Neutral Citation Number: [2011] IEHC 78

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2009 348 JR**

**BETWEEN**

**O. O. O-A,**

**A. O-A,**

**A. O-A (A MINOR),**

**N. M. A. O-A (A MINOR) AND**

**S. O. S. O-A (A MINOR, SUING BY THEIR NEXT FRIEND AND FATHER O. O. O-A)**

**APPLICANTS**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENT**

**JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 28th day of January 2011**

1. The applicants in this case are a family comprising a father (O), mother (A) and three children (A, N and S). The father, mother and middle child are nationals of Nigeria, while the two other children are citizens of Ireland. The family challenges the respondent Minister's decision to make a deportation order against the father, whose applications for refugee status and leave to remain in Ireland have been rejected.

2. Facts and legal issues similar to those raised in this case were argued and determined in *Alli (a minor) v. Minister for Justice* [2009] I.E.H.C. 595, (Unreported, High Court, Clark J., 2nd December, 2009) ('*Alli*') and *Asibor (a minor) v. Minister for Justice & Ors*. [2009] I.E.H.C. 594, (Unreported, High Court, Clark J., 2nd December, 2009) ('*Asibor*'), which were heard together as test cases. The grounds on which leave was granted in those two cases are identical to the grounds pleaded in this case and in approximately 100 other similar cases where deportation orders were stayed pending the decisions in *Alli and Asibor.*

3. The primary issue to be determined in *Alli and Asibor* was whether the Minister's use of the term "*insurmountable obstacles*" in his assessment of the reasonableness of the deportation of one parent from the State, where the other members of the family were lawfully resident, was the incorrect standard. A further issue for determination was how the Minister should have considered the proportionality of the effect of the father's deportation on the family. This Court found that the phrase "*insurmountable obstacles*", as used in the jurisprudence of the European Court of Human Rights ('ECtHR') and adopted by the Minister, is analogous to a test of reasonableness and is the appropriate test when considering whether or not a family can be expected to join a deportee in his country of origin and to maintain a family life there.

4. It would, therefore, appear that the legal principles determined in those cases would be binding on the applicants in this current challenge. However, the applicants urge the Court that the decision in *Alli and Asibor* was wrongly decided and that the legal landscape has changed since the decision of the Supreme Court in *Meadows v. The Minister for Justice* [2010] I.E.S.C. 3, (Unreported, Supreme Court, 21st January, 2010) ('*Meadows*'). In particular, it is argued that proportionality is now an issue which must be addressed by the Court when judicially reviewing the lawfulness of any decision which affects fundamental rights. It was submitted that had the *Meadows* decision been available to this Court, *Alli and Asibor* would have been differently decided. It was argued that those decisions cannot now stand as the law has fundamentally changed. This new argument has resulted in many of the "*insurmountable obstacles*" cases being further adjourned pending the determination in this case.

5. The substantive hearing in the within proceedings took place on the 29th and 30th June and the 1st July, 2010. Mr John Finlay S.C., with Ms Sarah Walsh B.L., appeared for the applicants and Ms Sara Moorhead S.C., with Ms Helen Callanan B.L., appeared for the Minister. Further affidavits were filed in late July and mid-December, 2010 and further submissions on the content of the affidavits were also heard.

**Background**

6. The particular background claimed in this family case is that the first and second applicants are a married couple of Yoruba ethnicity who lived in the Lagos area of Nigeria. Their marriage certificate, which was furnished to the Minister, indicates that they married in Lagos in April, 2003. The second applicant (referred to as "the mother") was pregnant when she arrived in Ireland without her husband in November, 2003 and applied for asylum. The basis for her asylum claim was not disclosed to this Court. Her child *A* (the third applicant) was born in January, 2004 and is an Irish citizen by reason of his birth in the State. His birth certificate describes his mother as a bank official and his father as an accountant. His mother withdrew her asylum application after his birth and in September, 2005 she was granted permission under the IBC/05 scheme to remain in Ireland with her infant son *A* on the basis of her parentage of an Irish citizen child. Her permission was initially valid for two years but has since been renewed for regular periods.

7. In September, 2006 the mother took up part-time employment at a large retail outlet and in December of that year her husband, the first applicant (who will be described as "the father"), entered the State illegally and then applied for asylum. His son was almost three years old at that time. His application for refugee status was refused. In August, 2007 the couple's second child, a daughter *S* (the fifth applicant), was born and in early 2009, the couple's third child *N*, a second daughter (the fourth applicant), was born. Like her brother, the younger daughter *N* is a citizen of Ireland by reason of the duration of her mother's lawful residence in the State at

the time of *N's* birth. Her older sister S is a citizen of Nigeria as, at the time of her birth, her mother had not reached the requisite period of lawful residence to obtain citizenship for *S.* All three children have lived in this State since their birth.

8. Thus it can be seen that the applicants' case shares features common to other claims made by the foreign-national fathers of citizen children born to their wives or partners who had entered the State as asylum seekers before or during 2004 and shortly afterwards gave birth. The father in this case was not with his wife when she gave birth to their oldest child, nor did he live with or share in the rearing of his son for almost three years and, like some 3500 other foreign-national fathers, he was clearly outside the terms of the IBC/05 scheme.

9. A brief record of the father's applications to the Minister is as follows. The negative decision of his appeal before the Refugee Appeals Tribunal ('RAT') was notified to him in December, 2007. He applied for residency in December, 2007. While awaiting a decision on that application, he was informed in March, 2008 that the Minister had declined to grant him refugee status and proposed to deport him. In April, 2008 he made leave to remain and subsidiary protection applications. In May, 2008 the Minister responded to his residency application, noting that the father fell outside of the IBC/05 scheme. In reply, the father made updated representations in support of his leave to remain and subsidiary protection applications. In December, 2008 he withdrew his subsidiary protection application and made additional representations in support of the leave to remain application. In January, 2009 the couple's third child was born and her birth certificate was furnished to the Minister. The Minister's decision to make a deportation order against the father issued to him in March, 2009.

**The residency application**
10. In December, 2007, following notification that his asylum appeal had been unsuccessful, the father applied for residency on the basis of his parentage of his Irish citizen son A. It was submitted on his behalf that 16,000 foreign-national parents of Irish citizen children had been granted residency under the IBC/05 scheme and a further 10,000 such parents were granted residency between 1996 – 2004 and that as he was the only member of his family whose situation was not regularised, this was a cause of great distress to the family as well as causing financial prejudice. The family's constitutional rights and rights under the European Convention on Human Rights ('ECHR') were highlighted and it was asserted that to refuse residency to the father would be:-

> *"unwarranted, unjustifiable and disproportionate and in breach of our client's rights as warranted under Article 8 of the ECHR and in breach of the personal rights of the Irish born citizen child and his rights as warranted under Article 40 of the Constitution. It would also be an unwarranted and unjustified and disproportionate interference with the private and family life of the family unit and the marriage of our client and his wife who has residency here [ and ] in breach of Article 41 of the Constitution, Article 8 of the ECHR and would be arbitrary, capricious, disproportionate, discriminatory, in denial of the principle of equality of treatment, would be an unlawful exercise or fettering of discretion and would be in breach of Article 14 of the ECHR. We remind you in this regard of the obligation pursuant to the European Convention on Human Rights Act 2003 on all organs of the State not to take any steps which are incompatible or inconsistent with the rights of our client and his family under the ECHR."*

11. It was further submitted that:-

> *"the Irish born citizen child and our client's family unit whose interests should be paramount should not suffer such discrimination. It is of particular importance and note in this regard that our client's wife has been granted residency in the State, which residency was renewed this year and our client's daughter, born in August 2007, by virtue of the residency granted to her mother has effective residency in the State."*

12. Appended to the residency application were testimonials from the couple's pastor in Ireland, their son's playschool and their local GP.

13. The Minister's office acknowledged receipt of the application for residency in February, 2008 and by letter dated the 21st May, 2008, the applicant father was informed that:-

> *"since the termination of the IBC/05 Scheme in March, 2005, there is no separate procedure for the processing of applications for permission to remain in the State as a parent of an Irish citizen child, nor is there any freestanding right of any person to make such an application".*

14. The father was reminded that he was illegally in the State without the Minister's permission and that the Minister proposed to make a deportation order against him. His three options as outlined in that letter were to voluntarily leave the State before the Minister would make a deportation order, to consent to the making of the deportation order or alternatively to make representations seeking permission to remain temporarily in the State on humanitarian grounds.

15. In reply, in May, 2008, the father made additional representations in support of the leave to remain and subsidiary protection made in March, 2008. The substance of those representations is discussed below.

**The leave to remain application under s. 3(6)**
16. Meanwhile, by letter dated the 11th March, 2008, the father was formally notified that the Minister had decided not to grant him a declaration of refugee status and intended to deport him. In April, 2008 the father applied separately for leave to remain under s. 3(6) of the Immigration Act 1999 and for subsidiary protection pursuant to *the European Communities (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006). The application for leave to remain furnished the father's personal and family circumstances in Ireland and the Minister was regularly furnished with updates until the father's file was examined in March, 2009.

17. The letter of application sent in April, 2008 repeated many of the submissions made in the application for residency. The testimonials furnished with the residency application were again forwarded to the Minister, along with an additional letter from the playschool, certificates from the GP indicating that the mother and son were being treated for asthma and letters from the family's landlords and the mother's employers. No country of origin information ('COI') was furnished at that stage.

**The subsidiary protection application**
18. The subsidiary protection application made in parallel with the leave to remain application addressed the same facts relied upon and rejected in the unsuccessful application for refugee status. It was stated that the father would face serious harm if repatriated to Nigeria in that he would be exposed to the anger of cult organisation which had already murdered two members of his household. In this context, the Minister was referred to several extracts from a Human Rights Watch ('HRW') report dated October, 2007 entitled "*Nigeria Criminal Politics, Violence, Godfathers and corruption in Nigeria*" and a HRW country summary on Nigeria in 2006, published in January, 2007. Some of these extracts had already been furnished to the RAT during the course of the father's appeal and had before

that been referred to in the Commissioner's negative recommendation in relation to his asylum application under s. 13 of the Refugee Act 1996.

19. The Minister acknowledged receipt of the subsidiary protection application on the 8th April, 2008.

**Additional representations**
20. In June, 2008 the father's solicitors made updated representations to the Minister in support of the leave to remain application, relying on the decision of the Supreme Court in *Oguekwe v. The Minister for Justice* [2008] 3 I.R. 795 ('*Oguekwe*') in relation to the rights of citizen children. The solicitor for the family repeated that the other members of the family were legally resident in this State because of the first child's Irish citizen status. That child was stated to be attending playschool, his mother was working and his father played a role in the care of that child while his mother was in employment. It was stated that:-

> *"The deportation of our client who is of exemplary character has not come to the attention of the authorities in this State, would have serious consequences for the entire family unit. We refer to country of origin information in respect of the general situation in Nigeria and the situation in respect of children and women. It is submitted that there is no substantial reason for deporting our client."*

21. Reference was made to extracts from COI reports on the treatment of women and children in Nigeria, in particular reports relating to discrimination against women in the area of employment and nationality and of the prevalence of domestic violence and sexual harassment in the workplace. Reference was made to the following COI reports:-

> • The 2005 Concluding Observations of the UN Committee on the Rights of the Child in respect of Nigeria;
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> • A US Department of State Report 2007 (released 2008);
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> • A 2006 Amnesty International Report "*Rape – the Silent Weapon*" on Nigeria;
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> • CEDAW Concluding Observations 2004;
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> • A US Department of State Report March 2008;
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> • A 2006 Human Rights Watch report entitled "*They Do Not Own This Place: Government Discrimination against Non-Indigenes in Nigeria*",
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> • A UN report on the Conclusion Observations of the Committee on the Elimination of Racial Discrimination dated the 1st November 2005;
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> • A US Department of State Report 2007;
>
> • The 2006 Human Rights Watch report "Criminal politics …" relied upon previously; and
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> • A Human Rights Watch World Report of 2008.

22. It was stated that:-

> *"Having regard to the treatment of women in Nigeria it would be wholly unreasonable and disproportionate to require our client's family and in particular the Irish citizen child to relocate to Nigeria in order to enjoy their family life. It is furthermore submitted that our client's children are entitled to the company and care of their mother in a country where women's rights are respected. It is abundantly clear that this is not the case in Nigeria."*

23. It was further submitted that:-

> *"Our client's Irish citizen child and his Irish born daughter are entitled to the care and company of their father in a country where the rule of law applies and where basic human rights are respected. The general human rights situation in Nigeria as set out in the above reports is so serious and the problems so endemic as to render – on this ground alone – untenable the suggestion that our client's family should relocate to Nigeria.*
>
> *The enclosed country reports show that the Nigerian state will fail to provide for the needs of our client's Irish citizen son and his daughter. The reports show a failure by the Nigerian state to protect the rights of children in general and a pattern of violence and discrimination against women. The reports also show a consistent pattern of general human rights violations by state and non-state actors and endemic corruption. All of this is clearly relevant to the assessment of whether the interference of the rights of our client's family which comprise an Irish citizen occasioned by our client's deportation would be proportionate and necessary in a democratic society."*

24. In a further submission it was stated:-

> *"It is abundantly clear having regard to the conditions prevailing in Nigeria that the best interests of our client's children (one of whom is an Irish citizen and the other who has effective residency in the State by reason of the residency granted to the mother) cannot possibly be served by the deportation of their father."*

25. After April, 2008 the Minister was regularly updated on the applicants' personal and family circumstances in Ireland right up to the date when the father's file was examined in March, 2009. In December, 2008 the father wrote to the Minister indicating that he was desperate to regularise his position, that his wife was pregnant again and that he was willing to withdraw his subsidiary protection application and proceed solely with the leave to remain application. Further information was then furnished including a letter from the mother's GP confirming her third pregnancy, handwritten letters from the mother and a letter offering the father employment on a "*project basis*". It was stated that the father had applied to various third level courses but that he was unable to take up employment or education or seek recognition of his accountancy qualifications because of his immigration status. The mother's letters stated, in moving terms, that sending her husband back to Nigeria would be truly devastating, especially to their children. She informed the Minister that she was writing her professional examination in banking and hoped to become a certified banker in the next couple of years. She also outlined the father's important role in helping with the care of the children while she was working and studying, and she detailed her reliance on her loving, caring intelligent father and husband while having her third child by caesarean

section. She urged the Minister to grant the husband leave to remain on humanitarian grounds so that he could have the same opportunities which she had to work and further his career and be economically viable to the State.

26. Receipt of the additional representations was acknowledged by the Minister by letter dated the 16th December, 2008. In February, 2009 the Minister's agents followed up on those representations, requesting a copy of the birth certificate of the newborn child, which was provided by return post and receipt was again acknowledged by the Minister.

**The Minister's impugned decision**
27. The father's leave to remain application was refused as the Minister accepted his officers' recommendation that there were no humanitarian circumstances of sufficient weight to cause the Minister to accede to the application and on the 5th March, 2009, the Minister signed a deportation order which was notified to the father by letter dated the 13th March, 2009. The father was advised to leave the State or to report to the Garda National Immigration Services by the 31st March, 2009. These judicial review proceedings challenging the Minister's decision were filed on the 30th March, 2009.

28. Before making the said recommendation, the Minister's agents examined the applicant father's file and the submissions made on his behalf. The departmental analysis memorandum ("examination of file") runs to 20 pages with more than half of that document taken up with information on general conditions in Nigeria and some specific information on a named organisation relevant to any risk of refoulement to the father if he were to be deported to Nigeria.

**The s. 3(6) consideration**
29. The Minister's agents followed the well established method of examining the father's file by following each of the headings set out in s. 3(6) of the Immigration Act 1999. The information available on the file and that which had been furnished was summarised and there is no dispute that every relevant fact, including the fact of the third child *N's* recent birth, was referred to under each heading in the summary. It was noted that the oldest child *A* was attending pre-school and was five years of age; that the mother was in employment and that she had stated that sending her husband back to Nigeria would be truly devastating, especially for the children. The father's employment record and employment prospects, his education record and work history in Nigeria were recorded and it was noted that there was a letter on file offering him employment on a project basis. It was observed that the pastor, who wrote a letter as a testimonial to the family's attendance at Church and their good character, shared the same name and address as the entity that made the job offer.

30. The facts of the father's two year residence in the State and his parentage of three children born here, including his two citizen children, were recorded as was his wife's stated need to have her husband available to help her with the new baby who had been delivered by caesarean section. The representations made on the father's behalf and all the testimonials and supportive letters were all noted. However, no reference was made to the receipt of the eight COI reports furnished with the updated leave to remain submissions in June, 2008 or to any of the extracts from that COI relating to the treatment of women and children in Nigeria. The Minister's agents also did not address the claimed effect of the deportation on the family, apart from commenting that "*Greg O'Neill Solicitors submitted that the Constitutional rights of their client's Irish citizen child would also be infringed by the return of their client to Nigeria.*"

**The s. 5 consideration**
31. A separate consideration was conducted into whether returning the father to Nigeria would constitute a breach of s. 5 of the Refugee Act 1996. The assertions he made during his refugee and subsidiary protection applications, insofar as they related to his asserted fear of the cult organisation, were summarised in considerable detail. COI available to the Minister was quoted. It was acknowledged that a number of cult organisations such as that named by the father exist in Nigeria, that they sow terror among the student populations of many university campuses and that they have powerful networks outside of university campuses. However, because their illegal activities were considered criminal offences prosecuted by the police, it was felt that if the father felt threatened he would have a number of options open to him, including reporting to the police, seeking help from human rights organisations or moving away from the threat. It was then concluded that returning him to Nigeria would not breach s. 5 of the Refugee Act 1996. The applicants do not challenge these conclusions.

**The conclusions made in the examination of file**
32. The advice given to and adopted by the Minister was that the circumstances of the applicant family were such that any proposed deportation would affect their family life, but as it accorded with the exceptions provided by Article 8(2) of the ECHR, the deportation of the father would not be an unlawful interference with their family life. The legal principles outlined in Strasbourg jurisprudence were recited in support of this conclusion. The principle consistently highlighted in that jurisprudence remains that the removal or exclusion of one family member from a State where other family members are lawfully resident will not necessarily infringe Article 8 of the ECHR, provided that there are no insurmountable obstacles to the family moving to and living together in the country of origin of the deported family member, even if this involves a degree of hardship for some or all members of the family.

33. The Minister's officer examining the file weighed up the competing interests of, on the one hand, the difficulties which would be generated by severing family ties which the deportation of the father would bring and, on the other, the State's rights to maintain immigration control. The officer concluded that the children (then 5, 4 and newborn) were of an adaptable age, insofar as two of them were too young to have commenced their primary education. If they were to move with their parents to live in Nigeria they could integrate into society there and all three were entitled to Nigerian citizenship. Although the father expressed the wish to perform his parental responsibilities to his children in Ireland, the jurisprudence of the ECtHR indicates that the Minister is not obliged to respect that choice. It was concluded that there is nothing to suggest that there are any insurmountable obstacles to the family being able to establish family life in Nigeria.

34. The officer considered the actual facts on the ground found to weigh against permitting the father to remain with his family in Ireland. Those facts were stated to include the unlikelihood of his obtaining employment in the current economic climate; the impact on the health and welfare systems to the granting permission to the father to remain in Ireland and how such a decision may lead to similar decisions in other cases. As in many other similar cases, it was concluded that if "*there is no less restrictive process available [than deportation] which would achieve the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control processing and monitoring of non-national persons in the State*" and this was stated to constitute a substantial reason associated with the common good which required the deportation of the father.

**Examination of the constitutional rights of the two citizen children**
35. This is the key issue in this challenge. The examining officer acknowledged the rights of *A*, *S* and *N* under Articles 41 and 42 of the Constitution, but stated that those rights were not absolute and had to be weighed against the rights of the State to control the entry of foreign nationals into its territory and against issues of national security, public policy, the integrity of the Immigration Scheme, its consistency and fairness to persons and to the State, as well as issues relating to the common good.

36. In support of this reasoning, the examining officer relied on the Supreme Court decision in *A.O. and D.L. v. The Minister for Justice* [2003] 1 I.R. 1) ('*A.O. and D.L*') where it was held that the constitutional rights of a citizen child do not include an automatic right to have his or her foreign-national parent or family members reside in Ireland. While the Minister was obliged to consider each case on its individual merits, he was entitled to take account of the consequences of allowing a particular applicant to remain in the State, which would inevitably lead to similar decisions in other cases. It was stated at p. 2 relying on a passage of Finlay CJ in *Fajujonu v. The Minister for Justice* [1990] 2 I.R.

> *"if… the Minister is satisfied for good and sufficient reason that the common good requires that the residence of these [non-national]parents within the State should be terminated, even though that has the necessary consequence that in order to remain as a family unit the three children must also leave the State, then that is an order he is entitled to make..."*

37. As with the consideration of the family's Article 8 rights, it was concluded that "*there is no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control processing and monitoring of non-national persons in the State*" and that this was a substantial reason associated with the common good, which required the deportation of the father.

38. The Minister then accepted that, notwithstanding this family's strongly stated desire to remain here where two of the children enjoy constitutional rights to live and to receive an education, the rights of the State prevailed as there were no insurmountable obstacles to their moving to Nigeria to maintain family life with their father. Although extensive examination of conditions in Nigeria as found in COI reports was referred to in the S.5 examination, no such examination occurred in relation to conditions in Nigeria for the citizen children.

**The Issues in the Case**

39. Initially, the applicants objected to the use by the Minister of the phrase "insurmountable obstacles" in his examination of the father's file and the Minister consented to leave being granted to challenge the validity of his decision on that ground on the 25th June, 2009. Along with many others, the proceedings were stayed while the test cases of *Alli and Asibor* were determined. As in those test cases, the agreed grounds were:-

> *(i) The Minister failed to apply the correct test in respect of the constitutional and convention rights of the applicants in applying a test of insurmountable obstacles in the context of considering whether the applicants could accompany the deported applicant to his country of origin;*
>
> *(ii) The analysis contained in the record of the Minister's decision did not reflect the principles laid down in the Supreme Court in the case of Oguekwe and in particular did not identify a substantial reason which required the deportation of the first named applicant with sufficient clarity but rather used a formula of words and did not sufficiently weigh and consider facts relevant to the citizen children and the family unit; and*
>
> *(iii) The decision to deport the first named applicant was not proportionate or reasonable.*

40. However, at the hearing of the proceedings, the applicants concentrated on two criticisms of the Minister's decision to deport the father: (a) that the Minister failed to consider the submissions made to him by the applicants, which failure – it was argued – was demonstrated by the lack of reference in the examination of file to COI on conditions for women and children in Nigeria; and (b) in the light of the Supreme Court's decision in *Meadows*, it would be unreasonable and therefore disproportionate to expect the mother and her children to return to Nigeria if she wished to enjoy family life with her husband.

**(A) Failure to recite that submissions were considered**

41. There is no doubt that the consideration of the applicant father's file contains no mention of any of the submissions made relating to the general conditions facing women and children in Nigeria. In fact, there is no specific reference to the eight reports submitted, nor is there any mention of the extensive submissions made on conditions in Nigeria, apart from the comment under the heading s. 3 (6) (i) (Representations made by or on behalf of the Person) that "*Greg O'Neill Solicitors submitted that the Constitutional rights of their client's Irish citizen child would also be infringed by the return of their client to Nigeria*." The first question for the Court is whether the Minister's decision ought to be quashed because of his failure to specifically recite that the applicants' submissions and the COI furnished in relation to conditions for women and children in Nigeria had been considered.

42. It should be observed that the mother here, unlike the mothers in *Alli and Asibor*, never expressed an intention to remain in Ireland with her family if her husband were to be deported. She did state in a letter to the Minister that to remove the father would have a devastating effect on his children, but it is not clear whether she meant that this effect would arise if they had to live without him in Ireland or if they had to move to Nigeria. The s. 3 examination contained a formulaic consideration of the possibility that the children would stay behind in Ireland. The observation was made that, notwithstanding his parental duties and obligations, the father did not join the mother and their son in Ireland until 2006 and that his family existed without him during that time. It was concluded that if the mother chose to remain in Ireland with her children, the impact on the family would be less than if her husband had been with the family for a much longer time. The fact that two further children had been born during the two years that the father had been in the State, that all three children had lived all their lives in Ireland and that although very young, their father was present and played a nurturing role during the entirety of the two younger children's lives was not mentioned.

43. Returning to the actual submissions on conditions in Nigeria, the overwhelming thrust of the submissions made and the extracts quoted from the reports furnished to the Minister was that Nigeria is a country where citizens, and especially women, do not enjoy the same human rights guarantees or opportunities in life as they do here and that the high incidence of rape and domestic violence would make it unreasonable for the family who had been living in Ireland for a period of over five years to relocate there. The submissions were undoubtedly directed to the relocation of the family to Nigeria if the father were to be deported.

44. The extracts upon which the applicants' submissions focused are familiar to this Court as the source COI reports are widely relied upon in leave to remain applications. It must be assumed that they are also extremely well known to the Minister, who frequently refers to the same reports. Many of the eight reports submitted lacked relevance to the facts pertaining to this middle class, Christian Yoruba family who have never claimed to be affected by ethnic, tribal or religious conflict, nor do they have any asserted connection with the violence prevalent in the oil producing Delta region. The report on the treatment of non-indigenes is irrelevant in its entirety given that – as was noted by the examining officer – the two Irish citizen children can clearly trace their roots to their parents' communities in Nigeria and are entitled to Nigerian citizenship in accordance with the Nigerian Constitution. Further, no submission was

made associating the difficulties relating to problems in the field of employment for women with the mother's asserted history of working as a banker in Lagos, nor did the mother put forward any personal account of discrimination or sexual harassment in her employment or workplace before she came to Ireland. Similarly, the applicants' submissions made no attempt to relate the threat of domestic violence to this couple who submitted that they were a happily married couple. These observations by the Court were not matters which were noted either expressly or by implication by the examining officer.

45. Counsel for the applicants argues that the s. 3(6) submissions directed the Minister towards the treatment of women and children in Nigeria, which is relevant to this family, two of whom are Irish citizens.

46. Counsel for the respondent argues that the applicants failed to identify how any particular COI would or could have made a difference to the consideration of this family's circumstances under s. 3(6). She accepts that the Minister is obliged to consider any information furnished in a general way, but argues that it would be unduly onerous on the Minister if he were expected to recite and comment on all the COI furnished when, as in this case, it had no specific reference to the applicant or his family. She accepts that simply because the examining officer stated at the close that the Minister had weighed all of the factors outlined above in relation to the family did not in itself make it so. However, she reminds the Court that Ms. Laurena Gradwell, an Assistant Principal Officer in the Minister's office who swore the affidavit on his behalf, has sworn that all information, submissions and arguments made were considered by the Minister. Ms. Gradwell averred that:-

> *"as is quite proper… the examination of file does not itemise each and every minute factor that was considered, particularly as the matters raised on behalf of the applicants were deemed not to present insurmountable obstacles to the family opting to live in Nigeria."*

47. Ms. Gradwell stated that there had been "*no failure to properly and adequately consider the application.*" She also took issue with the assertions in the father's affidavit that certain information was not considered when in fact the source – a US Department of State report – was actually referred to in the s. 3 examination.

**Decision**

48. Before the Minister may avail of his undoubted power to deport any person who is unlawfully in the State, he is obliged by s. 3(4)(a) of the Immigration Act 1999 to notify the proposed deportee of his right to make written representations to the Minister. The object of those representations must be to point out any special reasons which may exist for permitting that person to stay in Ireland, notwithstanding that his or her legal right to remain has expired. Generally speaking, it seems to this Court that comparisons between employment opportunities, health and welfare systems available in this State with those available in the State of origin, or the provision of general information concerning tolerance in that State of domestic violence, would be unlikely to invoke the Minister's discretion to grant humanitarian leave to remain. The almost prevalent habit of sending large amounts of completely unfocused but negative general COI reports without connecting that information with the applicant's specific situation has very little useful role in s. 3 applications.

49. While the father in this case may have fallen into the same trap, he and later the mother herself did make some attempt to inform the Minister, albeit in a very generalised fashion, that conditions in Nigeria were so bad that it would be a breach of their citizen children's constitutional rights for them to be expected to go there when they had known no other life but one in Ireland. That life in Ireland allowed the mother to work and attend courses to advance herself, where she and her children enjoyed a life free of sexual discrimination and sexual violence and where attitudes to domestic violence were less tolerant than in Nigeria. In particular, it was asserted on a number of occasions that the deportation of the father would be "*an unwarranted and unjustified and disproportionate interference with the private and family life of the family unit and the marriage of our client and his wife who has residency here*."

50. Having received those representations, the Minister was obliged under the terms of s. 3(6)(i) of the Immigration Act 1999 to have regard to them. The question is how far he has to go to demonstrate that regard. If all the submissions made had to be summarised or listed, the decision-making process would become intolerably difficult and the lengthy recitations of those submissions would render decisions turgid in the extreme. The real issue clearly does not lie in the recitation but in whether the decision gives confidence that essential submissions were considered. The decision must be of sufficient clarity for its reasoning to be understood. It is difficult to lay down any strict guidelines as to the content and form of the decision due to the immeasurable variety of personal facts which have to be set against the varying representations and their relevance to those personal facts.

51. In *Oguekwe* Denham J. considered the very issue which is before this Court. The applicant father in that case had furnished a great deal of COI on education opportunities for children. Denham J. held that there was no requirement to conduct a fact-specific examination of conditions prevailing in the country where the child's parent may be deported, but that the Minister should view the situation in a general way and that this general approach would not exclude a more detailed analysis in an exceptional case.

52. In *Meadows* the Supreme Court considered the adequacy of the Minister's reasoning when he determined that there was no danger of refoulement facing the applicant if she were to be returned to Nigeria. Murray C.J. held that where material is presented to the Minister on behalf of the proposed deportee in relation to the risk of refoulement, then the Minister must specifically address that issue and form his own opinion of the risk. This is notwithstanding that officers or tribunal members have, at an earlier stage in the course of the asylum application, come to a conclusion on the same claim. The majority of the Supreme Court was critical of the Minister's decision in *Meadows* because the decision was couched in terms which were so vague and opaque that its underlying rationale could not be properly or reasonably deduced. Similarly, the recommendation included in the memorandum submitted to the Minister, which included the statement that "*refoulement was not found to be an issue in this case*", was criticised because no reason had been provided for that conclusion. The majority found that on that basis, there was a fundamental defect in the Minister's decision.

53. In *Oguekwe*, Denham J. was considering submissions on education opportunities available to the Irish citizen child in Nigeria, while in *Meadows* the Supreme Court was dealing with submissions on country of origin conditions in the context of the absolute nature of the prohibition of refoulement under s. 5 of the Refugee Act 1996. In both instances, the underlying principles clarified by the Supreme Court related to the Minister's decision-making process when such decisions could encroach on constitutional rights. This Court can find no reason why the same principles should not also be applied to submissions on cultural attitudes towards women and children in the country to which the family may have to move when the constitutional rights of citizens are involved. In all such instances the decision relating to prevailing conditions as they apply to fundamental rights must be reasoned so that the rationale can be properly or reasonably deduced applies. As Denham J. held in *Oguekwe* at p.825:-

> *"The Minister is required in this process to consider the constitutional and Convention rights of the applicants. This includes express consideration of, and a reasoned decision on, the rights of the Irish citizen child."*

54. The challenge in this case is not dissimilar to the issue of the Minister's failure to indicate expressly or by implication that any regard had been afforded to representations relating to conditions in Nigeria for women and children. The Minister was dealing with the deportation of a father whose three children and wife were legally established in Ireland. The most substantive issue before the Minister had to be the two Irish citizen children's constitutional rights to remain in Ireland. While those constitutional rights are not unqualified, a decision to deport their father would deprive them of his society, care and company in Ireland. In such circumstances, if those children had to follow their father to enjoy his society and care, the Minister had to provide a reasoned decision as to whether the rights of the two Irish citizen children would be affected by conditions in Nigeria when conducting a balancing exercise between the children's rights and the rights of the State. It would be difficult to see how he could conclude that there were no insurmountable obstacles to the family enjoying their family rights in Nigeria without having considered, in a general way, what those conditions were.

55. While conducting his assessment of conditions in Nigeria and engaging in that balancing exercise, the Minister could have said that he considered the extracts furnished to him to have been irrelevant. He would have been entitled to refer to the State's rights and to properly balance those rights against the children's citizen rights in the light of the submissions made, but he failed to do so. He could have referred to the parents' original asylum questionnaires or to other information to which he undoubtedly had access to in order to assess the fears expressed by the father as to future life in Nigeria with his wife and children. Indeed, it seems very likely that the Minister had more information than is available to the Court as, for instance, the mother's asylum application. Obviously, the Court's view on the extracts furnished is no substitute for the regard which the Minister should have given to the representations as it does not fall to this Court to determine the relevance or otherwise of those representations. That was for the Minister to address.

56. Applying the reasoning of Murray C.J. in *Meadows* to the Minister's decision in this case, the question before the Court is whether it is possible to properly discern the rationale and basis for his determination that the constitutional rights at issue had been fully considered. The Court must answer that question in the negative because no reference was made to the submissions and no reason was expressed for disregarding them. As was noted by Fennelly J. in *Meadows* at para. 79: "*The Minister might have had any one of a range of reasons for his decision, but the court simply does not know*." The Minister could have made it clear in his decision that he did have regard to the father's representations, but he simply failed to do that.

57. For this reason, the decision of the Minister, which has the potential to seriously encroach on and diminish the children's constitutional rights, is defective in failing to provide any reason for ignoring submissions made relating to the conditions in Nigeria. The decision to deport is defective and will therefore be quashed.

58. Lest this decision be taken as an inroad into the decisions in *Alli and Asibor*, it is necessary to reiterate that the case-law examined in those cases leaves no doubt that while constitutional rights are guaranteed from unjust attack, those rights are neither absolute nor unlimited and must sometimes yield to other conflicting rights such as the operation of a fair immigration system.

59. This concept was recognised as long ago as 1965 during a relatively peaceful time in the State's development and long before the amendment to the Offences against the State Act 1939, the arrival of drug trafficking and organised crime, enormous economic expansion, followed by a huge rise in asylum claims as well as mass immigration and then the current economic collapse. As was held by Kenny J. in *Ryan v. Attorney General* [1965] I.R. 294 at pp. 312-313:-

> *"None of the personal rights of the citizen are unlimited; their exercise may be regulated by the Oireachtas when the common good requires this. When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen."*

60. The law remains – as set out by the examining officer – that "*if the Minister is satisfied for good and sufficient reason that the common good requires that the non-national parent should be removed from the State, even if that means that in order to preserve the family unit the Irish citizen must also leave the State, then that is an order he is entitled to make.*" However, it could not be said in this particular case that the Minister was satisfied for good and sufficient reason that the deportation was proportionate and reasonable when all facts submitted were not evaluated in a reasoned decision relating to the constitutional rights involved.

**(B) *Meadows* and proportionality**

61. The second issue is whether it was unreasonable and therefore disproportionate to expect the mother and her children to move to Nigeria to enjoy family life with the father.

62. While extremely important, this second ground loses its significance in light of the Court's earlier finding that the decision ought to be quashed because of the lack of clarity in the Minister's reasoning. However, as the second issue on which the applicants concentrated in this case is relied upon by a large number of other applicants, it becomes appropriate to deal with that specific ground.

63. There were two parts to this challenge. First, there was the assertion that the Minister did not identify a "substantial reason" requiring the deportation of the father in accordance with the judgment of Denham J. in the Supreme Court in *Oguekwe* and second, that immigration control was not a reason of sufficient substance to outweigh the detriment that the deportation would inflict upon the applicant family now that, following the decision in *Meadows*, proportionality is an aspect to be considered when reviewing the reasonableness of an administrative decision.

64. The first of those two issues has already been fully thrashed out and determined in *Alli and Asibor* and previously in A.*O. and D.L*. In the former, this Court adopted the rationale of a series of decisions in the High and Supreme Courts (being *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593; *Osheku v. Ireland* [1986] I.R. 733; *Fajujonu v. The Minister for Justice* [1990] 2 I.R. 151 ('*Fajujonu*'); *A.O. and D.L*. and *Oguekwe*) in holding that a "substantial reason" requiring deportation of the parent of a citizen child may include considerations relating to immigration policy. Immigration policy includes the effect on the health and welfare systems of permitting persons unlawfully in the State to remain and the question of how such a decision may lead to similar decisions in other cases. The proviso recognised in all the cases cited is that before concluding that a deportation order is necessary, reasonable or proportionate, the Minister first has to afford due and proper consideration to the constitutional and Convention rights of the citizen children and to their personal circumstances insofar as they are known to him.

65. These same principles were also considered and applied in *Igiba (a minor) & Ors v. The Minister for Justice* [2009] I.E.H.C. 593, (Unreported, High Court, Clark J., 2nd December, 2009) ('*Igiba*'), delivered on the same day as *Alli and Asibor*, but argued on a later date than those cases. The decision in all three cases can be encapsulated by paragraphs 20 and 21 of *Igiba* which said:-

> *"In brief, the Court has found that to ask whether there exist any insurmountable obstacles to the family returning with the deportee is essentially the same as to ask whether it would be reasonable to expect the family members to establish family life elsewhere. In other words there is no difference of any substance between the test applied by the European Court of Human Rights (ECtHR), as distilled in Mahmood, and the test set out by Denham J. in Oguekwe. The U.K. jurisprudence which clarifies the application of Mahmood derives from a misunderstanding from what was said by Lord Bingham in R v. Secretary of State for the Home Department, ex parte Razgar [2004] 2 A.C. 368 and has no impact on the Irish situation as no "exceptionality" test has ever applied here. In the circumstances, the applicants' first ground fails in this case as it did in Alli and Asibor.*
>
> *The second ground relates to the identification of a "substantial reason" which requires the deportation of the parent of an Irish citizen child. This is also a matter that was considered at length by this Court in Alli and the conclusions reached in that case apply equally in this case. As was the case in Alli and Asibor, the Minister expressly considered each of the competing rights in their fact-specific context, and he balanced those rights against those of the State. He was clearly aware of the consequences of the deportation on the citizen child, her mother and her siblings. In the circumstances, it was open to him to identify general reasons of immigration control associated with the common good as a "substantial reason" which required the deportation of Ms Igiba. Provided that he engages in a fact-specific analysis and weighs the competing interests there is no obligation on the Minister to identify an applicant-specific reason."*

66. However, as with the argument generally on the decisions of *Alli and Asibor*, it was submitted in the within case that the Court's previous decisions should be revisited as – in the applicants' submission – those conclusions were at variance with the decision of Cooke J. in *O & Ors v. The Minister for Justice* [2009] I.E.H.C. 448, (Unreported, High Court, Cooke J., 14th October, 2009) (a decision delivered prior to that in *Alli and Asibor*). It was submitted that Cooke J. had found, following *Oguekwe* and *Dimbo v. Minister for Justice* [2008] I.E.S.C. 26, (Unreported, Supreme Court, 1st May, 2005), that immigration control was not a sufficient reason to justify the deportation of the parent of a citizen child. Counsel for the applicants quoted extensively from that decision to support his argument in the within case.

67. By a quirk of fate, counsel for the respondent who appears in this case, also represented the respondent in *Igiba*. She relied on the decision in *Osunde v. Minister for Justice* [2009] I.E.H.C. 448, (Unreported, High Court, Cooke J., 14th October, 2009) ('*Osunde*') in support of her argument that the integrity of the immigration system was, in fact, a valid reason for deportation of a person who would leave behind Irish citizen family members lawfully residing in the State. She submitted that Cooke J. had noted that the Minister in *Osunde* had engaged in an applicant-specific analysis of all of the relevant facts and was aware of the gravity of the consequences of his deportation decision for the family. He gave reasons of substance for his decision and determined that he was satisfied that general reasons of immigration control would constitute a sufficient "substantial reason" requiring the deportation of the applicant.

68. Having reviewed the *Osunde* decision, the Court fears that the applicants here have fallen into error in citing background argument as the actual reasoning in *Osunde*, rather than addressing the rationale of the determination. Cooke J. held in refusing the relief sought that:-

> *"52. The argument advanced in the present case was to the effect that it is untenable to propose that the integrity of the immigration system could constitute a substantial reason for depriving a family of the presence and protection of a father and husband and thus interfering with the personal constitutional and convention rights of the applicants in question. It appeared to be implicit in this argument that a substantial reason would exist only if the Minister identified some reason relating to the person, character or conduct of the first named applicant himself which would, as it were, override the otherwise superior rights in question.*
>
> *53. The court does not consider that this was intended by the Supreme Court namely that the State's rights as mentioned in item 10 of the list in the Dimbo [and Oguekwe] case could not in itself constitute a substantial reason because they were abstract reasons of a policy of a political or social nature rather than specific factors relating to the individual personality of the proposed deportee. It seems to the court that the word "substantial" is used in its sense of a reason which has substance and thus as the antonym of "insubstantial" or "inconsequential". The very fact that such rights are enumerated at item 10 in the list demonstrates that the Supreme Court considered them capable of having such substance but that whether in any given case the State's rights will be sufficiently substantial to outweigh the rights of the deportee and his or her family members must depend, as the court indicated, on the full factual matrix of the particular case. Thus, the State will always have a substantial and serious interest in maintaining the integrity of its borders and the effectiveness of its immigration system. But whether that consideration is sufficient to prevail over the private or family rights of particular persons depends on the specific circumstances of the case. In that sense the substantial character of the State's reason for deporting is relative and will alter when assessed against the circumstances of the deportee and his or her family including, obviously, how long they have been in the State, what roots if any they have put down here, whether the minor children are at school and at what stage of schooling they may be and so on.*
>
> *54. In this case those factors have been addressed in the analysis made by the Minister when formulating the conclusion reached in favour of making a deportation order. In the court's judgment the reasons outlined are reasons of substance and, as such, cannot be interfered with as being unlawful or invalid.*
>
> *55. The court accordingly finds that grounds A and C are not made out and the application for judicial review will therefore be refused."*

69. This Court is therefore satisfied that the applicants' first argument relies on an erroneous understanding of *Osunde* with respect to what constitutes a "*substantial reason*" requiring a deportation order which would have consequences for Irish citizen children. That argument is not therefore sustainable.

70. The substance of the applicants' second argument was that immigration control in this case was not a reason of sufficient substance to outweigh the detriment that the deportation would inflict upon these particular applicants. The argument advanced was that the decision in *Meadows*, and especially the judgment of Murray C.J., had provided elucidation of the *Oguekwe* requirements when considering the deportation of the foreign-national parent of a citizen child, which must now pass a proportionality test in order to be considered reasonable. In particular, reliance was placed on this passage from the judgment of Murray C.J. in *Meadows*:-

> *"In examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense I see no reason why the Court should not have recourse to the principle of proportionality in determining those issues. It is already well established that the Court may do so when*

*considering whether the Oireachtas has exceeded its constitutional powers in the enactment of legislation.*

*The principle requires that the effects on or prejudice to an individual's rights by an administrative decision be proportional to the legitimate objective or purpose of that decision. Application of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness."*

71. This Court finds no substance in this argument. The passage quoted from the Chief Justice's decision does not contain any new principle, neither is it possible to infer that the *Meadows* decision effected any change to the application of the principle of proportionality, either under the ECHR or the Constitution. The three judges of the Supreme Court who formed the majority, who held that proportionality was part of the assessment of reasonableness appropriate to the judicial review of all administrative decisions affecting fundamental rights, were individually at pains to state that the concept of proportionality was not new in Irish law. The first paragraph of the very passage of Murray J. relied upon by the applicants states:-

*"It is already well established that the Court may do so [resort to the principle of proportionality] when considering whether the Oireachtas has exceeded its constitutional powers in the enactment of legislation."*

72. Since its delivery, the *Meadows* judgment has been cited in support of many propositions, including that all previous deportation decisions must now be considered frail and that the legal landscape pertaining to the applicable test in judicial review has been redrawn. In fact, the *Meadows* judgment primarily addresses the specific question posed by Gilligan J. (who refused leave in the High Court but permitted an appeal to the Supreme Court) as to the appropriate test to be applied when determining the reasonableness of a decision which affects or concerns constitutional rights or fundamental rights. The decision of the Supreme Court also addresses the question of what is required of the Minister when a failed asylum seeker makes specific representations to him pursuant to s. 5 of the Refugee Act 1996 in an application for humanitarian leave to remain. The decision then provides direction on the type of reasoning required in any decision that deportation will not breach the prohibition of refoulement.

73. The key guidance to be derived from *Meadows* is not its discussion on the inclusion of the concept of proportionality in the test of reasonableness, but rather the unanimous determination by the Court that no new standard of review such as *anxious scrutiny* as applied in the UK forms part of Irish law. The majority determined that the test of reasonableness which has been applied since *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 ('*Keegan*') was adequate to provide an effective remedy in judicial review, even where the decision under review has the potential to affect a person's fundamental rights. Fennelly J. stated in his decision at paras. 70 and 72 that:-

*"In my view, it is neither appropriate nor necessary to have a different standard of review for cases involving an interference with fundamental, constitutional or other personal rights."*

74. Later in the same paragraph, Fennelly J. continued:-

*"It seems to me that the principle of proportionality, more fully developed in the judgments which have been delivered by the Chief Justice and of Denham J, can provide a sufficient and more consistent standard of review, without resort to vaguer notions of anxious scrutiny. The underlying facts and circumstances of cases can and do vary infinitely. The single standard of review laid down in Keegan and O'Keeffe is sufficiently responsive to the needs of any particular case. [...] <u>This does not involve a modification of the existing test as properly understood. Rather it is an explanation of principles that were already implicit in our law.</u>" (emphasis added)*

75. In her judgment, Denham J. reiterated her position, at para. 18, on the appropriate test to be applied in judicial review a number of times. That determination was:-

*"[...] Where fundamental rights and freedoms are factors in a review, they are relevant in analysing the reasonableness of a decision. This is inherent in the test of whether a decision is reasonable."*

76. Adopting the reasoning of Henchy in *Keegan*, she stated:-

*"25. [...] Any effect on rights should be within constitutional limitations, should be proportionate to the objective to be achieved. f the effect is disproportionate it would justify the court setting aside the decision.*

*26. [...] I am satisfied that the test applied by Henchy J., and agreed to by all of the members of the Court, is the correct test. It should be applied in all the circumstances of each case. In a case where the decision maker has a special technical skill, such as in O'Keeffe v. An Bord Pleanála , the test should be applied strictly. In a case where fundamental rights are in issue, such rights form part of the constitutional jurisdiction of the Court in which a reasonable decision is required to be made and, if made, analysed. [...]*

*38. <u>The test as stated by Henchy J. in The State (Keegan) v. Stardust Victims' Compensation Tribunal is sufficiently general when construed broadly in relevant circumstances to be applied so that fundamental rights may be protected</u>.*

*39. The term "irrational" is less relevant in that it relates to situations which are alleged to be perverse and arise less frequently in litigation.*

*40. The term "unreasonable" is the key, it is broader and essentially the basis of this type of scrutiny. A decision which interferes with constitutional rights, if it is to be considered reasonable, should be proportionate. If such an approach is not taken then the remedy may not be effective. This is relevant especially when access to the courts has been limited by the legislature."(emphasis added)*

77. Murray C.J. considered that the *Meadows* appeal concerned the ambit of the criteria which the courts should apply when judicially reviewing the validity of administrative decisions. He carefully examined the principles of law applicable to judicial review of such decisions which were found in *Keegan* which in turn had adopted the principles enunciated in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223 (the *Wednesbury* principles). He considered that the issue of reasonableness in judicial review as found in *Keegan* was "*whether the conclusion reached in the decision can be said to flow from the premises. If it plainly does not, it stands to be condemned on the less technical and more understandable test of whether it is fundamentally at variance with reason and common sense."* Murray C.J. then examined the principles set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. He noted that Finlay C.J., who had provided the judgment of the Court, applied the principles set out by Henchy J. in *Keegan* as being:-

*"In dealing with the circumstances under which the court could intervene to quash the decision of an administrative officer or tribunal on the grounds of unreasonableness or irrationality, Henchy J. in that judgment set out a number of such circumstances in different terms. They are:-*

*(1) It is fundamentally at variance with reason and common sense.*

*(2) It is indefensible for being in the teeth of plain reason and common sense.*

*(3) Because the court is satisfied that the decision-maker has breached his obligation whereby 'he must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision.'"*

78. Murray C.J. in *Meadows* then stated that:-

*"The foregoing citations set out the essence of the principles which were applied in those two cases by this Court when judicially reviewing the administrative decisions in question."*

79. Murray C.J. went on to consider the larger constitutional jurisdiction of the superior courts in Ireland when judicially reviewing the exercise of powers of governmental and administrative bodies so as to ensure that those powers are exercised in a manner consistent with the rights of individuals affected by the decision in question. He found that:-

*"In exercising its jurisdiction to judicially review acts or decisions of the other branches of the Government the Courts must, of course, respect the powers and functions conferred on the executive and the parliament by the Constitution and by law. As I stated in T.D. & Ors v. Minister for Education and Others 'judicial review permits the Courts to place limits on the exercise of executive or legislative power not to exercise it themselves.'"*

80. Having outlined the well established reasons for which administrative decisions may be impugned, including for being repugnant to the Constitution, Murray C.J. observed that in most cases a decision is impugned for unreasonableness. He restated the legal principle that [when] "*reviewing the rationality or otherwise of the decision it remains axiomatic that it is not for the Court to step into the shoes of the decision maker and decide the issue on the merits but to examine whether the decision falls foul of the principles of law according to which the decision ought to have been taken*." He then went on to say that when "*examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense I see no reason why the Court should not have recourse to the principle of proportionality in determining those issues. It is already well established that the Court may do so when considering whether the Oireachtas has exceeded its constitutional powers in the enactment of legislation.*"

81. Contrary to the extraordinary arguments made that proportionality is a new and defining principle in judicial review, the Murray C.J. explained to the contrary when he said:-

*"The principle requires that the effects on or prejudice to an individual's rights by an administrative decision be proportional to the legitimate objective or purpose of that decision. Application of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness. I do not find anything in the dicta of the Court in Keegan or O'Keeffe which would exclude the Court from applying the principle of proportionality in cases where it could be considered to be relevant. Indeed in Fajujonu v. Minister for Justice [1992] I.R. 151 to which I will refer in more detail shortly, this Court made express reference to the need of the Minister to observe the principle of proportionality when deciding whether to permit the immigrants in that case reside in the State."*

82. Clearly the inclusion of proportionality as part of reasonableness did not have its origins in *Meadows*.

83. When Murray C.J. was reviewing previous decisions on deportation, reasonableness and proportionality, he distinguished between cases under s. 3 of the Act of 1999 involving humanitarian considerations where the Minister enjoys a broad discretion, contrasted with the quite different cases involving s. 5 of the Refugee Act 1996 and non-refoulement. He then referred to his previous decision in *A.O. and D.L.* where he held that "*in deciding whether there is such good and sufficient reason in the interests of the common good for deporting the non national parents the Minister should ensure that his decision to deport, in the circumstances of the case is not disproportionate to the ends sought to be achieved.*" He recalled that on the particular facts in that case, he had said:-

*"It seems to me entirely reasonable to conclude that the circumstances relating to the applicants are not unique but on the contrary it is a situation that could apply or would apply to a substantial proportion of applicants for asylum. In these circumstances it seems to me entirely reasonable that the Minister would consider whether a refusal to make a deportation order in such circumstances could call in question the integrity of the immigration and asylum systems including their effective functions. This is a matter for him."*

84. Murray C.J. then referred to his conclusion in *A.O. and D.L*. which was:-

*"The Minister had a stark choice to make, either to deport or not to deport, there is no halfway house. No circumstances have been disclosed or shown to exist upon which one could consider the Minister's decision to be disproportionate."*

85. He continued:-

*"On the other hand I did not exclude that there may be cases where, in exceptional circumstances, the Court might require evidence of the manner in which the integrity of the immigration and asylum systems could be called in question but that was not required in that particular case. What I had in mind there was that a purely formulaic decision of the Minister may not in particular circumstances be a sufficient statement of the rationale or reasons underlying the decision."*

86. The Chief Justice was clearly restating the law relating to the deportation of the parents of citizen children and not changing that law.

87. He also took the opportunity in *Meadows* to consider the Minister's functions under s. 3 of the Act of 1999. He was of the opinion that the Minister had been conferred with a broad discretion in that regard. The Minister's function was to balance the personal circumstances and other matters referred to in s. 3(6) with the common good and public policy, including the integrity of the asylum

system. He found that even if the balance favoured the applicant, the Minister is not bound to accede to a request for leave to remain since he has to balance any humanitarian considerations on file with broader public policy considerations which may not be personal to the person concerned. This aspect of the Chief Justice's decision in *Meadows* is frequently overlooked. It affirms that it is the Minister who retains the discretion and not the reviewing court as it is only the Minister who has responsibility for public policy in this area and it is for him to decide where that balance lies.

88. This is surely an unequivocal statement that the law relating to the deportation of the parents of citizen children and of judicial review is unchanged.

89. The decision in *Meadows* cannot therefore affect the decision in *Alli and Asibor* where this Court held that the question of whether or not "insurmountable obstacles" exist means no more than asking whether or not it is reasonable to expect the family to move to the country of origin of the proposed deportee. Proportionality was considered by the Minister in his decision in *Alli and Asibor* and formed part of the judicial review grounds considered by the Court in that case. Proportionality then, and long before that, formed part of a sound evaluation of the reasonableness of an administrative decision. A decision could not be reasonable if its effect were disproportionate to the objective pursued.

90. All decisions involving the deportation of a failed asylum seeker come at the end of the asylum claim process. The Minister must, if he is made aware of the existence of a spouse and children, be fully aware that the deportation would have the effect of breaking up a family. If, notwithstanding this disruption, having fully considered all relevant submissions made to him, the Minister makes the deportation order because he is satisfied that family life can reasonably be continued with the deported parent in the receiving country, then the reason for the deportation will be proportionate to the Minister's legitimate objective of immigration control. The very fact that a particular family can, without any great difficulty, follow the deported father is the essence of the reasonableness of the decision to deport.

91. The Minister must go a step further if there are citizen children and specifically consider the rights of those citizen children and must furnish a reasoned decision on the rights of such citizen children.

92. When balancing the State's interests against those rights, the Minister is undoubtedly entitled to take patterns of immigration into account and to have regard to the demands made thereby on the State's resources. This was stated by Hardiman J. in *A.O and D.L.* in 2003. While much has changed relating to resources since the financially happier days of 2003, no elaboration of the Minister's current immigration policy or the specific factors relevant to the common good was set out in the consideration of the father's file in this case. The father has stated in all of his correspondence relating to his application for leave to remain that 26,000 foreign-national parents and family members of citizen children have already been permitted to remain prior to 2005 and that he wishes to be included in this number. In the examination of file the Minister in effect says: *if I make an exception for you, I may have to make exceptions for other such parents of citizen children and this will have an effect on our social welfare and health system and our immigration policies*.

93. The Minister did not expand on just how large an effect on the social welfare and health systems such an exception made would have, nor did he outline what exactly his policy on immigration is or just what the "Immigration Scheme" is. The Court's experience is that this somewhat clipped and non-expansive language is common to all such decisions. It is left to the Court to try to discern this policy or scheme from previous decisions, legislation, statutory instruments and website information. Those sources indicate a closed immigration policy to non-EU nationals, unless an entry or work visa is first obtained. For this reason the Court considered that it would be helpful if the Minister could provide figures on the extent of the number of fathers who were in the position of Mr O-A, Mr Alli and Mr Asibor who were outside of the IBC/05 scheme, who have asserted a nurturing role in the upbringing of their citizen children in the State and who relied on their children's constitutional rights in seeking permission to remain in Ireland.

94. While it would also have been useful to know how many such fathers had sought visas to legally visit or join their families, how many had utilised the asylum system to enter the State or how many such fathers now face deportation, the Court confined its enquiries to statistics readily available on the number of fathers who have sought permission to remain in the State because of their parentage of citizen children born within the applicability of the IBC/05 scheme.

95. In this regard, the respondent furnished three affidavits. The first affidavit was sworn on the 19th May, 2006, by Ms Maura Hynes, the then officer in charge of the administration of the IBC/05 scheme. This affidavit was specifically prepared for the *Oguekwe* case in the Supreme Court and was exhibited in an affidavit sworn for this case by Mr Michael Flynn, an assistant principal officer who is currently in charge of the Irish Born Child Unit. These affidavits outline the problems created by the sudden influx in the 1990s of large numbers of asylum seekers, many of whom gave birth shortly after arrival in the State to children who were Irish citizens. The affidavits outlined the development of the law in this area, including the amendment to the Constitution in 2004 and the establishment of the IBC/05 scheme to deal with some 11,000 outstanding residency applications from the parents of citizen children born in Ireland before the Irish Nationality and Citizenship Act 2004 came into effect.

96. Mr Flynn's affidavit discloses that, in fact, not 11,000 but 17,917 parents and approximately 15,000 siblings of Irish citizen children applied for permission to remain under the IBC/05 scheme. Originally, only 933 of those parents were refused but, ultimately, the vast majority were granted permission to remain after the test cases of *Bode v. Minister for Justice* [2008] 3 I.R. 663 and *Oguekwe*. The numbers of fathers who remain outside the scheme can be extrapolated from the discrepancy between the number of females to whom IBC/05 status was granted and the number of males. The number of mothers who travelled alone and gave birth to citizen children in this State without their husbands or partners is the very probable explanation for the lower number of male applicants under the scheme. It has been determined that, at a minimum, there were 2,337 identified spouses / partners outside the State at the time of the application of the IBC/05 scheme and a further 1,102 whose identity or whereabouts was not disclosed at the time of the mother's application. Mr Flynn stated that since then, "*the Department had become aware that in many of these cases, these are persons who have now declared that at all times they had a spouse / partner and some of the spouse/partners came to join them in this jurisdiction or attempted to do so*."

97. If the content of Mr Flynn's affidavit is properly understood, then the potential number of asserted fathers of Irish citizen children born before the 1st January, 2005, and during the application of the IBC/05 scheme exceeds 3,400. This figure is the sum of 2,337 who were not with their spouses at the time the Irish citizen child was born and roughly a further 1,000 whose identity or location was not disclosed at the time the mothers applied under the IBC/05 scheme. What is not clear is whether any of these fathers have already been deported or served with a notice of an intention to deport. The breakdown was not available.

98. Mr Flynn has stated that this number of asserted fathers is a significant problem and that the effect of granting leave to remain to any one of these spouses / partners would have a significant effect on other cases. He further states that while the Minister will take account of the individual circumstances and reasons for the absence of the particular spouse / father while the IBC/05 scheme

was in operation, there is still a significant cohort of persons seeking to join their spouses / partners in this jurisdiction.

99. This is the first time that the Court has been made aware of the potential number of fathers involved. Whether the Minister considers this number to be a significant number is a matter of policy for him and not one for consideration by the Court as he is undoubtedly the person with responsibility for immigration policy with its knock on effect on social, medical and education services.

100. Immigration policy in its general sense can clearly be a substantial reason for refusing leave to remain, even to fathers of citizen children. This is not to say that the facts of any particular case may not render the refusal of leave to remain unreasonable in that particular case. That has been the law since *Osheku* and *Fajujonu*. No change has been brought about by the decision in *Meadows*. Had the applicants been relying solely on the ground that that the law has been changed since *Meadows*, then the Court would have refused to grant *certiorari*. However, as previously stated, for different reasons this Court has held that it is not possible to be confident that the constitutional rights of the children in this case were appropriately addressed in the memorandum forwarded to the Minister or in the reasoning of the decision.

**Conclusion**

101. For the reasons set out above, the Court will grant an order of *certiorari* quashing the Minister's decision and will remit the application for fresh consideration by the Minister.