THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 599 J.R.]

BETWEEN

LOVENDA ADAKU ONUAWUCHI,

PATIENCE NWAKOR

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 19th day of May, 2017

1. This is an application on notice for leave to issue judicial review proceedings to challenge the decision of the respondent to refuse to grant permission to the first named applicant to reside in the State with the second named applicant. The decision issued on 26th August, 2014.

2. The background is as follows: The first named applicant, who is the mother of the second named applicant, is a national of Nigeria and was born on 30th May, 1943. The second named applicant, who was born in Nigeria, arrived in the State in 2000, having lived in Italy with her husband for ten years prior to her arrival in the State. She is now a naturalised Irish citizen, as are her husband and children.

3. According to a letter written to the Irish Naturalisation and Immigration Service (INIS) on 7th July, 2014, by the applicant's solicitors, the first named applicant previously lived with her husband in Imo State, Nigeria. Her husband passed away in August 2009 and in 2010 the first named applicant was granted a 90 day visitors visa for Ireland. She travelled to the State on 9th September 2010. According to the second named applicant, after her mother's arrival in the State she became concerned as to her health. The first named applicant was subsequently diagnosed with high blood pressure, diabetes, high cholesterol, sickle cell disease and cataracts. The second named applicant determined that her mother was not fit enough to return to Nigeria and look after herself. No approach was made to the appropriate authorities in relation to this between the date of expiry of the 90 day visitor's visa and 7th July, 2014.

4. According to the second named applicant, in 2014 she became aware of the introduction of "stamp 0" residence permission which in her grounding affidavit she categorises as a residence permission granted to dependent parents of Irish citizens. She avers that on foot of this awareness she sought legal advice and her legal representatives explained "stamp 0" residence permission to her.

5. On 7th July, 2014, the applicant's solicitors made an application to the respondent "to use her general discretion to amend or vary [the first named applicant] status in the State from her current visit visa permission to long term dependency residence permissions, whether that is stamp 3 or stamp 0." The letter of application was headed "application for residence permission for dependent parent of Irish citizen" and it was stated that the application was made pursuant to s.4(7) of the Immigration Act 2004 ("the 2004 Act")

6. In part, the letter of application reads as follows:

> "On behalf of our clients we make the following requests of the Minister for Justice, Equality and Law Reform:
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> > 1. To grant [the first named applicant] permission to remain in the State on a long term basis on stamp 3/stamp 0 permission and
> >
> > 2. To grant [the first named applicant] temporary residence permission to remain, while the substantive application is being considered.
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> [The first named applicant] arrived in Ireland on a visitor visa on the 9th September 2010 and has resided in the State continuously since. Since her permission has expired, she has been undocumented. [The first named applicant] is very anxious to cease being undocumented and requested we highlight her request for a temporary permission to remain pending determination of this application.
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> We would highlight from the outset that this application is grounded on the fact that [the first named applicant] is dependent on her daughter … who is a naturalised Irish citizen."

7. The factual circumstances said to be relevant to the application were set out, including the second named applicant's immigration history and the first named applicant's background and dependency on the second named applicant. Specifically, the respondent was advised as follows:

> "In August 2009, [the first named applicant's] husband … passed away. [The second named applicant] instructs that she returned to the village for the funeral. When she arrived, she found that [the first named applicant] was suffering from a partial stroke. We refer to [the second named applicant] personal statement in this regard: 'I travelled to Nigeria in August 2009 to attend my father's burial from where I discovered the failing state of health of my mother. I arranged for her to be immediately rushed to hospital for about one week. She was suffering from a partial stroke. At present she has recovered from the stroke but still had side effects from time to time. It has affected the way she communicates and reasoning. She also from time to time struggles with mobility problems.'
>
> …

> In September 2010, [the first named applicant] travelled to Ireland … After her arrival in Ireland, she developed health conditions which was regarded to be very serious and [the second named applicant] arranged for her to attend Dr. Niall Moore at the Boroimhe Medical Centre, Rivervalley, Swords. She was subsequently diagnosed with high blood pressure, diabetes, high cholesterol and sickle cell disease and cataracts. She has been attending the Eye and Ear hospital on Adelaide Road for treatment and is taking a number of different medications. We refer to the enclosed medical documents.
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> [The second named applicant] instructs that she was too worried for her mother to return to Nigeria because she would be living alone with no support, and suffering from serious illnesses. [The first named applicant] requires a lot of support and medical attention, and this would be unavailable for her in Nigeria.
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> [The second named applicant] instructs that she has taken full responsibility for her mother's care by paying for all the medical bills and medication, and providing food and accommodation.
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> [The second named applicant] instructs she would be very stressed and unhappy if her mother returned to Nigeria, as she would be constantly worried for her mother's health. She states as follows in her personal statement:
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> > 'Due to my mother's serious medical conditions, I had no option than to keep her in my house and make sure she gets proper medical attention which is my responsibility and also the duty of care I owe her as a daughter. My mother is a 71 year old woman and sending her home with no one to take care of her was very difficult decision for me since she has not fully recovered from her health condition and living alone in the village would not be the best option for her. She was unwell medically, will be very lonely and further depressed if sent to the village in present condition. She needs family love and support and care that is the main reason she [is] presently staying with me'."

8. It was thus submitted that given the first named applicant's dependency on the second named applicant, physically emotionally and socially, it would be impossible for the second named applicant to provide her mother with the care and support she needed from such a distance as between Ireland and Nigeria.

9. The letter of application made reference to the second named applicant's financial circumstances, in aid of the submission that she was capable of looking after her mother financially such that she would not become a burden on the State. It was further submitted that it would be unreasonable and unjust to expect the second named applicant to relocate to Nigeria to look after her dependent mother giving the time she has resided in Ireland and her family ties to Ireland. It was submitted that the second named applicant was permanently tied to Ireland as that is where her employment and financial circumstances are. It was further submitted that it would be impossible to provide the support that the first named applicant required if the first named applicant was to return to Nigeria.

10. A book of supporting documentation was enclosed with the application.

11. The decision refusing "an extension of visitor permission" in respect of the applicant issued on 26th August, 2014. The refusal letter advised the first named applicant to make arrangements to leave the State by 25th September, 2014, failing which it was the intention of the respondent to issue a notification under s. 3 (4) of the Immigration Act 1999 (i.e. proposal to deport).

12. In the consideration document which attached to the decision letter, it was considered, *inter alia*, that:

> (a) The purpose of the first named applicant's journey was to visit the State. This was achieved when she was granted leave to land on 10th September and given visitor permission for 90 days;
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> (b) In her visa application the first named applicant's stated that the purpose of trip to Ireland was "visit B/0-no extensions";
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> (c) Both the first named applicant and her reference in the State gave written undertakings to observe the conditions of the visa and leave the State on the expiration of her visitor permission;
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> (d) The first named applicant had already been granted the maximum time permitted to visitors to the State;
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> (e) The second named applicant claimed that she had paid for all the first named applicant's medical expenses in Ireland but it was unclear as to who paid for these. A list of medical expenses was provided but no receipts were provided with the exception of one for €75;
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> (f) As the first named applicant has children living in Nigeria she had the option of going to live there with any of these children; and
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> (g) The first named applicant did not meet the requirements of 18.4 on Policy Document and Non-EEA Family Reunification ("the Policy Document"). As the first named applicant was a visa required national and should she wish to re-enter the State as a dependent of her daughter she would have to apply for the appropriate visa from outside the State.

13. The decision maker considered that in accordance with the immigration laws of the State, the first named applicant was required to leave the State on or before her visitor permission expired on 10th September, 2010. It was stated that once outside the State there was nothing to prevent her from applying for a further visit visa for the purposes of re-entering the State for a specified period.

14. The decision-maker went on to state that "all representations made on behalf of [the first named applicant] in support of her application for an extension of visitor permission have been fully considered. [The first named applicant's] position is not one to warrant an extension of her visitor permission."

15. The applicant's Article 8 rights were considered as follows:

> "While the applicant has a right to respect for his/her family life under Article 8 (1), this right has to be viewed in the context of the State's right to maintain control of its own borders and operate a regulated system for the control, processing and monitoring of non-EEA national persons in the State.
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> In addition, Article 8 (2) of the ECHR sets out that the State can interfere with a person's right to respect for their

private or family life in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

As this person does not meet the criteria residence permission under Visitor Permission as set out in the published INIS family reunification policy Document, which takes into account rights under Article 8, ECHR, the decision to refuse permission is not contrary to any rights that the applicant has under Article 8, ECHR.

The decision to refuse this residence permission does not of itself involve any separation of the family unit. If the applicant makes representations under Section 3 the Immigration Act, 1999 which could potentially involve a separation of the family unit, then a detailed balancing exercise will be undertaken at that stage to ensure the applicant's right to family life will be respected and any interference will be in line with the limitations set out in Article 8 (2) ECHR."

16. In summary, the grounds upon which leave is sought for judicial review are:

(a) The contested decision was unlawful in failing to deal adequately or at all with the substance of the application made by the applicants; in failing to weigh the family's rights adequately or at all; in making unfair comment in respect of which the applicants had no notice; in making findings that had no legal or factual basis and or were wrong in law; in failing to conduct any, or any adequate proportionality assessment; and in lacking any or any adequate, reasoning;

(b) The contested decision was unlawful in failing to weigh fully the applicants' rights as a family, and the State's duty to protect and/or respect the family unit, as required by Art. 41 of the Constitution, s. 3 of the European Convention on Human Rights Act 2003 (and, in particular Art.8 of the said Convention) and European Union Law; and

(c) If, and insofar as, the respondent relied on what is described as "the Policy Document on Non-EEA Family Reunification", the said document has no binding force and its application is unlawful for failing to recognise and vindicate, adequately or at all, the safeguards and protections for the family required by the Constitution, the European Convention on Human Rights and European Union Law, and acts as a bar to a valid proportionality assessment of an applicant's case.

Considerations

17. By way of preliminary issue, the court finds it necessary to address the applicable threshold for the granting of leave in this case.

18. It is common case that the application for leave is predicated on the basis that the contested decision was a refusal under s. 4(7) of the Immigration Act 2004 ("the 2004 Act"). Section 4(7) of the 2004 Act provides:-

"A permission under this section may be renewed or varied by the Minister, or by an immigration officer on his or her behalf, on application therefore by the non-national concerned".

19. A refusal to grant a permission under s. 4 of the 2004 Act is a decision which falls within s. 5 of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act"), as provided for in s. 16(6) of the 2004 Act.

20. The applicant's contention is that the first named applicant originally entered the State on the basis of a permission granted to her and although that permission had expired by the time the application which is the subject of the present proceedings was made, the said application was considered and determined by the respondent as an application pursuant to s. 4(7) of the 2004 Act. The applicants submit that the respondent has not sought to resile from this position in its pleadings before this Court. The respondent's position is that the application which was made to the respondent was for her to use her general discretion to amend or vary the first named applicant's status in the State "from her current visit visa permission to long-term dependency residence permission, with a Stamp 3 or Stamp 0". It is submitted that while this was said to be pursuant to s. 4(7) of the 2004 Act, in fact that provision provides for the renewal or variation by the respondent, or by an immigration officer on her behalf, of "*a permission under this section*". The respondent submits that, accordingly, there has to be an extant permission for it to be to renewed or varied and that this was not the case in respect of the first named applicant as her visitor permission lapsed in 2010. Counsel contends that at the time the application for residence permission for the first named applicant as a dependent parent of an Irish citizen was made, the first named applicant had no lawful status in the State. It is submitted that this would appear to have been acknowledged by the applicant herself given that the letter of application sought temporary residence permission to remain in the State while the substantive application was being considered. Accordingly, the respondent's position is that application was a freestanding application for long-term residency in the State for the first named applicant as an allegedly dependent non-EEA parent of an Irish citizen, in circumstances where the first named applicant was unlawfully in the State. Counsel cites the decision of the Court of Appeal in *A.B., C.D., E.F. v. Minister for Justice* [2016] IECA 48 where at para. 44 thereof, Ryan J. states:-

"The essential point is that there is not a halfway house status. There is no limbo position between being here by way of permission, and when that status ends, having a right to remain in suspended permission while a free-standing claim can be made. If a person is not here by permission or as of right such as an asylum seeker, they are prima facie unlawfully here and are subject to being expelled."

21. It is thus submitted by counsel for the respondent that it is illogical and incorrect in the present case, as was found to be the case in *Dike and Duru. v. Minister for Justice (Unreported, High Court 23rd February, 2016),* for the application to have been categorised as an application pursuant to s. 4(7) of the 2004 Act. It is submitted that the use of the phase "an application pursuant to s. 4(7) of the Immigration Act" in the application, and the repetition of same in the refusal decision, does not make the substantive application something which it patently was not, namely an application to renew or vary a permission pursuant to s. 4(7) of the 2004 Act.

22. It is common case that in the letter of application dated 7th July, 2014, albeit headed "application for residence permission for dependent parent of Irish citizen", the writer of the letter goes on to state that the application was to "amend or vary [the first named applicant's] status in the State from her current visa permission to long-term dependency residence permission" and that same was being made pursuant to s. 4(7) of the 2004 Act.

23. From a consideration of the papers in this case, and the submission advanced on behalf of the parties, it seems to the court that the application which was made to the respondent appears to be a hybrid type of application. On the one hand, an extension of the first named applicant's erstwhile permission was sought while simultaneously, permission was sought for the first named applicant to

reside in the State as a dependent non-EEA parent of the second named applicant who is an Irish citizen, together with a temporary permission to remain in the State while a consideration of the actual application was pending.

24. The respondent's letter of 26th August, 2014 clearly states that "the application for an extension of visitor permission …is refused" The considerations document which attached to the refusal letter is headed "Application for renewal of permission (pursuant to s. 4(7) of the Immigration Act 2004)" and there are a number of references to the first named applicant's "visitor permission" in that document. I also note that the document which records Mr. Ryan's (of the General Immigration Division) agreement with the recommendation to refuse was in the context that it was a refusal under s.4(7) of the 2004 Act.

25. Confusion of similar ilk arose in a refusal decision which was the subject of a judgment by this Court in *Dike and Duru v. Minister for Justice*. In that case, the court accepted that the refusal decision contained a misguided reference to s. 4 of the 2004 Act, which the court found had no applicability to the issue to be decided. In that case, an official in the respondent's department had sworn an affidavit to the effect that the reference to s. 4 of the 2004 Act was in error. In that case, there never was a permission to be in the State.

26. As far as the present case is concerned, there is no averment in Mr Ryan's affidavit that the application was erroneously considered pursuant to s.4(7) of the 2004 Act.

27. Essentially, the application for residence permission for the first named applicant as the non-EEA elderly parent of an Irish sponsor was made, and considered, with reference to s.4(7) of the 2004 Act. The substance of the refusal of the application (in part at least) was that the first named applicant's circumstances did not warrant an extension of her visitor permission. It was also stated that she did not meet the requirements set by the respondent for the granting of residency permission to dependent non-EEA parents of Irish and/or non-EEA national sponsors. The application was refused by the respondent by reference, *inter alia*, to the portion of the Policy Document which pertains to residency applications by the elderly parents of such sponsors. The actual basis upon which the application was refused in this context is a matter of some dispute between the parties. I will return to this in due course.

28. At this juncture, suffice it to say that the respondent's essential contention is that the application made by the first named applicant to the respondent was essentially a free- standing application by someone who had no basis to be in the State. The applicants' counsel's response to the respondent's argument was that if the respondent was now maintaining that the decision which was made was other than a refusal under s.4(7) of the 2004, then the leave application was not one caught by the provisions of s. 5 of the 2000 Act. He argues that the requisite threshold for leave is therefore on an arguable grounds basis. While there is some merit in that submission based on the arguments which counsel for the respondent advanced, and while it is not satisfactory that the applicants are now only being advised that the respondent does not consider the decision to be one made under s.4(7) of the 2004 Act, it seems to me that the court is nonetheless constrained to apply the provisions of s.5(1) of the 2000 Act given that on its face the refusal decision in issue in these proceedings was, in part at least, on the basis that a consideration of the first named applicant's circumstances "[did] not warrant an extension of [her] visitor permission" and that it was being refused under s.4(7). Accordingly, I find that the requisite threshold for leave is on a substantial grounds basis.

29. I turn now to the arguments made by the applicants in aid of their application for leave.

The alleged fettering of the respondent's discretion and absence of clarity and reasoning in the decision

30. In the first instance, counsel for the applicant contends that it is arguable to the requisite threshold, be that a substantial grounds basis or an arguable grounds basis, that there is no clarity in the decision as to the exact reason for the refusal. He submits that insofar as there is clarity in the decision, it is to the extent that the application for family reunification was refused on the basis of the respondent's adherence to a fixed or rigid policy of not accepting the application for residence permission because it was not made from outside the State. Counsel submits that the core basis of the refusal is the decision maker's statement that "as a visa required National…should [the first named applicant] wish to re-enter the State as a dependent of her daughter she would have to apply for the appropriate visa from outside the State". Counsel also submits that in as much as this was the core basis for the decision, this is corroborated by the affidavit sworn by Mr. Ryan (who affirmed the recommendation to refuse the application). In his affidavit, Mr. Ryan avers as follows:-

> "I say that Stamp 0 permission has evolved and can be applied to elderly parents of an Irish citizen living in the State. I say that it is clear from averment 10 of the second named Applicant's affidavit that she was aware of this and sought legal advice in relation to same. However, I further say that prior to seeking to have a Stamp 0 immigration stamp applied to the first named Applicant, an application must [be] made for a Join Family long stay visa from outside the State in accordance with the policy set out in the INIS document entitled "Policy Document on non-EEA Family Reunification" published on the 31st December 2013 as indicated in the INIS website…
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> I say that should such a Join Family long stay visa be granted to an elderly parent of an Irish citizen such as the first named Applicant it is presented at the borders of the State and, if the holder is allowed to enter the State, that person must register his or her permission to reside with the Gardaí National Immigration Bureau ("GNIB") within 90 days of arrival in the State. If the person is seeking Stamp 3 permission, this can be arranged by GNIB over the counter. If they are seeking Stamp 0 permission, they should write to the Respondent seeking same within 90 days of their arrival into the State on the Join Family long stay visa.
>
> I say it is clear from the above averments and from the information referred to and clearly available in the public domain that it is not possible for a person present in the State on a visitor's visa to apply whilst in the State for permission to remain in the State on a long term basis, irrespective of the immigration stamp thereafter attaching to such permission."

31. It is submitted on behalf of the applicants that the respondent erred in law in fettering her discretion in refusing *simpliciter* the application for long-term residence because it was not made from outside the State. The applicants contend that such a fettering of discretion is not in accordance with law, as made clear by the decision of this Court in *Dike & Duru v. Minister for Justice*. In that case, the Court addressed the question of ministerial discretion in the context of family reunification applications in respect of non-EEA parents of Irish or non-national sponsors in the following terms:

> "107. In the Statement of Opposition, the respondent asserts, *inter alia*, as follows:
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> > *'10. The Respondent was entitled to examine the said application and treat it in a manner consistent with her policy in relation to family reunification applications. In this regard, the Respondent could validly have applied an absolute position of refusing to entertain the application on the grounds it had been made from within the State (as set out in the Family Reunification Policy Document in relation to applications in respect of elderly dependent*

parents from within the State). Instead, however, the Respondent applied the more lenient policy applicable more generally to applications made from within the State, to the effect that such applications would not be accepted save in cases where there were special humanitarian circumstances. The Respondent examined the documents and representations submitted by the First Named Applicant and found, as she was entitled to do, that there were no such special humanitarian circumstances. The Respondent had regard to all relevant factors in reaching this decision. In this regard, and contrary to the assertions made in the Statement Grounding the Application for Judicial Review, the First Named Applicants age, financial position, insurance policy and alleged duration of residence in the State are not factors which could constitute special humanitarian circumstances.'

108. At para. 14 of his verifying affidavit, Mr. O'Sullivan deposed that:

> *'..The Respondent could properly have applied [the provisions of para.18.7] to the application by the First Named Applicant and refused the application on that basis. However, the Respondent applied the most lenient approach generally applicable to applications for family reunification (other than in respect of elderly dependent parents), which was that such applications would only be accepted from within the State where there were special humanitarian considerations. This departure from paragraph 18.7 operated in ease of the First Named Applicant. Nevertheless, the Respondent does not accept that any special humanitarian considerations had been identified by the First Named Applicant in this case.'*

109. Contrary to what is asserted by the respondent, had a bald application of para.18.7 occurred in the present case, in my view it could not withstand judicial scrutiny giving rise as it would to an effective bar to a consideration of whether there were any circumstances which might justify acceptance of an application from within the State and indeed which would be contrary to the respondent's own policy to have regard to humanitarian cases. In as much as the respondent asserts that the provisions in the Policy document on "Elderly Dependent Parents" are somehow excluded from ministerial discretion, that argument is not sustainable.

110. The approach of the courts is succinctly set out by O'Sullivan J. in *McDonagh v Clare County Council* [2002] 2I.R. 634:

> *'In my opinion a residence or indigenous policy is a proper inclusion by a housing authority in its traveller accommodation programme. But it must not be applied so rigidly that it becomes an effective bar to any consideration by the housing authority of an application for housing by a member of the traveller community. In its letter of the 2nd January, 2002, the respondent effectively did this. There was, as I have held, an application calling upon the respondent as housing authority "to address this situation as a matter of urgency." The letter of the 2nd January, 2002, constitutes a refusal to consider the applicants for permanent traveller accommodation by reference, it is clear, to the indigenous policy.*
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> *This is not to say that the respondent was not entitled to take the view that the applicants were most unlikely to succeed if they were so considered. By refusing to consider the application at all, however, no matter how unpromising, they fell foul, in my opinion, of the principles enunciated by Bankes L.J. in R v. Port of London Authority ex parte Kynock [1919] 1 K.B. 176 and Lord Reid in British Oxygen Ltd. v. Minister of Technology [1971] A.C. 610, both of which were referred to with approval by Keane J. in Carrigaline Community Television Broadcasting Company Ltd v. Minister for Transport Energy & Communications (No. 2) [1997] 1 I.L.R.M. 241. In particular it is worth re-quoting Lord Reid to the effect:-*
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> *"What the authority must not do is to refuse to listen at all."*

111. In *Crawford (Inspector of Taxes) v Centime Ltd*. [2006] 2IR 106, Clarke J. considered as open to "*serious question" "the elevation of …guidelines to matters which are applied as if they had the force of law".*

112. I was also referred by counsel for the applicants to the decision of the UK Court of Appeal in *R (Alcombury Developments Ltd. & Ors.) v. Secretary of State for the Environment* [2003] 2 AC 295, where the requirement for fairness in the implementation of policies was put in the following manner:

> *'143 One criticism which is levelled at the system is that the minister has the functions both of making planning policy and of applying the policies which he has made. But that combination of functions does not necessarily give rise to unfairness. The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions. There are advantages both to the public and the administrators in having such policies. Of course there are limits to be observed in the way policies are applied. Blanket decisions which leave no room for particular circumstances may be unreasonable. What is crucial is that the policy must not fetter the exercise of the discretion. The particular circumstances always require to be considered. Provided that the policy is not regarded as binding and the authority still retains a free exercise of discretion the policy may serve the useful purpose of giving a reasonable guidance both to applicants and decision makers.'*

113. I adopt the above dicta as the appropriate test against which the respondent's decision not to admit the application should be assessed."

32. Counsel for the applicant submits that the respondent fettered her discretion in not considering whether the first named applicant's circumstances constituted "special humanitarian circumstances" so as to allow for the application to be accepted by the respondent, albeit that it was not made from outside the State. It is also contended that the respondent fettered her discretion in not considering whether there were such special humanitarian circumstances in the case of the first named applicant, particularly in circumstances where para. 10.3 of the Policy Document expressly acknowledges that the respondent has such discretion. It reads as follows:

> "While it is envisaged that pre-clearance is the most appropriate way in which to proceed in this area, there will inevitably be cases where the applicant seeks to apply from within the State. One category where it is obviously permissible to apply from within the State is comprised of persons who already have residence status in their own right but of an inferior or more restricted nature (for example as a student) and they seek to 'upgrade' this on the basis of their relationship with, say, an Irish citizen. Beyond this group however the general policy should be to refuse to accept applications from within the State except in cases where there are special humanitarian circumstances. It may also be appropriate to

operate a higher fee for in-country applications. There provisions relate to family reunification applications only and are without prejudice to any possibilities that foreign national might have to apply for an upgrade or extension of their status in their own right (i.e. not based on their relationship to another person).

33. It is submitted that while in *Dike and Duru v. Minister for Justice* this Court found that there was no fettering of the of the respondent's discretion in this regard because the decision- maker in that case had considered whether or not there were special humanitarian circumstances, there was no such consideration in the present case despite the respondent being on enquiry from the contents of the letter of application and the documents attached thereto as to a number of factors pertaining to the applicants which could constitute special humanitarian circumstances.

34. While acknowledging that the decision could have been more clearly phrased, counsel for the respondent submits that the reason for the refusal is clear; it was refused on the basis that applications for family reunification in cases involving elderly dependent parents can only be made from outside the State and will not be accepted in respect of a person who has come into the State on a visitor's visa and overstayed and then seeks leave to remain. Counsel also submits that contrary to the applicants' counsels' arguments, it can be inferred from the decision overall that the question of whether there were any special humanitarian circumstances such as might admit the application albeit that it was not made from outside the jurisdiction was in fact considered. Counsel contends that all of the humanitarian issues which were set out in the letter of application were replicated in the considerations document which attached to the decision. It is submitted that, in particular, the decision- maker noted that the first named applicant suffered a partial stroke in 2009 and spent a week in hospital. Medical information relating to the first named applicant was noted. This largely related to the medication prescribed in 2011 and 2012 in relation to the first named applicant's cataracts and their treatment. Further, it was noted that she was being treated for high blood pressure and high cholesterol. Counsel for the respondent also relies on the fact that the applicants did not furnish up-to-date medical report which might have supported a finding that there were exceptional circumstances. Furthermore, the first named applicant was described by the second named applicant as being independent and improved health wise and much happier since her relocation to the State. Counsel contends that these circumstances patently did not, or could not, on any consideration of the facts, equate to the exceptional circumstances reference in the Policy Document. Additionally, it is contended that while the second named applicant maintained that as the eldest of her family she was responsible for the first named applicant, the first named applicant has children living in Nigeria and accordingly has the option of going to live with them.

35. Counsel for the respondent thus submits that it can be taken that the application for residence permission for the first named applicant was refused because there was found to be no special humanitarian circumstance such as would have warranted the acceptance of the application from within the State. It is submitted that, as this Court found in *Dike and Duru*, *"the circumstances put forward by the applicants did not present special or compelling humanitarian circumstances such as to allow the acceptance of the application from within the State".*

36. On the other hand, the applicants contend that there were myriad factors in the application which was furnished to the respondent which constituted exceptional humanitarian circumstances. Not least of these was the partial stroke suffered by the first named applicant in 2009 shortly after the death of her husband and mother, and its side effects, in particular, on the first named applicant's mobility and reasoning. There was also the unavailability of necessary medical treatment in Nigeria and the myriad health conditions with which the first named applicant presented to her General Practitioner after her arrival in this State. It is further contended that the respondent was alerted to the first named applicant's physical, emotional and social dependency on the second named applicant and the logistical difficulties facing the second if she was required to frequently fly back and forth to Nigeria to look after her mother. The applicants submit that there is nothing on the face of the decision to indicate that the decision-maker had directed her mind to the question of whether there were special humanitarian circumstances which could warrant the acceptance of the application from within the State so that a consideration of its merits could be embarked on.

Decision

37. To my mind, on a first principles basis, it is arguable to the requisite substantial grounds threshold that there is an absence of clarity in the decision. This is so because, on its face, the decision is capable of being read as one which encompasses a rejection of the first named applicant's application because the financial resources of the second named applicant did not reach the financial threshold set out in para. 18.4 of the Policy Document. Yet in the very same paragraph, the decision-maker appears to state that should the first named applicant wish to enter the State as a dependent of her daughter, she must apply for a visa from outside the State. At a minimum, there is a substantial ground basis for the argument that the recipient of a decision should be able to glean the actual rationale for the decision. There is also a substantial grounds basis upon which the applicants can argue that it is not clear whether special humanitarian considerations such as might have admitted the residency application from within the State were alluded to at all in the decision.

38. I also find that it arguable, to the requisite standard, that the basis for the refusal was in fact that the application could not be entertained because it was not made from outside the State. Accordingly, it is arguable on a substantial grounds basis that in the absence of any consideration as to whether special humanitarian considerations arose such as to might warrant the acceptance of the application for residence permission from within the State, the respondent fettered her discretion, contrary to the legal principles set out in the decision of this Court in Dike and Duru.

39. An alternative argument put forward on behalf of the applicants is that if there was in fact a consideration by the decision-maker of whether special humanitarian circumstances existed, then the decision-maker erred in law in failing to give any proper reasons as to why the applicants' particular circumstances did not constitute special humanitarian circumstances. Counsel submits that on this basis there are arguable grounds for leave to seek judicial review of the decision. I am satisfied that the requisite threshold for leave has been met in this regard also. It is therefore arguable to the requisite threshold that if consideration was in fact given to the question of whether special humanitarian factors arose, then the basis for the rejection of such factors is not evident on the face of the decision, or patent from the said decision.

40. Accordingly, with regard to the aforesaid, leave is granted to seek judicial review on the basis that:

(i) The respondent erred in law and unlawfully fettered her discretion in failing to consider whether there were any special humanitarian circumstances such as could permit of the application for residence permission for the first named applicant as a claimed dependent elderly parent of the second named applicant to be made from within the State; and

(ii) The respondent erred in law in failing to give any or any adequate or proper reasons as to why the circumstances/factors in the applicants' case, as set out in the application, did not constitute special humanitarian circumstances such as would have allowed the application to be considered by the respondent on its merits.

Are there substantial grounds on which to grant leave on the Art. 8 ground?
41. In the course of his submissions, counsel for the applicant argued, based on the decision of Barr J. *in Luximon v. Minister for Justice and Equality* [2015] IEHC 227, that the applicants should get leave by reason of the respondent's failure to comply with her duties under s.3 of the European Convention and Human Rights Act 2003 together with her misapplication of Art. 8 of the European Convention of Human Rights (ECHR). It is submitted that these failures rendered her decision unlawful. In Luximon, Barr J. held that the fact that the question of the engagement of Mrs. Luximon's and her daughter's constitutional and Art.8 rights would be considered in the immigration process, pursuant to s.3 of the Immigration Act 1999, did not absolve the respondent from considering constitutional and ECHR rights when making a decision under s.4(7) of the 2004 Act.

42. Since the hearing of the within application, the decision of Barr J. has been upheld by the Court of Appeal in *Luximon v. Minister for Justice* [2016] IECA 382. The central question which fell to be determined on appeal was:

> *"whether or not the trial judge was correct in deciding that the Minister, when considering an application pursuant to s. 4(7) of the 2004 Act to renew a permission to be in the State, is obliged to consider any rights of the applicants alleged to be protected by the Constitution or Art. 8(1) of ECHR prior to making a decision to refuse to renew the permission. The Minister accepts that any such alleged rights of the applicants fall to be considered in the procedure established by s. 3 of the Immigration Act 1999 (as amended) prior to making a deportation order."* (At para. 24)

43. That question was answered in the affirmative by the Court of Appeal. Finlay Geoghegan J. states:

> *"59. I am in agreement with the trial judge that a proposed decision not to renew a permission pursuant to s. 4(7) of a person such as Ms. Luximon who had been in the State lawfully pursuant to a s. 4 permission for several years has the potential to be an interference with her right to respect for private life and family right such that it is capable of engaging Article 8 of ECHR. The question as to whether or not on the particular facts of the application, a decision not to renew the permission would have consequences of such gravity for Ms. Luximon and her daughter in relation to their alleged rights to family or private life such that Article 8 is engaged in the sense that term is used in the Razgar, C.I. and Dos Santos judgments is a matter for determination by the Minister subject only to judicial review by the courts.*
>
> *60. Another way of putting my conclusion is that the obligations of the Minister pursuant to s. 3 of the 2003 Act in relation to Article 8 ECHR in proposing not to renew a permission pursuant to s. 4(7) of the 2004 Act, are similar to the obligations which she accepts exist where there is a proposal to deport save of course that a different decision is under consideration.*
>
> *61. I am also in agreement with the trial judge for the reasons he gives that the position of Ms. Luximon as the holder of a permission to be lawfully in the State and the s. 4(7) decision to refuse to renew that permission is wholly distinguishable from the position of applicants in Bode v. Minister for Justice ."*

44. However, albeit that the first named applicant in this case sought *inter alia* an extension of her permission under s.4(7) of the 2004 Act and that same was refused by reference, *inter alia*, to s. 4(7), I am not persuaded that the applicant has made out a substantial grounds basis upon which to challenge the decision of the respondent to defer any consideration of whether constitutional or Art.8 rights were engaged until such time as the s.3 immigration process might be commenced in respect of her.

45. However, I am satisfied that the first named applicant's circumstances are at a considerable remove from those which pertained in Luximon. In the latter case, Mrs. Luximon had been lawfully in the State for a number of years. As stated by Finlay Geoghegan J.:-

> *"38. The remaining part of this judgment is concerned exclusively with the decision made on behalf of the Minister to refuse to renew the permission of Ms. Luximon to be in the State. The consequences for a non national such as Ms. Luximon of a refusal to renew a permission to be in the State is that she is then unlawfully present in the State (s. 5(1) and (2) of the 2004 Act). If she wishes to abide by the law of the State then she must leave the State unless as indicated in the letter of the 5th November, 2012, she secured another form of immigration permission such as a work permit or green card. Those avenues had already been explored and were not available to Ms. Luximon or had already been refused.*
>
> *39. If, thereafter, she were to remain in the State then, in addition to being unlawfully present in the State, she faced the further difficulty that it was expressly stated that it was intended to issue a notification proposing to deport her under s. 3(4) of the Immigration Act 1999. She would then be a person in respect of whom the Minister might make an order of deportation pursuant to s. 3(2) of the 1999 Act.*
>
> *40. Ms. Luximon is a person who entered the State lawfully. She obtained a permission to be and remain in the State and with the exception of a short period of time (which the Minister has not relied upon in making her decision) she was at all times lawfully present in the State. If she wishes to continue to behave lawfully, then she must leave the State by reason of the Minister's refusal to renew her permission to be in the State.*
>
> *41. The stark submission made on behalf of the Minister is that there is no obligation to consider in any way family or private life rights which Ms. Luximon and her daughter allege the State is bound to respect pursuant to Article 8 ECHR prior to reaching a decision which will require her to leave the State if she wishes to continue to act lawfully in relation to her immigration status. Further that contention is made in a context that Ms. Luximon had lawfully lived in the State pursuant to s.4 permission for approximately 7 years at the time of the decision and the Minister would consider such alleged rights if it was proposed to deport the applicants.*
>
> *42. I am of the view that the trial judge was correct in deciding that such refusal by the Minister to consider matters (which she accepts must be considered prior to the making of a deportation order) is not consistent with her obligations in exercising the discretion conferred on her by s. 4(7) of the 2004 Act.*
>
> *43. First, it cannot be disputed that in accordance with the judgments of the Supreme Court in East Donegal Co-Operative Livestock Mart Limited v. Attorney General [1970] I.R. 317 and in The State (Lynch) v. Cooney [1982] I.R. 337 , that the Minister must exercise the discretion given her by s. 4(7) in a manner which would be in conformity with the Constitution. Accordingly, where an applicant for a renewal of permission under s. 4(7)*

identified a relevant right which it is contended the applicant holds pursuant to the Constitution or protected by the Constitution then the Minister is obliged to exercise her discretion in a manner consistent with respecting and upholding such right."

46. In the instant case, I am not persuaded, for the purposes of a substantial grounds basis for leave, that the factual circumstances which pertained to the first named applicant's status in the State from the expiry of her visitor permission in 2010 to the time of her application to the respondent on 7th July, 2014 during which time, as acknowledged in her application, she was "undocumented" are such as to equate her position to that of *Luximon*. Accordingly, leave is refused in this regard.

Summary

47. I will grant the applicant leave to seek *certiorari* of the respondent's decision on the grounds as formulated in the judgment.