision was made.

7. The Appeals Officer addressed the appeal under the following headings:

- Firstly, whether, through the operation of the Policy Document on non -EEA Family Reunification ("the Policy Document"), including the discretion retained by a decision-maker, the visa application ought be granted; and if not

- Whether under the operation of Article 20 TFEU the application ought to be granted; and if not

- Whether under a consideration of Article 8 rights under the European Convention of Human Rights (ECHR) the application ought to be granted; and if not

- Whether under the Constitution the application ought to be granted.

The Policy Document

8. In the context of the policy document consideration, it was accepted that in general it was in the best interests of minor children that they would be raised in the company of both parents. The Appeals Officers referred to a letter from the third named applicant in support of her father. Notwithstanding that the family did not currently live together as a family unit, it was accepted that it had been established that it would be in the best interests of the children for the second applicant to be admitted to the State. This conclusion was arrived at notwithstanding that the best interests of the child did not inexorably lead to family reunification where it may reasonably be concluded that the strength of other considerations outweighed the best interests principle and where, in the applicants' case, there were ameliorating factors, in particular the existence of an established long distance relationship between the second applicant and his family, involving visits by them to Nigeria and established telephonic and electronic means of communication. However, it was concluded that neither of those aspects set aside the conclusion that it would be in the best interests of the children if the second applicant was admitted to the State. This conclusion however had to be considered in the context of other considerations, including matters of public policy.

9. The Appeals Officer then went on to review the evidence which had been submitted to establish the involvement of the second applicant in the lives of the first named applicant and the infant applicants. She quoted from letters which the first and third named applicants had submitted in aid of the appeal and she noted the level of electronic contact between the parties. The money transfers which the second applicant made to his family in Ireland were noted. It was also noted that the first applicant was in receipt of State support which assist her in taking care of the children, and that the children had access to health care in the State. It was noted that, albeit that no evidence of the visa had been provided, that the second applicant was in Ireland for a short period in 2004. His employment in Nigeria was noted, as were his family ties in Nigeria. The Appeals Officer considered it relevant that neither the first applicant nor the second applicant had been given any assurances by the State that the second applicant would be granted a visa. It was considered that the first and second applicants could not have been unaware of the precarious nature of the second applicant's potential immigration status should he seek to apply for a visa to travel to Ireland and/or to seek some right of residency in the State. It was again noted that the first applicant and the children had visited the second named applicant in Nigeria and that no submissions had been made to the effect that anything would prevent her from doing so again. However, the Appeals Officer went on to find "on balance … taking into account the evidence of visits, communication, and financial support, and the assessment regarding the applicability of the best interests of the child, and, in particular, taking into account the preference in favour of admittance, as expressed by [the third named applicant (child)], the Appeals Officer considers that a reasonable claim for family reunification has been made out".

10. Having so concluded, the Appeals Officer next considered the claim in light of public security, public policy and public health considerations. In this regard, the second applicant's conviction in France on 13th June, 2013, in respect of six charges was considered. The Appeals Officer considered that she must take into account that the French Court had considered the offences to be of such a serious nature as to warrant a term of imprisonment of four years, together with the imposition of a ten year prohibition from entering French territory imposed on the second applicant.

11. The Appeals Officer went on to note that, as set out in the Policy Document, "a criminal record will not automatically exclude a person from consideration for family reunification but it clearly is highly influential in any consideration of the merits of the individual case".

12. Having reviewed the particular facts of the second applicant's case, the Appeals Officer found that the particular circumstances of the case indicated that the second applicant was convicted of offences in relation to not just the possession of illicit drugs but also the transportation and offering for sale of illicit drugs. It was noted that three drug offences were classified by the French authorities as repeat offences. It was also noted that the second applicant had been convicted on two other charges concerning the possession of a false instrument and receipt of stolen property, albeit these were not classified as repeat offences.

13. The Appeals Officer concluded that taking into account the very serious negative impact which the supply of illicit drugs has on the State, and on other persons resident in the State, and on communities and families, it was clear that the suppression of the supply of illicit drugs was of fundamental interest to the State. She went on to state:

> "As to [the second applicant's] personal circumstances, having considered the nature of the offences, their classification as repeat offences, the length of the custodial sentence imposed by the French Court, and the fact that a prohibition from French territory as imposed on [the second applicant], which would indicate that the French Court retained a concern that [the second applicant's] personal conduct was such he would be a danger to French society after his release, the Appeals Officer is satisfied that the personal conduct of [the second applicant] represents a threat to the requirements of public policy".

14. The Appeals Officer next addressed the visa application in the context of the requirements in the Policy Document for financial resources for family reunification. She was not satisfied that the first applicant has not been totally or predominantly reliant on benefits from the Irish State for a continuous period in excess of two years immediately prior to the making of the application. Additionally, the Appeal Officer was not satisfied that the first applicant (as the sponsor of the second applicant) had, over the three years prior to the making of the visa application, earned a cumulative gross income, over and above any State benefits, of not less than €40,000. While the second applicant's employment in Nigeria was noted, the Appeals Officer concluded that without State support, the second applicant's presence in the State would likely place pressure on his family's financial resources and that that in turn might result in a cost to public funds and public resources.

15. The conclusions with regard to the Policy Document were, in summary,

1. It would be in the best interests of the children for the second applicant to be admitted to the State;

2. A reasonable claim for family reunification had been made out;

3. The personal conduct of the second applicant represented a threat to the requirements of public policy;

4. The first applicant, as the visa sponsor, did not meet the minimum financial requirements outlined in the Policy Document for sponsors; and

5. The general policy to grant immigration permission where a parent can demonstrate an active and continuous involvement in the child's life ought not to apply in the particular circumstances of the case, having taken into account the issues relating to the personal conduct of the second applicant.

The Article 20 TFEU consideration

16. The Appeals Officer next considered the visa application in the context of Article 20 TFEU. This consideration arose in the context whereby, in June, 2011,

the second applicant made representations to the respondent that he had a right to reside and be employed in Ireland pursuant to Article 20 TFEU, as interpreted by the ECJ in Case C-34/09 *Ruiz Zambrano* [2011] ECR 1-1177. Albeit that it was accepted that the second applicant played a role in the life of his children and had transferred money to his family members in Ireland, the Appeals Officer concluded that it was clear that the children were in the care of the first applicant in the State. Moreover, the first applicant was in receipt of State support which assists her in taking care of the children. Accordingly, the Appeals Officer did not accept that it had been demonstrated that the second applicant's Irish citizen children were dependent on him. The Appeals Officer quoted from the decision of the ECJ in Case C-256/11 *Dereci* [2011] ECR 1-11315:

> *"[T]he criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State which he is a national but also the territory of the Union as a whole."*

17. The Appeals Officer concluded that the information in the applicants' case did not lead to the conclusion that the infant applicants would be forced to leave the territory of the EU if the second named applicant's visa application was refused. As the infant applicants were currently residing in the State with the first applicant, the refusal of a grant of a visa to the second applicant would in no in way impair the infant applicants in the genuine enjoyment of the substance of their rights as EU citizens.

Consideration under ECHR and the Constitution

18. Consideration was next given to the visa application in the context of the applicants' rights under ECHR. It was accepted that the refusal of the visa application would be an interference with Article 8 rights. The ultimate conclusion was to the effect that the admission of the second named applicant to the State would be detrimental to public safety and the economic wellbeing of the country and that the rights of the State were weightier and outweighed the private and family life rights of the applicants.

19. In the context of a consideration of the applicants' constitutional rights, the Appeals Officer again concluded that factors relating to the rights of the State were weightier than those relating to the personal rights of the first named applicant and of the family, and that a decision to refuse the visa application was not disproportionate in all the circumstances. The draft decision went on to state:

> "The visa officer is satisfied that there is no less restrictive process available which would achieve the legitimate aims of the State to safeguard the economic wellbeing of the country, the rights and freedoms of others, and to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. This therefore exists as a substantial reason associated with the common good which requires the refusal of the visa application."

The applicants' response to the Draft Decision

20. On 11th March, 2016, and 1st April, 2016, respectively, the second applicant furnished submissions in response to the invitation to comment.

21. In their letter of 11th March, the applicants' solicitors updated the Appeals Officer with regard to the third applicant's medical condition, stating that she had been discharged from hospital and was currently being monitored by her medical practitioner.

22. The letter next addressed the finding in the draft decision that "there is no less restrictive process available which would achieve the pressing social need and the legitimate aims of the State." It was submitted that no "less restrictive" processes had in fact been considered. It was submitted that the second applicant would be agreeable to additional conditions being attached to any permission which would granted for him to enter the State, namely that:

> "(a) It is limited as to time;
>
> (b) It is conditional upon [the second applicant] obtaining employment/setting up a business/within a reasonable stipulated period,
>
> (c) He would keep the authorities aware of his whereabouts at all times and "sign-on" at the local Garda station regularly".

23. It was further pointed out that in the absence of the presence of the second applicant in the State, the first applicant and the infant applicants would likely remain "a burden on the State's finances". It was submitted that the second applicant was deeply regretful of the difficulties he had encountered in France and the subsequent convictions and that he absolutely undertook to refrain from any unlawful activity in the State, if permitted to enter. The view was also expressed that it was unlikely that the French Court would have imposed the ten year ban had the first named applicant and the minor applicants been French and living in France at the time the ban was imposed.

24. The applicants' solicitors went on to advise as follows:

> "We are therefore of the view that while it could be said this juncture that "*Zambrano* does not apply" to our client, the undoubted rights available under *Zambrano*, as clarified by the CJEU, would in fact be triggered by a refusal of a visa, and the children, in view of their tender years will effectively be forced [to leave the territory of the EU] (albeit by their mother's decision brought about by the refusal of a visa for her partner). In this sense we would respectively submit that *Zambrano* does in fact apply … although this is a matter that may not need to be considered if the other submissions

made in this letter are sufficient to "tilt the balance" in favour of the granting of a visa, given the particularly difficult circumstances of this case."

25. In their letter of 1st April, 2016, the applicants' solicitors again advised that if permitted to join his family in Ireland, the second applicant would be willing to sign-on with the gardaí and undertake to abide by any conditions attached to the visa. It was stated that he would take out health insurance for himself and his whole family if permitted to join them and he undertook not to be a burden on the State. Reference was made to the second applicant's employment history in Nigeria and that he was prepared and ready to take on employment as a taxi driver or any employment and become a net contributory to the State's finances. It was advised that he had a job offer in Ireland with a named enterprise and that a letter in that regard could be furnished if required. The letter continued as follows:

> "Lastly, having taken detailed instructions from [the first applicant] in the recent past and enquired of her what her intentions would be if it became apparent that her partner would not be allowed to come to Ireland for a very long time. After much soul searching and reflection [the first applicant]… has informed that she would in those circumstances leave Ireland and go and live in Nigeria with her children. At the end of the day she feels unable to continue indefinitely and singlehandedly to bring up her children and the emotional support from her partner and practical assistance in parenting her young family would outweigh, in her view, the undoubted benefit of raising her family in Ireland".

The decision

26. The Appeals Officer's decision issued on 11th April, 2016.

27. The findings and conclusions were largely as had been set out in the draft decision.

28. Notwithstanding the representations of 1st April, 2016, that the second named applicant would sign-on with the gardaí and undertake to abide by any conditions attached to any visa that might be granted, under the Policy Document heading, the Appeals Officer remained of the view that the second applicant's personal conduct represented a threat to the requirements of public policy, having regard to the nature of his drug offences and their classification as repeat offences.

29. With regard to the second applicant's employment prospects in Ireland, she noted the representation that he could pick up employment as a taxi driver in Ireland, or "any employment", and noted that it was said that he had been offered employment with a named enterprise. The Appeals Officer noted that no details had been given with regard to the job offer and that "the existence of a job offer, even in a permanent capacity, in itself, does not guarantee continued employment, especially as no connection between [the second applicant's] previous employment or experience has been demonstrated, and no relationship between [the second applicant] and his potential employer shown… As such, the Appeals Officer, in the absence of relevant supporting documentation, does not attribute significant weight to the apparent job offer".

30. The decision repeated the earlier conclusion that the first applicant's circumstances did not meet the minimum financial requirement set out in the Policy and the appeals officer went on to conclude that the second applicant had not demonstrated that he would be self sufficient should he be admitted to the State.

31. The Appeals Officer went on to conclude that the submissions did not "tilt the balance" in favour of the granting of a visa", notwithstanding the discretion which a decision-maker retains under the Policy Document. This was so in light of the finding that the second applicant represented a threat to the requirements of public policy.

32. With regard to the Article 20 TFEU considerations, the Appeals Officer noted the submissions made on behalf of the applicants in the letters of 11th March, 2016, and 1st April, 2016, to the effect that the infant applicants would be forced to leave the territory of the EU by virtue of the first named applicant's decision that she would have to return to Nigeria if a visa for the second named applicant was refused. It was concluded that while the first applicant "may take a decision to leave and remove the children from the territory of the European Union", the Appeals Officer was not satisfied that that was "equivalent to a situation where children would have to leave territory of the Union."

33. The Appeals Officer went on to distinguish the applicant's circumstances from the circumstances in *Zambrano* and she noted, as had already been set out in the draft decision, that the infant applicants were all currently residing in the State with the first applicant and that the first applicant was in receipt of State support which assists her in taking care of the children within the State. It was also noted that by virtue of her Irish citizenship, the first applicant was entitled to work in the State. It was further considered that "it has not been demonstrated that the children are dependent on [the second applicant]. Accordingly, "on balance", the Appeals Officer did not accept that it had been demonstrated that the infant applicants would have to leave the territory of the EU should the visa application be refused.

34. Under the ECHR considerations, the Appeals Officer dealt with the submission that no "less restrictive" processes had been considered in the visa refusal. The propositions set out in the applicants' solicitor's letter of 11th March, 2016, were addressed as follows:

> "The Appeals Officer has considered the suggestions concerning the attachment of conditions to any visa granted. [The second applicant] applied for a "long stay" join family visa indicating that it is his intention to travel to, and then remain in the State on a permanent basis. It is now suggested, on his behalf, that a time-limited visa could be issued or that it would be a condition of any visa that he obtain employment or set up a business within a certain timeframe. Before such a conditional visa issued the Appeals Officer would have to consider whether [the second applicant] would observe such conditions. For instance, after travelling to Ireland would [the second applicant] voluntarily leave on the expiry of a certain time period, or if he failed to gain employment and/or establish a business, even though it is his express intention to remain permanently in the State? On the other hand the Appeals Officer must also consider whether there exists any reasonable grounds for concern that [the second applicant] might fail to observe any such conditions.
>
> When considering same the Appeals Officer considers it reasonable to take into account that it has already been found the personal conduct of [the second applicant] constitutes a present threat to the requirements of public policy. Given the concerns as to [his] personal conduct, concerns which were extensively set out in the "invitation for comment" letter by this office dated 26 January, 2016, the Appeals Officer is not satisfied that there is anything in either of the letters dated 11 March, 2016 or 01 April, 2016 … which would provide adequate assurance of [the second applicant's] intention to observe the proposed conditions. Therefore the Appeals Officer is not satisfied that the potential less restrictive process advanced on [the second applicant's] behalf … ought to be adopted".

35. The considerations under the heading of constitutional rights were as set out in the draft decision.

36. By letter of 22nd April, 2016, the second applicant requested that the decision be withdrawn, which request was refused by way of email dated 27th April, 2016.

The *grounds of challenge*
37. In the within proceedings, the grounds upon which the decision is challenged are as follows:

> 1. In failing to properly address two issues raised by the second applicant, namely the question of "less restrictive measures" and the applicability of "*Zambrano*", the refusal of the second named applicant's appeal was arrived at in breach of fair procedures and the second applicant's right to be heard.
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> 2. No proper regard was had to the Irish citizen applicants' rights pursuant to Article 20 TFEU in arriving at the decision to refuse the second applicant's appeal.
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> 3. In concluding that the appeal of the visa refusal be refused, *inter alia*, on the basis that there were "no less restrictive process available which would achieve the pressing social need and the legitimate aims of the State" without in fact considering and weighing in the balance any other less restrictive measures, the first respondent was in breach of fair procedures and the applicants' right to be heard.
>
> 4. In any event and even in the absence of any error of law, irrationality or breach of fair procedures (which absence is not admitted) it is for the High Court to reassess the balance of reasonableness as between the interests of the State and the rights and interests of the applicants.

In the statement of grounds, relief was also sought by way of declaration that the applicants were entitled to an effective remedy before an independent court or tribunal. This relief was grounded, *inter alia*, on Article 47 of the Charter of Fundamental Rights of the European Union ("the EU Charter"). In the course of his oral submissions, counsel for the applicants advised that reliance on the EU Charter was not being pursued.

Grounds 1 and 2 – alleged failure to properly address the applicability of *Zambrano*
38. It is submitted on the applicants' behalf that the Appeals Officer failed to properly address the representation made by the first applicant that if the second applicant could not join her in Ireland she would have to leave the State, with the result that the minor applicants would have leave the territory of the European Union, thereby rendering them unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the EU. Counsel for the applicants points to the averments of the first named applicant in her affidavit sworn 3rd May, 2016, wherein she avers, *inter alia*, as follows:

> "I believe it is in the best interests of my children to grow up in Ireland. From a personal point of view however I have to "weigh" my children's best interests against other factors. For instance, I also think that it would be in their best interests to grow up in the company of and with the emotional support of their father. Also, from a purely personal point of view, I want to spend my life with the second Applicant who I love deeply as, I believe, he loves me. It is against that background, that despite all the disadvantages of living in Nigeria for my children over and above living in Ireland … I have decided that if my husband cannot come to be with us in Ireland, then I shall take my children to Nigeria so that we can be all together as a family."

39. The first applicant also avers that "without the help and support of my husband, it is virtually impossible for me to take up employment in the State and we seem, if we wish to remain in Ireland, to be "doomed" to grow up as a "one parent family", that parent being unable to work and being effectively forced into the social welfare system. Raising money for a trip now and again to Nigeria to see the second Applicant drain most of our meagre resources. I am afraid, as my children get older, they will be more likely to misbehave in society because of the lack of a guiding hand and emotional support from two parents. Although my husband did get into serious trouble in France as can be seen from the decision which we challenge, I am convinced he would never re-offend, he has suffered much to date on an account of his behaviour".

40. It is submitted that the refusal of the appeal will effectively force the infant applicants to leave the State. It is further submitted that the Appeals Officer erred in finding that the infant applicants were not dependent on the second applicant, in circumstances where there was evidence of financial and emotional dependency. Counsel contends that no real reasons were given by the Appeals Officer for finding that the children were not dependent on the second applicant. Insofar as the Appeals Officer was not satisfied that the infant applicants were dependent on the second applicant, that is so because the second applicant cannot provide for them in this State as he cannot get a visa – effectively a "catch 22" situation. In all the circumstances, the finding that the refusal of the visa would not mean that the infant applicants will have to leave the territory of the European Union flies in the face of the representations which were made on the applicants' behalf in the letters of 11th March, 2016 and 1st April, 2016. Accordingly, insofar as the Appeals Officer determined that any decision the first applicant might take to leave Ireland did not equate to a situation where the infant applicants would have to leave the territory of the EU, the Appeals Officer erred in so concluding, in circumstances where the first applicant had positively stated that she would have to leave if the visa was not granted. This, counsel submits, is the core issue in this case. It is thus submitted that the applicants' circumstances are on all fours with *Zambrano* and that they can be distinguished from the circumstances which arose in E.*B. & Ors. v. Minister for Justice, Equality and Law Reform* (Faherty J. 29th January, 2016) and *Bakare v. the Minister for Justice, Equality and Law Reform* [2016] IECA 292.

41. Counsel submits that if the refusal of a visa in the present case is to be inevitable, then the first applicant is effectively and in reality forced to leave, thereby forcing the infant applicants to leave the EU. This reality was not treated as such by the Appeals Officer and accordingly *certiorari* should be available to enable the decision to be remade on a rational basis. It is submitted that the particular circumstances of the applicants' case have not been properly considered.

42. The respondents contend that the applicants' circumstances do not equate to the type of conditions which are necessary for the application of the principles set down in *Zambrano*. While the first applicant has averred, in her affidavit sworn 3rd May, 2016, that if the respondent does not grant the second applicant a visa to enter the State, she will uproot her family and join him in Nigeria, those unsubstantiated assertions ought not to be accepted by the Court, without more, in the absence of any realistic evidence of compulsion, as distinct from a choice made by the first applicant to leave the State. It is submitted that the first applicant's averments are proffered in an attempt to create a scenario in line with *Zambrano* when no evidence of the reality of return to Nigeria has in fact been set out. Moreover, the first applicant's assertions are against the established background of significant integration by her and the infant applicants in the State. It is further submitted that, historically, the first applicant has shown no prior inclination to leave the State to permanently join the second applicant even at times when she could have done so such as when the second

applicant was in France and when he was residing in Austria. There were no steps taken by the applicants to progress a family reunification application at an early opportunity, despite enquiries made by the first applicant in June 2011, which was at a time prior to his subsequent incarceration in France. Furthermore, while it is clear from the first applicant's affidavit that her status as a single parent is material to her considerations, the situation in which she finds herself is not dissimilar to many thousands of single parents living in the State. In the decision, the Appeals Officer considered and set out the State's supports as provided to the first applicant and her family. It is submitted that, essentially, the first applicant invites the Court to accept her subjective avowals, without any rational grounding or consideration in fact attaching to those avowals.

43. It is the respondent's further contention that the first applicant's statement that she would be forced to leave the State does not stand up in the context of the factual matrix in this case. The first applicant has residency of and is a citizen of the State and the infant applicants, who reside with her, are citizens. Moreover, all of the available evidence led the Appeals Officer to conclude that the infant applicants were dependent on the first applicant.

44. It is thus submitted that the denial of the visa to the second applicant will not trigger the removal of the infant applicants from the State. If their removal is to arise it will be on foot of a decision which the first applicant avows she has made.

45. Counsel for the respondents also points to the fact that in the initial submissions of 16th September, 2015, there is no case made that the refusal of a visa would give rise to the infant applicants having to leave the territory of the EU. As can been seen, the *Zambrano* issue was addressed by the Appeals Officer in both the draft decision and the decision because there was, on record, a letter from the second applicant in June 2011 purporting to make an application for residency in the State on foot of the decision of the ECJ in *Zambrano*. That letter was acknowledged by the first respondent on 14th June, 2011, and the second applicant was advised that any visa required non-national who was outside the State and who wished to enter and reside in the State in reliance on *Zambrano* must first apply for a visa. However, no steps were taken by the second applicant in that regard until the present visa application was made on 4th June, 2015.

46. The respondents further contend that the submissions made on 16th September, 2015 highlight the first applicant's difficulties in being separated from the second applicant only in the context of making representations as to why he should be granted a visa. The submissions were not premised on the first applicant and the infant applicants being forced to leave the State on *Zambrano* grounds if the visa was not granted. Furthermore, all of the representations made in the submissions of 16th September, 2015, together with the documentation which attached thereto, highlight the first applicant and the infant applicants' integration in the State, including the first applicant's wish to avail of educational services in the State. Accordingly, the evidence which was before the Appeals Officer was of significant integration by the first applicant and the infant applicants in the State. Despite no reference to *Zambrano* rights in the initial submissions, it is clear from both the draft decision and the ultimate refusal decision that the Appeals Officer considered the possibility that the infant applicants might be forced to leave the territory of the EU. However, it was determined that this would not arise as it had not been demonstrated that the infant applicants were dependent on the second named applicant (albeit it was accepted that he played a role in their lives and had transferred money to them), given that all of the available evidence established that the infant applicants were in the care of the first applicant in Ireland and that, with State support, the first applicant was taking care of them.

47. The respondents also submit that in the representations which were made on the applicant's behalf in response to the draft decision the applicants did not dispute the Appeals Officer's findings on dependency; all that was said was that the first applicant would have to leave the State. This representation was specifically addressed by the Appeals Officer in the decision of 11th April, 2016. The Appeals Officer referred to the jurisprudence of the ECJ in *Zambrano* and *Dereci*. She determined that if the infant applicants were to leave the State, it will be consequent to a decision which the first applicant may make and not as a result of the refusal of a visa to the second named applicant. It is submitted that this was a finding within jurisdiction and that it accords with the decision of the Court of Appeal in *Bakare*.

48. It is thus submitted that it has not been demonstrated in the context of this application that the Appeals Officer erred in finding that the element of compulsion which would lead to the infant applicant's having to leave the territory of the EU had not been established in this case.

Discussion

49. In *Bakare*, the Court of Appeal had occasion to consider as to whether Article 20 TFEU rights were engaged in respect of the Irish citizen child of an Nigerian national who had been deported from the State, and who then entered the State illegally and applied for residency based on his parentage of an Irish citizen child.

50. In the course of giving judgment for the Court of Appeal, Hogan J. considered the rationale for the decision in *Zambrano*. The learned judge stated as follows:

> *"13. There is no doubt but that the decision of the Court of Justice in Ruiz Zambrano upon which Mr. Bakare relies was a ground-breaking one. As is well known, in that case the Court of Justice held that one essential attribute of citizenship of the European Union conferred by Article 20 TFEU was that nationals of the constituent Member State had, in principle, the right to live in the territory of the Union. The Court then reasoned that this right might be jeopardised if the non-national parents of young dependent children who were themselves citizens of a Member State of the Union were to be refused a right of residence. As the Court explained (at paras. 42-44 of the judgment):*
>
> > *'42. Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union….*
> >
> > *43. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.*
> >
> > *44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.'*

14. There was, however, one feature of the facts of Zambrano which, to some degree, possibly obscured the true rationale of that decision. While the decision in Zambrano only concerned the position of the father, it is clear from the Court's factual narrative that the Belgian authorities had taken a similar position attitude towards Mr. Zambrano's spouse. It is implicit in para. 44 of that judgment that these particular parents should be treated in effect as one unit for this purpose. The Court accordingly assumed that refusal of a residence permit to the husband would effectively have compelled both parents to leave Belgium (along with the children), as without that right to reside the father would have been denied access to Belgium's social security system and jobs market. In those circumstances the entire family would have faced economic hardship – even destitution – and the Court evidently considered that upon the particular facts of that case the entire family would have been obliged to leave Belgium and, for that matter, the entire territory of the Member States of the European Union.

15. It is, however, clear from the subsequent case-law that this assumption regarding the likely impact of residency or other similar immigration decisions might not always hold true where the underlying facts were somewhat different, particularly where the children were being raised in the EU state in question by a parent who was a citizen of the Member State in question or who otherwise had a lawful status in the State in question."

51. Hogan J. also noted also the decision in Dereci, wherein at para. 68 of judgment, the ECJ stated:

"Consequently, the mere fact that it might appear desirable to a national of a Member State for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory of such a right is not granted."

52. Hogan J. opined that the above pronouncement of the ECJ showed "*the true rationale of Zambrano*".

53. The learned judge next considered the decision of the ECJ in Joined Cases C-356/11 and Case C-357/11 O. and S. [2012] ECR 1-000, where the ECJ emphasised that *"the criterion [in Zambrano] relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole".* (at para. 66 O. and S.) and that *"the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted."* (at para. 68 of *O. and S.*).

54. Hogan J. noted that, in *O. and S.*, the ECJ had stressed that the ultimate issue was whether an adverse immigration decision was likely to trigger a set of circumstances leading to the situation where the young children who were Union citizens are effectively compelled to leave the Union territory. (at para. 20)

55. Hogan J. also considered the decision of the ECJ in case C-156/13 *Alfredo Rendón Marin* [2016] ECR 1-000. In that case the ECJ found that the *Zambrano* principle was engaged by reason of the refusal by the Spanish authorities to permit a Columbian national who was the father of two children, who had respectively Polish and Spanish citizenship, to enter Spain. The visa was refused in circumstances where the whereabouts of the mother was unknown. The reason for the refusal was that the father had been convicted of an unspecified crime. The ECJ found that the refusal in those circumstances engaged *Zambrano* rights as the children in question were in the "sole care" of their father.

56. In considering the application of the *Zambrano* case law to the case before him, Hogan J. found that there was no doubt, when viewed from the perspective of the best interests of the children, that it would be desirable for Mr. Bakare to reside with his wife and children in Ireland. However, Hogan J. concluded that *Zambrano* rights were not engaged in the circumstances of the case. He stated:

"26. Here it is impossible not to have considerable sympathy for Ms. Bakare, since she is being effectively compelled by force of circumstances to choose between having a normal married relationship with her husband on the one hand (if she were to return to Nigeria to follow him were he obliged to leave the State) and ensuring that in his absence the children are raised in an advanced Western economy such as Ireland on the other. As, however, the Court of Justice made clear in both Derechi (para. 68) and O and S (para. 68), these considerations in themselves are not decisive: these cases makes it clear that it is necessary to go further in order to demonstrate that the practical effect of the denial of residency would be that the children would be obliged to leave the territory of the Union.

27. Can it be said that this is a real risk in the present case? The available evidence suggests that there is in fact no such risk of any appreciable kind. Ms. Bakare did not in fact move from Ireland to Nigeria following her husband's deportation in 2009. Ms. Bakare is now a naturalised Irish citizen with (it would appear) secure employment and her children are even more integrated into the Irish school system than was the case in 2009. She has, moreover, access to high quality health care in this State which facilitates the on-going management of her mental health issues. Despite the challenges which these mental health issues doubtless present, no evidence has been adduced to suggest that she would be medically or otherwise physically unable to look after the children without her husband's presence in the State. In all these circumstances the prospect of Ms. Bakare leaving Ireland for Nigeria with the children (including the Irish citizen child, Omotaoy Bakare jnr.) must be considered to be a remote one. 28. In these circumstances I find myself obliged to conclude that the present case is no difference in principle from other cases with broadly similar facts such as Derechi and O and S. Given that on these facts there is no appreciable risk that the children would be obliged to leave the territory of the State by reason of the decision of the Minister to refuse to grant residency to Mr. Bakare, I do not see that the present case properly comes within the scope of Zambrano. The net effect of this conclusion is that as the denial of such status will not in practice affect the entitlement of the second appellant child of the substance of his right to reside within the territory of the Union, his rights qua citizen of the Union remain unaffected for the purposes of Article 20 TFEU."

57. Having regard to the circumstances of the present case, I am not satisfied that the practical effect of the denial of a visa to the second applicant would be that the infant applicants would be obliged to leave the State or the EU. That was the conclusion arrived at by the Appeals Officer and I am satisfied that she was entitled to so conclude having regard to the factual matrix which presented to her, as described in the decision. While the first applicant, in her affidavit of 3rd May, 2016, avers that she will leave Ireland if a visa is not granted to the second applicant, that averment, without more, is, to my mind, not sufficient to engage *Zambrano* rights. The first applicant is a naturalised Irish citizen with three Irish citizen children who are integrated into the Irish school system. As

noted by the Appeals Officer, while not employed, the first applicant is receiving State support and she and her children have access to healthcare in this State, which has been availed of and continues to be availed of, particularly in relation to the third named applicant. There is no evidence put before the Court that the first applicant is medically or otherwise physically unable to look after the infant applicants without the presence of the second applicant in the State. While the Court accepts entirely that it is the fervent wish of the first applicant that the second applicant would join her in the State for the reasons she has outlined, given the factual matrix in this case, I am however constrained to find that if the first applicant and the minor applicants leave the State, it will not in reality be as a result of any compulsion to do so, as defined by the ECJ jurisprudence, but rather to give effect to the first applicant's choice to do so. Furthermore, I must take into account the respondents' submission that the first applicant did not seek to join the second applicant at a time when he was lawfully resident in Austria and in employment there. Accordingly, notwithstanding her sworn avowal to leave the State, I am constrained to find that the prospect of the first applicant leaving for Nigeria with her three Irish citizen children, in the words of Hogan J. in *Bakare*, "*must be considered to be a remote one*". Accordingly, the challenge on *Zambrano* grounds has not been made out.

Grounds 1 and 3 – the alleged failure of the Appeals Officer to properly address and weigh in the balance of the question of "less restrictive measures"

58. Counsel for the applicant submits that the Appeals Officer's consideration of the "less restrictive measures" proffered by the applicants was neither fair nor adequate. It is submitted that in the context of her consideration whether the refusal of the visa application was necessary in a democratic society, including whether it was proportionate, the Appeals Officer failed to properly consider the representations which were made on behalf of the second applicant, namely that the concerns in relation to him could be addressed by attaching conditions to any visa granted to him. It is contended that no proper reasons were provided for refraining from considering any less restrictive process. Accordingly, the applicants contend that, in the absence of any proper consideration of "less restrictive measures", the refusal of the visa was disproportionate. Counsel submits that at its height, the Appeals Officer's statement that she "was not satisfied that there is anything in the letters from [the applicants solicitors] which would provide adequate assurance of [the second applicant's] intention to observe the proposed conditions" merely says that the second named applicant could not be trusted. It is submitted that this cannot be a rational or fair consideration, and is tantamount to stating that no less restrictive process will ever be given any consideration because the second applicant is not to be trusted and that the State could not enforce compliance with such conditions, if the second applicant were to enter the State.

59. It is submitted that this is an irrational approach, particularly in circumstances where the Appeals Officer acknowledged it would be in the best interests of the infant applicants if their father were to be permitted to reside with them. On the apparent rationale of the decision-maker the second applicant could never be admitted to the State. Counsel also submits that there is no proper or rational basis for the respondents' mistrust of the second applicant. This is so given that he has a family in the State, and given the fact that when in Ireland in 2004, he abided by conditions which attached to the visa which had been granted for that visit.

60. In aid of his submissions that the Appeals Officer erred in the manner in which the applicants' proposals were considered, counsel cites *S. & Ors. v. The Minister for Justice, Equality and Law Reform* [2011] IEHC 417, where Clark J. stated:

> *"36. The father in this case was seeking to join his family legally. The possibility that the Minister would consider revoking the deportation order so that a limited visa could be granted was simply not examined and the effect of the permanent exclusion of this father from visiting his family was not even mentioned. The finding that "there was no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own border and operate a regulation system for the control, processing and monitoring of non-nationals in Ireland" was not in fact an accurate statement. In this case, there was a less restrictive process available as Mr. S could have been given leave to re-enter for a limited period with conditions attached which could have been subject to renewal, provided he did not become a charge on the state and was of good behaviour."*

61. Counsel also points to *B (A minor) v. the Minister for Justice, Equality and Law Reform* [2010] IEHC 296, where the requirement to consider "less restrictive" processes was considered by Cooke J. in granting leave to apply for judicial review on the basis that *"the respondent did not in fact consider and weigh in the balance any other less restrictive measures available to him to control the limited or temporary presence of the Third Named Applicant in the State."* (at para. 13)

62. Counsel or the applicants submits that the Appeals Officer took a "sledgehammer" approach to the suggestions canvassed on behalf of the second applicant.

63. Counsel for the respondents submits that the Appeals Officer did in fact consider all the "less restrictive measures" suggested by the applicants' legal representative, including a limited visa. This is evident from the recitals of the submissions in the appeal decision and the consideration afforded thereto by the Appeals Officer. Accordingly, the respondents submit that the applicants' reliance on *S v. Min. for Justice and B (A minor) v. Minister for Justice* is misplaced. The respondents also contend that it is clear from the decision that the Appeals Officer was not satisfied that the suggestions canvassed on behalf of the applicants were sufficient to outweigh the respondents' assessment that the second applicant's personal conduct constituted a present threat to the requirements of public policy. It was not considered that the suggestions provided adequate assurance of the second applicant's intention to observe the proposed conditions.

Discussion

64. It fell to the Appeals Officer to consider whether the representations made on the second applicant's behalf displaced the preliminary finding as set out in the draft decision that the rights of the State were weightier than the rights of the applicants. The applicants contend that the decision-maker failed to consider or weigh in the balance any other less restrictive measures other than the refusal of the visa application. However, I am satisfied that such measures were considered. The suggested conditions that might apply to any visa granted to the second applicant, as tendered on his behalf, were the subject of consideration by the Appeals Officer, as is clear from the decision.

65. The Appeals Officer found that the less restrictive measures, as submitted on the second applicant's behalf, were not sufficient to displace the finding that the second applicant represented a present threat to the requirement of public policy and that the grant of a visa may result in a cost to public funds and public resources.

66. The less restrictive measures which were put forward included, *inter alia*, that the second applicant's entry would be conditional on his gaining employment within a specific timeframe and that he would not become a burden on the State. The Appeals Officer was not persuaded that these particular measures were sufficient to tilt the balance in the second applicant's favour in terms of the consideration of the cost to public funds and public resources, were he to be admitted to the State.

67. As earlier referred in this judgment, the Appeals Officer noted the second applicant's employment in Nigeria and she recites the

contents of the contents of the letters of 11th March, 2016, and 1st April, 2016 where the second applicant's plans, if admitted to the State are set out. The decision-maker went on to give reasons as to why she was not persuaded by the representations concerning the job offer, which was said to await the second applicant in the State. Nor was she persuaded as how his employment history in Nigeria could be said to relate to the job offer said to await him in Ireland. The Appeals Officer noted that no details had been given with regard to the job offer and noted that "the existence of a job offer, even in a permanent capacity, in itself, does not guarantee continued employment, especially as no connection between [the second applicant's] previous employment or experience has been demonstrated, and no relationship between [the second applicant] and his potential employer shown… As such, the Appeals Officer, in the absence of relevant supporting information, does not attribute significant weight to the apparent job offer".

68. The Appeals Officer's findings on the second applicant's employment prospects, together with the finding that the first applicant did not meet the minimum financial requirements such that she would not genuinely be able to meet her responsibility as a sponsor for the second applicant, were deemed to give rise to a reasonable concern that the second applicant's presence in the State may put pressure on the family's finances, leading in turn to a possible cost to public funds and public resources. That was an assessment for the decision-maker to make and I am not satisfied that that assessment was otherwise than one made within jurisdiction, and which cannot be deemed irrational or unreasonable given that the decision-maker was cognisant of her responsibility to weigh her assessment of the second applicant's employment prospects in the State and his being a possible burden on the State against her established finding that the best interests of the infant applicants would be best served by having their father reside with them. I am not persuaded that the Appeal Officer erred in her finding that there was a reasonable concern that there would be a cost to public funds in terms of social assistance and public healthcare if the second applicant was admitted to the State, in view of her findings as set out in the decision, and in circumstances where the applicants' circumstances, including the impact on the family life of the applicants if the visa was not granted, were carefully considered in the decision.

69. It was also found that the proposed restrictive measures did not appease the concern that, by virtue of his conviction in France and the ten year ban from French territory for drugs offences, the second applicant's personal conduct represented a threat to the requirements of public policy, in particular the prevention of disorder or crime. Ultimately, the Appeals Officer was not convinced that the contents of the letters of 11 March, 2016 and 1st April 2016 provided "adequate assurance" of the second applicant's intention to observe the proposed conditions. While I have some sympathy for the applicants' contention that the Appeals Officer was not as expansive on the question of why a visa "limited as to time" and the second applicant undertaking to "keep the authorities aware of his whereabouts at all time and 'sign-on' at the local Garda station regularly" would not provide adequate assurance of the second applicant's intention to observe the proposed conditions, as she was earlier in the decision on the issue of the second applicant's employment prospects, I am not satisfied that that the absence of a more expansive analysis on this aspect is of such a magnitude as to impugn the decision. At the end of the day, in the weighing exercise that was undertaken by the Appeals Officer, the findings as to the personal conduct of the second applicant as representing a threat to the requirements of public policy were found to be weightier than the rights of the applicants, and the decision-maker was not appeased by the proposed restrictive measures. That was an assessment made within jurisdiction.

70. In this case, the factors relating to the rights of the State were found to be "weightier" than the factors relating to the applicants' rights as a family, hence it was concluded that the refusal of a visa to the second applicant was not disproportionate "as the State has the right to uphold the integrity of the immigration system in order to control the entry, presence, and exit of foreign nationals, subject to international agreements, and to ensure the economic well-being of the State and to protect the rights and freedom of others". There was found to exist "a substantial reason associated with the common good which requires the refusal of the visa application."

71. As this Court is not exercising an appellate function, it can only enquire as to whether the applicants' rights and all relevant facts and circumstances were correctly identified, whether all submissions were considered and whether the ultimate decision was arrived at fairly and accorded with the principles of proportionality, rationality and reasonableness, as is required pursuant to the principles set out in *Meadows v. Minister for Justice* [2010] 2 IR 701. In the words of Cooke J. in *F. & Ors. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 457, the Court *"is required pace Meadows to decide whether the conclusion is proportionate and therefore whether the respective merits underlying the proportionality of the decision have been correctly assessed and balanced*." As put by Fennelly J. In Meadows:

> *"I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word, 'substantive', to distinguish it from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of the decision-maker. This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J. The applicant must discharge that burden by producing relevant and cogent evidence."*

72. In all the circumstances of this case, I am not satisfied that the applicants have discharged the burden of proof that is on them in this regard, as enunciated by Fennelly J. *Meadows*. Accordingly, I find that the challenge on the "less restrictive measures" ground has not been made out.

Ground 4 – Whether it is for the Court to assess the balance of reasonableness as between the interests of the State and the rights and interests of the applicants

73. By virtue of this ground, the applicants invite the Court to reassess the balance of reasonableness as between the interests of the State and the rights and interests of the applicants in this case. It is the applicants' contention that it is for the Court to reappraise their case and, if necessary, substitute its own view. If that were the approach to be adopted in this case, it is submitted that the Court would find that there was a less restrictive process that could be employed in this case, whereby the second applicant could be given leave to enter the State for a limited period with conditions attached and which could be subject to renewal provided the second applicant was not a burden to the State and was of good behaviour.

74. Counsel for the applicants submits that in L*ofinmakin (An Infant) v. the Minister for Justice, Equality and Law Reform* [2011] IEHC 116, Cooke J. had certified such a question regarding the role of the court in cases such as the present, for consideration by the Supreme Court, in the following terms:

> *"2. Whether in applying the test or principle reaffirmed by the Supreme Court in the case of Meadows v Minister for Justice, Equality and Law Reform [2010] IESC 3 to an application to quash a decision made by the respondent under the*

above section to deport a non-EU national who is the parent of a minor Irish citizen, the High Court was correct in law in exercising its jurisdiction in judicial review on the basis that:

> *a) It is not sufficient that an application merely asserts that the decision is irrational, unreasonable and disproportionate and invites the Court to reassess the balance of reasonableness as between the interests of the State and the rights and interests of the applicant and the child or family concerned;*
>
> *b) The Court is entitled to require the applicant to identify the particular error, omission or other flaw in the respondent's reasons or assessment of the case which is claimed to render the decision irrational, unreasonable or disproportionate?"*

75. Ultimately, the *Lofinmakin* case became moot and the matter was not then considered by the Supreme Court ([2013] IESC 49).

76. In opposing this ground of challenge, the respondents submit that it is not a matter for the Court to make decisions concerning the balancing of rights. In this regard, counsel for the respondents relies on *F.& Ors. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 457and *F.E. v. the Minister for Justice, Equality and Law Reform* [2014] IEHC 62.

Discussion

77. The function of the court in judicial review proceedings, where fundamental rights are concerned, is well described in the decision of McDermott J. in *F.E. v. Minister for Justice, Equality and Law Reform.*

> *"9. This Court in its application of the Meadows principles applied what is acknowledged to be the repeated and consistent interpretation by the High Court of that decision as expressed by Cooke J. in I.S.O.F. v. Minister for Justice, Equality and Law Reform (No.2) [2010] IEHC 457, in which he stated as follows:-*
>
> > *"Where the validity of an administrative or quasi judicial decision comes before the court on judicial review, the Court's starting point is the decision itself; the basis upon which it has been reached and the process by which it has been decided. It does not have before it an appeal against the decision, much less a merits-based appeal by way of re-adjudication of the original issue. Its jurisdiction is based upon the content of the decision and the law applicable thereto. 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 which is itself susceptible to judicial review for proportionality where necessary.) In the judgment of the Court no material difference exists between the evaluation of proportionality as regards the interference with "qualified rights" (as in the present case) and "absolute rights" (as in the case of Meadows). 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 of 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… It remains the case however… that judicial practice in the exercise of the judicial review function is capable of adapting to accommodate the need to examine the substantive content of a decision having impact on fundamental rights in order to evaluate the lawfulness of its encroachment on those rights without thereby supplanting the administrative decision with a new decision of its own… By examining the substance of the effect of an interference brought about by an administrative decision on fundamental rights of an applicant for judicial review in order to assess whether it goes beyond a lawful encroachment, the Court is not substituting its own view of what the decision ought to be but is testing it by reference to what is objectively reasonable and commonsense.'"*

78. At para. 10 of his judgment, McDermott J. reprised the argument canvassed on the part of the applicants in F.E., in the following terms:

> *" The applicants claim that they are entitled to request that the High Court itself assess the proportionality of the decision to deport rather than defer to the assessment of the respondent in the sense that the court will refrain from quashing a decision unless it can be said to be unreasonable or irrational as set out in I.S.O.F. It is contended that the principle of proportionality requires the reviewing court to assess the balance which the decision maker has struck and exercise its own judgment as to whether a decision affecting fundamental rights is disproportionate in its effects but should not constrain the court to uphold the respondent's assessment on proportionality provided it is not reached unreasonably or irrationally. It is submitted that an effective remedy requires the court to exercise its own judgment as to what, in the circumstances, is a disproportionate impact on those rights rather than to assess proportionality in a manner circumscribed by the common law rules applicable to judicial review."*

79. In the course of his judgment, McDermott J. went on to consider a number of decisions where the issue of the scope of a reviewing court's remit when considering the question of the proportionality (post-*Meadows*) of an administrative decision having an impact on fundamental rights was in issue. The learned Judge referred, *inter alia*, to *F. v. Minister for Justice* [2010] IEHC 386, where Cooke J. stated:

> *"Contrary to the implication of the argument made by counsel for the applicants, the High Court is not entitled or obliged to re-examine the case with a view to deciding whether, in its own view, the correct balance has been struck. To do so would be substitute its own appraisal of the facts, representations and circumstances for that of the Minister."*

80. McDermott J. also referred to *Efe & Ors v. Minister for Justice (No. 2)* [2011] IEHC 214, stating, at para. 22:

> *"Though the applicants on this application rely upon the decision of Hogan J. in Efe & Ors v. Minister for Justice, Equality and Law Reform & Ors (No.2) [2011] IEHC 214, it is clear that the learned judge in that case adopted what he regarded as "the succinct and comprehensive summary of the present law contained in the judgment of Cooke J." in I.S.O.F. v. Minister for Justice, Equality and Law Reform (No.2) concerning how the Meadows decision ought to be applied to a challenge by way of judicial review in deportation cases. As noted by Hogan J. I.S.O.F. was a decision in which a certificate of leave to appeal to the Supreme Court in order to clarify aspects of Meadows was refused by Cooke J."*

81. McDermott J. went on to state:

> *"Hogan J. in Efe held that the constitutional rights of the applicants were adequately vindicated by the common law rules of judicial review following the Meadows decision. He also concluded that the Meadows principles satisfied the requirements of Article 13 of the European Convention on Human Rights and that there was no basis for granting a declaration that the rules of judicial review were unconstitutional because they did not provide an effective remedy sufficient to satisfy the requirements of Article 13.*
>
> *…*
>
> *As repeatedly stated by the Supreme Court, judicial review is not a form of appeal and the onus of proof lies upon the applicant to demonstrate that the impugned decision is fundamentally flawed. In this case the court has determined that the applicants have failed to do so. It was clearly incumbent upon the applicants to demonstrate by reference to the impugned decision the factors which establish the disproportionality for which they contended. As already indicated, the applicants advanced such factors but the court rejected the challenge for the reasons set out in the judgment."* (at paras. 24 and 28)

82. With regard to the questions certified by Cooke J. in *Lafonmakin*, McDermott J. opined:

> *"It is clear that Cooke J. considered the law in the matter to be settled and, indeed, had refused to certify a similar point in the I.S.O.F. case. Furthermore, his certification predates the decision of the Supreme Court in Donegan which effectively affirmed the decision in Meadows and, in my view, supports the approach in the various decisions of the High Court on this issue which have sought to apply the Meadows decision in the asylum immigration area. In my view the continued assertion that the High Court has a jurisdiction and obligation to examine the substantive merits of a challenged decision and effectively substitute its own deportation decision when the court considers the Minister's decision to be disproportionate is, in the light of present authorities, incorrect and does not give rise to a point of law of exceptional public importance that requires resolution by the grant of a certificate."* (at para. 34)

83. More recently, the issue of judicial review as an effective remedy was considered by Hogan J. in *N.M. v. Minister for Justice* [2016] IECA 217. In the course of his judgment for the Court of Appeal, the learned Judge referred, *inter alia*, to Meadows, *F. & Ors. V. Minister for Justice* and his own decision in *Efe v. Minister for Justice*. He stated:

> *"51. In the light of this trilogy of case-law - Meadows, ISOF and Efe - it is clear that what might be termed modern, post-Meadows-style judicial review will satisfy the effective remedy requirements of Article 39.1 of the Procedures Directive. As I have already stated, what is clear from the judgment in Diouf that what is necessary is that "the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review." Whatever might have been the situation within the narrow and artificial confines of O'Keeffe, it is clear from other important authorities that the decision of the Minister must satisfy the requirements of factual sustainability (The State (Lynch) v. Cooney) and the reasons for that decision can furthermore be fully scrutinised within the parameters of the judicial review procedure (Meadows). There is, in any event, well-established case-law whereby the court can quash in judicial review for material error of facts: see generally, Daly, "Judicial Review of Factual Error in Ireland" (2008) 30 Dublin University Law Journal 187; Hill v. Criminal Injuries Compensation Tribunal [1990] I.L.R.M. 36; AMT v. Refugee Appeal Tribunal [2004] 2 IR 607; L. v. Minister for Justice, Equality and Law Reform [2010] IEHC 362 and HR v. Refugee Appeal Tribunal [2011] IEHC 151.*
>
> *52. In his judgment in the present case Barr J. found that the essence of the reason why the judicial review remedy was not, in his opinion, an effective remedy within the meaning of Article 39.1 was because that it was not a remedy which was "capable of reversing the first instance refusal" in the sense of substituting its own decision for that of the original decision-maker. Barr J. also drew attention to the other limitations inherent in the judicial review process, such as the fact that the court could only annul the decision and remit the matter for further consideration. He also observed that the court was further confined to the information which was before the decision maker at the time of the decision, before adding:*
>
> > *"It has been stated on many occasions that the courts can only review the process leading to the impugned decision, rather than review the merits of the decision itself. The court is not an appeal court and is not free to substitute its own substantive findings for those of the decision maker. The court cannot reverse the decision of the decision maker; it can only annul its decision. The court can only interfere if it is satisfied that there was an error of law, or an error of fact on the face of the record, or there was some unfairness in the procedure adopted or if the decision was irrational in that there was no evidence supporting the finding made by the decision."*
>
> *53. All of this is in its own way true. But, perhaps, with respect, this passage may be thought to underplay the scope of contemporary, post-Meadows judicial review. While the judicial review court cannot review the merits of the decision, it can nonetheless quash for unreasonableness or lack of proportionality (as in Meadows) or where the decision simply strikes at the substance of constitutional or EU rights: see, e.g., S. v. Minister for Justice [2011] IEHC 92; O'Leary v. Minister for Justice [2012] IEHC 80. The court can further examine the conclusions reached and ensure that they follow from the decision-maker's premises. The court can further quash for material error of fact."*

84. Having regard to the foregoing body of case law, I am entirely satisfied that it is not for this Court to embark upon adjudication on the merits in this case, or upon a balancing of competing rights. In my view, it has been comprehensively established that judicial review, adapted as it has been, post *Meadows*, to apply a proportionality test to administrative decisions which affect fundamental rights, is an effective remedy by which such rights can be vindicated. Accordingly, this ground has not been made out.

Summary

85. For the reasons set out in the judgment, the relief claimed in the Notice of Motion is denied.